CITATION: *Colbert v Proprietors of Unit Plans 90/009 and Robert Turner and Associates Property Rentals Pty Ltd* [2002] NTMC 033

PARTIES:	TREVOR KEITH COLBERT
	v
	THE PROPRIETORS OF UNIT PLANS 90/009 & ROBIN TURNER AND ASSOCIATES PROPERTY RENTALS PTY LTD T/AS WHITTLES BODY CORPORATE MANAGEMENT
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	20208584
DELIVERED ON:	11.09.02
DELIVERED AT:	Darwin
HEARING DATE(s):	24.07.02 & 31.07.02
DECISION OF:	Mr Trigg

CATCHWORDS:

Service of notice of demand - Form of notice of demand.

Workmen's Liens Act sections 5, 10(1), 10(2)

REPRESENTATION:

Counsel:

Plaintiff:	Mr Ward
Defendant:	Mr Cureton

Solicitors:

Plaintiff:	Cridlands
Defendant:	Purcell Lancione Cureton

Judgment category classification:	C
Judgment ID number:	NTMC 033
Number of paragraphs:	48

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20208584

BETWEEN:

TREVOR COLBERT T/AS BEAUMONT TILES
Plaintiff

AND:

THE PROPRIETORS OF UNIT PLANS 90/009, CT COL FOL 215 FOL 106, TOWN OF NIGHTLCIFF
1st Defendant

AND

ROBIN TURNER AND ASSOCIATES PROPERTY RENTALS PTY LTD T/AS WHITTLES BODY CORPORATE MANAGEMENT
2nd Defendant

REASONS FOR DECISION

(Delivered 11 September 2002)

D Trigg SM:

1. Proceedings were commenced in this Court on the 30th day of May 2002 when the plaintiff filed a statement of claim. In that statement of claim the plaintiff claimed the following relief;

> "1. Enforcement of the Notice of Workmen's lien registered on 17 May 2002;
>
> 2. Payment of the sum of $12,877.34;
>
> 3. Interest; and

4. Costs."

2. The first defendant filed a Notice of Defence on the 2nd day of July 2002 and on the same day filed an application seeking the following orders;

> "1. Judgment for the first defendant against the plaintiff;
>
> 2. Alternatively, that the claims of the plaintiff in respect of enforcement of the workmen's lien registered 17 May 2002 in the Particulars of Claim dated 30 May 2002 be struck out; and
>
> 3. The plaintiff pay the first defendant's costs of the proceeding on an indemnity basis, and alternatively the costs of this application on an indemnity basis."

3. Whilst there is considerable dispute between the plaintiff and the first defendant on the pleadings it is clear that a contract was entered into between the plaintiff and the first defendant in September of 2001, and that such contract related to the plaintiff supplying and laying tiles to the stairwells at the unit premises at 302 Casuarina drive. Leaving aside the issues in dispute it appears clear that the terms of a facsimile from the plaintiff to "Joel, body Corporate" dated 24 September 2001, at least in part contained some of the terms of the contract. This facsimile was in the following terms;

> "Please find following 2 quotations for tiling of stairwells at 302 Casuarina Drive.
>
> | | |
> |---|---|
> | Supply of tiles and step treads | $ 7,106.00 |
> | Labour and associated materials | $ 12,210.00 |
> | TOTAL | $ 19,316.00 |
>
> To proceed with this project we would require:
>
> a) 1/3 of total (being $ 6,438.66) before ordering tiles.
>
> b) A further progress payment of 1/3 of total when works are 50% complete.

c) Remaining 1/3 on completion of project.

Please do not hesitate to contact me if I can be of further assistance in this matter."

4. Additionally, it is not in dispute between the parties that the plaintiff did start work and perform works at the premises in pursuance of the contract (the full terms of which is a matter for the trial). In the course of the works an additional contact was entered into between the plaintiff and the first defendant in relation to some additional works to be performed. Whilst there is no dispute that there was an additional contract, the quantum of the contract and the terms of it are in dispute.

