SUPREME COURT OF QUEENSLAND

CITATION:	*AE & E Australia Pty Ltd v Stowe Australia Pty Ltd* [2010] QSC 135
PARTIES:	**AE & E AUSTRALIA PTY LTD (ABN 73 116 625 060)** (applicant) **v** **STOWE AUSTRALIA PTY LTD (ABN 27 002 556 603)** (respondent)
FILE NO:	4069 of 2010
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	27 April 2010
ORDER:	**(1) The respondent be restrained from serving or causing others to serve an adjudication application that seeks adjudication of claims VQ-E-027, VQ-E-064, and items 2, 4, 5, 6, 8 and 10 of both VQ-E-100 and VQ-E-101 in the payment claim dated 12 April 2010 referred to in paragraph 1 of the Originating Application.** **(2) The respondent pay the applicant's costs of and incidental to the application to be assessed.**
JUDGE:	Applegarth J
CATCHWORDS:	BUILDING AND ENGINEERING CONTRACTS – *Building and Construction Industry Payments Act* 2004 (Qld) – whether payment claim sought to re-agitate issues decided in earlier adjudication determination – whether issue estoppel arises from adjudication determination –whether claimant should be restrained from serving an adjudication application with respect to items that are re-agitated in new payment claim
LEGISLATION	*Building and Construction Industry Payments Act* 2004 (Qld) *Building and Construction Industry Security of Payment Act*

1999 (NSW)

CASES	*Doolan v Rubikon (Qld) Pty Ltd* [2008] 2 Qd R 117; [2007] QSC 168 considered *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 applied *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd trading as Novatec Construction Systems* [2009] NSWSC 416 considered *Northside Projects Pty Ltd v Trad* [2009] QSC 264 cited *Securcorp Pty Ltd v Civil Mining & Engineering Construction Pty Ltd* [2009] QSC 249 cited *University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635 considered *Urban Traders Pty Ltd v Paul Michael* [2009] NSWSC 1072 applied *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168 applied
COUNSEL:	R A Holt SC, M D Ambrose for the applicant T Matthews for the respondent
SOLICITORS:	Hemming & Hart Lawyers as agent for Colin Biggers & Paisley for the applicant Sawford Voll Lawyers for the respondent

[1] The issue for determination is whether the respondent ("Stowe") is entitled to seek an adjudication under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act") in respect of claims for certain items that have been the subject of a prior adjudication decision under the Act. The applicant ("AE") seeks a declaration to the effect that Stowe is not entitled to do so, and an injunction restraining Stowe from making an adjudication application under s 21 of the Act in respect of a payment claim dated 12 April 2010, or, alternatively, certain claims made in that payment claim ("the re-agitated claims").

[2] AE relies upon the decision of the New South Wales Court of Appeal in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*[1] and other authorities to contend that the Act does not permit re-agitation of claims except in narrowly defined circumstances. It submits that the re-agitated claims do not fall within these exceptions. As a result, it submits that they are the subject of an issue estoppel, or attract the more general principle of abuse of process.

[3] On 1 March 2010 an adjudicator made a decision in respect of Stowe's payment claim dated 18 December 2009 ("the December 2009 Claim"). Stowe submits that the items claimed by it in the payment claim dated 12 April 2010 ("the April 2010 Claim") and which are in contention in this application were not the

---

[1] (2009) 74 NSWLR 190 ("*Dualcorp*").

subject of a decision by the adjudicator as to Stowe's entitlement, nor have they been valued. It submits that the April 2010 Claim is valid and "far from the abuse of process alleged by AE".

Facts

[4] On or about 11 July 2008 AE engaged Stowe to perform the electrical, instrumentation and controls portion of the construction works in relation to the Condamine Power Station Project. There is no dispute that there is a "construction contract" within the meaning of the Act, and there is no dispute that the Act applies to payment claims made by Stowe. In fact, claims have been made and paid to date under the statutory regime in an amount that exceeds $8,000,000.

[5] On 18 December 2009 Stowe served a payment claim for $3,884,216 (excluding GST) on AE. This December 2009 Claim included amounts for variation claims referred to as VQ-E-027, VQ-E-064, and Items 2, 4, 5, 6, 8 and 10 of both VQ-E-100 and VQ-E-101. These items are the subject of the application before me. I shall describe them as "the re-agitated claims".

[6] AE served a payment schedule pursuant to the Act on 11 January 2010. On 25 January 2010 Stowe filed an adjudication application under the Act with respect to the December 2009 Claim and Mr Smithies was appointed to undertake the adjudication of that claim. He delivered his adjudication decision on 1 March 2010. He decided that the amount of $983,666.10 was payable by AE to Stowe.

[7] It will be necessary to return to his adjudication decision in respect of the re-agitated claims. For present purposes it is sufficient to note that his decision included conclusions that Stowe had not provided sufficient supporting information to substantiate the matters claimed by it in respect of certain items and that, as a result, "I will not value this variation." In respect of other items he stated that Stowe had not "demonstrated an entitlement" to be paid the amount claimed.

[8] The evidence is that after 18 December 2009 there was no change in the "percentage complete" figure for the work relating to the re-agitated claims, Stowe has not performed any new work in relation to those claims and no new revision of or additional information or material substantiating those claims was received by AE.

