JUDGMENT McDougall J : New South Wales Supreme Court : 9th December 2004

1 The plaintiff (BMC) as contractor and the defendant (TWB) as principal are parties to a construction contract made on 11 November 2002. On 7 May 2004, BMC served a payment claim, called "Progress payment claim number 13", on TWB. On 18 May 2004, within the time for TWB to provide a payment schedule to BMC, TWB prepared a letter to BMC responding to the payment claim. BMC says that the letter was not a payment schedule and was not provided to it. Thus, it says, it is entitled to judgment for the amount of the payment claim, $1,111,923.

The issues

2 There are four:

(1) Was the letter of 18 May 2004 sufficient in law to be a payment schedule?

(2) Was that letter provided to BMC in circumstances where (TWB says) it was posted but (BMC says) it was not received?

(3) Alternatively, has TWB made out in fact an estoppel against BMC, preventing BMC from asserting that TWB has not provided a payment schedule to BMC?

(4) If so, can such an estoppel prevent BMC from relying on its rights under the *Building and Construction Industry Security of Payment Act* 1999 (the Act)?

3 A pleaded defence, relying on s 52 of the *Trade Practices Act* 1974 (Cth), was not pressed.

First issue

4 The Act creates a statutory right to progress payments under construction contracts: see s 8. The mechanism for recovering a progress payment is initiated by the service of a payment claim in accordance with s 13.

5 If the respondent to a payment claim does not concede the claim, it may provide a payment schedule to the claimant in accordance with s 14. By s 14, "payment schedule" means a schedule referred to in s 14.

6 Section 14(2), (3) sets out a number of requirements for payment schedules:

> ***"14 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 In the present case, BMC conceded during submissions that the 18 May letter, as I will call it, complied with s 14(2)(a), but it maintained that the letter did not comply with s 14(2)(b) or (3).

8 The amount claimed in the payment claim included some amount for variations, an amount for costs said to have been incurred as a result of extensions of time to which BMC said it was entitled, and (it was said) an amount for work under the contract.

9 The 18 May letter, omitting formal parts, read as follows: *"Further to ongoing communications between us concerning Progress Claim No 13 and the EOT claim it is apparent that the Parties are in Dispute under Clause [sic] 30 and 40. Pursuant to clause 25A of the building Agreement it is considered appropriate that we refer the matter to the Independent Certifier nominated in the Agreement for an assessment and determination of the matters detailed below.*

> ***Progress Claim No 13 – Issue of Variations not Agreed***
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> *Variation Numbers 59, 63, 68, 69, 74, 84, 95, 103, 104, 105, 105A, 106, 112, 114, 116, 118, 121, 123, 125, 127, 129, 131, and 132 are in dispute with the Principal and Superintendent [sic] view being that these Variations formed part of the Contractors [sic] Design & Construct Risk, and that the proper procedures for lodgement and assessment of Variations have not been followed and that as such payment by the Principal of these Variation Claim [sic] made up to Progress Claim No 13 and in any future claims is not required.*
>
> ***EOT And Associated Costs Claim and Liquidated Damages***
>
> *It is the view of the Principal and the Superintendent that the Claim made is invalid for the reasons detailed in their correspondence to the Contractor dated 12 May 2004 pursuant to Clause 33.2 and Clause 35.5 of the Agreement. An assessment by the Independent Certifier is required, in the first instance, to identify if the EOT and associated costs claim submitted by the Contractor has been made in accordance with the Agreement. Should the Independent Certifier determine that the claim has been lodged in accordance with the Agreement an assessment on the detail of the Claim should be undertaken.*
>
> *It is the view of the Superintendent and Principal that Liquidated Damages in the amount of $145,000 are due and payable by the Contractor. The Independent Certifier is to assess the liability of the Contractor for payment of Liquidated Damages.*
>
> *We will deliver over the course of the next two days copies of all correspondence and associated information to the nominated Independent Certifier being Mr Peter Hammond of Napier and Blakeley at 309 Kent Street, Sydney."*

10 In an earlier judgment in these proceedings, given on an unsuccessful application by BMC for summary judgment ([2004] NSWSC 716), I set out in para [8] the approach I thought should be taken in considering whether a document purporting to be a payment schedule complied with the relevant mandatory requirements of the Act.

11 I said:

> "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."*

12 Mr Rudge SC, who appeared with Mr Sibtain of Counsel for BMC, reminded me that what Palmer J had said in *Multiplex* was directed to an issue raised under s 20(2B) of the Act. That subsection prevents a respondent from raising, in an adjudication response, a reason for non payment that was not included in the payment schedule.

