



December 2023

Less than a pleading, more than an outline – the precision required for a payment schedule.

Turnkey Innovative Engineering Pty Ltd v Witron Australia Pty Ltd [2023] NSWSC 981

Introduction

1. The decision delivered by His Honour Justice Stevenson of the Supreme Court of NSW on 18 August 2023 in *Turnkey Innovative Engineering Pty Ltd v Witron Australia Pty Ltd* [2023] NSWSC 981 has revisited the requirements for a valid payment schedule under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“SOPA”).
2. In this case, the Supreme Court held that the Contractor was entitled to judgment for the full amount of the payment claim because the Principal’s email response failed indicate reasons as a payment schedule for withholding payment on one major component of the claim.

Background

3. On 8 September 2022, Witron Australia Pty Ltd (“**the Principal**”) entered into a contract with Turnkey Innovative Engineering Pty Ltd (“**the Contractor**”) to carry out electrical installation works at a Coles Group Limited automated distribution centre in Kemps Creek.
4. On 22 March 2023, the Principal sent an email to the Contractor to reduce the scope for a number of Group Control areas (“**GCs**”) due to the works being delayed.
5. By exchange of email on 14 April 2023, the parties reached an agreement to vary the contract price from \$11.4 million to \$14,141,951.32, on account of “additional works” outside the scope of the contract and not due to the Contractor’s fault.

6. On 18 and 19 April 2023, the Contractor served a number of variation claims on the Principal.
7. On 1 May 2023, the Contractor served a payment claim under s 13 of the SOPA claiming a total of \$884,570.10, comprising:
 - (a) \$499,924.63 for the contract works based on the varied contract price;
 - (b) \$304,243.00 for ten (10) identified variations.
8. On 3 May 2023, the Principal sent the following email to the Contractor in respect of the payment claim ("**the Email**"):

"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."

9. The sole question in the case was whether the Email was a valid payment schedule for the purposes of s14 of the SOPA.

Requirements for a valid in Payment Schedule

10. His Honour stated that a payment schedule is not required to be a formal document, but "at the very least identify" the amount the respondent proposed to pay "instead of the amount in the payment claim" and "what parts of the claim are objected to and why"¹.
11. Appearing below is a table below that sets out the requirements for a payment schedule contained in s 14(2) and s 14(3), and the corresponding findings by Stevenson J in relation to the Email.

#	REQUIREMENT	SOURCE SOPA	THE EMAIL	FINDING IN THE CASE
1	Did the Email identify the payment claim to which it relates?	14(2)(a)	✓	Issue was not disputed
2	Did the Email indicate the amount of the payment (if any) that the respondent proposes to make (scheduled amount)?	14(2)(b)	✓	In the context of the varied pricing being disputed and the Principal's request to "please adjust your claim and resubmit for approval",

¹ [21].

#	REQUIREMENT	SOURCE SOPA	THE EMAIL	FINDING IN THE CASE
				Stevenson J was satisfied that the Email indicated that the Principal proposed to pay nothing ([37] - [41]).
3	Did the Email indicate why the Schedule amount was less than the amount and the Contractors' reasons for withholding payments.	14(3)	*	"Resolution of this case depends upon a careful analysis of the words used in the email itself, in the context of the mutually known background accepting the limits to which resort can properly be held to context. "The Principal did indicate its reasons for withholding payment of "the Contract Works" component of the payment claim..." [43]" "The Email did not indicate in any way the Principal was withholding payment in respect of the (Variation) component of the Payment Claim" [44] which was 40% of the Contractor Claim" [45] "The Email did not indicate why the Principal proposed to make no payment at all in response to the Payment Claim..." [45]

Some Key Principles

12. Stevenson J stated that a payment schedule does not need to be as precise as a Supreme Court pleading,² and stated in [42]:

"...there is nothing in s 14(3) of the Act that requires that the reasons given be correct, justified or adequate; so long as the reasons are indicated."

13. Setting aside the merits of the reasons, the prerequisite for a valid payment schedule is that reasons for the scheduled amount(s) need to be indicated sufficiently for the claimant to consider whether to escalate.

² [23].

14. Stevenson J remarked that the required particularity for s 14(3) is to 'indicate', which has a less stringent standard than 'identify' and allows for some lack of precision.

15. In [22], Stevenson J stated:

"some lack of precision is permissible as long as the essence of 'the reason' for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication".³

16. In [23], Stevenson J further stated:

"It is permissible to have regard to matters of context in considering a document that purports to be a payment schedule, although not so as to provide or supply reasons that are not in the document itself."

Decision in the Case

17. The payment schedule failed to indicate reasons in respect of the variation items and comply with s 14(3) of the SOPA, even though the payment schedule:

- (a) identified the payment claim to which it relates;
- (b) identified a scheduled amount, being NIL;
- (c) provided reasons for the contract works portion of the payment claim.⁴

18. Stevenson J found that the complete lack of reasons in respect of the variations component of the payment claim (which was circa 40% of the claimed amount) was in excess of a permissible lack of precision and essentially fatal to the payment schedule.

Key Take-Away

19. The case provides some comfort in respect of the form that schedules may take and the existence of a level of tolerance and realism for a lack of accuracy and particularity.

20. However, the decision also provides a caution against careless payment schedules that omit reasons entirely in respect of elements of a payment claim it purports to respond to.

21. A respondent who serves an incomplete payment schedule risks the payment schedule being held to be invalid or limiting the scope of what they may agitate in an adjudication response.⁵

³ *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140 at [78] (Palmer J); followed in *Style Timber Floor Pty Ltd v Krivosudsky* (supra) at [46] (Leeming JA, Bell P, the Chief Justice then was, and Simpson AJA agreeing); *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 at [255] (Warren CJ, Tate and McLeish JJA) and earlier in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391 at [31] (Mason P, Giles and Santow JJA agreeing).

⁴ [42] – [43].

22. If you are a respondent to a payment claim, remember to:
- (a) be aware that a payment claim may contain multiple elements;
 - (b) fully review and respond to each claimed amount in a payment claim with a scheduled amount;
 - (c) prepare reasons for withholding payment in each instances where the scheduled amount is less than the claimed amount;
 - (d) include particulars and details, if there is any doubt that the conversation, previous discussions or documents are not properly incorporated into the payment claim and/or payment schedule.
23. If you are a claimant, remember to look out for weaknesses in purported payment schedule that are served in response to your payments claims.
24. If you have questions in this area, please reach out to the writer and follow our page for further articles.

CONTACT US

If you would like more information or need any assistance, please contact us on **02 8329 6500** or **excellence@kreisson.com.au**

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⁵ [19].