

SUPREME COURT OF QUEENSLAND

CITATION: *J Hutchinson Pty Ltd v Galform Pty Ltd & Ors* [2008] QSC 205

PARTIES: **J HUTCHINSON PTY LTD (ACN 009 778 330)**
(applicant)
v
GALFORM PTY LTD (ACN 112 088 294)
(first respondent)
and
RICS DISPUTE RESOLUTION SERVICE
(second respondent)
and
RUSSELL WELSH
(third respondent)

FILE NO: BS 7699 of 2008

DIVISION: Trial Division

PROCEEDING: Civil application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 21 August 2008

DELIVERED AT: Brisbane

HEARING DATE: 15 August 2008

JUDGE: Chesterman J

ORDER: **Declare that the adjudication decision made by the third respondent on 8 August 2008 is void and of no effect.**
Order that the respondents be restrained from proceeding further with the adjudication or with the issue of a certificate pursuant to it.
Order that the first respondent pay the applicant's costs of and incidental to the application on an indemnity basis.

CATCHWORDS: PROCEDURE – PROCEDURAL MATTERS – whether the second payment claim, adjudication application and adjudication were an abuse of process

Legislation

Building and Construction Industry Payments Act 2004, s9, s19

Judicial Review Act 1991

Supreme Court Act 1995, s48

Supreme Court Regulations 1998, s4

Cases

Blair v Curran (1939) 62 CLR 464

Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421

Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd and Hanlon [2008] QCA 83

Jackson v Goldsmith (1950) 81 CLR 446

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589

Railways Commissioner for New South Wales v Cavanagh (1935) 53 CLR 220

Rogers v The Queen (1994) 181 CLR 251

Walton v Gardiner (1992-1993) 177 CLR 378

COUNSEL: Mr P Davis SC with Mr M Ambrose for the applicant
Mr JH Sive for the first respondent

SOLICITORS: Holding Redlich for the applicant

- [1] The applicant ('Hutchinson') carries on business as a building contractor. The first respondent ('Galform') is a formwork subcontractor. The third respondent is an adjudicator for the purposes of the *Building and Construction Industry Payments Act* 2004 ('the Act') and the second respondent is an appointing authority for the purposes of the Act. They took no part in the proceeding and indicated they would abide the order of the Court.
- [2] In August 2006 Hutchinson and Galform entered into a 'formal instrument of agreement for subcontract' pursuant to which the first respondent was to supply and erect formwork for a block of home units being built by the applicant at Ipswich. The subcontract price was \$2,796,063.
- [3] The parties (by which I mean Hutchinson and Galform) are unhappily engaged in a series of disputes arising out of the subcontract. The disputes have led to the institution of three separate sets of proceedings in this Court: these proceedings and Nos 11422/07 and 9993/07.
- [4] The subject matter of the disputes includes the amount of money paid pursuant to the subcontract; the quality of the work undertaken by Galform; whether Hutchinson is entitled to call up bank guarantees provided by the Galform in lieu of retention monies; and whether any further monies are payable to Galform by Hutchinson or whether Galform should reimburse Hutchinson for monies already paid.
- [5] To compound their problems Hutchinson contends that it reached a compromise of the legal disputes but Galform denies having made any such binding compromise. Accordingly Hutchinson seeks in proceedings 9993/07 a declaration that the actions

have been compromised on terms which have resolved all the disputes arising out of Galform's performance of the subcontract.

- [6] The object of the Act is to ensure that subcontractors recover progress payments due under a construction contract as defined by the Act. According to s 9 that object is achieved by:

- ‘(b) Establishing a procedure that involves –
- (i) the making of a payment claim by the person claiming payment; and
 - (ii) the provision of a payment schedule by the person by whom the payment is payable; and
 - (iii) the referral of a disputed claim, or a claim that is not paid, to an adjudicator for decision; and
 - (iv) the payment of the progress payment decided by the adjudicator.’

