

**BARCLAY MOWLEM CONSTRUCTION LTD V TESROL WALSH BAY PTY LTD [2004]  
NSWSC 716**

Supreme Court of New South Wales – 13 August 2004

**FACTS**

Barclay Mowlem Construction Ltd ('Barclay') undertook building work for Tesrol Walsh Bay Pty Ltd ('Tesrol'). Barclay Mowlem served a Payment Claim pursuant to section 13 of the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act') on Tesrol for \$1,111,923.

Tesrol provided Barclay with a document, purporting to constitute a Payment Schedule, within the time permitted by section 14(4) of the Act. The document referred to "ongoing communications" and stated that "it is apparent that the Parties are in Dispute" and that "it is considered appropriate that we refer the matter to the Independent Certifier... for an assessment and determination of the matters detailed below". The document did not indicate in terms any amount that Tesrol proposed to pay; nor did it say in terms that Tesrol proposed to pay nothing.

Barclay contended that Tesrol did not provide it with a Payment Schedule in accordance with section 14 of the Act. That is, the document was not a Payment Schedule because it did not indicate the amount of payment (if any) Tesrol proposed to make. Accordingly, Barclay said that Tesrol was liable to pay the amount claimed and then sued to recover the amount as a debt. Tesrol argued that it did, within the time permitted by section 14 of the Act, provide Barclay with a Payment Schedule for the purposes of section 14.

**ISSUE**

Whether a Respondent to a Payment Claim is required to expressly state that they propose to pay nothing.

**FINDING**

The Court referred to *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140, in which Palmer J set out the approach that the Court should take in considering whether documents purporting to be Payment Claims or Payment Schedules complied with the relevant mandatory requirements of the Act.

The Court noted that they were exchanged between parties who, because of their experience in the building industry and with the particular contract, knew the history of the project and the issues in dispute, and that they would be likely to contain material in abbreviated form unintelligible to the uninformed reader but comprehensive to the parties.

Based on this approach the Court indicated that an available inference even from the terms of the letter itself that Tesrol did not propose to pay any amount to Barclay. If this inference was incorrect, it would be arguable that the reference to prior communications and correspondence would be sufficient indication, to someone in the position of Barclay, of the reasons underlying Tesrol's apparent decision. Ultimately, the Court declined to decide whether the document was a Payment Schedule.

## QUOTE

McDougall J at paragraph 13 stated:

*“It is arguable that, when s 13(2)(b) refers to “the amount of the payment (if any) that the respondent proposes to make”, it requires an indication of an amount only where some amount only where some amount is to be paid; and does not apply if nothing is proposed to be paid: on the basis that nothing (or its equivalent nil or zero) is not an “amount”. It is arguable that, if nothing is proposed to be paid, then there is no scheduled amount and therefore no obligation under s 14(3) to indicate reasons.”*

## IMPACT

A document in response to a Payment Claim may constitute a Payment Schedule, even though the amount that the respondent proposes to make is not specified.

The more concerning impact of the judgment is that it may be arguable that no reasons need to be provided in circumstances where there is reference to previous communications or correspondence.

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