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Article Information

Authors: Robert Riddell, Gareth Gillespie, Alexander Andriopoulos
Service: Commercial Disputes, Construction Litigation, Dispute Resolution & Litigation, Projects & Construction
Sector: Infrastructure, Real Estate

Rolling the dice on payment schedules – Is it valid or not?

Piper Alderman's Sydney Construction team considers a recent security of payment decision by the Supreme Court of NSW regarding the minimum requirements for a valid payment schedule: Turnkey Innovative Engineering Pty Ltd v Witron Australia Pty Ltd [2023] NSWSC 981 (Turnkey v Witron) per Stevenson J.

Introduction

In the security of payment regime under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SoP Act**), the payment schedule is the respondent's opportunity to indicate the amount it proposes to pay (**scheduled amount**) and the reasons why that amount is less than the claimed amount. It is in a respondent's interests to serve a payment schedule, as failure to do so allows the claimant to enforce all of the claimed amount as a statutory debt by way of summary judgment.

But what is the minimum required of a payment schedule in order for it to be valid? If the payment schedule rejects the claimed amount but does not clearly indicate the scheduled amount, will that lack of clarity invalidate the payment schedule? If the payment schedule indicates an amount but does not provide reasons why the scheduled amount is less than the claimed amount (or only provides vague or incomplete reasons), will that invalidate the payment schedule?

Turnkey v Witron considered these issues, with the Court holding that the payment schedule was entirely invalid because, although it provided reasons for withholding 60% of the claimed amount, it failed to indicate reasons for withholding payment of the remaining 40% of the claimed amount.

The Court's fine reasoning has rather impractical implications for claimants who, upon receiving a poorly worded payment schedule, must quickly undertake a potentially complex analysis to form a view as to its legal validity. If the claimant gets it wrong, it may irreversibly impair the claimant's ability to take enforcement action under the SoP Act.

It will be equally frustrating for respondents as, if they overlook providing grounds for a material disputed part of a claim, what they thought was a valid payment schedule will in fact be a complete nullity. Even strong express grounds for withholding payment will be disregarded, simply because other disputed components of the claim have not been addressed.

Factual Background

Witron Australia Pty Ltd (**Witron**), the principal, and Turnkey Innovative Engineering Pty Ltd (**Turnkey**), the contractor, entered into a fixed price contract for approx. $11 million (**Contract**), under which Turnkey was to complete electrical installation works at an automated distribution centre in Kemps Creek, NSW (**Project**).

Over the course of the Project, a number of variations were directed, leading to a repricing of the Contract Sum to approx. $14 million (email evidence before the Court appeared to establish that this repricing was agreed between the parties in April 2023).

On 1 May 2023, Turnkey served a payment claim on Witron. The claimed amount consisted of a contract works component (based on the re-priced Contract Sum) and a component for variations claimed by Turnkey.

The payment schedule was due by 15 May 2023. On 3 May 2023, Witron sent an email to Turnkey (**Witron Email**), which Witron later characterised as a payment schedule. The entire text of that email was as follows:

> *"As discussed during our meeting on 18/4 with Cameron and Jurgen, we will review your variations and your new pricing after we see real progress on the handing over of GCs. This approach is also in line with our meeting from last week in Redbank with our 2 CEOs.*
>
> *Based on this you can claim progress for April based on the original contract price minus the 5 deducted GCs.*
>
> *Please adjust your claim accordingly and resubmit for approval."*

Turnkey replied to the Witron Email that same day, saying *"you already agreed to the… reprice"*. Subsequently, Turnkey commenced proceedings seeking summary judgment of the claimed amount, pursuant to s 15 of the SoP Act, on the basis that Witron failed to serve a payment schedule.

Court's Analysis

The only issue before the Court was whether the Witron Email constituted a valid payment schedule under the SoP Act.

The Court considered s 14(2)-(3) of the SoP Act:

> *"**14 Payment Schedules***
>
> *[…]*
>
> *(2) A payment schedule—*
>
> *(a) must identify the payment claim to which it relates, and*
>
> *(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**).*
>
> *(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment."*

The Witron Email clearly met the requirement in s 14(2)(a), as it identified the payment claim. However, the Court needed to decide whether:

- in accordance with s 14(2)(b), the Witron Email indicated the scheduled amount Witron proposed to pay; and
- in accordance with s 14(3), whether the Witron Email indicated Witron's reasons for withholding payment.

Upon detailed consideration, his Honour concluded that the words of the Witron Email indicated that Witron proposed to pay $Nil as the scheduled amount, thus satisfying s 14(2)(b). Phrases supporting that conclusion included: *"we will review your… new pricing"* and *"Please adjust your claim accordingly and resubmit for approval"*.