[9] On 12 April 2010 Stowe served a further payment claim under the Act. This April 2010 Claim was for $2,609,111 and included the amount of $2,483,803 in respect of the re-agitated claims for variations that had been included in the December 2009 Claim. AE's solicitors disputed Stowe's entitlement to claim for these items and asserted that the claims were invalid or an abuse of process.

AE filed an originating application seeking declaratory and injunctive relief in respect of the April 2010 Payment Claim, or alternatively the re-agitated claims. On Tuesday, 27 April 2010 I granted an interim order with a view to restraining submission of the April 2010 Payment Claim to an adjudication until I determined AE's application.

Relevant principles and authorities

[10] The purpose and scheme of the Act has been described in previous decisions of this Court and it is unnecessary to repeat that description. The *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the *NSW Payment Act*") is in practically identical terms to the Act, but contains different section numbers. The extent to which the *NSW Payment Act* permits re-agitation of claims has been the subject of a number of authorities.

Dualcorp Pty Ltd v Remo Constructions Pty Ltd

[11] In *Dualcorp* the New South Wales Court of Appeal considered the extent to which a party may serve another claim and seek a further determination of issues that were previously before the same, or another, adjudicator. Subject to certain qualifications, Macfarlan JA (with whom Handley AJA agreed) concluded that such a course was contrary to the intent of the *NSW Payment Act* and was precluded by the principles of issue estoppel. Allsop P agreed that the *NSW Payment Act* "as a whole generally manifests an intention to prevent repetitious re-agitation of the same issues".[2] His Honour found it unnecessary to consider whether principles of estoppel prevented any apparently abusive operation of the Act.[3] Allsop P stated:

> "I agree with Macfarlan JA that the [Act] was not intended to permit the repetitious use of the adjudication process to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions. A party in the position of the applicant (Dualcorp), here, should not be able to re-ignite the adjudication process at will in order to have a second or third or fourth go at the process provided by the Act merely because it is dissatisfied with the result of the first adjudication."[4]

[12] AE submits that *Dualcorp* is authority for the following propositions[5]:

(a) the Act was not intended to permit the repetitious use of the adjudication process to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions;[6]

---

2 At 194 [16].
3 Ibid.
4 Ibid at [2].
5 References to sections are to sections of the Queensland Act.

(b) adjudications under the Act attract (where the necessary legislative intention is shown) the principles of issue estoppel;[7]

(c) the legislative intent of the Act is to render adjudicator determinations relevantly "final" for the purposes of attracting the principles of issue estoppel.[8] Relevant matters identified by Macfarlan JA at [52] to [59] are:

(i) The object of the Act is to require speedy resolution of disputes. Reconsideration of claims is inconsistent with this object;

(ii) Only one payment claim may be served (s 17(5)) in respect of each reference date. While an amount which has been the subject of a previous claim might be included in a payment claim (s 27(2)), that does not authorise the inclusion of an amount that has been the subject of an earlier adjudication. To allow this would be inconsistent with the requirement for finality of determinations;

(iii) An adjudicator is bound by the value given to work etc by an other adjudicator unless he or she is satisfied that the value has changed.

(iv) The respondent is required to pay the adjudicated amount (s 29(1));

(v) Construction work may be suspended if the adjudicated amount is not paid (s 33(1));

(vi) The adjudication certificate may be filed as a judgment of the Court (s 31). If application is made to set the judgment aside under s 31(4) there are strict limitations on matters that may be raised by the respondent. These matters provide a strong indication of an intent that the determination be clothed with "a significant degree of finality";

(vii) New applications for adjudication under s 32 may be made in narrowly defined circumstances;

(viii) Adjudication determinations determine rights in relation to progress claims and do not effect contractual rights (s 100).

(d) The Act "manifests an intention to preclude re-agitation of the same issues". Therefore, the ambit of issue estoppel is not restricted to valuation of claims under the Act but also applies to the anterior question of entitlement;[9]

(e) an adjudicator would be bound:

---

6 Ibid, [2] per Allsop P; [18] per Macfarlan JA.
7 Ibid, [48] per Macfarlan JA.
8 Ibid, [51] – [60] per Macfarlan JA.
9 Ibid, [67] per Macfarlan JA.

(i) by a previous adjudicator's decision including decisions as to lack of entitlement by reason of want of evidence;[10]

(ii) by a rejection of a claim because it was not in accordance with the express requirements of the contract;[11]

(iii) where questions of entitlement have been resolved by an adjudication determination, save for the narrow basis for revaluation provided for by s 27(4) of the *Payments Act*.[12]

[13] Stowe does not contest that *Dualcorp* supports these propositions, or submit that *Dualcorp* was wrongly decided. Instead, it relies upon the judgments of McDougall J in *Urban Traders Pty Ltd v Paul Michael* [13] and in *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd*[14] which were decided after *Dualcorp*. Stowe submits that passages in those two judgments support the following propositions:

(a) re-agitation of a previously made claim alone cannot amount to an abuse of process;[15]

(b) the Act does not intend to prevent a claimant from claiming amounts that have been the subject of a previous adjudication;[16] and

(c) this is particularly so where the first adjudicator has not actually valued items in the payment claim.[17]

Counsel for AE addressed *Urban Traders*, *Watpac* and other decisions of the Supreme Court of New South Wales. In the interests of determining the present application without delay I do not propose to discuss these decisions at length. Instead, I shall principally consider the particular passages in *Urban Traders* and *Watpac* upon which Stowe relies, and briefly refer to two other decisions which considered the principles discussed in *Dualcorp*.

Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd trading as Novatec Construction Systems[18]

[14] In *Perform* Rein J considered *Dualcorp* in circumstances in which the claimant sought to re-agitate a contractual interpretation issue that was determined

---

10 Ibid, [71] – [72] per Macfarlan JA.
11 Ibid, [69] per Macfarlan JA.
12 Ibid, [67] per Macfarlan JA.
13 [2009] NSWSC 1072 ("*Urban Traders*").
14 [2010] NSWSC 168 ("*Watpac*").
15 *Urban Traders* (supra) at [43].
16 *Watpac* at [60] – [84].
17 *Watpac* at [83] - [84].
18 [2009] NSWSC 416 ("*Perform*").

adversely to it by an adjudicator. It also had made some minor alterations to the amounts claimed. Rein J rejected the contention that a party, having put forward a claim framed in a particular way, may serve another claim framed in a different way once the claim is rejected. Such a view was said to be entirely inconsistent with the object of the Act and the principle of finality to which Macfarlan JA referred in *Dualcorp*. Such a second claim was described as "incompetent" because it ventilated issues that had already been decided.[19] The issue that had been decided was Mev's entitlement to payment in respect of the invoices that had been previously rendered.

University of Sydney v Cadence Australia Pty Ltd[20]

[15] In *Cadence* Hammerschlag J did not accept a submission that the majority holding in *Dualcorp* in relation to issue estoppel was *obiter*. The findings in the previous adjudication in *Cadence* were not to the effect that the first defendant did not have a valid claim for delay costs under the contract. Instead, the adjudication was that cadence "had not adduced evidence which made out such a claim".[21] Hammerschlag J was of the view that cadence had "exhausted its statutory entitlement to claim the delay costs which were the subject of the first claim". Hammerschlag J went as far as to say that "the Act gives no right to re-make a payment claim which has earlier been made and adjudicated upon".[22] For the reasons given by Mc Dougall J in *Urban Traders* and *Watpac*, that statement may require some qualification. However, Hammerschlag J was, with respect, correct in saying that s 13(6) of the *NSW Payment Act*[23] does not contemplate "a payment claim for an amount which has previously been claimed and which has been adjudicated upon and rejected".[24]

[16] Hammerschlag J applied the general principle of abuse of process as discussed in *Dualcorp* in concluding that dealing with the application for adjudication "would require the adjudicator to re-perform a statutory function which he has already discharged".[25] It followed that Cadence had "no right to apply for the adjudication" of the relevant claim, and the adjudicator had "no jurisdiction to adjudicate it".[26] Cadence was ordered to withdraw the adjudication application and was restrained from seeking adjudication of the impugned payment claim. Such relief was appropriate to remedy an abuse of process in circumstances in which a party "should not be vexed with a fresh process when it ought not to be, and that the intent of the Act is to provide a speedy determination of claims for payment on an interim basis, not to burden the parties to a construction contract with a prolonged quasi-judicial process".[27]

---

19 Ibid at [42].
20 [2009] NSWSC 635 ("*Cadence*").
21 Ibid at [47]-[48].
22 Ibid at [51].
23 Section 17(6) of the Queensland Act
24 *Cadence* at [54].
25 Ibid at [56].
26 Ibid.
27 Ibid at [59].

Urban Traders v Michael

[17] In *Urban Traders* McDougall J analysed a number of authorities, including *Dualcorp*, in connection with doctrines of issue estoppel and abuse of process in the context of the *NSW Payment Act*. I respectfully adopt his Honour's analysis of the authorities which led to the following conclusion:

> "[41] It does not follow from the decisions to which I have referred 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 relevant concept is not abuse of process at large. It is abuse of the processes of the Act: specifically, the processes of the Act designed to ensure that builders and subcontractors (and of course others) received prompt and progressive payment for construction work performed or related goods and services provided. The question of whether there has been an abuse the processes of the Act must take into account relevant provisions of the Act. Specifically:
>
> (1) s 13(6) of the Act recognises that a claimant may include in a payment claim an amount that has been the subject of a previous payment claim; and
>
> (2) s 22(4) of the Act deals, to an extent, with a repeated claim by providing that if particular construction work or related goods and services have been valued by an adjudicator, an adjudicator in a subsequent adjudication application is to give them the same value unless satisfied that the value has changed since that previous determination.
>
> [42] Further, whether or not the repetition of a claim amounts to an abuse of process requires consideration of all relevant contextual facts. In addition, 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. Thus, in deciding whether a repetition of a claim amounts to abuse of process, it may be relevant to take into consideration whether, because of fresh claims that are advanced, the respondent will be required to defend itself in any event.
>
> [43] I do not think that it is possible to state in some exhaustive fashion what combination of factors, including

> repetition, will lead to the conclusion that there is an abuse of process. (See, as to this, French CJ, Gummow, Hayne and Crennan JJ in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43 at [27]. My concern is simply to make it clear that, in my opinion, it would be inconsistent with the provisions of the Act to which I have referred above to hold that repetition, by itself and without more, always amounts to abuse of process."