5. In para 10 of the statement of claim the plaintiff alleges that this additional contract was for $11,100.00

6. In para 6 of the first defendant's counterclaim, the first defendant alleges that the contract sum for additional work was $9,900.00

7. In para 7 the amended statement of claim (filed on 22 August 2002, and therefore after the argument in this matter concluded) the plaintiff now says that the contract price was $11,550.00 or, in the alternative, $9,900.00. Be that as it may, there was an additional contract. It is further admitted on the pleadings that on 4th October 2001 the plaintiff raised an invoice to the first defendant for $6,438.66 and that the first defendant has paid that amount.

8. In para 15 of the plaintiff's statement of claim, he alleges that "on 12 December 2001 Paul Delos Santos, on behalf of the second defendant, wrote to the plaintiff advising that the work was suspended."

9. In para 9 of the defence of the first defendant this allegation is denied and it is pleaded that "Drew Cox of the first defendant wrote a letter and had it faxed to the plaintiff on or about 12 December 2001, in which he stated that it was necessary for the plaintiff to suspend works on the tiling in light of the first defendant's concerns regarding that tiling work, as set out in that

letter." In para 13 of the amended statement of claim, the plaintiff now pleads "On 12 December 2001 Drew Cox, on behalf of the first defendant, wrote to the plaintiff directing that the work be suspended."

10. It does not appear to be in dispute that the works were ceased on or about 12 December 2001 and have not been recommenced by the plaintiff. As to the financial, legal and other consequences of these matters, this is all a matter for trial. On the 6th day of May 2002 Jennifer Nicole Laurence who describes herself as "a solicitor in the employ of Cridlands Lawyers duly appointed agent for Beaumont Tiles", signed a notice of demand purportedly pursuant to section 10(2)(a) of the *Workmen's Liens Act* 1893 (hereafter referred to as "the Act"). This notice of demand was in the following terms:

> " Notice of Demand
>
> TO: Whittles Body Corporate Management
>
> Suite 34/21 Cavenagh Street
>
> Darwin NT 0800
>
> TAKE NOTICE that Beaumont Tiles (ABN 65 050 683 890) (hereinafter called "the Creditor") hereby requires you to pay the sum of $12,877.34 to the Creditor for work done and materials furnished in connection with work under the contract which was entered into between the Creditor and yourself on or about 24 September 2001."

11. Section 5 of the Act is in the following terms:

> "5. Lien of contractor or sub-contractor
>
> A contractor or sub-contractor shall have a lien for the contract price, so far as accrued due, on the estate or interest in land of any owner or occupier in each of the following cases –
>
> (a) where the work is done, with the assent, express or implied, of the owner or occupier to the land or to any fixture thereon;

(b) where the materials are, with the assent, express or implied, of the owner or occupier, used or intended to be used in or about work done, or intended to be done, to the land or to any fixture thereon."

12. Pursuant to section 2 of the Act "contractor" means "a person (not being a subcontractor) contracting with or employed by another person to work, or to procure work to be done, or to furnish materials in connection with work." In addition, "contract price" is defined to mean "the money payable to any contractor or subcontractor for any work, or materials furnished or to be furnished in connection with work, under any contract, and whether such price has been fixed by express agreement or not."

13. Section 10 of the Act is in the following terms:

"10. LIEN TO BE REGISTERED

(1) A lien under this Act with regard to land shall be available only if registered before the expiration of 28 days after the wages or contract price in respect of which such lien has arisen shall for the purposes of this section have become due.

(2) Any wages or contract price shall for the purposes of this section be deemed to have become due –

(a) if unpaid for 7 days after the same (being payable) shall have been demanded by notice in writing, signed by the person claiming the same and given to the person liable to pay the same, or posted in a registered letter addressed to him at his usual or last known place of abode;

(b) if either before or after the same shall have become payable, the person liable to pay the same shall have called a meeting of his creditors, or committed an act of bankruptcy, or executed a deed of assignment within the meaning of the *Bankruptcy Act 1966* of the Commonwealth, or shall have taken or attempted to take the benefit of any law relating to bankrupts or insolvent debtors, or shall have suffered his goods to be taken in execution or seized under legal process or distress for rent.

(3) A lien shall be registered by the person claiming the same lodging with the Registrar-General a notice in the prescribed form or in a form to a similar effect, which notice shall be signed by such person and attested, together with the prescribed fee.

(4) A lien may be registered after the wages or contract price have become payable, although the 7 days mentioned in subsection (2) shall not have commenced to run.

