

SOPA Update: The Effect of a Previous Adjudication Determination

A look at the recent decisions of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 and *Urban Traders v Paul Michael* [2009] NSWSC 1072

Introduction

Regular users of the *Building and Construction Industry Security of Payment Act 1999* ("the Act" or "SOPA") will be aware of the effect of section 22(4) of the Act.

The practical effect of section 22(4) is that once a claim for Construction Work has been valued in an Adjudication Determination, there is little utility for a Claimant to include the same claim in a subsequent Payment Claim and Adjudication Application, because a subsequent Adjudicator will be bound to award the same value.

In recent years, it has been arguable that an Adjudicator could find that a Claimant was "not entitled" to be paid for a particular item of construction work without "valuing" the work for the purpose of section 22(4) of the Act.

A finding of "no entitlement" left the door open for a Claimant to improve the evidence in support of its claim and then include the same claim in a subsequent Payment Claim and Adjudication Application. This was because a subsequent Adjudicator was seemingly not bound to follow any previous finding of "value", as a finding of "no entitlement" was not a finding of "value" for the purpose of section 22(4) of the Act.

The recent decisions of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 and *Urban Traders v Paul Michael* [2009] NSWSC 1072 have both considered the application of section 22(4) of the Act, and have shed some light on the consequence of an Adjudicator determining the a Claimant is "not entitled" to be paid for particular work.

The Decisions

These issues concerning section 22(4) of the Act first arose in the findings of McDougall J in *Rothnere v*

Quasar [2004] NSWSC 1151, where at paragraph 43 of that decision his Honour stated as follows:

"A determination under the Act may involve both questions of quantification...and questions of entitlement; or it may involve one or the other..."

His Honour McDougall J affirmed the above findings in his subsequent judgment in *John Goss v Leighton Contractors* [2006] NSWSC 798.

The decisions of McDougall J in both *Rothnere* and *John Goss* were overruled by the Court of Appeal in the decision of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69.

In the *Dualcorp* decision, his Honour McFarlan JA, with whom Allsop P and Handley AJA agreed, stated as follows:

(at paragraph 67): *"I do not consider however that s 22(4) should be regarded as an exhaustive statement of the matters determined by an earlier adjudicator which are binding on a subsequent adjudicator...I consider that the Act when read as a whole manifests an intention to preclude reargitation of the same issues...Thus, if questions of entitlement have been resolved by an adjudication determination, those findings may not be reopened upon a subsequent adjudication..."* [emphasis added]

(at paragraph 70): *"I thus disagree with the view ultimately arrived at by McDougall J in John Goss Projects that s 22(4) defines the extent to which an adjudicator is bound by an earlier adjudication. The view that the claimant once disappointed by an adjudicator can seek a different determination from another, or indeed from a succession of others, until a favourable decision is reached would in my*



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view conflict with the policy of the Act to render adjudicators' determinations final on issues which they resolved, subject only to provisions of the Act conferring limited rights of correction of determinations."

(at paragraph 72): *"...It is not at all unusual that persons seeking remedies in courts or other forums have a once only opportunity to bring forward evidence and submissions in support of their claim..."*

The above position was further clarified by his Honour McDougall J in *Urban Traders v Paul Michael* [2009] NSWSC 1072, where his honour states as follows:

(at paragraph 41): *"It does not follow...that every repetition, in a subsequent payment claim, of a claim made in an earlier payment must amount to an abuse of process. That is so even if that earlier payment claim has been the subject of an adjudicator's determination...The question of whether there has been an abuse the processes of the Act must take into account relevant provisions of the Act..."*

(at paragraph 42): *"...whether or not the repetition of a claim amounts to an abuse of process requires consideration of all relevant contextual facts...it requires consideration of the reasons why the courts intervene to prevent abuse of process. Those reasons include intervention to prevent a person from being vexed by having to reargue an issue already authoritatively decided..."*

The effect of *Dualcorp* and *Urban Traders* on repeated Claims

It seems that the intention of the Courts in the decisions of *Dualcorp* and *Urban Traders* is to begin moving towards a regime whereby there is no longer any distinction to be drawn between an Adjudicator's finding of "value" and finding of "entitlement" for the purpose of section 22(4) of the Act.

In other words, the finding of an Adjudicator that a Claimant has "no entitlement" to be paid for a particular claimed item may trigger section 22(4) of

the Act, and bind any subsequent Adjudicator to make the same finding in respect of the same claim.

This area of law is not settled and will continue to develop in the coming months as Claimants, disappointed that an Adjudicator has found that they are not entitled to be paid for particular work, prepare the same claims in different ways with more extensive evidence in the hope that a subsequent Adjudicator will award some value for those claims.

How can Claimants avoid problems?

Our view is that Claimants should prepare Payment Claims under the Act supported by detailed submissions and evidence. This gives Claimants the best opportunity to successfully recover claims through the Adjudication process.

It is dangerous for Claimants to approach Payment Claims and Adjudication Applications with a casual attitude, assuming that an Adjudicator's finding of "no entitlement" in respect of a particular claim will result in the opportunity of preparing more substantial evidence and submissions on a later occasion.

It is becoming increasingly important for Claimants to get the SOPA process right the first time. The message being sent by the Courts is clear: Claimants have one opportunity to convince an Adjudicator to award the claims sought in a Payment Claim. Once the merits of a claim have been considered, the findings in relation to that claim, including a finding of "no entitlement" will generally be binding on any subsequent Adjudicator.

If you would like any further information on this topic, or on the Security of Payment Act generally, please contact Matthew Graham, Solicitor, or David Glinatsis, Solicitor Director, at our office on (02) 8239 6500 or via email matthew.graham@kreissonlegal.com.au



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