The provisions of the *NSW Payment Act* to which his Honour referred to in [41] are reflected in the provisions of the Queensland Act.[28]

[18] McDougall J proceeded to apply the majority view in *Dualcorp* to the facts, and this led to the conclusion that the decision of the adjudicator on the claims in question created an estoppel, the effect of which was that those same claims could not be re-agitated in a subsequent adjudication.[29] His Honour stated that were it necessary to do so, he would have concluded also that the re-agitation of the claims amounted to an abuse of process, insofar as that concept is capable of application to the scheme of interim dispute resolution contained in Act. This was for three reasons. First, the claim, being barred by issue estoppel, was foredoomed to fail. Secondly, the builder seemed to be doing no more than seeking, from the second adjudicator, a better result than it got from the first. There were no new circumstances or material that warranted reconsideration of the claims in question. Thirdly, the builder had obtained judgment for the amount determined by the first adjudicator. In essence, it sought to re-open the basis on which it obtained that judgment.[30]

[19] The result was that the builder was restrained from advancing certain claims in any adjudication.

[20] For the reasons given by McDougall J at [41]–[43], certain provisions in the Act mean that it cannot be said that "repetition, by itself and without more, always amounts to abuse of process." However, *Urban Traders* illustrates that an issue estoppel or an abuse of process may exist where a party seeks to re-agitate a claim that has been adjudicated upon and rejected.

---

28 Section 17(6) of the Act is the equivalent of s 13(6) of *NSW Payment Act* and s. 27 of the Act is the equivalent of s 22(4) of the *NSW Payment Act.*

29 *Urban Traders* at [58].

30 Ibid at [59].

Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd

[21] In *Watpac* McDougall J again considered the principles to be derived from the authorities in relation to issue estoppel and abuse of process in the context of the *NSW Payment Act*. His Honour expressed some difficulty with the generality of what was said by Macfarlan JA in *Dualcorp* at [53].[31] McDougall J stated:

> "Section 13(6) authorises the inclusion in a later payment claim of an amount that has been the subject of an earlier payment claim. Section 22(4) contemplates that the amount that is "re-claimed" might have been the subject of earlier adjudication and provides for the consequences. I accept, of course, that s 22(4) does not deal with all occasions on which amounts are "re-claimed" amounts. Nonetheless, I do not understand how, in those circumstances, it can be said that the Act impliedly prohibits the inclusion, in a later payment claim, of an amount that has been the subject of a prior adjudication. His Honour's approach would, with respect, make it difficult for the claimant to seek to have a later adjudicator revalue the work on appropriate evidence; yet the prospect of revaluation is expressly preserved by s 22(4)."[32]

His Honour observed that the reasons that had been given by Rein J in *Perform* and by Hammerschlag J in *Cadence* overstated the position, and he reiterated the reservation expressed in *Urban Traders*. The authorities supported the proposition that s 13(6) of the *NSW Payment Act* did not contemplate resubmission of a claim that had previously been adjudicated and rejected.[33]

[22] McDougall J proceeded to consider the issue of whether a certain payment claim was "invalid" in the sense of being "a document purporting to be a payment claim that ... is not a payment claim under the Act and does not attract the statutory regime of the Act".[34] McDougall J expressed the view that there are two possible categories of payment claims that could be described as "invalid" in this sense:

> "(1) first, that described by Allsop P in *Dualcorp* at [14]: a repetitious payment claim, being no more than the same claim for the same completed works, resubmitted after work under the construction contract in question had ceased, and resubmitted purely for the purpose of "creating" a fresh reference date. On his Honour's

---

31 Summarised in [12](c)(ii) above.
32 *Watpac* at [60].
33 *Watpac* at [63].
34 *Watpac* at [71] citing Allsop P in *Dualcorp* at [14].

> reasoning, this would be outside the permission given by ss 8(2)(b) and 13(6) of the Act.
>
> (2) The second is a payment claim claiming an amount that has been the subject of a prior payment claim and adjudication thereon, in circumstances where the prior adjudicator has determined that there is nothing due by the respondent to the claimant. **That might occur in circumstances where** (as Macfarlan JA postulated at [71] of *Dualcorp*) **the prior adjudicator had rejected the claim for want of evidence, without considering on its merits**. It could also occur where (as here) the prior adjudicator rejected the claim because he concluded that the claimant had not made out any legal entitlement to it, or had not put the claim on a basis that was capable of being the subject of an adjudicators' determination."[35] (emphasis added)

His Honour observed that the case for invalidity was stronger where the earlier adjudicator had determined that there was no entitlement to the amount of a payment claim (or to a severable portion of the amount claimed by that payment claim). However, in other circumstances resubmission might be regarded as outside the scheme of the Act. Section 22(4) of the *NSW Payment Act* was said to have no operation where "the prior adjudicator determined the fate of the claim on the basis that the claimant had made out no entitlement to be paid".[36] In those circumstances, where there is no question of abiding by the previous valuation (or of showing that the value of the work had changed) and no question of a cumulative payment claim where work is ongoing, it was said to be easier to see why "mere resubmission might be regarded as outside the scheme of the Act, and in particular outside whatever permission to resubmit can be implied from ss 8(2)(b) and 13(6)."