(5) Notices of lien under this Act shall state the Court in which action will be brought to enforce the same, and any person to whom notice is given may deposit the amount claimed in such Court to abide the event of such action, and thereupon the lien shall be deemed to cease.'

14. In *Longreef Pty Ltd v Leighton Contractors (SA) Pty Ltd* (1991) 160 LSJS 270 King CJ had the following to say at page 276:

> "It seems to me that a contractor's or sub-contractors lien can only arise when the lienor's title to the debt has accrued under the terms of his contract (section 5), although it may arise notwithstanding that the debt, having arisen, is payable in the future. The extent of the lien is limited by section 6 to the amount due and presently payable by the owner or occupier under the contract for the purpose of which the work was done or the materials supplied. In a situation in which a lien which has arisen because an amount has accrued due under the contract, but there is no amount presently payable by the owner or occupier, the lien is dormant until an amount becomes so payable.
>
> Although a lien has arisen by reason of the contract price or part thereof having accrued due under the terms of the contract, it is not available, that is to say not capable of enforcement or valid as a security, until it has "become due" for the purposes of section 10. That will occur if one or other of the events enumerated in section 10(2)(b) has occurred, or if the price is unpaid for seven days after notice has been given under section 10(2)(a). That notice can only be given validly after the price is payable, that is to say after the entitlement has arisen under the contract, thereby bringing the lien into existence, and the time for payment has arrived. The lien, if it has acquired a valid existence by reason of the price having accrued due, may be registered pursuant to section 10(4) prior to the section 10(2)(a) notice, but the action to enforce it cannot be commenced until the lien is "available" under section 10(1)."

This passage was expressly approved by Kearney J (with whom Martin CJ, Mildren, Thomas and Bailey JJ all agreed) in the case of *Jovista Pty Ltd v Pegasus Gold Australia Pty Ltd* (1999) 130 NTR 1@ 23, and the decision in *Leichardt Development Co Ltd v Pipeline Properties Pty Ltd* (1989) 62 NTR 1 was (in my respectful opinion, correctly) overruled.

15. On the same day that the SA Full Court handed down it's decision in *Longreef*, the Full Court (comprising the same three Judges also handed down it's decision in the case of *Marriott Industries Pty Ltd v Mercantile Credits Limited; Maesbury Plumbers Pty Ltd* (1991) 160 LSJS 288. At pages 293 to 294 King CJ had the following to say:

> "Scrutiny of the section itself discloses that it is expressed in restrictive terms. That which otherwise exists is "available" only if the contract price "shall for the purpose of this section have become due" and there is registration within 28 days. Moreover, the natural construction of subsection (2) is as a definition of what is meant by "become due" in subsection (1). It seems to me, with all respect to those who hold contrary views, that to construe the section as "facilitative" is to strain if not ignore the language used.
>
> It is noted that the contract price will "become due" by virtue of the notice procedure only if it is "payable". That implies that the price has already accrued due in the section 5 sense. As Napier J pointed out in *Metropolitan Brick Company v Hayward and Anor* (1938) SASR 462 @ 466, there is a sense in which money can be "due" although not yet "payable" but the converse cannot be true. T say that money is payable is to say that it must be paid, that is to say that it is due and the time for payment has arrived. To say that money is payable in the future is, as Napier J also pointed out, an elliptical way of saying that it is not yet payable but will or may become so in the future. The expression "being payable" in section 10(1)(a) therefore implies that the contract price or part thereof accrued due in the section 5 sense, but that more is needed to make it "become due"…….
>
> A lien may be registered pursuant to subsection (4) after the contract price has become payable, although the seven days mentioned in subsection (2) has not commenced to run, that is to say before the lien is available……**If a lien is registered under section 10(4) before it becomes available, it is not capable of enforcement until the section 10(2)(a) notice has been given and the seven day**

period has expired or one of the events specified in section 10(2)(b) has occurred. I think that it is clear that the lien must be in an enforceable condition before legal proceedings for it's enforcement are instituted. As the lien ceases if legal proceedings for enforcement are not brought within 14 days from registration, there is a practical requirement for the section 10(2)(a) notice to be given before or soon after registration, unless one of the section 10(2)(b) events has occurred…….