- [7] By s 17 of the Act a person who has performed construction work under a contract may serve a payment claim on the person liable to make payments under the contract. The claim must identify the construction work to which it relates and state the amount of the progress payment sought. By s 18 the person served with the claim may reply by way of a payment schedule which must identify the payment claim to which it relates and state the amount, if any, it proposes to pay. In the event that the scheduled amount is less than the claimed amount the schedule must explain the proposed shortfall.
- [8] If a respondent does not serve a payment schedule within the time allowed by the Act it becomes liable to pay the amount claimed. In that event, by s 19, the claimant may recover an unpaid amount as a debt in any court of competent jurisdiction or may make what is called an adjudication application. Judgment can be entered for the debt upon proof only of the fact that a payment claim was made and no payment schedule was served within the permitted time.
- [9] By s 20 if an amount which a respondent specifies in its payment schedule as the amount it proposes to pay is not paid the amount becomes a debt recoverable in any court of competent jurisdiction. Alternatively the claimant may make an adjudication application.
- [10] A claimant may apply for adjudication of a payment claim (‘adjudication application’) if it has made a payment claim and received a payment schedule for an amount less than the claim, or if the respondent has not paid the amount it admitted was payable pursuant in its payment schedule, or if the respondent does not serve a payment schedule. An adjudication application is made to an authorised nominating authority who appoints an adjudicator to determine the amount payable pursuant to the payment claim (s 21(3)(b); (6)). An adjudication application must be served on the respondent who may, pursuant to s 24, respond in writing setting out its answers to the claim. The Act provides for short time limits for the delivery of applications and responses and the adjudication itself.

- [11] By s 26 the adjudicator must decide the amount of the progress payment to be paid by the respondent, the date on which payment became due and the rate of interest payable on any amount determined to be payable. The adjudicator must have regard only to the Act, the terms of the construction contract between the parties, the payment claim and the payment schedule. The decision must be in writing and include the adjudicator's reasons.
- [12] By s 29 a respondent is required to pay the amount determined by the adjudicator. By s 30 if it does not pay the nominating authority may issue a certificate setting out the amount adjudicated as payable which may, by s 31, be filed 'as a judgment for a debt', and may be enforced in a court of competent jurisdiction.
- [13] On 4 October 2007 Galform made an adjudication application claiming the sum of \$778,409.97 pursuant to a payment claim dated 24 August 2007. On 23 October 2007 the adjudicator, the third respondent, found in favour of Galform for the amount claimed. The adjudicator found that the amount had become payable on 12 September 2007 and awarded interest on the amount from that date at the rate of 17.08 per cent.
- [14] Section 24 of the Act provides that a respondent who does not deliver a payment schedule in response to a payment claim may not contest an adjudication application by delivering an adjudication response. Hutchinson did reply to Galform's payment claim by letters dated 13 and 14 September 2007 and a more formal reply on 18 September 2007. For reasons which he gave the adjudicator did not regard any of these documents as constituting a payment schedule in response to the payment claim. The communication of 18 September which seems to have been the only one put before the adjudicator was therefore ignored by him, as was the adjudication response, relying upon s 24(3) of the Act.
- [15] Having obtained the adjudicator's decision Galform entered judgment against Hutchinson in this Court in the sum of \$776,987.93 and proceeded to obtain an enforcement warrant – redirection of debt addressed to Hutchinson's bankers. When Hutchinson learnt of the debt and the attempt to enforce it, it commenced proceedings as a matter of urgency claiming interlocutory injunctions against Galform. The application was listed to be heard on 5 November 2007. The apparent basis for relief was that the adjudicator had not afforded natural justice, or procedural fairness, to Hutchinson. He had ignored what was said to be a valid payment schedule and adjudication response which set out (I assume) Hutchinson's detailed reasons for disputing the payment claim.
- [16] On 5 November 2007 the application was compromised. The parties consented to an order that the matter be adjourned to 9 November 2007 upon the applicant undertaking to pay the sum of \$777,354.93 into Court to abide the result of the proceedings, and upon Galform undertaking that it would not proceed with the enforcement of the judgment. The money was paid into Court pursuant to the undertaking on 6 November. The next day, 7 November, the applicant commenced proceedings 9993 of 2007 seeking a declaration that Mr Welsh's adjudication was void because it was made without any consideration of the contentions raised by the applicant in its payment schedule and adjudication response.
- [17] In the meantime Hutchinson sought to call up bank guarantees provided by Galform pursuant to the subcontract. The guarantees had been provided in lieu of

Hutchinson's right to retain monies otherwise due under the contract until the subcontract work had been completed satisfactorily. Galform responded to the attempted enforcement of the guarantees by filing an application for an injunction against Hutchinson. That application filed in proceedings 9993 of 2007, was also made returnable on 7 November.

