



“WITHOUT PREJUDICE” LETTER IS NOT A PAYMENT SCHEDULE



Case Study

In the decision of National Vegetation Management Solutions Pty Ltd. V. Sheker Plant Hire Pty Ltd (12 January 2010) Wilson J in the Supreme Court found that a letter to the Applicant marked “Without Prejudice” from the Respondent’s Solicitor, in which the amount claimed was disputed and an offer to pay a lesser amount was made, did not constitute a “payment schedule” within the meaning of Section 18 of the *Building & Construction Industry Payments Act 1994* (“the Act”).

The Respondent’s Solicitor sent a letter in response to a tax invoice in the amount of \$511,324.20, which was properly endorsed as a “payment claim” within the meaning of the Act. In its letter, the Respondent’s Solicitor claimed that certain aspects of the invoice were “spurious claims and were rejected”. It also offered to pay a lesser sum in full and final satisfaction of the payment claim.

The Court considered whether or not that letter could amount to a “payment schedule”. Her Honour looked at the purpose of the Act and applied the comments of Hodgson JA in *Brodyn Pty Ltd T/as Cost and Quality v. Davenport* when His Honour stated: “The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise... The procedure contemplates a minimum of opportunity for Court involvement.”

What Constitutes a Payment Schedule?

Her Honour said that the Act emphasised speed and informality and that “one should not approach the question of whether or not a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint. No particular form is required. One is concerned only with whether the content of the document in question satisfies the statutory description.

Her Honour stated that the “Without Prejudice” letter would constitute a payment schedule if it:

1. identified the claim to which it related;
2. stated the amount which the recipient of the payment claim proposed to make in response to it; and
3. most importantly, if that amount is less than the amount claimed in the payment schedule, it must state why it is less.

If these three criteria were satisfied, then the document would be a payment schedule. In relation to form, Her Honour stated, “how they are expressed, with what formality or lack of it, and with what felicity or awkwardness, it will not matter.”

The Result

It was found that while the “Without Prejudice” letter contained an offer, it was not a proposal to make a payment within the meaning of Section 18, and in Her Honour’s opinion, this was, a fundamental difference and accordingly, was not a payment schedule. Thus, the Applicant was entitled to recover in full the amount of the claim.

It is important that a party who wishes to dispute a payment claim ensures that the document disputing the claim complies with the requirements under the Act. This case highlights that

there is no special form as to the description of a payment schedule. However, the payment schedule must address the three criteria set out above; otherwise, it will not satisfy the requirements of the Act. A consequence of a defective notice may result in a judgment being entered against the Claimant.

At **msl**, we regularly advise upon and represent parties in respect of claims and disputes under the *Building & Construction Industry Payments Act*. We recommend you contact us if you have any queries in respect of matters of this nature.



Michael Sing, Managing Director of **msl**, has over 25 years of extensive experience in commercial and construction litigation, insurance matters, property and business transactions representing both plaintiff and defendant clients in all jurisdictions in Queensland. He has represented local government in public liability and contractual dispute resolution work for over 15 years. Michael has also successfully conducted substantial superior court litigation involving contractual and property disputes for individual investors, builders, developers and property owners.



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