If a worker or contractor whose wages or contract price have accrued due under the contract can enforce a lien and rely upon it as security without giving the section 10 notice, no purpose is served by the giving of the notice and section 10(2)(a) is purposeless.

Whatever may be thought of the utility of the notice procedure, it seems to me that the form of the section and the words "being payable" in subsection (1)(a) are conclusive of its true meaning.

The respondent did not give section 10(2)(a) notice at any time before the action was instituted…….The lien was not available and therefore not capable of enforcement when the action was instituted." (highlighting added)

I respectfully agree with and adopt these reasons.

16. It is clear from s 10(2) of the Act that a demand in accordance with that section is a prerequisite to the entitlement to lodge a notice of lien over a person's title. A valid demand has the effect of deeming the contract price demanded to have become due. The requirements of a valid notice of demand appear to be as follows:

- The demand must be in writing.
- The notice must actually demand payment.
- The notice must be signed by the person claiming the contract price, and
- The notice of demand must be either:

  Given to the person liable to pay the same, or

posted in a registered letter addressed to the person liable to pay the same at his usual or last known place of abode.

17. It is clear from the pleadings that the second defendant was not the party with whom the plaintiff contracted. Nor was it the party who was liable to pay any money to the plaintiff. Accordingly, the notice of demand (as set out in paragraph 10 hereof) was clearly sent in error and is legally ineffective.

18. On 7 may 2002 Ms Laurence wrote the following letter to Whittles Body Corporate Management:

> "We refer to our letter dated 6 May 2002 and to the notice of demand enclosed therein.
>
> We note there is an error in the previous notice sent to you. Accordingly, please find enclosed (*) an amended Notice of Demand addressed to the body corporate, the registered proprietors of UP90/009."

19. This new notice of demand dated 7th May 2002 and again signed by Ms Laurence as "a solicitor in the employ of Cridlands, Lawyers duly appointed agent for Beaumont Tiles) was this time addressed to:

> "The registered proprietors of UP90/009
>
> Under the management of Whittle's Body Corporate Management
>
> C/- Whittle's Body Corporate Management
>
> Suite 34/21 Cavenagh Street
>
> Darwin NT 0800
>
> TAKE NOTICE that Beaumont Tiles (ABN 65 050 683 890) (hereinafter called "the Creditor") hereby requires you to pay the sum of $12,877.34 to the Creditor for work done and materials furnished in connection with work under the contract which was entered into between the Creditor and yourself on or about 24 September 2001.
>
> Dated this 7th day of May 2002."

20. Accordingly, this second notice of demand is addressed to the party with whom the party contracted. However, this letter and the new notice of demand was apparently sent by facsimile transmission to the second respondent. I will return to this issue later in these reasons.

21. There is a factual dispute as to how much of the contract work the plaintiff had completed up to the time that he was directed to stop work by the first defendant. The resolution of that matter is one for the trial magistrate after hearing all of the evidence. However, it is necessary to deal with this issue in part as Mr Cureton argues that no invoice has been sent, the work isn't 50% complete, and therefore no monies are due. In my view, it is not necessary for an invoice to have been created. The question is whether there is any money due under the contract. If there is then the "workman" has a lien available to him for that money.

22. In his book "The Artificer's Lien" the learned author says at pages 37 to 38:

> "The workman must normally have completed the work which he undertook to do, so that his account is presently payable, before his lien actually arises. Before the work is complete, his lien is said to be incohate. It arises by implication from the contract as a right to a lien but that right is not capable of being enforced until the work is done. A workman therefore who, after doing some of the work, refuses to complete it, which refusal the owner accepts as a repudiation and discharge of the contract, will not have a lien even for the work he has actually done up to the time of the refusal to complete.
>
> If however, the workman is prevented by the owner from completing his work, or if the owner countermands the order for the work after it started, the workmen's lien will cease to be incohate and he will have an effective and enforceable lien from the time of the prevention or countermand, but only for the portion of the work done (and materials used) up to that time. It is important to note in this regard that, even though there may be a fixed contract price for the whole job, the amount for which he will have that lien is limited however to the value of his work and materials to the time of such prevention or countermand, that is to say, to their value on a fair and reasonable basis or quantum meruit. (*Lilley v Barnsley* 1 Car. & Kir. 344; *Pinnock v Harrison* (1838) 3 M. & W. 532). His lien will not be effective for the whole contract price, or for any damages for breach

of contract which he may be entitled to claim against the owner (*Lilley v Barnsley* supra)."

