

# ADJUDICATION UNDER THE SOP LEGISLATION – DO CLAIMANTS ONLY HAVE ONE CHANCE?

The Court of Appeal's decision in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 in April this year sent out a clear warning to claimants under the *Building and Construction Security of Payments Act 1999 NSW* ("the Act") that it would in most cases be futile for claimants to lodge a subsequent payment claim under the Act which is the same in content as a prior payment claim which has already been adjudicated.

Since then the Supreme Court of New South Wales has handed down two further decisions which follow *Dualcorp* and perhaps go beyond it: *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd trading as Novatec Construction Systems* [2009] NSWSC 416 and *The University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635. We shall set out the facts and principles emerging from those

decisions together with *Dualcorp* in this article and discuss the various possible answers to a question that claimants often ask "do I only have one chance?"

the 4 invoices.

The claimant being dissatisfied with the above result, lodged a second payment claim under the Act comprising of the same 6



## A. The principles in *Dualcorp*

Let us first look at the facts and principles in *Dualcorp* which we did not have the opportunity to fully set out in our last newsletter.

The claimant (subcontractor) in *Dualcorp* made a claim under the Act in respect of 6 invoices and subsequently sought adjudication of 4 of them (the other 2 had been conceded by the respondent). An adjudication determination in respect of that claim was handed down awarding \$75,509.43 to the claimant, much less than the total claimed amount of \$659,619.65 of

invoices, more than one month after the first payment claim was lodged. The respondent (head contractor) did not issue a payment schedule under the Act to respond to the second payment claim. The claimant then sought judgment in the District Court of New South Wales for the amount claimed in the second payment claim pursuant to s.15 of the Act. The District Court declined to enter judgment in the full amount claimed by the claimant on the basis that the second claim involved repetitious use of the Act which is impermissible. The claimant appealed to the Court of Appeal.

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The majority in the Court of Appeal (Macfarlan JA with whom Handley AJA agreed) dismissed the appeal and held that the legal principles of issue estoppel were applicable given the overall intention of the Act. The principles of issue estoppel apply when the same issue has been earlier determined as is later sought to be re-agitated. The Court of Appeal was of the view that the merits of the first payment claim were already determined in the earlier adjudication determination and so the claimant was estopped from relying on the second payment claim which was the same in content and concerned the same work as the first for the purpose of obtaining judgment pursuant to the Act. The majority was of the view that in seeking to obtain such judgment, the claimant relied on a basis which conflicts with issues resolved in the earlier determination.

of adjudication, are preserved.

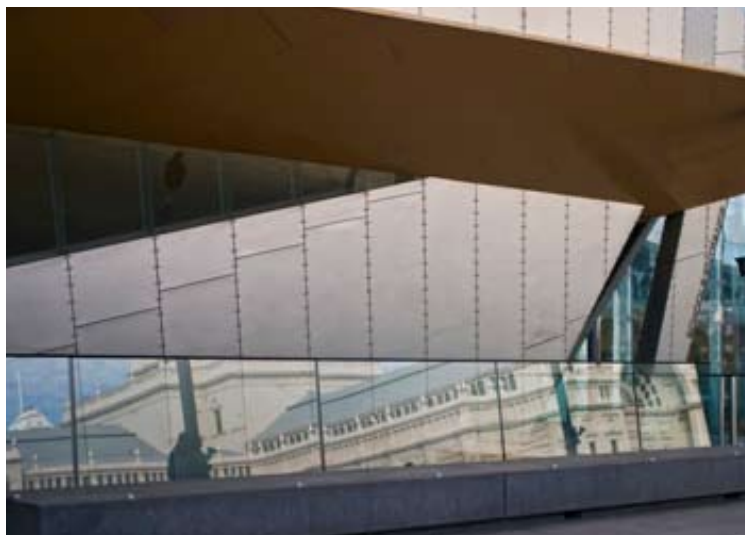
It is worth noting that according to the majority's view there may be very limited circumstances where a second progress claim which is the same as a prior adjudicated claim may validly give rise to a second

*a progress claim were rejected by an adjudicator because it was premature by reason of the date stipulated for payment by the contract, a later claim made on a timely basis would not be precluded...."*

It seems to follow from the above that in each case in determining whether the claimant is estopped from relying on a second claim, a Court will have to ascertain the answers to the following two questions:

- 1) what issues have been determined in the first adjudication determination? and
- 2) are any or all of the above identified issues being sought to be re-agitated by the claimant through a second payment claim in the same content as the first?