His Honour reasoned that, by these words, Witron was asserting that it had not yet agreed to the repricing of the Contract (despite there being evidence before the Court that the repricing was agreed prior to the payment claim being served). By its words, Witron suggested that it might consider paying something in response to a re-submitted payment claim based on the original Contract Sum (before the repricing), but this is not how the 1 May payment claim was framed, so Witron was essentially rejecting that payment claim in its entirety, equating, so his Honour found, to a scheduled amount of $Nil.

Regarding whether the Witron Email satisfied s 14(3), his Honour distinguished between the two components of the payment claim, the first being the contract works component (based on the re-priced Contract Sum) and the second component being the further variations.

His Honour's view was that Witron, in its email, had provided reasons for not paying the contract works component of the payment claim (being that Witron asserted it had not agreed to the repricing of the Contract). However, his Honour found that the Witron Email failed to indicate any reasons as to why Witron scheduled $Nil in respect of the variations component, as the variations component had nothing to do with the repricing issue. The variations component represented

around 40% of the overall claimed amount.

Therefore, his Honour determined that the Witron Email failed to comply with s 14(3) and so it was not a valid payment schedule. Turnkey was therefore entitled to summary judgment of the claimed amount.

In reaching this conclusion, the Court considered case law on the issue of the minimum requirements for a payment schedule to be valid. Importantly, it has been held that it is not sufficient for a payment schedule to take issue with part of a payment claim but not address the balance of the claim, because the purpose of the payment schedule is to identify what parts of the claimed amount are in dispute and why.

Implications

Turnkey v Witron highlights the imperative for respondents to ensure their payment schedule adequately responds to all items claimed in a payment claim. In respect of any claim item for which the respondent is withholding payment, the payment schedule must give reasons as to why the scheduled amount is less than the claimed amount. A failure to do so will result in the payment schedule being invalid under the SoP Act.

Taking a more critical view, it could be argued that determining a payment schedule's validity based on a fine consideration of the adequacy of the reasons given for withholding payment creates too much legal complexity and uncertainty for many claimants, the vast majority of whom are unsophisticated in terms of their capacity to legally analyse a payment schedule. Arguably the bar is set too high.

Upon receiving a vague or brief payment schedule, claimants are expected to quickly form a view as to its legal validity before choosing which step to take next in the SoP Act process, which as demonstrated by the scenario in *Turnkey v Witron* is by no means a straightforward task and can be akin to a 'roll of the dice'.

This is less than satisfactory. The consequences of such uncertainty are potentially severe:

- If the claimant proceeds to adjudication without issuing a s 17(2) notice and a court or the adjudicator later decides that the payment schedule was invalid, the claimant's adjudication application is vulnerable to being impugned as invalid. Should there be no further entitlement to serve a payment claim under the SoP Act, then the claimant may well be shut out from the SoP Act's fast-track adjudication process. This potentially involves tens of thousands of dollars in irrecoverable adjudicator and legal costs, which is at odds with the fast-track and cost efficient objective of the SoP Act.
- Similarly, if the claimant assesses the payment schedule as invalid then the claimant might pursue a summary judgment application before discovering that the court takes a different view. The claimant would again incur irrecoverable legal costs and then need to start the payment claim process all over again (assuming it still has an entitlement to do that).

Section 14(3) states that the respondent "*must*" provide reasons for why it is withholding payment, so a strict approach to determining the validity of the payment schedule based on incomplete reasons is understandable from a judicial perspective. However, as a practical matter, it is by no means always a simple task to determine validity based on the adequacy of the reasons given for withholding payment. It may be debatable whether the respondent's reasons correspond to all claim items.

The Court in *Turnkey v Witron* found the payment schedule to be invalid because it was silent as to why payment was being withheld in respect of 40% of the claimed amount, but would the Court have declared the payment schedule invalid if that percentage was only 20% or 10%?

A more practical interpretation of s 14(3), which is perhaps more appropriate in the context of contractor payment claims under the SoP Act, might be to view the payment schedule as the respondent's ***opportunity*** *to provide reasons for withholding payment, rather than viewing the provision of reasons for every contested item as an essential condition of validity of the payment schedule.*

This would be fair as, if the respondent fails to take up the opportunity to provide reasons in the payment schedule, the respondent bears the consequences of that failure, which is that they are barred, by reason of s 20(2B), from raising any reasons in the adjudication response that were not raised in the payment schedule (other than jurisdictional reasons).[1]

This approach would likely reduce uncertainty for claimants around assessing whether the payment schedule is valid, without giving respondents an unfair advantage in an adjudication. Respondents would also benefit from not having their payment schedules found to be invalid if, in stating their reasons, they overlook a few of the claim items.

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require legal advice on your specific situation, please contact the authors.

[1] This is the position in NSW, but not necessarily in other States, where a respondent may be able to raise new reasons in the adjudication response.