23. In the instant case the plaintiff appears to claiming the whole of the contract price in the notice of demand. In my view, this is not permitted and the lien is only available for work done and materials supplied (and not paid for) up to the time that the plaintiff was told to stop work. Further Mr Cureton argues that a Workmen's Lien is not available for damages. In light of the above quoted passage I accept that submission.

24. The affidavits relied upon contain the following passages going to the issue as to what (if anything) might be owing to the plaintiff (leaving aside any damages to which he may be entitled, and any counterclaim to which the first defendant may be entitled):

Affidavit of Andrew Cox affirmed 2 July 2002, paragraph 10:

> "Irrespective of the problems in the tiling executed by the plaintiff as at or about 10 December 2001 when the plaintiff ceased work as requested, the works were not yet half completed, as the first stairwell was still requiring completion and the works on the second stairwell had yet to be commenced."

Affidavit of Jennifer Laurence sworn 24 July 2002, paragraph 5:

> "On 11 July 2002, I discussed paragraph 10 of Andrew Cox's affidavit with Trevor Colbert. Mr Colbert told me and I verily believe that the works remaining on the tiling job would take approximately half a day to one day to complete and that it is incorrect to say that the works were not yet half completed when Beaumont tiles were told to cease work."

Affidavit of Trevor Colbert sworn 30 July 2002, paragraph 10:

> "I disagree with the statement made by Andrew Cox at paragraph 10 that as at the date when Beaumont Tiles were told to cease work, the works were not yet half completed. At the time Beaumont Tiles was told to stop work, the works on the project were more than fifty per cent complete. I say this on the basis that the total time required to complete the project was five weeks, using three labourers. At the time Beaumont tiles were told to stop work, around three weeks'

> work had been spent on the first stairwell and only one more day was required. A lot more work was required on the first stairwell than the second because of the condition of the stairs. There was still only two weeks work remaining to be done to complete the project."

25. In my view, the attention of the parties to whether fifty per cent of the work had been completed or not misses the point. This was relevant under the contract only to enable the plaintiff to issue an invoice for a further payment during the continuation of the contract. However, on the pleadings the contract has not been complied with (for whatever reason) since about 10 December 2001. The plaintiff, having been told to stop work, was entitled to issue a notice of demand under the Act for whatever work he had done, and materials he had supplied up to that date. The demand under section 10(2) of the Act is what creates the contract price to be deemed to have become due. As noted at page 95 of "The Artificer's Lien":

> "This falling due for the purposes of the Act is an artificial point of time and does not mean the time when the wages or contract price became due and payable under the arrangement between the parties themselves."

26. It is clear from the facsimile dated 24 September 2001 (see paragraph 3 hereof) that the initial payment was for the "supply of tiles and step treads". On it's face there was no allowance for any work. Accordingly, the plaintiff (on all versions of the evidence) has done some work at the subject premises, and there is no evidence to suggest that this has all been paid for. It is not for me to consider at this stage of the case whether the work was any good or of any real value. The fact that there was work done which remains unpaid is itself sufficient to enable the plaintiff to avail himself of the Act.

27. That however, is not the end of the matter. As noted above the plaintiff has claimed more than he is entitled to under the Act. Does this invalidate the demand and the lien? In some cases it may. In his book "The Artificer's

Lien" (supra) the learned author has the following to say at pages 50 to 51 (excluding irrelevant parts):

> "He may waive his lien by his conduct. So he will be deemed to have waived it in any of the following circumstances:-
>
> .....
>
> (3) If the workman will not state the amount for which he claims a lien and the owner has no way of finding out what the amount of the claim is. A workman claiming a lien must claim it for a definite sum or give the owner sufficient particulars to enable him to calculate what is owing on the lien. If he does not do so, then the lien will be deemed to be waived (*Albermarle Supply Co v Hinds* (1928)1KB307 @ 318).
>
> .....
>
> However, a workman will not be deemed to have waived his lien merely because:-
>
> .....
>
> (b) he demands more than the amount for which he rightly has a lien, so long as he gives the owner details of his claim (*Albermarle Supply Co v Hinds* supra; *Scarfe v Morgan* (1838) 4 M.&W.270)."