13 I accept the point. However, I remain of the view that what Palmer J said in *Multiplex* indicates the approach that should be taken in dealing with the first issue. It is consistent with the evident intention of the legislature, that entitlement to progress payments should be resolved expeditiously, that this be done with a minimum of formality and expense.

14 I add, in this context, that I do not regard anything said in ***Brodyn v Davenport*** [2004] NSWCA 394, in so far as it dealt with the decision of Palmer J in *Multiplex*, as detracting from his Honour's reasoning in the particular paragraphs to which I have referred.

15 There is a question as to whether "nothing" or "nil" or "zero" is "an amount" for the purposes of s 14(2)(b). In the context of the Act, and regardless of mathematical and philosophical considerations, I think that it is. That is because a respondent who proposes to pay nothing is clearly proposing to pay less than the claimed amount. In those circumstances, as s 14(3) makes clear, the claimant should know why. For example, the claimant would need to decide whether to take the next step, of seeking adjudication. It seems to me that a practical, rather than a mathematical or philosophical, approach is required. A practical approach would include within "the amount" the concept of a nil payment. Some support for this is, I think, obtained from the words "(if any)" that followed the word "amount" in s 14(2)(b).

16 Further, the alternative view would mean that where a respondent proposed to pay nothing, a valid payment schedule need only identify the payment claim to which it relates (s 14(2)(a)). It need not, on the alternative view, say anything more: an obvious absurdity. I do not think that the legislature intended that a respondent who proposed to pay nothing need comply only with s 14(2)(a).

17 When one reads the 18 May letter, I think that it emerges clearly that TWB did not propose to pay BMC anything in respect of the payment claim. In other words, I think, it is plain from the letter, read as a whole, that TWB proposed in it to pay nothing in respect of the payment claim.

18 If it were necessary to do so, I would consider that the context known to the parties supports this view. For example, the letter of 12 May 2004 (referred to in that part of the 18 May letter that deals with the extension of time costs) said that the claim was "surprising" and "invalid".

19 I therefore conclude that the 18 May letter satisfies the requirements of s 14(2)(b). That is so a fortiori if, contrary to my view "nothing" is not an amount for the purposes of s 14(2)(b).

20 It is therefore necessary to consider whether TWB has, for the purposes of s 14(3), indicated why the scheduled amount (nothing) is less than the claimed amount.

21 The issue between the parties was whether the 18 May letter addressed all the elements of the payment claim and whether, if it did not, it was thereby insufficient.

22 BMC noted that the payment claim included a substantial amount for variations. They fell into two categories: "agreed variations" and "variations to be agreed".

23 The 18 May letter referred directly to twelve (out of more than 100) in the first category and to eleven (out of 19) in the second. It said that they "are in dispute" and that TWB's view was that they formed part of the contract (ie, that they were not variations).

24 The letter said also "that the proper procedures for lodgement and assessment of variations have not been followed and that as such, payment by the principal ... is not required." Mr John Shepherd, the superintendent under the contract who was the author of the 18 May letter, identified a further six or seven variations from the second category as the subject of this last point.

25 Mr Rudge submitted that the 18 May letter had not dealt with all the variations, so that it should be inferred that some were admitted. He submitted that TWB had given no reason for not paying those impliedly admitted claims.

26 I think that there are two answers to that submission. The first is that s 14(3) requires in substance that the respondent to a payment claim indicate in its payment schedule its reasons if it proposes to pay less than the claimed amount. The subsection is not concerned with the adequacy or sufficiency of those reasons. (There may be a limiting case where what is indicated cannot in any real sense of the word "reasons" be described as reasons, but this is not such a case, and I therefore do not propose to consider that question.) If the reasons are inadequate, the claimant will no doubt proceed to adjudication. In that event, the respondent will be limited, in its adjudication response, to the reasons given in the payment schedule (s 20(2B)).

27 The second answer is that it is clear from the payment claim that some variations have been paid. The adjusted contract sum was $8,044,000. The amount paid was $8,484,454. The difference, $440,454, represents paid variations. Thus, it is not clear as a matter of fact that the 18 May letter does not deal with all disputed variations.

28 As to the claim for costs associated with the extensions of time, the 18 May letter referred (as I have said) to the letter of 12 May 2004. That earlier letter gave two reasons for rejecting the claim. On any view, I think, it is legitimate to read the two letters together; and on any view when this is done, TWB gave reasons for not accepting this aspect of the payment claim.

29 Finally, the 18 May letter stated that TWB claimed liquidated damages of $145,000. It is, I think, a clear inference from the letter that TWB intended to set off that claim against any amount that might be found to be owing to BMC.

30 I therefore consider that the 18 May letter satisfies the requirements of s 14(3). It therefore meets the formal requirement of s 14 and is (or if provided to BMC would be) a valid payment schedule.