[23] Having canvassed the issue of "invalidity" arising from resubmitted claims, McDougall J then addressed the question of issue estoppel, which was the basis upon which the decision in *Watpac* rested. His Honour observed that *Dualcorp* decided that the determinations of adjudicators attract the principles of issue estoppel. The ratio in *Dualcorp* did not in terms include the extended principle of issue estoppel. However, after reviewing the extended principle of issue estoppel and the decision in *Dualcorp* McDougall J concluded:

> "In my view, both as a matter of principle and because of the clear policy of the Act, as to the finality of determinations, identified by Macfarlan JA, the doctrine of issue estoppel, in so far as it applies to determinations of adjudicators under the Act, includes the extended principle. To conclude otherwise would permit a party to retain the opportunity to resubmit

---

35 Ibid at [86].
36 Ibid at [87].

> claims, until finally it got an advantageous outcome, by holding back part of its case each time. Except in special circumstances, a party should put the whole of its case, in support of a particular payment claim, before an adjudicator who is charged with the statutory responsibility of deciding that parties' entitlement to the amount claimed." [37]

[24] The principles discussed in the New South Wales authorities support the proposition that the policy of the Act and the doctrine of issue estoppel operate to preclude resubmission and re-agitation of a claim that has been previously rejected for, amongst other things, want of evidence. I respectfully adopt the principles discussed in *Dualcorp*, subject to the qualifications expressed in *Watpac* at [60] – [65].

[25] A repetitious payment claim, being no more than the same claim for the same completed works that has been previously rejected for want of evidence or because the previous adjudicator concluded that the claimant had not made out any legal entitlement to it, may be "invalid".

[26] In concluding that the statement by Macfarlan JA in *Dualcorp* at [53] and similar statements may require qualification, McDougall J in *Urban Traders* and *Watpac* referred to certain provisions of the *NSW Payments Act*. The same position applies in respect of the equivalent provisions Queensland Act. However, the circumstances of the application before me do not engage the qualifications that arise by virtue of s17(6) and s 27 of the Act (s 13(6) and s 22(4) of the *NSW Payment Act*).

[27] The decisions in *Urban Traders* and *Watpac* illustrate the application of the principles of issue estoppel that McDougall J found arose in both cases. His Honour also would have found an abuse of process.[38]

[28] In conformity with the analysis in *Urban Traders* and *Watpac*, certain provisions of the Act mean that it cannot be said that "repetition, by itself and without more, always amounts to abuse of process."[39] However, AE does not rely upon the mere fact that a claim is being re-agitated. It relies upon the re-agitation of precisely the same items, the absence of changed circumstances and the basis upon which the adjudicator determined each re-agitated claim.

Queensland authorities

[29] The parties' submissions did not cite any decisions of this Court, and the respondent submitted that there was no Queensland case decided directly on the

---

37 Ibid at [104].
38 *Urban Traders* at [59]; *Watpac* at [136].
39 *Urban Traders* at [43].

point that arises in this application. I note in passing that in *Doolan v Rubikcon (Qld) Pty Ltd* [40] Fryberg J considered the validity of a payment claim that was identical to a previous claim. His Honour stated that s 17(6) permits a previous claim to be *included* in a later one, but this did not mean that a previous claim can be the sole item included in the later one. The Act did not prevent cumulation of amounts in successive payment claims. However, because the second claim in that case was identical to the first and related to the same reference date it was not capable of founding the jurisdiction of the adjudicator, and was invalid. The same issue arose in *Northside Projects Pty Ltd v Trad* [41] in which Martin J dealt with a payment claim that was identical in amount and reference date to an earlier claim.

Basis for determination of the application

[30] In this matter, I am not concerned with successive payment claims that are identical in all respects. The factual circumstances are more complicated, and certain items were withdrawn from the adjudication before Mr Smithies. Stowe acknowledges that the re-agitated claims were made in both the December 2009 Claim and the April 2010 Claim. If I dealt with the matter in terms of the alleged "invalidity"[42] of the April 2010 Claim, then any invalidity would be to the extent of the repetition and would not extend to items that were readily severable. I prefer to determine the application by reference to the doctrine of issue estoppel, including the extended principle of issue estoppel.[43] In applying the principles of issue estoppel and, if necessary, abuse of process in the context of the Act, and in the circumstances of the present application, it is necessary to recall that a determination under the Act may involve both questions of entitlement and questions of quantification, or it may involve one or the other.[44]

[31] I will avoid repeating the analysis from the New South Wales authorities of the principles of issue estoppel that apply in connection with determinations by adjudicators under the Act. I respectfully adopt the principles of issue estoppel discussed in *Dualcorp*, *Urban Traders* and *Watpac*. They concern a statute in the same terms as the Queensland Act. The legislation manifests a general intention to preclude re-agitation of the same issues. I should follow the interpretation of identical New South Wales legislation unless I conclude that the interpretation is plainly wrong. I do not. To the extent that certain general statements in the judgments in *Dualcorp, Performa* and *Cadence* require qualification for the reasons given by McDougall J in *Urban Traders* and *Watpac*, I respectfully adopt the interpretation of McDougall J. These qualifications do not have any significance upon the disposition of the present application.

---

40 [2008] 2 Qd R 117; [2007] QSC 168.

41 [2009] QSC 264.

42 In the sense discussed by Allsop P in *Dualcorp* and by McDougall J in *Watpac.*

43 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Henderson v Henderson* (1843) 3 Hare 100.

44 *Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151 at [43] cited in *Dualcorp* (supra) at [64].

[32] It is sufficient to state the relevant principles that I intend to apply in determining this application:

(a) The concept of issue estoppel, insofar as it is applicable to determinations by adjudicators under the Act, includes the *Anshun* principle.[45]

(b) For the purposes of issue estoppel, the issue determined by the adjudicator is to be ascertained by reference to the payment claim, payment schedule, relevant supporting submissions, the provisions of the contract and the provisions of the Act.[46] Accordingly, the relevant issue for determination by the adjudicator was whether Stowe was entitled to a progress payment pursuant to the statutory mechanisms contained in the Act in respect of the relevant items for the amounts claimed.