- [18] On that day consent orders were made with respect to three applications: Hutchinson's originating application for declarations that the adjudication was void; Galform's application for an injunction restraining Hutchinson from calling up the bank guarantees; Hutchinson's application to restrain execution of the enforcement warrant. Orders were made for the delivery of affidavits and outlines of argument in preparation of a final hearing of the applications on 7 December 2007. Mutual undertakings were given as conditions precedent to the orders made by consent. Hutchinson undertook that it would not enforce either of the bank guarantees until further order and Galform undertook not to enforce its judgment and, more particularly, undertook that it would not:

'... otherwise seek to enforce the adjudication decision made by the (third) respondent on 23 October 2007 and/or the judgment obtained by it on 2 November 2007 until further order.'

- [19] Prior to the hearing scheduled for 9 December the parties communicated, and according to Hutchinson agreed to compromise all of the disputes between them. Galform denies any such compromise and, as I mentioned, the applicant on 9 December 2007 filed an application seeking a declaration that the disputes had been compromised. The parties did manage to reach agreement upon directions to prepare the outstanding litigation for trial. Hutchinson delivered points of claim on 14 December 2007 and Galform delivered what was said to be a deficient defence on 6 February 2008. Particulars were eventually given of the defence on 24 July 2008.

- [20] On 30 May 2008 Galform delivered another payment claim to Hutchinson seeking payment of \$1,102,255.61. The claim included the amount of \$750,966.73 which had been the subject of the first adjudication. It sought also \$49,146.53 for variations to the subcontract and two sums each of \$69,926 for retention monies, one payable on practical completion and one on a date three months after practical completion.

- [21] Hutchinson delivered a payment schedule in response on 18 June 2008. On 27 June Galform lodged a second adjudication application with the second respondent which was referred again to the third respondent for adjudication. Hutchinson delivered a lengthy adjudication response which does not appear in the material. It objected to the inclusion in the payment claim and adjudication application of the amount the subject of the earlier determination on the ground that it was the subject of compromised legal proceedings and an earlier judgment. It also addressed Galform's other claims.

- [22] The third respondent disposed of Hutchinson's objections in these terms:

'46. (Hutchinson) asserts that no monies are due and payable ... because these monies have been paid into the court in

accordance with the consent orders agreed between the parties.

47. The paying of monies into a court is not, in my opinion, satisfaction of an adjudication decision. To satisfy the adjudication decision the money must be paid to the claimant and the claimant must be able to use such payments. ...
48. In its adjudication response ... (Hutchinson) raises a new issue of the adjudicator not having jurisdiction to decide this portion of the payment claim.
49. (Hutchinson) has not supported its argument by reference to any section of the Act which would persuade me that I do not have jurisdiction.'

- [23] The adjudicator then proceeded to 'find in favour of the claimant in the full amount decided in the previous adjudication decision in the amount of \$750,966.73 ...', but rejected the claim for variations in its entirety. He allowed the claim for retention monies for \$139,852. He noted:

'(Galform) has provided two bank guarantees as security for retention in accordance with the contract I am satisfied that the claimant has achieved practical completion and is entitled to the release of retention. Accordingly I find in favour of the claimant and value the release of retention at \$139,852 The return of the bank guarantees to (Galform) will satisfy this part of the decision.'

- [24] The adjudicator refused an award of interest with respect to the retention monies which had been provided by way of bank guarantee and had not involved the expenditure of any money by Galform. With respect to the claim the subject of the earlier adjudication interest was allowed in the sum of \$91,718.34 at the 'penalty rate' of 17.08 per cent. This award and the rate underpinning it is inconsistent with the rate of 10 per cent payable on judgments fixed by s 48 of the *Supreme Court Act 1995* and s4 of the *Supreme Court Regulation 1998*. The amount adjudicated was subsumed into a judgment of this Court on 2 November 2007.

- [25] The applicant by originating application seeks a declaration that the second adjudication of 8 August 2008 is void or should be set aside on the grounds that the amount of \$776,987.93 claimed and awarded had merged in the judgment and that the making of the second adjudication application was an abuse of process given the history of the litigation I have recounted and the consent orders made in those proceedings. The applicant also sought interlocutory injunctions maintaining the *status quo* until the determination of the originating application. Injunctions were sought restraining Galform from seeking an adjudication certificate with respect to the adjudication of 8 August 2008 which might become the subject of another judgment and an injunction restraining Galform from seeking to enforce the adjudication decision of 8 August 2008. An injunction was also sought restraining the second respondent from issuing an adjudication certificate.

