

Rodrigues v CustomOz Services Pty Ltd [2023] NSWSC 379

FACTS

The case of *Rodrigues v CustomOz Services Pty Ltd [2023] NSWSC 379* involved a dispute between the builder (**CustomOz**) and two home-owner principals (**Rodrigues**), in respect of a particular payment claim.

Two contracts were signed in respect of the works conducted on the Rodrigues' home and when a dispute arose, the matter was referred to adjudication, with the parties agreeing to delay the dispute process by 7 days; however even with the additional time, no payment schedules were received within the contractual timeframe or the timeframe allowable by Security of Payment Legislation.

A 'without prejudice' offer was provided in the timeframe and the Rodrigues argued that the offer was:

- a. Not actually privileged; and,
- b. Constituted a payment schedule.

ISSUE

Whether the without prejudice offer could be a payment schedule?

FINDING

Her Honour, Rees J first considered whether the offer was a payment schedule, before turning to whether such a confidential privileged correspondence could constitute a Payment Schedule at all:

- “47. *The requirements for a payment schedule have been described as “relatively undemanding” and are satisfied where the document identifies the claim to which it is responding, what the respondent proposes to pay instead and what parts of the claim are objected to and why...*
48. *The without prejudice email did identify the payment claim... More importantly, the plaintiffs did not indicate why the amount which they offered to pay was less than the payment claim, beyond stating that they were confused with the series of invoices.*
50. *Finally, the fact that a communication is marked without prejudice tells strongly against it being construed as a payment schedule for the purposes of section 14 of SOPA. The very fact that the communication is marked without prejudice indicates that the purpose of the document is to attempt to negotiate a settlement of a dispute on a confidential basis and without admission. A respondent's ability to rely on such a document, before an adjudicator or in subsequent proceedings, is severely undermined by the prima facie inadmissibility of the document. Indeed, taking such a communication into account, absent waiver of privilege by the parties to the negotiation, may result in a manifest error of law...*
51. *As such, the without prejudice email does not satisfy the requirements of section 14 of SOPA...*”

IMPACT

This judgment shows how protections regarding without prejudice communications are may interact with SOPA legislation, including where (despite the inclusion of the phrase “without prejudice”) a particular correspondence may not actually be sent for a non-privilege purpose.

While the requirements for SOPA Payment claims or Schedules are undemanding, it is best practice to draft such documents to clearly articulate each component as well as the document's purpose as a whole.

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