(c) The particular basis upon which the adjudicator determined each contested item and the December Claim in general (whether it be lack of legal entitlement, insufficiency of explanation of the basis of the claim, insufficiency of evidence, a failure to establish an entitlement in the amount claimed or some other basis) does not detract from the proposition that the issue he determined was Stowe's entitlement to an interim progress payment in the amounts claimed by it, save for claims that were withdrawn.

(d) The principle of issue estoppel discussed in the majority judgment in *Dualcorp* applies when the previous adjudicator does not allow a claim for want of evidence.[47]

(e) The principle of issue estoppel applies when the previous adjudicator determines that an entitlement to be paid has not been made out for one or more of a variety of reasons that include:

(i) there is no entitlement

(ii) the claimed entitlement is not made out because the basis for it is not demonstrated, or there is insufficiency of proof as to entitlement, valuation or both.

The re-agitated claims and the adjudicator's determination

[33] As previously noted, Stowe submits that the adjudicator, Mr Smithies, did not determine its entitlement and did not value it. AE submits that the adjudicator determined that Stowe had no entitlement to payment for each of the re-agitated claims on one of the following bases:

---

45 *Watpac* at [94]-[104]
46 Ibid at [113]-[118].
47 *Dualcorp* at [71].

(a) there was no contractual entitlement to support the claim;

(b) Stowe had not sufficiently outlined or identified the basis upon which the claim was made so as to make out an entitlement;

(c) there was insufficient evidence or substantiating documentation provided to make a conclusion either as to entitlement or value of the work claimed.

[34] Each party included in its submissions a table of the contested items along with a summary or extract from the decision of the adjudicator in respect of each item. This schedule also identified each party's contention as to whether the adjudicator determined the claimed entitlement.

[35] The adjudicator's decision must be viewed in the context of the claim being adjudicated and the parties' contentions to the adjudicator, rather than in isolation. Given the scheme of the Act and the time constraints under which an adjudicator must operate, the decision of an adjudicator in respect of each item in contention may be expressed in a short form. For present purposes, the issue is whether the adjudicator determined Stowe's claimed entitlement to payment of the amounts claimed. Regard must be had to his reasons for deciding whether or not each claimed amount should be paid. The decision to not accept a claimed amount in respect of an item may be for a variety of possible reasons. It may be due to a finding that no entitlement exists as a matter of construction of the contract and, accordingly, the claimant has not made out any legal entitlement to it. The claimed amount might not be accepted on "the basis that (the adjudicator) had insufficient evidence to accept the claim". [48] There may be other reasons. Where, however, an adjudicator rejects a claim for want of evidence, he or she has determined for the purposes of the adjudication that the claimed amount is not payable. Such a determination attracts the principles of issue estoppel.

[36] In very general terms, the adjudicator, Mr Smithies, decided each re-agitated item against the background of a previous adjudicator's determination that decided issues in connection with the valuation of variations. Mr Smithies proceeded to make determinations having regard to:

- an unvalued variation in the previous adjudication (VQ-E-027);
- those aspects of VQ-E-100 and VQ-E-101 that related to work that had not been previously claimed or adjudicated;
- newly claimed variations (that included VQ-E-057 and VQ-E-064).

---

[48] *Dualcorp* (supra) at [35].

The earlier adjudicator, Mr Wallace, determined, contrary to Stowe's submissions, that certain conditions of contract governed the valuation of variations. Stowe continued to contend to the contrary, but Mr Smithies saw no reason to "vary the decision made by Adjudicator Wallace that the Claimant is bound by the Respondent's contract terms".[49] I make no comment about Stowe's attempt to re-agitate issues of contractual interpretation before Mr Smithies that were determined against it by Mr Wallace. It is sufficient for present purposes to note that Mr Smithies adopted the same interpretation of the application of contractual terms to the valuation of variations. I shall deal in turn with each re-agitated claim that is the subject of the current application.

VQ-E-027

[37] Stowe had previously claimed VQ-E-027 in an earlier payment claim which was referred to Mr Wallace to adjudicate. The matter in contest was a reduction of the contract amount by $32,317.90 (plus GST) to reflect work deleted from the contract. Mr Wallace did not value this variation because of insufficient information.[50] In his determination of VQ-E-027 Mr Smithies stated:

> "Based on the information before me, I am not satisfied that the claimant has presented any further information to support its entitlement to the claimed amount. Accordingly I will (not) value this claim."

Stowe submits that Mr Smithies did not value the claim, but merely stated that he had not been provided with sufficient detail to support the claimed entitlement and that Stowe's entitlement is a matter that can be determined by a subsequent adjudicator. I do not accept this submission. The adjudicator determined the question of Stowe's entitlement to the claimed amount and effectively determined that the entitlement claimed was not proved due to the absence of any further information. In circumstances in which the adjudicator determined that the claimed entitlement was not proved, the principles of issue estoppel preclude re-agitation of the claim.

VQ-E-064

[38] This item related to a claim for additional hours due to completion delay and lost productivity on certain works. The dispute in relation to this item included a contention that Stowe had not complied with relevant clauses of the contract, that there was insufficient information and no supporting documentation and that administration and management costs had been claimed when they were

---

49 Adjudication Decision 1 March 2010 pp11-12; pp 304-305 of the Exhibits to the first affidavit of Mr Caldow filed 23 April 2010 (Court File Index 3).

