

Effective service of notices under construction contracts

April 2019

Authors: [David Robertson](#), [Katarina Sikorska](#)

In the recent case of *The Trust Company (Australia) Ltd atf the WH Buranda Trust v Icon Co (Qld) Pty Ltd & Anor* [2019]QSC 87, the Supreme Court of Queensland was asked to consider whether a contractual notice served via a cloud-based project management information system (Aconex) was valid and effective.

The effectiveness of service depends ultimately upon the intention of the parties, which is ascertained on a case-by-case basis from the terms of the relevant contract.

Construction and engineering contracts often contain notice provisions to give the parties certainty over (a) how they may communicate with each other; (b) to whom the communications are to be made; (c) the address or details of where the communications are to be directed; and (d) when a communication will be effective for contractual purposes. In the case of *The Trust Company (Australia) Ltd atf the WH Buranda Trust v Icon Co (Qld) Pty Ltd & Anor*, the central questions were (i) whether a payment claim was a “notice” within the meaning of the relevant contract provisions; and (ii) whether its delivery via the Aconex project management information system amounted to valid service.

Key facts

The Respondent (“ICON”) and the Applicant (the “Trust Company”) entered into a design and construction contract, and AECOM Cost Consulting Pty Ltd was appointed as agent for the Trust Company (the “Principal’s Representative”). The contract provided for an electronic form of document control called Aconex, which was used for the circulation and sharing of documents, including payment claims, relating to the project. When a new document was uploaded to Aconex, the person to whom the correspondence was directed received an email notification.

ICON submitted a payment claim pursuant to the Building and Construction Industry Payments Act 2004 (Qld) (the “BCIPA”) (repealed on 17 December 2018) through Aconex. The Principal’s Representative downloaded the claim and issued a payment certificate in response. ICON brought adjudication proceedings against the Trust Company disputing the amount certified by the Principal’s Representative. The adjudicator found in favour of ICON. The Trust Company, subsequently, made an application to Court to have the adjudicator’s decision declared void on the ground that the adjudicator lacked jurisdiction because the service of ICON’s payment claim via Aconex was invalid.

The Trust Company’s primary argument was that the payment claim was a “notice” and thus has to be served at ICON’s physical address. Alternatively, the Trust Company argued, a notice sent by email via the Aconex software system was not a valid notice for the purposes of the contract.

Decision by the Court

The Court dismissed the application and held, amongst other things, that:

- A payment claim may be described as a “notice” but that will depend on the proper construction of the contract. In the context of this contract, the judge concluded that a payment claim is not a “notice” within the meaning of clause 7A of the contract, which states that notices under the BCIPA “shall be served to the Principal’s physical address” (which happens to be the address of its solicitors). The judge could not imagine that the Trust Company intended its solicitors to host its construction documents.
- The service of a payment claim is instead governed specifically by clause 37.1, which states to whom and how a payment claim is to be given: “each [payment] claim shall be given in writing to the Principal’s Representative”.
- The agreed use of the Aconex software system for the lodgement and processing of payment claims, and the email notification to the Trust Company of the existence of the correspondence complied with the method of serving a payment claim pursuant to clause 37.1 of the contract. The judge concluded that clause 37.1 was broad enough to engage the use of Aconex, including its system for email notification and was not precluded by clause 7 of the contract, which explicitly excluded (subject to certain exceptions) service by email.

Comment

The decision in *The Trust Company (Australia) Ltd atf the WH Buranda Trust v Icon Co (Qld) Pty Ltd & Anor* is a useful reminder of the importance of considering carefully how parties should communicate with each other when addressing matters of contractual importance.

In today’s modern world, software systems such as Aconex are commonly used to facilitate the review and processing of documents. The Court distinguished service of a notice via an agreed project management information system from service simply using email (which under this contract was expressly prohibited). However, the Court emphasised that any form of service must be agreed by the parties and not explicitly excluded in the contract or otherwise not permitted by law.

The Courts have in recent cases taken a more pragmatic approach to considering the validity of notices served by alternative means, but only if the alternative service takes place by a method that is (a) effective in terms of actual communication of a contractual matter; and (b) evidently acceptable to the party to whom the notice is sent (see [Serving contractual notices: wrong method, right result](#) by Julian Bailey, Michael Turrini, Luke Robottom and Luka Kristovic Blazevic).

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
T +44 20 7532 1000

In this publication, White & Case means the international legal practice comprising White & Case LLP a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.