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Without deciding on the topic, the majority indicated that the principles of abuse of process were probably applicable - in addition to the principles of issue estoppel.

Furthermore the majority noted that the estoppel is confined to a claimant's rights as to progress payments. The claimant's rights to put its case in pursuit of a contractual claim in a Court of competent jurisdiction, not by way

adjudication, these circumstances are where the issues sought to be determined with respect of the second claim have **not** been earlier determined. The majority gave an example at paragraph 69:

*"As pointed out in Kuligowski, for the principle of issue estoppel to apply, the same issue must have been earlier determined as is later sought to be re-agitated (at [40]). Thus, if*

Therefore adopting the majority's view in answering our question of "do claimants only have one chance?", the answer may be said to be "**claimants only have one chance to seek the determination of the same issues arising from a payment claim in the adjudication process under the Act**".

Allsop P while agreeing with the majority as to the interpretation of the intention of the Act, took a

different approach to the majority in dismissing the claimant's appeal: His Honour held that because the second claim is the same in content and for the same completed work as the first, the second payment claim was in effect made in respect of the same reference date as the first claim (even though it was made later in time by more than 1 month). As the Act prohibits lodging more than one payment claim with respect to the same reference date, Allsop P held that the claimant's second payment claim was invalid in the first place and hence incapable of being relied upon for enforcement or a second adjudication. [Detailed

discussion of the law on reference dates under the Act can be found in our last newsletter.]

Adopting this minority view, the answer to our question may be stated as **“claimants only have one chance under the Act to lodge the same payment claim with respect to the same work.”**

In another words, this minority view means that a second claim which is the same as the first and for the same completed work as the first claim is invalid (provided that the first claim was valid), irrespective of whether the first claim has been subject to adjudication. Hence under this view it does not matter what issues have been determined

in a prior adjudication and whether these issues have now been sought to be re-agitated.

Following *Dualcorp*, the claimant in *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd trading as Novatec Construction Systems* [2009] NSWSC 416 was in a



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similar situation to the claimant in *Dualcorp* and it sought to argue that *Dualcorp* did not apply alleging that the second claim was not the same as the first and that the same issues were not being sought to be re-agitated. The above arguments, if successful, would mean that neither the majority view nor the minority view in *Dualcorp* could prevent the claimant from

adjudicating the second payment claim. We shall proceed to discuss that case below.

### **B. *Perform v Mev-aus* : Application of *Dualcorp* or going beyond *Dualcorp*?**

In *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd*, the claimant (a formwork materials supplier) served a payment claim under the Act on the respondent (a formwork contractor) in July 2008 and an adjudication determination in respect of that claim was made in the amount of \$nil. The claimant then served a second claim in relation

to the same work as the first in May 2009. The respondent sought to restrain the claimant from lodging an adjudication application with respect to the second claim. The respondent argued that the claimant having lodged a claim and having had it adjudicated cannot lodge the further claim in respect of the same matters.

The claimant first argued that the first and second claim, although overlapping, were not identical in content and form. The second claim is for a less claimed amount, framed in a different way and the indexes and enumeration of the claim have been reordered.

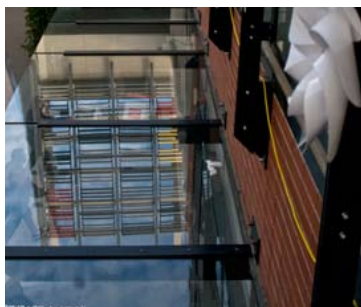
Rein J. held that despite the above, the second claim covered the *same items* as dealt with by the adjudication of the first claim and hence was capable of attracting the application of the principles in *Dualcorp*. In so deciding, emphasis was placed on the fact that no items have been identified as new in the second claim.



