

BARCLAY MOWLEM v TESROL WALSH BAY
[2004] NSWSC 1232
Supreme Court of New South Wales – 9 December 2004

FACTS

Barclay Mowlem Construction Ltd ('Barclay') undertook building work for Tesrol Walsh Bay Pty Ltd ('Tesrol'). Barclay Mowlem served a Payment Claim pursuant to section 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act') on Tesrol for \$1,111,923. Tesrol, within the time permitted by section 14(4) of the Act, prepared a letter to Barclay responding to the Payment Claim. However, Barclay took issue with the receipt of the letter.

An employee of Tesrol drafted the letter and put it in an envelope on a receptionist's desk. The letter was marked for courier delivery. The receptionist's desk was unattended when the employee left the letter there. Tesrol's courier records showed that the letter was not sent by courier. The employee and the receptionist gave evidence that it was likely that, by mistake, the letter was sent by post rather than courier. However, Barclay had no record of receipt or copy of the letter. Further, employees of Barclay who might have been expected to have seen or received a copy of the letter, made searches for it but were unable to locate it.

Accordingly, Barclay submitted that as no Payment Schedule had been received they were entitled to recover the amount as a debt. Tesrol argued that it "provided" a Payment Schedule within the meaning of section 14(1) of the Act which relevantly provides "A person on whom a payment claim is served ... may reply to the claim by providing a payment schedule to the claimant".

ISSUE

Was that payment schedule "provided"?

FINDING

The Court held that the letter was not received by Barclays. To "provide" a Payment Schedule means that the process of delivery chosen must be put into operation, rather than actual receipt of the Payment Schedule by the Claimant itself. The Court concluded, therefore, that a letter was drawn, signed and left on a receptionist's desk was not "provided" within the meaning of the Act.

QUOTE

McDougall J at paragraph 41, 42 and 49:

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.

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.

IMPACT

This case stands for the proposition that to "provide" a payment schedule means that the process of delivery must be initiated by the Respondent rather than actual receipt of the Payment Schedule by the Claimant. Further, this definition of "provide" is likely to be applied consistently across other aspects of the Payment Claim / Adjudication process.

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