Second issue

31 The 18 May letter was prepared by Mr Shepherd. He prepared a draft on Saturday 15 May and sent it to TWB's solicitor, Mr Malcolm Johns, for comment.

32 Mr Johns reviewed and approved the draft. On 17 May he rang Mr Shepherd and told him that "the draft letter is fine to send as it is". The draft was dated 18 May. Mr Shepherd said that this was to allow time for Mr Johns to review it. However, somewhat surprisingly given that Mr Shepherd understood that he had 14 calendar days to respond to a payment claim, the draft was not engrossed and despatched on 17 May. Mr Shepherd explained this by reference to the pressure of other work.

33 I interpose that, under the Act, a payment schedule must be provided, if at all, within 10 days of service of the payment claim. It is clear that, except perhaps at times such as the Christmas/New Year break (see the definition of "business day" in s 4) or Easter, 10 business days will normally equate to 14 calendar days. In this case, the parties agreed that the payment claim was served on 7 May 2004 and that the last day for provision of a payment schedule was 21 May 2004. That is consistent with Mr Shepherd's understanding at the time.

34 Mr Shepherd said that on 18 May he engrossed and signed the letter and put it in an envelope on TWB's receptionist's desk. The letter (and I would infer, the envelope) were marked for courier delivery. The receptionist's desk was unattended when Mr Shepherd left the letter there. There is no evidence to show what happened, or who came by, whilst it was unattended, or indeed to show for how long it was unattended.

35 TWB's records of courier dispatches for the week in question do not include any record showing that the 18 May letter was sent by courier to BMC.

36 Mr Shepherd and the receptionist, Ms Megan Smithyman, said that it is likely that, by mistake, the letter was sent by post rather than by courier. Mr Shepherd said that the letter was not returned to him. He does, however, have a signed copy in his file.

37 Mr David Dale of BMC, who was responsible for the administration of the contract, said that BMC has no record of receipt or copy of the 18 May letter. Other employees of BMC, who might be expected to have seen or received a copy of the letter, have made searches for it but have been unable to find it.

38 Messrs Shepherd and Dale were challenged in cross-examination. The other employees (of both BMC and TWB) who gave evidence were not.

39 Mr Colin McKenzie of Australia Post gave unchallenged evidence as to the efficacy of the postal services. He said that, for the quarter ending 30 June 2004, 95.3 per cent of letters posted in New South Wales were delivered on time, and 98.5 per cent were delivered on time or within one working day thereafter. In this context, it appears, a letter posted in Sydney city by 6 pm should be delivered to Pymble (which is where BMC was located) the next business day; and I would infer that this is what Mr McKenzie meant by "on time".

40 Mr McKenzie's evidence strongly supports the proposition that, had the 18 May letter been posted, it would have been delivered. BMC's evidence strongly supports the proposition that the letter was not received. In this context, Mr Dale gave detailed evidence of the processes within BMC whereby mail was received, opened and distributed (and copied if required).

41 Mr Inatey SC, who appeared with Mr Miller of Counsel for TWB, submitted that I should find that the 18 May letter was received by BMC but that it was thereafter lost. I do not accept that submission. As I have said, Mr Dale's evidence described in detailed the passage that a letter would take within BMC. Searches have been made at the places where, within BMC and according to the system described by Mr Dale, a letter might have been misplaced or misfiled. The letter has not been found. The evidence shows, and I find, that the 18 May letter was not received by BMC.

42 If, nonetheless, the 18 May letter was posted, it may have been "provided" to BMC for the purposes of s 14(1), (4)b, even though (as I have found) it was not received. The Act appears to draw a distinction between "provision" and "receipt". Compare s 14(1), (4)(b) with s 17(3)(b). However, as I have come to the view that the evidence does not, on balance, show that the 18 May letter was posted, I express no concluded view on this point.

43 The evidence of posting is inferential and exiguous. There is no evidence of the procedures in place within TWB for the collection, stamping or franking and posting of outwards mail, or of records (such as a mail book) from which proof of posting might be inferred. There is, in short, no evidence of any system that, in accordance with ***Connor v Blacktown District Hospital*** [1971] 1 NSWLR 713, might permit the drawing of an inference; nor is there any evidence that, whatever system may have been in place, it was followed.

44 Indeed, the evidence such as it is, suggests that whatever the normal procedures were, they were not followed in this case. That is because a letter marked for courier delivery was not, on the evidence, despatched by courier.

45 There are three possibilities:

(1) The letter was not posted.
(2) The letter was posted but was not delivered.
(3) The letter was posted and delivered but was lost within BMC before it came to Mr Dale's attention.

46 My findings on the second and third possibilities leave the first as the most likely. In circumstances where, on any view, there was a handling error within TWB - because the letter was not sent by courier - I find that the letter was not posted.