The above indicates that while in *Dualcorp* the two claims were i) the same and ii) with respect of the same work, the application of the principles in *Dualcorp* is now extended to factual circumstances where two claims are **not** the same in content but are simply with respect to the same work. This view may be said to be consistent with the majority's view in *Dualcorp* that what matters is not whether the claims are the same, but is whether issues already determined are being sought to be re-agitated. However, it may also be seen as expanding the minority view in *Dualcorp* which we shall discuss a little further below.

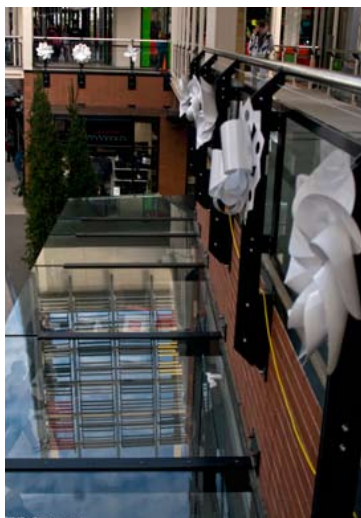


The claimant proceeded to argue that the first adjudication determination did not decide on the issue of the value of work but only determined that the claimant had not made out a claim for a progress payment by their evidence. Hence it was argued that the issue of the value of work may be agitated by way of a second payment claim put forward based on a new approach to the contract previously not advanced.



Rein J. rejected the above argument, His Honour stated at paragraph 38:

“... [the adjudicator] determined,



*for the purposes of the Act only, that Mev was not entitled to any payment in respect of the invoices previously rendered. What Mev seeks to do, apart from re-agitating the construction issue that was determined adversely to it by the adjudicator, is to make minor alterations to the amounts claimed, present an alternative basis to its claim, and bring another claim over the same subject matter of the first claim when no further work or services have been rendered or goods supplied between the date of the first claim and the second. ...” [emphasis added]*

As mentioned above in section A of this article, adopting the majority's view in *Dualcorp* the first question to be determined is: what issues have been decided in the first adjudication determination? The interpretation of Rein J. seems to be a wide interpretation of the scope of the issues covered by an adjudicator's determination. Hence under this view the scope of the issues left able to be agitated by the claimants in a following claim, if it exists at all, is very limited.

Rein J. went on to hold that the majority's view *Dualcorp* applied.

As a further ground for a finding against the claimant, Rein J held that he also agreed with Allsop P's view in *Dualcorp* and in that regard interpreted Allsop's view as “the Act permits only one payment claim to be made in respect of the same work, services or goods supplied.” (at para. 42). In another words, under this interpretation

**claimants only have one chance under the Act to lodge a payment claim in respect of the same work.**

The above interpretation may significantly restrain a claimant's rights under the Act: if a claimant lodges a payment claim under the Act in respect of some particular work and the claimant does not apply to adjudicate that payment claim within the statutory limitation period, the claimant would have forever lost the opportunity to adjudicate any claims in respect of that particular work, because the claimant cannot lodge a second or further payment claims in respect of the same work irrespective of whether the second claim is the same as the first.

With respect, whether the above is a correct interpretation of Allsop P's view in *Dualcorp* may be called in question given the policy behind the Second Reading Speech in Parliament on its inception. As discussed above, adopting a relatively narrow interpretation, Allsop P in *Dualcorp* seems to have based his view on two essential features: 1) that the second claim is "*the same claim*" as the first and 2) that the second claim is for "*the same completed works*" as the first. With respect, it seems that the requirement of the first factual circumstance on which Allsop P's view was based was ignored by Rein J.

Further the above interpretation seems to be at odds with the majority's view in *Dualcorp*. As already mentioned above, according to the majority in *Dualcorp*, a claimant is only estopped from relying on a second payment claim to seek a re-

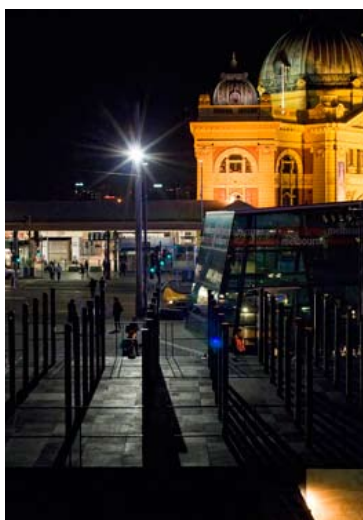
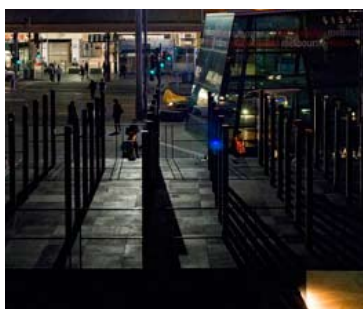


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**agitation of issues** already determined in an adjudication determination, but a claimant is **not** precluded from making more than one payment claims in respect of the same work, services or goods supplied, as long as the issues that those claims raise have not been already determined in an adjudication determination.