28. To the extent that the plaintiff claims $12,877.34 this is in excess of the amount for which he may rightly have a lien, as on all the evidence the contract works have never been completed by the plaintiff. Even on the affidavit of Mr Colbert some two weeks worth of work was still outstanding. In the affidavit of Simon Cureton sworn on the 4th day of July 2002 he annexes two letters as "SCC2" and "SCC3". In the first of those letters Mr Cureton sought:

> "(2) Particulars of the work allegedly done and the materials said to have been furnished by your client under that contract applicable to the claim; and
>
> (3) The basis upon which the claim is quantified in the sum of $12,877.34."

In the reply from Ms Laurence (SCC3) she does not answer these two requests. If Mr Cureton had gone on to assert in his affidavit that the plaintiff has still failed to answer either of these requests then I would have found that the plaintiff had waived his right to a lien by his conduct and made appropriate orders. However, as the affidavit evidence goes no further I am unable to reach such a conclusion.

29. I now turn to other aspects of the submissions before me.

30. When this matter was first argued before me on 24 July 2002, the material put forward by the plaintiff was insufficient to establish any proper agency or authority for Ms Laurence to sign the notice of demand on behalf of the plaintiff. However, after documents were produced to Mr Cureton (counsel for the first defendant) no further issue was taken that the notice was not validly signed.

31. Interestingly as matters progressed, it transpired that RJ Beaumont & Co Pty Ltd was the owner of the registered business name of Beaumont Tiles. However, it appears that the plaintiff uses the same name. The lawfulness of this was not argued before me. However, Mr Cureton does complain that the notice of demand is from "Beaumont Tiles" and says that it should have been in the name of Trevor Colbert. As I understand the argument, it is pressed on the basis that as Colbert does not own the business name, he is not entitled to demand in that name and it is a legal entity in which he has no apparent right. I consider that there is some force to this submission.

32. It does appear from the various documents annexed to the affidavits relied upon that Mr Colbert does use the name "Beaumont Tiles". There is nothing before me to indicate whether Mr Colbert has any interest in RJ Beaumont & Co Pty Ltd. Nor is there anything before me to indicate on what basis he purports to use the name of Beaumont Tiles. The proceedings were commenced in the name of "Trevor Colbert trading as Beaumont Tiles". Paragraph 1 of the Particulars of Claim simply pleads:

"The plaintiff carries on business as a supplier and layer of tiles."

In paragraph 1 of the Amended Particulars of Claim this is now amended to plead:

> "The plaintiff carries on business as a supplier and layer of tiles in the name and style of Beaumont Tiles."

33. In my view, the notice of demand should have been in the name of Trevor Colbert. As noted at page 96 of "The Artificer's Lien":

> "A demand by a partnership (whether trading under a registered business name or not) should be given in the individual names of the partners mentioning their trade name e.g. "Martin Smith and Mary Smith trading as "M & M Smith"."

In my view, the same applies to the plaintiff in this case.

34. In my view, there is a further defect with the notice of demand and that relates to the way it was purported to be served.

35. It is clearly the plaintiff's case (as disclosed by the original statement of claim and amended statement of claim) that any contracts were between the plaintiff and the first defendant. Whittle's Body Corporate Management is alleged by the plaintiff to have been the agent of the first defendant only.

36. On 13 December 2001 Drew Cox (body corporate committee member on behalf of the body corporate 302 Casuarina Drive, Nightcliff) wrote to the plaintiff. A copy of this letter is Annexure A to the affidavit of Jennifer Nicole Laurence sworn the 23rd day of July 2002. At the end of this letter is the following:

> "Please direct future correspondence to
>
> Paul Delos Santos
>
> Whittles Body Corporate Management
>
> GPO Box 1513

Darwin

NT 0801"

37. Richard Quan (a body corporate manager engaged by the second defendant) in his affidavit sworn the 2nd day of July 2002 confirms receipt of the letter and second notice of demand (as set out in paragraphs 16 and 17 of these reasons). In paragraph 5 of his affidavit he goes on to state "I faxed the Cridland's facsimile and attached notice to Mr Drew Cox of the Management Committee of the first defendant."