- [26] On 15 August 2008 I made interlocutory orders restraining the respondents from proceeding further with respect to the adjudication decision until the delivery of judgment on the originating application.
- [27] The application was not brought pursuant to the *Judicial Review Act* 1991 ('*JR Act*') but 'pursuant to s 128 of the *Supreme Court Act* 1995 or ... the inherent jurisdiction of the ... Court ...'. As I mentioned Hutchinson seeks a declaration that the adjudication of 8 August 2008 is void or liable to be set aside. Section 128 empowers the Court to make 'merely declaratory decrees'. No doubt the amendments to the *JR Act* which took effect on 28 September 2007 by which adjudications under the Act were added to Part 2 of Schedule 1 thereby removing them from decisions to which that Act applies explains the choice of jurisdiction invoked, but as I pointed out in *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd and Hanlon* [2008] QCA 83, the effect of the amendment is only to remove adjudications made pursuant to the Act from the purview of judicial review under Part 3 of the *JR Act*. Adjudications remain reviewable under Part 5 of the *JR Act* which preserves the jurisdiction the Court formerly had to control proceedings of inferior courts and domestic tribunals. Section 41(1) of the *JR Act* forbids the Court from issuing writs of prohibition of certiorari but confirms the power to grant relief to the same effect as the forbidden writs. A writ of certiorari when made absolute quashed the decision with respect to which the writ was sought.
- [28] One ground on which certiorari could be granted and which under Part 5 of the *JR Act* remains a basis for a prerogative order is that the inferior tribunal lacked jurisdiction to make the order or determination in question. One means by which a tribunal might lack jurisdiction is that an essential statutory precondition for the exercise of its jurisdiction did not exist.
- [29] Counsel for Hutchinson preferred to rest their application on the foundations of s 128 and to seek support from cases decided in New South Wales on relevantly identical legislation which have held that an adjudication may be declared void or ineffective where there has been a failure to comply with the terms of the statute which set out the preconditions for a valid adjudication. In such a case the decision actually made is characterised as one not made pursuant to the Act and is accordingly invalid. The leading case is *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 in which (para 52) Hodgson JA, speaking for the Court of Appeal, said:
- '... For a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever other conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination would not in truth be an adjudicator's determination within the meaning of the Act: it will be void A court ... could in those circumstances grant relief by way of declaration or injunction without the need to quash the determination by means of an order (in) the nature of certiorari.'
- [30] It is obvious that the making of a payment claim is an indispensable step along the way to obtaining an adjudication. It is the first step and is obviously a prerequisite which must exist before an adjudicator can exercise the statutory powers of making

an adjudication leading to the issue of a certificate which will found a judgment. The Act requires a payment claim which meets the statutory criteria. The respondent may reply by way of a payment schedule. If the payment schedule is unsatisfactory to the claimant it may seek an adjudication application which it must serve on the respondent which has another right to respond by way of its adjudication response. The statutory insistence upon a payment claim as a precondition to the adjudication may be seen in s 21(3). This provides that an adjudication application must identify the payment claim to which it relates.

[31] Hutchinson took the point before the adjudicator that there was no payment claim which did or which could give rise to an adjudication application because the claim set out in the ‘payment claim’ of 30 May 2008 had been the subject of the earlier payment claim of 4 October 2007 which had been the subject of the earlier adjudication which had in turn been subsumed into the judgment in this Court in action 9853/07.

[32] It is, I think, obvious that without the payment claim of 30 May 2008 there could have been no adjudication application and no adjudication. The existence of that payment claim was indispensable to the third respondent’s jurisdiction. There was obviously a document entitled ‘payment claim’ of 30 May 2008 but Hutchinson submits that it was as a matter of law incapable of constituting a payment claim for the purposes of the Act. The ground advanced was that the claim in respect of which payment was sought was a debt which had merged with the judgment and had ceased to exist as a chose in action with an existence separate from the judgment.

[33] The principle was described by Dixon J in *Blair v Curran* (1939) 62 CLR 464 at 531:

‘A judicial determination directly involving an issue of fact or of law disposes once and for all the issue, so that it cannot afterwards be raised between the same parties or their privies.’

and at 532:

‘... The very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence ...’.

Fullagar J in *Jackson v Goldsmith* (1950) 81 CLR 446 said at 466:

‘Where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action. ...’

[34] These passages were cited with approval by Gibbs CJ, Mason and Aickin JJ in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 597.