Lastly the Act appears to permit the inclusion of an amount for the same work, services or goods supplied in a subsequent payment claim on a subsequent reference date, see s.13(6). To say that the Act permits only one claim in respect of the same work seems to be inconsistent with this subsection of the Act.

Overall *Perform(NSW)* seems to have been decided against the claimant on two bases: that the second claim does not contain new items to the first and that the second claim raises the same issues that have been determined. What if a second claim, which incorporates the first claim, contains new items and raises new issues? The most recent decision in the Supreme Court on this issue in *The University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635 gives us the answer.

**C. New items and new issues may still be insufficient - *The University of Sydney v Cadence Australia***

In *The University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635, the claimant (consultant) served a payment claim

under the Act on the respondent (principal) on 18 December 2008 for a total of \$525,344 of which \$266,390 was for delay costs. The matter proceeded to adjudication and the adjudicator handed down a determination with a \$nil award to the claimant.

The claimant then on 31 May 2009 served a second payment claim under the Act for \$515,317 of which \$468,470 were delay costs (the balance being for variations). Delay costs claimed in the first claim were in the second and the second claim claimed for longer periods of delay and hence a higher quantum. Furthermore the second claim included delay costs for one additional project which the first claim did not cover.

On 18 June 2009 the claimant made a second adjudication application with respect of the second claim. The respondent immediately commenced proceedings in the Supreme Court seeking an order that the second adjudication application be withdrawn together with an injunction that the claimant be restrained from seeking such adjudication permanently.

The following arguments submitted by the claimant before Hammerschlag J. are relevant to our discussion:

- 1) that the majority's view in *Dualcorp* on issue estoppel is *obiter dictum* and the Court is not bound to follow it;



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- 2) that the issue determined in the first adjudication was simply whether there was sufficient evidence to support the delay claim in the first claim, not whether the claimant had a claim for the delay costs in question;
- 3) that this case is distinguishable from *Dualcorp* because the two claims are not identical and there are new issues raised in the second claim: to the extent that there is an overlap between the first and second claim, s.22(4) of the Act applies so that the second adjudicator is bound to follow the previous adjudicator's valuation, but is free to determine the issues raised only in the second claim for the first time;

Hammerschlag J recognised (at paragraph 4) that this case is “a little different” to *Dualcorp* and *Perform(NSW)* because the second claim is an expanded version of the first claim. However, His Honour rejected the above arguments with the exception of (2).

As to (1), His Honour expressed his “significant doubt” (at paragraph 46) that the majority's view in *Dualcorp* was *obiter* and suggested that the majority decided *Dualcorp* based on the principle of issue estoppel.

As to (2), Hammerschlag J. agreed that the first adjudication determination only established that the claimant had not adduced evidence which made out the first claim and had **not** determined the value of the delay claim.

We note that while this finding seems to differ from Rein J’s finding in *Perform(NSW)* that the adjudication determination in that case had a broader effect of determining that the claimant had no claim under the Act, the practical effects are of no difference because of Hammerschlag J’s views as to the remaining arguments of the claimant.

Hammerschlag J. followed and confirmed the view of the majority in *Dualcorp* that a previous adjudication does not give rise to an issue estoppel which has the broad effect that the claimant does not have a valid claim for delay costs under the contract. If a claimant is dissatisfied with the result of an adjudication determination, it can sue in the ordinary course in a Court and prove its claim there, but it cannot seek a second adjudication on the same issues.

We note here that to sue in the ordinary course in a Court, the claimant is likely to incur much higher legal costs than in adjudication and will likely be tied-up in proceedings which may run for years.