38. In my view, a request to "please direct future correspondence" to a particular person does not grant any apparent or ostensible authority for that person to accept service of formal documents on behalf of the other. The second defendant was merely acting as a mail box for the first defendant. In the same way, a solicitor may write to notify that they are acting for a particular client and to request that all future correspondence be directed to them. This of itself does not authorise the service of notices (such as notices under the Bankruptcy Act, the Corporations Act, the Act) or court proceedings. There is nothing on the material before me to indicate that the second defendant had the authority of the first defendant to accept service of a notice of demand under the Act from the plaintiff on behalf of the first defendant. On the evidence before me I find that, in fact, the second defendant did not have such authority. Upon receipt of the documents, the second defendant wisely and prudently forwarded them on to the first defendant by facsimile transmission.

39. I find that Drew Cox received a facsimile copy of the notice of demand to the first defendant from the second defendant on or about the 8th day of May 2002. At no time has the first defendant received any other copy of the notice of demand by any other process.

40. The statutory deeming on a contract price to have become due is effected when the notice of demand is given to the person who owns the same or sent by registered mail to that person. Accordingly, the plaintiff had two options available to it and, for reasons which remain unclear, chose not to exercise either of them. In my view, the purpose of the two options is to bring certainty to the deeming. As noted at pages 96 to 97 of "The Artificer's Lien":

> "The giving of a demand however is *essential* in order to fix the date on which the 7 days expired and the 28 days time-limit commenced to run, so that the owner or occupier (or a Court hearing the lienee's action for enforcement of his lien), can calculate whether the Notice of Lien was given within the time laid down by the Act or whether it is invalid as having been given outside that time limit.
>
> ……
>
> It must be served personally on the person to whom it is addressed (the place of service in this case is immaterial) or posted to him in a prepaid registered letter addressed to him at his normal or last place of abode….It cannot be served on him by registered letter addressed to his place of business – the Act says "place of abode". A company's place of abode is it's registered office…."

41. If the plaintiff had personally given the notice of demand to the first defendant, then an affidavit of service in that regard would make it clear when the deeming arose. Likewise, if the notice of demand had been sent by registered mail, an affidavit of service to that effect enclosing the relevant post office documentation would have made that date clear. If the registered mail option were utilised, receipt of the item would be irrelevant. The deeming would arise upon the registered mailing and, even if the item was never received, the deeming would still exist.

42. There was some interesting submissions as to what "place of abode" meant in relation to the first defendant. However, in my view, it is unnecessary for me to consider the point. The fact is that the plaintiff did not send the notice of demand by registered letter at all. If the plaintiff had done this then it

would be necessary to decide whether the place to which it was sent was the first defendant's place of abode. In the instant case no such inquiry is relevant.

43. In my view, the fact that the first defendant eventually did come into possession of a facsimile copy of the documents is irrelevant. There is no power in the Act to enable a court to authorise or permit any mode of service other than that expressly laid down. Where service of a document is prescribed by rules of court, then there is usually a power to dispense with service, order substituted service etc. This indicates that the underlying issue in those cases is to bring the particular document to the attention of a person, and the method of doing so can be flexible.

44. There is no similar provisions under the Act. The court has no power to excuse or permit a failure to comply with section 10(2). In my view, the reason for this is self-evident. Service in accordance with section 10(2) has the primary purpose of deeming the contract price to have become due as at a definite date, and for the other time limits in the Act to then commence to run. I find that the service provisions in section 10(2) are mandatory and must be strictly complied with. A failure to comply has the consequence that the contact price is not deemed to have become due.

45. The plaintiff had only two choices of service available to it under the Act and, by choosing not to utilise either of them, this has the consequences that the deeming in section 10(2) of the Act has not arisen. Accordingly, I find that the contract price has not become due in accordance with section 10(2) of the Act, and therefore a lien under section 10(1) of the Act was not available.

46. The defect is one which is not now capable of remedy.

47. It must follow that the notice of lien over the title is invalid. It must also follow that any proceedings in this court to enforce the notice of lien cannot

succeed. The plaintiff can still proceed on his alternate claims against the first defendant but the parts of the claim which are based upon the Act must be struck out.

48. I will hear the parties on the formal form of the order to be made and on the question of costs and any related issues.

Dated this 11th day of September 2002.

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D.TRIGG
STIPENDIARY MAGISTRATE