[35] A payment claim is a claim or an assertion of a right to be paid a progress payment due under a construction contract. Sections 12 and 13 of the Act expressly provide to this effect. It is a cause of action of a very common sort. The Act provides a speedy and informal process by which the cause of action may be determined by way of an adjudication. The adjudication procedure which results in a speedy

determination does not alter the nature of the claim: it is a cause of action in contract. The Act provides that the cause of action is to be judged by an adjudicator qualified in accordance with the Act rather than a court. But there is no doubt that the adjudication, once made, is binding on the parties. It can, as I have mentioned, be entered as a judgment of the court and enforced as such. The rather special procedure for dealing with claims for progress payments by subcontractors should not be allowed to disguise the fact that what is in question is a cause of action in contract resulting in a judgment. There can, I think, be no doubt that an adjudication giving rise to a judgment does give rise to a *res judicata* and, indeed, issue estoppel.

- [36] Galform obtained an adjudication in its favour, then a certificate and then judgment which it sought to enforce. It is impossible to think that the cause of action which it described in its payment claim of 24 August 2007 has not merged in the judgment. It is nothing to the point that the amount of the judgment debt has not been paid to Galform. The existence of a *res judicata* does not depend upon a judgment being satisfied. It arises from the fact of judgment itself. See *Res Judicata* 3rd ed by Handley para 399 and cases cited in note 36.
- [37] Galform's claim the subject of its payment claim of 30 May 2008 and its adjudication application of 27 June 2008 were based upon a cause of action, a claim for payment under the subcontract, which had ceased to exist, having merged in the judgment obtained on 2 November 2007. There was, as a matter of law, no claim in respect of that cause of action which the first respondent could then have made. The facts were not in dispute and were put before the adjudicator. They established unequivocally the absence of the claim, the existence of which was a necessary precondition to the making of an adjudication application and the obtaining of an adjudication. The adjudication purportedly made by the third respondent was not one permitted by the Act and is void.
- [38] As the applicant's counsel points out the first respondent could have made a payment claim for the variation and, perhaps, for the retention monies. As it turned out it failed on the former claim though it succeeded on the latter. Such a payment claim would no doubt have been properly made and could have been the subject of an adjudication. By including the claim for the payment already made the subject of a judgment and obtaining an adjudication for an indivisible total amount the whole adjudication is defective. In any event the adjudication amount includes an amount for interest inconsistent with interest payable pursuant to s 48 of the *Supreme Court Act* 1995 and the payment of retention monies when no monies were in fact retained by Hutchinson. The adjudicator recognised this. He said that the claim to retention monies would be satisfied by the return of the bank guarantees. Nevertheless he included in the adjudicated sum the amount for which the guarantees were given. This error is one of law and appears on the face of the adjudication.
- [39] The Act itself contains some indications that a contractor may not make more than one payment claim with respect to the same claim for payment under the contract. Section 17(5) provides:
- (5) A claimant cannot serve more than one payment claim in relation to each reference date under the construction contract.

- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.’

[40] A reference date is a date stated in or worked out under a construction contract as the date on which a claim for a progress payment may be made. The two payment claims in question were obviously in relation to the same reference date. They were for the same work. The claims were identical. The proviso to the prohibition is not, I think, relevant though its meaning is not readily apparent. Subsection (6) is, I think, meant to permit the inclusion in a subsequent payment claim made in relation to a different reference date of an amount previously claimed but disallowed, perhaps on the basis that the work was not completed. When completed the work may be included in a subsequent claim though it had been asked for earlier.

[41] Section 32 described as circumstances in which a claimant may make a new, or second, adjudication application. The circumstances are limited to those in which the adjudicator does not give notice of acceptance of the adjudication within four business days or an adjudicator does not decide the application within the time allowed by s 25(3). This circumscription is inconsistent with the notion that the claimant could obtain a second adjudication application merely by delivering a second payment claim in respect of a claim already made.

[42] The only response made by counsel for the respondent was to refer to s 100 of the Act which preserves the rights of parties to a construction contract to recover monies due under it or damages for breach of it. The section provides:

‘(1) ... Nothing in Part 3 affects any right that a party to a construction contract –

- (a) may have under the contract; or
- (b) may have under Part 2 in relation to the contract; or
- (c) may have apart from this Act in relation to anything done or omitted to be done under the contract.

(2) Nothing done under or for Part 3 affects any civil proceedings arising under a construction contract, whether under Part 3 or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal –

- (a) must allow for any amount paid to a party to a contract under Part 3 in any order or award it makes in those proceedings; and
- (b) may make the orders it considers appropriate for the restitution of any amount so paid, and in the other orders it considers appropriate, having regard to its decision in the proceedings.’