As to (3), Hammerschlag J. held that the claimant was seeking to re-agitate the issues already decided in the first adjudication determination, irrespective of the fact that the second claim provided further evidence, raised new issues and claimed for costs for longer periods of delay. It seems to be of significance to that finding that



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the claimant in the second adjudication application clearly indicated that it wished to re-agitate the issues in the first claim by stating that “claims/details attached as Attachment 4 to the Adjudication Application now provide this information”.

Hammerschlag J. referred to s.13(1) of the Act where the phrase “a payment claim” is used and s.17 which gives a claimant the right to have that particular payment claim adjudicated. His Honour held that the above was an indication that a claimant had only one opportunity to adjudicate a claim and when such opportunity is availed of and complete, the statutory entitlement has been exhausted and to seek re-exercising that statutory entitlement would be an abuse of process.

Under the above view, it seems that it does not matter whether the same issues are being sought to be re-agitated: as long as a claim has been adjudicated, it cannot be adjudicated again even if it has been included as a part of new claim – a departure from the result of *Dualcorp*.

Hammerschlag J. addressed the potential inconsistency of the above view with s.13(6) of the Act by stating at paragraph 54:

“Section 13(6) of the Act does not overcome this problem for the first defendant. The section does not in my view have in contemplation a payment claim for an amount which has previously been claimed and **which has been adjudicated upon and rejected.**”  
[emphasis added]

Hence in this regard His Honour’s view seems to be consistent with the majority in *Dualcorp* that a claimant may lodge subsequent payment claims for the same work as long as the earlier claim(s) has/have not been subject to adjudication, although this may seem inconsistent with His Honour’s view in regards to the interpretation of “a payment claim” in s.13(1) as discussed above.

His Honour further held that s.22(4) of the Act did not apply on the basis of the finding that the previous adjudication did **not** determine the value of the delay cost claim but merely rejected the first claim on the basis that it had not been established on the evidence. We shall discuss the interaction of the case law with s.22(4) of the Act

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in more details in Section D below.

It was further held that although there are new issues raised in the second claim, dealing with a second adjudication application on the second claim would require the adjudicator to reconsider the first claim, hence the claimant is not allowed to have the whole of the second claim including the new items and new issues adjudicated.

The above finding seemed to have been based on the fact that the claimant had not suggested that it was possible or feasible for the adjudicator to deal with only part of the second application.

It seems to be an open question for future cases as to whether the Court would find otherwise if a claimant establishes that the items in the first claim can be severed from the new items in the second claim so that a second adjudicator may consider the new items and new issues without re-considering the issues already determined.

The Court finally indicated that in some cases where there is a duplication of a part but not the whole of an earlier claim, whether the second claim can be allowed is a matter of fact and degree to be determined on a case by case basis.

It must be emphasised that Hammerschlag J indicated that



issue estoppel was probably not applicable in this case (due to the factual finding that the prior adjudicator did not decide the issue of the value of the work) but preferred the suggestion of the majority in *Dualcorp* that the principles of abuse of process applied. His Honour made the finding against the claimant on the basis of abuse of process.

Practically speaking, to the claimant there is little difference which principle applies. The practical outcome of the latest decision - as distinct from *Perform(NSW)* and *Dualcorp* - is that: a subsequent payment claim which includes new items of work and raises new issues compared to an earlier claim (which has been adjudicated) is still capable of being found to be invalid depending on the extent to which it incorporates the same items as the earlier claim.



**D. How does the above interact with s.22(4) of the Act?**

The above decisions seem to be at odds with s.22(4) of the Act which on its face contemplates that the issue of the value of the same construction work **could** be raised repeatedly before multiple adjudicators - but provides that generally works cannot be re-valued, it states the following:

*“If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:*

- (a) the value of any construction work carried out under a construction contract, or*
- (b) the value of any related goods and services supplied under a construction contract,*

*the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and*

*services, to give the work (or the goods and services) **the same value** as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has **changed** since the previous determination.”*  
[emphasis added]

Hence the intention of the Act seems to be that a claimant may validly seek the adjudication of the same work more than once, but doing so would be practically **futile** because the first adjudicator’s valuation of the work is binding on the subsequent adjudicators, unless the value of the work (or the goods and services) has changed since the previous determination. *Dualcorp* and the other decisions effectively promote futility to impossibility.

