JUDGMENT McDougall J : New South Wales Supreme Court : 13th August 2004

1 The plaintiff ("Barclay Mowlem") undertook building work for the defendant ("Tesrol"). On 7 May 2004, Barclay Mowlem served a payment claim on Tesrol. The claim was said to be made under s 13 of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Act"). The amount claimed was $1,111,923. Barclay Mowlem says that Tesrol did not provide it with a payment schedule in accordance with s 14 of the Act. Accordingly, Barclay Mowlem says, Tesrol is liable to pay the amount claimed. Barclay Mowlem has sued to recover that amount as a debt. It moves for summary judgment.

2 Tesrol says that there are three arguable defences:
(1) It did, within the time permitted by s14 of the Act, provide Barclay Mowlem with a payment schedule for the purposes of s 14.
(2) Alternatively, Barclay Mowlem is estopped from asserting that Tesrol did not do so.
(3) Alternatively, Barclay Mowlem has engaged in misleading and deceptive conduct, in breach of s 52 of the *Trades Practices Act* 1974 (Cth) ("the TP Act") and is liable to Tesrol in damages.

The question for decision is whether any of those matters raises an arguable defence, so as to preclude Barclay Mowlem from obtaining summary judgment.

First issue: was there a payment schedule?

3 Payment claim 13 calculated the amount said to be due by taking the contract sum and making a number of adjustments. The first set of adjustments was for changes in provisional sums. The second set related to "Agreed Variations as attached summary". The third set related to "Variations to be agreed as attached summary and details". The fourth set related to "additional costs as a result of entitlement to extension of time …". There was then set out a revised contract sum, from which certain deductions were made for work yet to be completed and "Additional Preliminaries". The amount previously paid was then deducted and the resulting figure was the amount claimed.

4 The document relied upon as a payment schedule is dated 18 May 2004. It is common ground that it was provided to Barclay Mowlem within the time permitted by s 14(4) of the Act. It 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."* It stated that a number of the variations were "not agreed" or "in dispute" for a number of reasons and also that Tesrol was not required to pay the amount claimed under them. It asserted that the claim for additional costs relating to extensions of time was invalid for reasons given in earlier correspondence. It asserted that liquidated damages in the amount of $145,000 were payable by Barclay Mowlem.

5 The letter of 18 May 2004 did not indicate in terms any amount that Tesrol proposed to pay; nor did it say in terms that Tesrol proposed to pay nothing.

6 In s 14(2), (3) of the Act there are mandatory requirements relating to the contents of 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."

7 Barclay Mowlem submitted that the letter of 18 May 2004 was not a payment schedule because it did not indicate the amount of the payment (if any) that Tesrol proposed to make.

8 In ***Multiplex Constructions Pty Ltd v Luikens and Anor*** [2003] NSWSC 1140, 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. He 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 an abbreviated form unintelligible to the uninformed reader but comprehensible to the parties. He said:

"76 A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.

77 A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are

known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.

78 Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity 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. "

9 I adopt his Honour's analysis.

10 Mr Inatey SC, who appeared with Mr Miller of counsel for Tesrol, submitted that the question, whether the letter of 18 May 2004 was capable of being a payment claim within s 14, required consideration against the contractual and factual background. He submitted, therefore, that it was a question to be determined on a final hearing and not by way of summary judgment.

11 I accept those submissions. It is, I think, an available inference even from the terms of the letter itself that Tesrol did not propose to pay any amount to Barclay Mowlem. Whether that is the correct inference to draw would depend, among other things, upon the content of the "ongoing communications" concerning the payment claim and (in particular) the claims relating to extensions of time. That is not something to be undertaken on an application for summary judgment.

12 If the letter of 18 May 2004, considered in context, should be taken to indicate to Barclay Mowlem that Tesrol proposed to pay nothing, then there would be a question, whether that was required to be stated expressly and whether it was required to be supported with reasons.

13 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 is to be paid; and does not apply if nothing is proposed to be paid: on the basis that nothing (or its equivalents 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.