Part 3 contains provisions dealing with the procedure for recovering progress payments.

- [43] The effect of s 100 is to make progress payments enforced by the statutory procedures for adjudication, certification and entering of judgment ‘only payments on account of a liability that will be finally determined otherwise ...’. Per Hodgson JA in *Brodyn* at 440-1. Payments made pursuant to the Act are meant to effect a quick resolution of payment disputes between parties to a construction contract on an interim basis without extinguishing a party’s ordinary contractual rights to obtain a final determination with respect to the dispute by a court of competent jurisdiction. See *Intero Hospitality Projects* at para 46.
- [44] The first respondent’s contention is that because these payments are made on an interim basis, or on account of a liability to be subsequently determined, they do not give rise to *res judicata*. They lack finality which is a necessary prerequisite.
- [45] The answer to this submission is that a judgment obtained pursuant to Part 3 of the Act is conclusive, final and binding, unless and until a court pronounces judgment in a proceeding brought by virtue of the contractual rights preserved by s 100, which is inconsistent with the earlier judgment. Unless and until a court gives judgment which affects the rights of the parties determined by a judgment obtained pursuant to Part 3 that judgment stands. In principle the case is the same as that of a judgment is reversed on appeal. Until the appellate reversal the judgment is conclusive and gives rise to *res judicatae*. See *Railways Commissioner for New South Wales v Cavanagh* (1935) 53 CLR 220 at 225.
- [46] Accordingly I conclude that the third respondent had no jurisdiction to embark upon the adjudication and erred in law in proceeding to determine the first respondent’s claim for the payment which had already resulted in the entry of judgment in its favour. The applicant is entitled to a prerogative order quashing the adjudication and a declaration that it is void.
- [47] There is a second basis on which the applicant is entitled to relief. The first respondent’s invocation of the peremptory procedures to protect subcontractors to invite Part 3 of the Act was in the circumstances of this case, an abuse of process. The second payment claim and adjudication application subverted, and were no doubt intended to circumvent, the orders of the Court made by consent in November and December 2007. Galform knew that Hutchinson disputed the legal validity of the first adjudication on the basis that its submissions had not been taken into account. It agreed to the payment of the judgment sum into court pending the outcome of proceedings to determine the legal efficacy of the adjudication. It undertook not to enforce the adjudication until further order. It agreed to directions designed to obtain a speedy determination of the disputed question. Galform only had to succeed in its contention that the adjudication was valid to obtain payment out of court of the judgment sum. Instead it sought to disregard the agreed procedures to resolve its entitlement to the judgment sum by seeking a second adjudication on the very same claim.
- [48] I readily infer that its purpose in doing so was not to obtain payment of a sum honestly thought due from the performance of its subcontract but to deprive the applicant of the legal protection it had obtained, by consent, against an obligation to pay monies as to the existence of which there was a genuine doubt.

[49] The institution of a fresh payment claim and adjudication application was a breach of the undertaking given by Galform to the Court. It was an attempt to obtain payment when it had accepted that its right to payment was genuinely disputed on substantial grounds.

[50] In *Rogers v The Queen* (1994) 181 CLR 251 McHugh J (who dissented in the result) noted that (286):

‘Inherent in every court of justice is the power to prevent its procedures being abused Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) The court’s procedures are invoked for an illegitimate purpose; (2) The use of the court’s procedures is unjustifiably oppressive to one of the parties; or (3) The use of the court’s procedures would bring the administration of justice into disrepute.’

[51] In *Walton v Gardiner* (1992-1993) 177 CLR 378 Mason CJ, Deane and Dawson JJ said (392):

‘... Proceedings ... should be stayed as an abuse of process if, notwithstanding that the circumstances did not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has formerly been disposed of by earlier proceedings.’

[52] The second payment claim, adjudication application and adjudication were oppressive and therefore an abuse of process. They were a means by which Galform sought to evade the conduct of legal proceedings the parties had agreed should determine Galform’s right to be paid the judgment sum. It was an attempt to deprive the applicant of the safeguards to its position and to evade the undertaking it gave the court with respect to the judgment it had obtained. It is, of course, ordinarily vexatious and oppressive to sue twice for the same debt. It is clearly so when the debt has already merged in a judgment.

[53] The third respondent should have seen the application for what it was and refused to entertain it.

[54] The applicant is entitled to an injunction restraining the respondents from proceeding further with the adjudication and with the issue of a certificate pursuant to it.