50 Adjudication Decision 25 August 2009 p 44; pp 393 of the Exhibits to the first affidavit of Mr Caldow filed 23 April 2010 (Court File Index 3)

incorporated in the applicable rate. The adjudicator's decision includes the following:

> "The Claimant submits that the respondent's only reasons for withholding payment is failure to comply with contract provisions and lack of substantiation (10)(tt) and Attachment 45 of application)
>
> I have reviewed the Claimant and Respondent's documentation in Attachment 45 and on balance consider that the Claimant has grounds for a variation claim. However, I agree with the Respondent that the Claimant has not provided sufficient supporting information to substantiate the hours claimed in Item 1 to 4 of the variation. As previously decide (sic) the Claimant is not entitled to claim Item 4 Administration and Management. Accordingly, I will not value this variation."

I interpret the adjudicator's decision as involving a conclusion that, contrary to AE's submissions, Stowe had an entitlement to make claims in respect of parts 1, 2 and 3 of this item, but that it had not provided sufficient supporting information to substantiate the hours claimed in respect of all four items. In addition, the adjudicator found that Stowe was not entitled to claim Item 4. In short the adjudicator determined both questions of entitlement and quantification. Stowe is precluded from re-agitating these claims.

VQ-E-100 (Items 2, 4, 5, 6, 8 and 10) and VQ-E-101 (Items 2, 4, 5, 6, 8 and 10)

[39] The claims for VQ-E-100 and VQ-E-101 were essentially parallel claims in relation to I & C cable variations and LV cable variations respectively. For present purposes they may be taken together because the contentions about each item in dispute and the adjudicator's reasons are the same in respect of VQ-E-100 as the comparable item in VQ-E-101. I shall not set out the terms of the adjudicator's decision in relation to each item. The adjudicator stated in one instance that he was "not convinced that the Claimant has demonstrated an entitlement for [the item] as claimed". In another instance, he stated that, on the information before him, he was not satisfied that Stowe had demonstrated an entitlement to be paid the additional amount. In other instances he stated that the claimant had not adequately explained the claim and therefore demonstrated its entitlement to be paid the item. In one way or another the adjudicator expressed the conclusion that Stowe had not demonstrated an entitlement to the claimed amount.

[40] For example, Item 2 related to additional hours for EWP & Pit Spotters. Apart from submitting that this item related to work valued by Adjudicator Wallace, AE submitted to the adjudicator that the "agreed rate" for cable installation was an all inclusive rate that included the provision of all direct and indirect labour including EWP Spotters and Cable Pit Spotters. Mr Smithies' determination stated:

> "The Claimant does not agree that the rate for cable installation was an all inclusive rate which included EWP Spotters and Cable Pit Spotters. The Claimant also does not agree with the Respondent that it is not entitled to claim additional amounts for this item ((ddd) pages 26 to 27 of application)
>
> On the information before me, I am not convinced that the Claimant has demonstrated an entitlement for the EWP Spotters & Pit Spotters as claimed. Accordingly, I will not value this item."

[41] Item 4 (Effect of Changes-Management Planning) related to a dispute about whether management time consumed in respect of a vast number of changes was included in an agreed rate. Stowe contended that the agreed rate was for management of individuals and not the management described in its variation submission. After summarising the competing contentions, the adjudicator concluded:

> "On the information before me, I am not satisfied that the Claimant has demonstrated an entitlement to be paid an additional amount for management planning. Accordingly, I will not value this item."

Item 5 was a similar dispute in relation to additional accommodation and meals for management. The same determination was reached in respect of this claim.

[42] Item 6 (Effect of Changes on Stowe Trades Labour Planning) was disputed by AE for reasons that the adjudicator summarised as a contention that Stowe had not provided any explanation or substantiation of this item and had not demonstrated an entitlement to payment. The adjudicator's decision on this item was:

> "I have reviewed the Claimant's adjudication application submission ((hhh) pages 27-30 of application) and the variation submission dated 17 December 2009 and I am not convinced that the Claimant has adequately explained the claim and therefore demonstrated its entitlement to be paid for item 6. Accordingly, I will not value this item."

[43] Item 8 was described as "Lost time/AEE Condamine factor". AE's contention was that Stowe had not explained the meaning of the item, and it also submitted that Stowe had not substantiated the claim or complied with certain contractual requirements. The adjudicator stated in his decision:

> "I am not convinced that the Claimant has adequately explained the claim and therefore demonstrated its entitlement to be paid for Item 8."

[44] Item 10 (Assessment of Termination Schedules Prepared by AEE) involved a number of contentions, including AE's contention that the agreed rates included a rate for costs associated with installing cable terminations, including assessing cable schedules. Stowe submitted that the assessment and production of cable termination schedules did not form part of the agreed unit rate as it was an engineering and drafting function. The adjudicator concluded:

> "On the information before me, I am not convinced that the Claimant has adequately explained its claim and therefore demonstrated its entitlement to be paid for item 10, particularly when the Respondent says that the Claimant has already been compensated for this work. Accordingly, I will not value this item."