14 But even if this analysis is incorrect, it is arguable that the reference in the letter of 18 May 2004 to prior communications and correspondence would be a sufficient indication, to someone in the position of Barclay Mowlem, of the reasons underlying Tesrol's apparent decision.

15 My conclusion on the first issue is sufficient to dispose of the claim for summary judgment. However, in case I am wrong, I will deal with the second and third issues.

Second issue: estoppel

16 The estoppel relied upon is, in substance, estoppel by representation. It is said that, on 18 May 2004, representatives of Barclay Mowlem and Tesrol had a discussion in the course of which they "*acknowledged that there was a dispute and agreed to a meeting for the purposes of negotiation*". It is said to have been "*agreed that the parties would take no further step in response to the claim that otherwise might have been necessary until the [meeting] had taken place and the parties had failed to resolve the dispute*". Tesrol says that, in reliance upon those matters, it acted to its detriment by taking no further steps under the Act in respect of the payment claim.

17 Some of the factual matters – in particular, the content of the relevant conversations – are in dispute. However, that is not something to be decided on an application for summary judgment. Again, Barclay Mowlem's submissions as to reliance are not matters to be resolved upon an application for summary judgment.

18 However, Mr Rudge SC, who appeared with Mr Sibtain of counsel for Barclay Mowlem, submitted that the estoppel defence was prohibited by the terms of s 34 of the Act. Section 34 is a "*contracting out provision*" that avoids any provision of any agreement that purports to exclude, modify or restrict the operation of the Act. It provides as follows:

"*(1) The provisions of this Act have effect despite any provision to the contrary in any contract.*

(2) A provision of any agreement (whether in writing or not):

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,

is void."

19 Tesrol does not assert that the "agreement" that it alleges was reached was enforceable as a matter of contract. It relies upon the agreement – more accurately, the alleged conduct of Barclay Mowlem's representative in relation to the agreement – as founding the estoppel. It submits that, at most, s 34 would avoid the agreement. On this analysis, the relevant conduct would be available for analysis and an estoppel said to have been created by intended or reasonably expected reliance on that conduct would be enforceable.

20 In my judgment, the question is not one that is appropriate to be resolved on an application for summary judgment. It involves not only the proper construction of s 34, but also its application. Its application would

depend upon the facts that are proved. I think that it is arguable that estoppel by representation would survive, even if, and "agreement" based on the conduct that is said to give rise to the estoppel would be struck down.

21 Mr Rudge submitted that s 34 should be construed purposively, so as to assist in giving effect to the objects of the Act as stated in s 3. Those objects include ensuring that a person who undertakes to carry out construction work is entitled to receive, and able to recover, progress payments in relation to that work (s 3(1)). I accept the principle. It does not alter my conclusion that the proper construction and, in particular, application of s 34 are matters for a final hearing.

22 For this reason also, in my judgment, summary judgment should be withheld.

Third issue: section 52

23 Mr Rudge submitted that the matters said to give rise to a claim under s 52 could not give rise to a defence. He said that, at most, they would give rise to a separate cause of action.

24 I accept those submissions. It is not said that some form of ancillary relief should be granted under s 87 of the TP Act so as (for example) to restrain Barclay Mowlem from relying on its right at law. Nor is it said that any damages recoverable by reason of any breach of s 52 are capable of giving rise to a defence by way of setoff. Indeed, no damages are alleged; and no relevant effect (that is, relevant to Barclay Mowlem's claim) is attributed to the s 52 case.

25 It follows that the s 52 allegations would not themselves have justified the withholding of summary judgment.

Conclusion and Order

26 Two of the three matters raised by way of defence are arguable. Barclay Mowlem is not entitled to summary judgment.

27 I order that the notice of motion filed on 2 July 2004 be dismissed. I will hear the parties on costs

M Rudge SC / D Sibtain (Plaintiff) Corrs Chambers Westgarth
G Inatey SC / D Miller (Defendant) Malcolm Johns & Company (Defendant)