47 Quite apart from the elimination of the other possible causes of disappearance, I simply do not find, on the whole of TWB's evidence on this point, any persuasion on balance that the letter was posted. In other words, I would have concluded in any event that the evidence is insufficient to draw the inference of posting. That this inference is consistent with the elimination of the other possibilities confirms my view of the evidence.

48 There is some support for this conclusion in a file note prepared by Mr Shepherd of a telephone discussion with Mr Dale on 19 May 2004. That file note records Mr Shepherd as saying, amongst other things, that "we were sending a letter" which "would recommend that we go to an independent certifier". Mr Shepherd agreed that this was a reference to the 18 May letter. The tenses used are not apt to refer to a letter that, on Mr Dale's evidence, had been sent the previous day. Mr Shepherd sought to explain this by saying that it was a reference to the letter in transit. I do not regard that explanation as persuasive.

49 Whatever "provide" may require in the context of s 14(1), it must require at least that the process of delivery be initiated - that the document be posted, or given to a courier for delivery, or that whatever means of transmission is chosen be put into operation. I therefore conclude that the 18 May letter was not provided to BMC.

Third issue

50 For TWB to succeed on the third issue, it must show that, in the course of a telephone conversation on 21 May 2004 between Messrs Shepherd and Dale, Mr Dale said to Mr Shepherd words to the effect that BMC would not do anything in relation to its claim until after a meeting that was then fixed for 10.30 am on 28 May 2004. Mr Dale denied that he made any such statement.

51 In substance, I accept Mr Dale's account of the relevant conversation over Mr Shepherd's. There are three reasons for doing so. The first reason is that Mr Dale said that the conversation concerned the release of certain security given by BMC to TWB. Mr Shepherd denied this. Immediately after the conversation, Mr Dale sent an e-mail to

colleagues in which he set out this aspect of the conversation. That contemporaneous communication provides strong support for his evidence on this point.

52 The second reason is that it would have been most unlikely for Mr Dale to have said the words attributed to him. He was acutely aware that 21 May was the last day for TWB to provide a payment schedule, and that (at the time of the conversation) none had been received. It was his intention to cancel the meeting, and proceed to sue and recover judgment for the amount of the payment claim if TWB did not provide a payment schedule within time. (Indeed, it was this uncommunicated intention that TWB relied upon, among other things, to attack Mr Dale's credit.) In those circumstances, it is implausible that he would have made a statement to directly the opposite effect. It was not put to him that he made the statement in effect fraudulently, with the deliberate intention of lulling Mr Shepherd into a false sense of security.

53 The third reason is that Mr Shepherd's purported file note of the conversation, made on 28 May 2004, contains no reference to the statement. Mr Shepherd agreed that he prepared the file note on legal advice at a time when a dispute was brewing. He agreed that he sought to set out all important aspects (of this and other conversations) in the file note. He agreed that the statement attributed by him to Mr Dale was a matter of importance, because he understood that it stopped time from running. Yet it was not referred to in the file note, nor was it referred to in correspondence.

54 Although there were some unsatisfactory aspects of Mr Dale's evidence (as there were of Mr Shepherd's), I have no hesitation in accepting, in substance, Mr Dale's account of the critical conversation over Mr Shepherd's.

55 The estoppel case therefore fails on the facts and it is unnecessary to consider the fourth issue.

56 There are, however, two other matters that I should mention. The first is reliance. It is clear that Mr Shepherd did not rely in any relevant sense on the representations said to have been made by Mr Dale. That is because Mr Shepherd (on his evidence) thought that he had already provided a payment schedule, on behalf of TWB, to BMC. It could not be said that Mr Shepherd, in reliance on the alleged representation, refrained from providing a payment schedule.

57 The second matter relates to a disputed conversation of 19 May 2004. Although submissions were addressed to that conversation, I do not need to decide which version to accept, because that decision does not bear on the estoppel point.

Conclusion and order

58 BMC succeeds. It is entitled to judgment in the sum of $1,111,923, together with interest up until the date of entry of judgment. Unless the parties wish to submit otherwise, costs should follow the event.

59 I direct the parties within 7 days to bring in short minutes of order to give effect to these reasons. The short minutes of order should provide that the exhibits are to be retained and dealt with in accordance with the Rules.

60 I stand the proceedings over to Monday 13 December 2004 at 9.30 am to bring in draft orders. If the parties wish to make submissions on costs they can be made on that occasion; otherwise, as I have said, costs should follow the event.

M G Rudge SC/D R Sibtain (Plaintiff) instructed by Corrs Chambers Westgarth
G Inatey SC/D TMiller (Defendant) instructed by Malcolm Johns & Co (Defendant)