[45] As to each of the re-agitated claims, Stowe's position is that the adjudicator "did not determine that Stowe had no entitlement to the items and did not value the items". It may be correct that the adjudicator did not determine that Stowe had "no entitlement", as he might have if he had concluded that there was no legal basis for the claim. However, the adjudicator did determine the claimed entitlement. He determined that Stowe had not proven its entitlement. The various claims failed for want of proof.

[46] Having tried and failed to establish before the adjudicator an entitlement to the amount claimed, Stowe should not be permitted to resubmit the same claim. The fact that the adjudicator routinely concluded each determination with the words "I will not value this claim" or "I will not value this item" is beside the point. These words appeared because the adjudicator reached the determination that Stowe had not demonstrated an entitlement to the amount claimed, either because it had not demonstrated an entitlement or because there was insufficient supporting documentation to enable the adjudicator to value the claimed entitlement.

[47] AE has established that the doctrine of issue estoppel as it applies in the context of the Act prevents Stowe from re-agitating the claims and items that are the subject of this application by having them made the subject of an adjudication application under s 21 of the Act.

Abuse of process

[48] If it had been necessary to do so, I would have found that the service of an adjudication application in respect of the claims described in paragraph 1 of the originating application ("the re-agitated claims") would an abuse of process in the circumstances. The first of these circumstances is that there is an issue estoppel, so that an adjudication application was "foredoomed to fail" in respect of the re-agitated claims. The second circumstance is that Stowe seems to be doing no more than seeking from another adjudication a better result than it got from Mr Smithies. For the reasons given in *Dualcorp* and authorities that have

followed it, re-agitation of the same issue before another adjudicator in an attempt to obtain a different determination of the same issue is precluded by the Act. Such a re-agitation would constitute an abuse of the processes created by the Act for the speedy determination of claimed entitlements to progress payments. Respondents to payment claims must deal with them within the time allowed in the Act. They should not be vexed by repetitious claims for items that an adjudicator has determined were not made out. Such a course is precluded by the Act.

[49] The Act does not permit Stowe to seek a further adjudication of items that Mr Smithies adjudicated and found were not established. To seek such a benefit is to seek an advantage that the law does not provide, and to apply for a further adjudication of the same items would be an abuse of process. AE should not have to devote time and costs to responding to those repetitious claims.

Conclusion

[50] Claims for the same items in the same amount have been resubmitted in circumstances in which there has been no ongoing work or change in the value of the work. The claims have been the subject of a previous adjudication in which the claims were not accepted for reasons that included a want of evidence. AE has established an entitlement to relief on the basis of issue estoppel.

Relief

[51] AE has established an entitlement to an order that Stowe be restrained from making an adjudication application under s 21 of the Act in respect of the claims described in paragraph 1 of the originating application as the Adjudicated Claims.

[52] Stowe raised no issue about the jurisdiction of the Court to restrain it from making such an application, or that it was inappropriate to make such an order if AE established that an issue estoppel arose. I consider that a restraining order is appropriate having regard to the reasons given by Rein J in *Perform*[51] and McDougall J in *Urban Traders*.[52] These may be summarised as follows:

(1) A subsequent payment claim seeking to re-agitate matters determined in an earlier adjudication "is not… within the intent of the Act" and "is not… permitted by the Act", and hence is not a payment claim for the purposes of the Act;

---

51 Supra at [47].

52 Supra at [28].

(2) The remedy for abuse of process or issue estoppel is to apply for a dismissal or permanent stay of the proceedings, and there is no mechanism for such an application before an adjudicator.

(3) The continuation of the claim or proceedings is the very matter which the party asserts is the abuse. It is required to expend time and money and "is vexed" with a fresh process when it ought not to be. Therefore it is no answer to say that the respondent can raise the issue estoppel before the adjudicator, because requiring, or leaving, the respondent to do that is the very abuse that ought to be restrained.

(4) The Act is intended to provide a means of speedy determination of claims for payment to be made on an interim basis not to burden the parties to a construction contract with a prolonged, repetitious quasi-litigious process.

(5) A determination under the Act is a means of enforcing an interim payment. A party that is unsuccessful before the adjudicator has rights and remedies at law.[53]

[53] In the circumstances of this matter, AE should not have to incur the costs associated with arguing before an adjudicator that he or she has no jurisdiction to determine the re-agitated claims. This is not a matter, unlike others, in which a party should await the adjudicator's decision rather than ask the Court to intervene in a pending adjudication.[54]

[54] The April 2010 Claim included other items that were withdrawn rather than adjudicated by Mr Smithies. Payment of certain amounts was the subject of an undertaking given by AE on 27 April 2010, and it is inappropriate to make a declaration of invalidity in respect of the April 2010 Claim, at least in respect of items in it that are severable and not submitted to be invalid claims or the subject of issue estoppel.

[55] Subject to hearing the parties as to the terms of the orders to be made, and on the question of costs, the orders will be:

(1) The respondent be restrained from serving or causing others to serve an adjudication application that seeks adjudication of claims VQ-E-027, VQ-E-064, and items 2, 4, 5, 6, 8 and 10 of both VQ-E-100 and VQ-E-101 in the payment claim dated 12 April 2010 referred to in paragraph 1 of the Originating Application.

(2) The respondent pay the applicant's of and incidental to the application to be assessed.

---

53 See s 100 of the Act.

54 Cf *Securecorp Pty Ltd v Civil Mining & Engineering Construction Pty Ltd* [2009] QSC 249 at [15] and the authorities cited therein.