

ESTATE PROPERTY HOLDINGS v. BARCLAY MOWLEM CONSTRUCTION
[2004] NSWCA 393
Supreme Court of New South Wales – 3 November 2004

FACTS

Barclay Mowlem Construction ('Barclay') entered into a design and construction contract with Estate Property Holdings ('Estate') for the construction by Barclay of four residential towers in Gosford. Barclay served on Estate a document purporting to be a Payment Claim under section 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act'). The Payment Claim included a \$1,606,561.50 claim for piling work, out of the total claim of \$4,900,497.34. The piling work had been completed more than twelve months before service of the Payment Claim.

Estate Property submitted on the grounds of section 13(4)(b), (which states that a payment claim may be served only within 12 months of the work being carried out), that the Payment Claim was invalid as the piling work had been carried out more than 12 months before the service of the Payment Claim.

At first instance the judge noted three possible interpretations of section 13(4)(b): first, as requiring only that some work under the construction contract had been performed in the twelve month period; second, as requiring that some work for which payment was claimed in the payment claim had been performed in the twelve month period; and third, as requiring, in respect of each item for which payment was claimed, that some work had been performed in the twelve month period.

ISSUE

Whether the Payment Claim had been served in accordance with section 13(4) of the Act.

FINDING

The Court held that the correct interpretation of section 13(4) was the second of the three above possibilities. Section 13(2)(a) requires that a payment claim identify the construction work for which payment is claimed in the claim, not merely the construction work as a whole that is being carried out under the relevant construction contract. This is consistent with "Construction work...to which the claim relates" in s.13(4)(b), which is also reference to the construction work for which payment is claimed in the claim.

The Court also held that sections 13-15 do not provide that separate consideration should be given to individual items that comprise the claimed amount in determining whether some work was carried out in the twelve-month period. The distinction between discrete items of construction work and continuous processes of construction would create an unclear distinction within the operation of the Act.

QUOTE

Hodgson JA at paragraph 17 stated:

"In my opinion, s.13(2)(a) of the Act requires that a payment claim identify the construction work for which payment is claimed in the claim, not merely the construction work as a whole that is being carried out under the relevant construction contract. I think this is indicated by the words "construction work ... to which the progress payment relates"; and strongly confirmed by the consideration that, unless a progress claim identified the particular work for which payment was claimed, it would be impossible for a respondent to provide a meaningful payment schedule supported by reasons. This in turn would make wholly unreasonable s.20(2B) of the Act, which prevents a respondent relying, in an adjudication of a payment claim, on reasons not included in the payment schedule."

IMPACT

This case stands for the proposition that some work included in the Payment Claim must be performed in the last twelve months.

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