In *Dualcorp* the majority approved McDougal J’s interpretation of s.22(4) in *Rothnere v Quasar & Ors* [2004] NSWSC 1151 and *John Goss Projects v Leighton Contractors & Anor* [2006] NSWSC 798: s.22(4) only covers the situation where the first adjudicator has actually valued the construction work, it does not cover the case where the first adjudicator has determined the amount of progress payment without reference to the value of the work. The word “if” in s.22(4) is interpreted as an indication that “an adjudication determination need not necessarily include the valuation of

*construction work”.*

At this point it is interesting to note the following situations where the Courts have held that an adjudicator would have determined the amount of progress payment **without** reference to the value of the work:

- a) claims rejected for being invalidly made (e.g. no reference date has yet arisen, non-compliance with s.13(2) of the Act ) [the majority in *Dualcorp* approving McDougal J in *John Goss*];
- b) delay damages and interest or any other amounts, if the relevant provisions in the contract allow them to be claimed as part of progress payment under the contract, are also allowed to be claimed under the Act. [Hodgson J in *Coordinated Construction* at [40]]. Hence in determining those amounts, no reference would have been made to the value of construction work or related goods or services.

Coming back to *Dualcorp*, the majority went on to state that



s.22(4) along with other sections of the Act when read as whole “manifests an intention to preclude re-agitation of the same issues”. On that basis, the majority’s view is that s.22(4) should not be an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator and questions of entitlement may not be reopened once resolved, bearing in mind the expressly stated exception: where the first adjudicator rejects a claim because it is premature, the second adjudication which involves a valid claim is allowed to go ahead.

At this point one would ask why is the above necessary when s.22(4) itself may operate to prevent re-agitation of the issue of valuation in a second adjudication?



In *Dualcorp* the claimant was not seeking a second adjudication: it was seeking the enforcement of a judgment debt arising from a second payment claim (to which no payment schedule

was issued in response) which re-claims the same work already valued. In those factual circumstances a respondent cannot rely on s.22(4) which only applies to adjudication and would have no protection absent the principles in *Dualcorp*. In this regard, it may be said that the majority in *Dualcorp* felt necessary that the intention of s.22(4) and of the Act as a whole be preserved by the application of the principles of issue estoppel.

This is a convenient point for us to discuss McDougall J’s view on the effect of non-compliance of s.22(4) in *Rothnere*. After considering the earlier Court of Appeal authorities *Brodyn Pty Ltd v Davenport* [2004]

NSWCA 394 and *TransGrid v Siemens* [2004] NSWCA 395, McDougall J reached the view that s.22(4) was **not** a basic and essential requirement to the validity of an adjudication determination and so an adjudicator’s failure to comply with s.22(4) could **not** have the effect of invalidating the adjudication determination (unless the adjudicator did not act in good faith or in making the determination denied the claimant natural justice, which is rarely found).

The above means that if a second adjudicator forms **an erroneous view** that he needs not be bound by the valuation of a first adjudicator or that the value of the work has changed and proceeds to re-value the work, the Courts will not set aside a determination made on that erroneous basis. The remedy for a party adversely affected by such determination would be to sue under the contract in the ordinary proceedings and prove the value of the work there, not to commence proceedings for a declaration that the determination is void or an order that the determination be set aside.

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Hence in practical terms a claimant needs to be aware of the following:

- (1) where a claimant seeks to rely on a second payment claim in respect of work that has already been valued by an adjudicator to obtain a judgment under s.15 of the Act (as is the case in *Dualcorp*): after *Dualcorp* it is futile for a claimant to do so because Courts would generally decline to enter such a judgment on the basis that the second claim seeks re-agitation of the same issue which is not allowed. S.22(4) in this scenario does not apply because the claimant is not seeking a second adjudication.
- (2) where a claimant seeks a second adjudication in respect of a second payment claim for work that

has already been valued by a prior adjudicator:

a) prior to *Dualcorp*, the respondent needs to serve a payment schedule as usual in which it has to rely on s.22(4) to argue that the second adjudicator is bound by the first adjudicator's valuation – this may be risky from the point of view of the respondent because a second adjudicator may find, erroneously, that the first adjudicator has not valued the works or that the value of the work has changed since the first adjudication and as discussed above Courts are unwilling to set aside a determination on the basis of such errors;

