

### A PAYMENT CLAIM BY ANY OTHER NAME ...

**Boulderstone Hornibrook Pty Ltd v Queensland Investment Corporation**  
[2007] NSWCA 9

Veno Panicker, Lawyer

Holding Redlich, Sydney

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Section 14 of the Building and Construction Industry Security of Payment Act (Act) prescribes a series of basic requirements for a valid payment schedule made under the Act.

The Court of Appeal decision in *Boulderstone Hornibrook Pty Ltd v Queensland Investment Corporation*<sup>1</sup> reinforces that issues not expressly required by section 14 will have little, if any, bearing on the validity of a payment schedule.

The decision also sends a clear warning to those contractors tempted to issue a Notice to Suspend Works under the Act by relying on purported defects in a payment schedule.

#### BACKGROUND

On 5 June 2003 Boulderstone Hornibrook Pty Ltd (BHPL) entered into a design and construct contract (contract) with Queensland Investment Corporation (QIC) for the redevelopment of the Westpoint Shopping Centre at Blacktown, New South Wales.

Up until December 2004 BHPL made progress claims under clause 42(b) of the contract. Thereafter those claims were served on a monthly basis as payment claims pursuant to section 13(1) of the Act. The first such claim made under the Act

was payment claim No 28 under the contract. QIC responded to those payment claims by providing payment schedules to BHPL pursuant to section 14(1) of the Act.

Three of the above payment claims claimed amounts in excess of \$80 million. Those claims were determined by the respective adjudicators and gave rise to an entitlement to payment of under \$2 million in each claim and in one instance nil.

On 11 April 2006 BHPL served payment claim 42 on QIC (the payment claim) which became the subject of court proceedings. On 28 April 2006, within 10 business days after the payment claim had been served, QIC delivered to BHPL a box containing eight volumes of documents, including:

- a letter by QIC's Representative referring to the progress payment certificate relating to the payment claim (cover letter); and
- the progress payment certificate (payment certificate);
- a document entitled 'Payment Schedule' which was attached to the top of eight volumes of documents supporting the purported payment schedule (payment schedule).

BHPL then purported to suspend work under the contract pursuant to sections 15(2) and 27(1) of the Act on the basis that QIC failed to pay the payment claim and that no valid payment schedule had been provided.

On the same day as it suspended work, BHPL instituted proceedings pursuant to section 15(2)(a)(i) of the Act seeking judgment for the claimed amount upon the ground that QIC had not provided a valid payment schedule.

#### DECISION OF TRIAL JUDGE

The matter was heard by Justice Einstein in the Supreme Court.

BHPL put forward a myriad of arguments in relation to the invalidity of the payment schedule before the trial Judge. Of note, it was asserted that:

- the cover letter attached the payment schedule did not refer to the payment schedule or the Act;
- the payment schedule was signed by a partner of a law firm who did not have the authority to sign on behalf of QIC; and
- QIC's Representative breached its duty to act reasonably and independently of QIC by allowing its consultant to assemble and deliver the documents on behalf of QIC to BHPL.

His Honour rejected BHPL's submissions as to the invalidity of QIC's payment schedule. In making this determination, his Honour held that:

- i. There are no requirements in section 14 of the Act that in order for a document to be a 'payment schedule' it must be signed in a particular manner or by a particular person.
- ii. Indeed, there are no requirements that the payment schedule be signed at all.
- iii. The only relevant requirement is that the payment schedule be provided by the respondent [being the person on whom the payment claim has been served] to the claimant (section 14(1)).
- iv. The question as to whether the payment schedule has been provided to the claimant by the respondent is a question of fact.
- v. That question of fact is answered in the affirmative on the evidence before the court.<sup>2</sup>

Ultimately, it was held by his Honour that the work by QIC's representative was an administrative function and did

not constitute a breach of duty. Issues relating to the conduct of QIC's representative were not pursued on appeal.

## COURT OF APPEAL DECISION

BHPL then appealed to the Court of Appeal. In a unanimous judgement, upholding the decision of Justice Einstein, it was held that:

- There is no requirement under section 14 of the Act that a payment schedule make express reference to the Act.
- It was immaterial whether or not the payment schedule was referred to in the cover letter. Given the history of the matter, including the previous payment claims and adjudication applications, a reasonable person would have appreciated that the payment schedule was in response to the payment claim.
- The documents did not need to be signed by QIC, as the partner of the law firm engaged by QIC was authorised to sign the documents as agent.
- The onus of proof was on BHPL to establish the payment schedule provided to it on 28 April 2006 was not a payment schedule authorised by QIC.
- In determining whether or not a solicitor has authority to prepare or sign a payment schedule, such authority is determined by the terms of the retainer agreement between a solicitor and his or her client. It is implied that a solicitor has the authority to carry out matters incidental to the object of his or her retainer. This position was further supported by the conduct of QIC and its solicitors over the course of the contract.
- The documents provided to BHPL by QIC did constitute a payment schedule for the purposes of section 14 of the Act.

- BHPL's section 15(2)(b) Notice to Suspend Works was invalid.

BHPL's appeal was dismissed with costs in favour of QIC.

## IMPACT

If a principal provides a number of documents relating to a contract concurrently with a payment schedule under the Act, this of itself will not render that payment schedule invalid. The Baulderstone decision was not a case where there was any suggestion that the provision of the additional contractual material with the payment schedule constituted misleading and deceptive conduct. However, any party submitting additional material together with a payment schedule should be careful that their conduct does not contravene the Trade Practices Act 1974 (Cth).

The decision also provides a valuable caution for contractors seeking to rely on technical arguments relating to the validity of a payment schedule when exercising the right to suspend works under the Act. The Court of Appeal has sent a clear message that the scope of such arguments will be very limited.

As an interim determination of progress payments, payment schedules should not be burdened by unduly technical or prescriptive requirements. The pragmatic approach taken by the Court of Appeal reflects the need for certainty with respect to a party's compliance with the Act in order to ensure the integrity of the adjudication process.

## PRACTICAL TIPS

The threshold for a valid payment schedule under the Act is low. However, best practice by a principal would support the use of a clearly labelled payment schedule provided as a single document, or if concurrently with

other contract materials, as a clearly identifiable document.

It should be noted that the decision made no criticism of the solicitors involved in the drafting of the payment schedule. Given the extent of evidence and scrutiny afforded to those practitioners' conduct, the case is a useful reminder of the importance of up to date and clear retainers and the need for solicitors to confirm and make clear their instructions, particularly where such works are incidental to their retainer.

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## REFERENCES

1. [2007] NSWCA 9
2. Baulderstone Hornibrook Pty Ltd v Queensland Investment Corporation [2006] NSWSC 522 at [36]