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## IS SERVICE BY USB ACCEPTABLE SERVICE?

### INTRODUCTION

The *Building and Construction Industry Security of Payment Act 1999* ('the Act') prescribes strict provisions relating to the service of documents. While there may be more convenient ways of serving documents than through hard copies, *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd t/as Total Concept Group* [2017] NSWSC 194 reminds us of the necessity of strict compliance with the Act. In this case the issue was whether the service of an adjudication application via USB constituted valid service.

**PARKVIEW CONSTRUCTIONS PTY LTD V  
TOTAL LIFESTYLE WINDOWS PTY LTD  
T/AS TOTAL CONCEPT GROUP [2017]  
NSWSC 194**

### FACTS

Parkview Constructions Pty Ltd ('Parkview') entered into a contract with Total Lifestyle Windows Pty Ltd ('Total Lifestyle') for the glazing

of windows and doors. After receiving a payment schedule from Parkview, Total Lifestyle made an Adjudication Application ('the Application') pursuant to the Act.

The Application was first uploaded onto Parkview's cloud-based platform ('the Cloud') on 8 November 2016. On the same day, a revised version of the Application was uploaded onto the Cloud. A USB containing the revised Application was couriered to and received by Parkview on 9 November 2016. Hard copies of the revised application were sent to Parkview but did not contain some of the files from the USB while the USB did not contain some files from the hard copies.

### ISSUES

The adjudicator determined that service was effected once the USB was received by Parkview on 9 November 2016. The adjudicator disregarded Parkview's response to the Application, made on 17 November 2016, as it was too late.

The issue for the court was whether the adjudicator's disregard for Parkview's response was a reviewable error.

## JUDGMENT

The case turned on whether the service of the adjudication application via USB on 9 November 2016 was valid.

The Court stated that the fact that s 17(3) of the Act requires a copy of the Application to be served on the respondent means that the **written words of the Application need to be communicated to the respondent**. Since an Application needs to be in writing and served on the respondent, the Court stated that the service was not effected on 9 November 2016 as the USB did not communicate written words.

The Court stated that service via USB does not meet the requirements of s 17(5) of the Act.

- As the USB did not represent or reproduce words in visible form
- Rather, the USB only represented or reproduced its content when accessed – which requires the recipient to have compatible technology which is not always guaranteed.

The Court stated that since there had been a denial of procedural fairness, the adjudication application ought to be quashed.

The decision in *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd t/as Total Concept Group* [2017] NSWSC 194 serves as a reminder to consider how you serve documents pursuant to the Act; strict compliance with the provisions of the act should override considerations relating to expediency or convenience.

## For more information

For more information on the service of documents under the Act contact our Principal Solicitor/ Director:

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