

## A lesson on payment schedules and the scope of adjudication responses

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The *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**) provides processes designed to ensure prompt and fair payment for construction work and establishes a framework for resolving payment disputes quickly through adjudication or Court application. The Act also prescribes certain requirements that must be adhered to if a payment dispute is to fall under its jurisdictional framework.

### Takeaways

- It is crucial for a payment schedule to set out all of the reasons that are relied on for withholding any amounts claimed in a payment claim.
- The decision in *Miller v LMG Building Pty Ltd* [2023] NSWSC 995 found that materials produced after the date of a payment schedule may still be duly made, and as long as its contents do not amount to new reasons for withholding payment, an adjudicator must consider such material.
- An adjudicator who refuses to consider such material fails to perform their duty and therefore makes a jurisdictional error, allowing the adjudicator's decision to be overturned by a Court.

### Payment Schedules & Adjudication Responses

A payment schedule is a formal response by the party served with a payment claim under the Act (i.e. the respondent). The payment schedule outlines the amount the respondent agrees to pay of the amount claimed in the payment claim (if any), being the scheduled amount. If the scheduled amount is less than the claimed amount, the schedule must indicate the respondent's reasons for withholding payment.

If the payment dispute is not resolved after the respondent serves its payment schedule, then the claimant can apply for the matter to be adjudicated. The adjudication process established under the Act is a formal and expedited process that involves an independent third party, known as an adjudicator, assessing the payment dispute and making a determination. In responding to a claimant's adjudication application, the respondent cannot include any reasons for withholding payment unless those reasons were already included in the payment schedule provided to the claimant.

If a claimant is successful in an adjudication, they may receive an adjudication certificate, which is binding and enforceable through the Court.

### Background in *Miller v LMG Building*

In May 2023, LMG Building Pty Ltd (**LMG**), served a payment claim under the Act on a Ms Suzanne Miller. In response, Ms Miller served a payment schedule which stated that the amount she proposed to pay in respect of the claim was "\$NIL". The payment schedule gave a number of reasons for withholding payment of the entire amount claimed, including for defective and incomplete works, and was supported by two expert reports.

In June 2023, LMG lodged an adjudication application under the Act with respect to its payment claim. The adjudicator determined that Ms Miller was liable to pay the whole of the claimed amount plus the adjudicator's fees of \$16,650. LMG then proceeded to seek judgment of the adjudicator's determination in the District Court, and the claimed amount was subsequently garnisheed from Ms Miller's bank account.

### What happened in the Adjudication?

In her adjudication response, Ms Miller provided a supplementary expert report which outlined the costs of rectifying the defects that were identified in one of the initial expert reports that accompanied the payment schedule. The response also included a statutory declaration from Mr Nathan Grice, who acted as superintendent in relation to the building contract.

In reaching his determination, the adjudicator refused to consider the supplementary expert report or the statutory declaration because they were produced after the date of the payment schedule and were therefore not properly made submissions. The adjudicator also thought that it was appropriate to compare the credibility of each of LMG and Ms Miller's submissions and make a determination from that comparison.

## Issues

Ms Miller sought to challenge the adjudicator's decision in the Supreme Court and repayment of the amounts garnisheed from her bank account. In this instance, the Court was required to consider two possible jurisdictional errors in the adjudicator's approach:

1. whether the adjudicator was wrong to refuse to consider any material produced after the date of the payment schedule; and
2. whether the adjudicator was wrong to make a determination based on the credibility of the parties' respective expert reports, rather than on the merits of the claim.

## Decision

The Court found that the adjudicator had fallen into jurisdictional error on both counts.

On the first issue, the Court considered section 22(2) of the Act, which requires an adjudicator to consider the payment schedule "*together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule*". The Court clarified that submissions will not be duly made if they are not made within the time period specified in the Act, which was not the case here. It also found that the payment schedule need only "*indicate*" the respondent's reasons for withholding payment. An adjudication response can expand on such reasons using documents prepared both before and after the date of the payment schedule. A limitation to this is that such documents cannot raise new reasons that were not included in the payment schedule.

The Court found that the supplementary expert report and statutory declaration produced by Ms Miller in her adjudication response did not introduce any new reasons for refusing the claim - they merely gave additional information in relation to the reasons already cited in the payment schedule and the adjudicator should have considered both materials.

On the second issue, the Court was critical of the credibility approach adopted by the adjudicator. To this end, the Court affirmed that an adjudicator's role is to make their own assessment based on the material before them. While the adjudicator may form an opinion on the credibility of reports, that is only a part of the adjudication process and cannot be a substitute for the task of addressing the overall merits of a claim.

The Court quashed the adjudicator's determination, set aside the District Court judgement and ordered LMG to repay to Ms Miller the amount it received as a consequence of enforcing that judgement plus interest.

**If you would like any further information on this case, or are the subject of an adjudicator's decision, please contact [Lesly Ann Cho](#) or your usual ClarkeKann contact.**