

Article Information

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Service: Arbitration, Construction Litigation, Project Finance, Projects & Construction, Property & Development, Property Development, Strata & Community Title

Sector: Government, Infrastructure, Not-for-Profit, Real Estate

The purposive approach to payment schedule validity

There are only four criteria to be satisfied before a document will be characterised as a payment schedule under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (Act), being that it:

- 1. identifies the payment claim to which it relates;**
- 2. indicates the amount of payment (if any) the Respondent proposes to make; and**
- 3. indicates, if applicable, why the proposed payment is less than the amount claimed;**
and
- 4. is provided to the claimant by the applicable time.**

This piece focusses on the third criterion.

The New South Wales Court of Appeal has recently confirmed the lens through which that criterion is evaluated. In most cases it is clear and unambiguous that a document is a payment schedule and the reasons for withholding payment are relatively clearly stated. But where any doubt exists, the question is not to be taken lightly. The existence of a valid payment schedule determines the correct route to adjudication, whether a statutory debt might be enforced and even the right to suspend work. Getting it wrong can be time consuming, expensive, and likely embarrassing.

In *Turnkey Innovative Engineering Pty Limited v Witron Australia Pty Limited* [2023] NSWSC 981, the Claimant sought summary judgment on its payment claim, despite a purported payment schedule that read:

"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 [Group Control areas]. This approach is also in line with our meeting from last week in Redbank with our two 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."

Stevenson J concluded the document satisfied section 14(2)(b) [identifying the payment claim and indicating the amount proposed to be paid, i.e. \$0.00], but not section 14(3), as it:

1. did not indicate reasons for withholding payment with respect to the variations component of the payment claim [about 40% of the claimed amount]; and
2. it is not sufficient that the document takes issue with part of the claim but does not address the balance, particularly where a lesser sum is proposed to be paid in respect of that balance.

The respondent, Witron, appealed on the basis that Stevenson J erred in holding that the purported payment schedule did not indicate reasons for withholding payment in respect of the entire amount claimed. It also took issue with the finding that not addressing part of the payment claim in the payment schedule disqualifies the document from being a payment schedule.

In *Witron Australia Pty Limited v Turnkey Innovative Engineering Pty Limited* [2023] NSWCA 305 Kirk JA, with whom Leeming JA and Payne JA agreed, found that Witron gave no reasons in the purported payment schedule that could reasonably be seen as answering the distinct component of the claim relating to variations. It simply stated that “we will review your variations...after we see real progress on handing over of the GCs.”

The decision on that is largely factual and dependent upon the language of the communication. Far more enlightening is the lens through which the purported payment schedule is analysed.

The court observed that the payment schedule is of potential significance to a number of stakeholders in the statutory scheme, namely:

- The claimant, in deciding whether or not to take a claim to adjudication or, if not a payment schedule, to enforce the debt or suspend the work;
- The authorised nominating authority, as it may affect the adjudicator nominated by it; and
- The adjudicator in considering:
 - (a) whether to accept the nomination [which assumes the adjudicator has visibility of the payment schedule before accepting the nomination]; and
 - (b) whether the respondent’s submissions in any adjudication response are “duly made”.

Kirk JA noted Chesterman J’s observation in *Minimax Firefighting Systems Pty Limited v Bremore Engineering (WA) Pty Limited* [2007] QSC 333

“[29]... the machinery for prompt payment and enforcement of a payment would break down if a document, said to be a payment schedule, took issue with only part of a claim, but was silent as to what it proposed to pay in respect of the balance. The contractor could not enter judgment. The respondent’s reticence could frustrate the operation of the Act.”

In *Style Timber Floor Pty Limited v Krivosudsky* [2019] NSWCA 171 the closest the respondent’s response came to giving a reason was “damages you done (sic) is more than what you claimed.”

Leeming JA noted that “one point of the provision of a payment schedule is to permit the statutory mechanism of adjudication to take place. It is impossible to express any views as to the limits of the adjudication if the 30 November email is to amount to reasons which engage s 20(2B).” [being the prohibition on the adjudication response including reasons not set out in the payment schedule]

He continued:

“[74] These concerns may be tested practically. What was the scope of the dispute which might be adjudicated ...? Was there a dispute about all five of the properties throughout Sydney? Or just one property? Or a number of properties? What material would [the claimant] have to supply to an adjudicator if this email were a valid payment schedule? Would [the claimant] have to make submissions about the condition of the concrete floors at Freshwater? About what had occurred at the North Sydney property? How many of the matters raised in October and November had been resolved by 30 November?”

The emphasis is on the need for a payment schedule to address the substance of what is claimed in the context of the statutory scheme. The lens through which one determines whether a document satisfies the requirement of a payment schedule under the Act is purposive. It is certainly not, for instance, determined by the form of the document or whether the scheduled amount is stated numerically.

Consideration of the purpose for giving the reason/s, including to apprise the other party of the real issues in dispute, is paramount. It must permit the claimant make an informed decision as to how to proceed and enable the adjudicator to identify the submissions that are “duly made” in the adjudication response. It must do this in respect of all material components of the payment claim, where the respondent proposes to pay less than is claimed, thus identifying the parameters of the dispute.

In other words, is the document, purporting to be a payment schedule, fit for purpose?