Article Information

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A payment claim by another name

If it smells like a letter of demand and looks like a letter of demand, then it could be a payment claim. Recent NSW judicial guidance directing attention to the substance, rather than the form, of payment claims and schedules.

Despite the criteria for payment claims and schedules under the *Building and Construction Security of Payment Act* (**Act**) appearing simple, parties continue to stumble into disputes as to their validity. Getting it wrong can easily inflict irreversible damage to one's prosecution of or defence to statutory debts and adjudication applications.

Richmond J in *Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd* [2023] NSWSC 309 (***Megacrane***) suggests that a holistic and practical approach should be used, but the devil remains in the detail.

Facts

Piety and Megacrane entered into a subcontract for the supply of tower cranes and labour for a project in Hurstville.

Megacrane, through its administrator (under a Deed of Company Arrangement), issued a letter to Piety that was labelled as "*a letter of demand*". The letter made a demand of payment for a number of invoices, to a rolled up total of $258,976.18. The invoices were of various dates and for various periods. Whilst the letter of demand itself did not contain an endorsement per section 13(2)(c) of the Act, each of the invoices were endorsed:

> *"This is a payment claim issued pursuant to the Building and Construction Industry Security of Payment Act NSW 1999."*

Piety issued a letter responding to the letter of demand. In the subject line, it referred to the letter of demand and, in the body of the letter, Piety denied any indebtedness and provided reasons why no payment would be made.

Questions arose as to whether the letter of demand comprised a payment claim and whether the response was a payment schedule, under the Act.

Adjudication application

Megacrane lodged an adjudication application. In its adjudication response, Piety contented that the adjudicator did not have jurisdiction to deal with the adjudication because:

1. The payment claim relied on by Megacrane was not a valid payment claim;
2. Even if it was found that it was a valid payment claim, no valid payment schedule was issued by Piety; and
3. If there was no valid payment schedule, Megacrane was required to serve a section 17(2) notice on Piety prior to commencing the adjudication.

The Adjudicator addressed Piety's 3 submissions in his determination as to why he lacked jurisdiction, finding that that in "*reading the letter of demand as a whole*", it constituted a valid payment claim per section 13 of the Act.

In a similar vein, the Adjudicator determined that by responding to the letter of demand with a letter which provided reasons as to why payment was not going to be made, Piety had effectively provided a payment schedule.

The Adjudicator valued the payment claim at $108,828.05. Megacrane obtained an adjudication certificate and caused that to be converted to a judgment debt in the sum of $121,321.50.

Judicial Review

Piety commenced proceedings to have the determination set aside.

Richmond J applied a practical approach, stating that *"the Administrator's letter of 11 May 2022 needs to be considered as a whole"* [42]. He noted the letter expressed a claim for $258,976.18 which was calculated as a sum of two amounts, being for work performed prior to the administrator's appointment and for the dry hire of two cranes for the period of 1 March to 30 April 2022.

His Honour found that "*on a fair reading of the letter*", it was a claim for $258,976.18 in respect of amounts which are particularised in an invoice [43]. In circumstances where that invoice identifies the construction work completed by Megacrane, it enabled the respondent, Piety, to understand the basis of the claim and to consider whether to approve or dispute the payment claim by way of a responding payment schedule.

Richmond J observed that the requirements of s13(2) are *"relatively undemanding"* [36]. All that is required [to satisfy 13(2)(a)] is an identification of the construction work (or related goods and services) to which the progress payment relates in sufficient detail to enable the recipient to understand the basis of the claim.

His Honour cited the case of *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd* (2005) 64 NSWLR 462; [2005] NSWCA 409, where Hodgson JA considered:

> *"I do not think a payment claim can be treated as a nullity for failure to comply with s 13(2)(a) of the Act, unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made."*

In the same case, Ipp JA agreed with Hodgson stating:

> *"Provided that a payment claim is made in good faith and purports to comply with s 13(2) of the Act, the merits of that claim, including the question whether the claim complies with s 13(2) is a matter for adjudication under s 17 and not a ground for resisting summary judgment in proceedings under s 15."*

Richmond J made it clear that the question of whether a document is a payment claim or a payment schedule is determined by having regard to its substance, rather than form, and an unduly critical approach is not appropriate. His Honour concluded that there was no reason why the letter of demand could not be considered a payment claim.

Noting this finding, Piety argued that there was no valid payment schedule served, but again his Honour adopted a practical approach to what comprises a payment schedule. At [45], his Honour found that the 20 May 2022 letter is a payment schedule because it:

1. Identified the payment claim to which it relates by references in the first sentence to the administrator's letter dated 11 May 2022;
2. Indicated that no amount is proposed to be paid by denial of any liability; and
3. Stated the reasons for that contention.

Key take aways

Megacrane provides support for the adoption of a practical yet cautious approach to payment claims. It supports the application of a "*fair reading*" of the totality of the document rather than anguishing (and straining) over its form.

At a high level a respondent is best to avoid being dismissive as to whether demands for payment are in fact payment claims under the Act. If it looks like a letter of demand but its enclosures contain an endorsement under the Act, then there is a good chance it is a payment claim, and the respondent should respond appropriately (under the Act) to protect its interests. The requirements of section 13(2) are a low threshold.

In a similar vein, payment schedules only need to refer to the payment claim and indicate whether or not the entire, or part of, the amount claimed will be paid and the reasons for amounts claimed being withheld.