b) after *Dualcorp*, a respondent may seek an injunction from a Court of competent jurisdiction that the second adjudication be permanently restrained and is able to do so prior or after

the commencement of the second adjudication. Then the Court has to decide the question of whether the first adjudicator has valued the work and with respect, is less likely than an adjudicator to make an erroneous finding. It follows that

if a second adjudication goes ahead and a second determination is made as if the second adjudication is valid, it is likely that a respondent will be able to seek a declaration from a Court that the second determination is void because the second adjudication has been invalidly commenced in the first place.

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Arguably under the above view s.22(4) may still have limited application - it allows re-valuation if “*the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.*” One would immediately question how the value of the work may change for the purpose of s.22(4). The answer seems to be

that the value may change in limited circumstances where the respondent concedes that the value has changed: e.g. *Baseline Constructions Pty Limited v Classic Group Painting Services Pty Limited and Anor* [2006] NSWSC 397. In those circumstances it seems that seeking a second adjudication will not be seeking the re-agitation of the issue of the valuation of the work as unchanged, but seeking the determination of the valuation of the work as changed which is a different issue and which is not prohibited by the majority in *Dualcorp*. Then s.22(4) may apply to allow the second adjudicator to re-value the work.

Hammerschlag J in *University of Sydney* addresses a different scenario

to *Dualcorp* where the issue of value of work was found to have **not** been decided by a prior adjudicator. S.22(4) of the Act and the majority in *Dualcorp* would suggest that in such situation the claimant would **not** be estopped

from seeking a second adjudication to have the work valued. However, as discussed above Hammerschlag J nevertheless applied the principles of abuse of process to invalidate the second adjudication application on the basis that the claimant had utilized its one and only opportunity to adjudicate a claim.



With respect, whether the above result is consistent with the intention of the Act is questionable. As discussed above, s.22(4) clearly allows re-valuation by a second adjudicator where the value of work has changed. Hammerschlag J's view would likely mean that such re-valuation is impossible: where a second adjudication with respect to the same work is invalid

in the first place, there can never be a valid second adjudication which requires a second adjudicator to follow the valuation of a first adjudicator or to revalue when the value has changed.

When we consider the view of Rein J. in *Perform(NSW)* which may be said to be a more liberal view compared to that of Allsop P's in *Dualcorp*, it has the same effect as Hammerschlag J's view except that the invalidity lies within the payment claim: where a second payment claim with respect to the same work is invalid in the first place, there can never be



a valid second adjudication which requires a second adjudicator to follow the valuation of a first adjudicator or to revalue when the value has changed.

It may be that the legislature should now seek to preserve the meaning of s.22(4) by introducing an Amendment Act adding a paragraph to s.22(4) to the following effect: *“A claimant may lodge a payment claim with respect to the same work as included in an earlier payment claim on and from any reference date subsequent to the reference date to which the earlier claim relates and may apply for an adjudication of the subsequent payment claim.”*

### **E. Concluding from the above - what should the claimants do?**

Overall the answer to our question based on the three decisions above may be stated in short as: “claimants only have one chance to **adjudicate** with respect to any particular **issue**” (the majority in *Dualcorp*); Hammerschlag J's view seems to be “claimants only have one chance to **adjudicate** with respect to any particular **work**”; while Rein J and Allsop P suggests an alternative view that “claimants only have one chance to **claim** any particular **work**”;

Hence claimants must prepare their payment claims and adjudication applications with the greatest degree of care and as before with the assistance of legal professionals to ensure that they obtain the best possible outcome in their only chance to adjudicate.

It is notable that neither of the writers of the judgments in *Dualcorp* had previously decided security of payment cases before 2009 and that the effect of these strictures is to convey upon manifestly interim decisions all the fixity and consequences of a High Court judgment that special leave not be granted for an appeal. The terms “injunction” and “depends on the circumstances of the case” could stultify the SoP regime, because courts bog down in discretions. It seems that the Act has been judicially neutered as effectively as the SoP regime in W.A. in being everything to everyone has become utterly neglected by the constituency for which it was established.

