

Dualcorp extended: new authority on reagitated claims AE&E Australia P/L v Stowe Australia P/L [2010] QSC 135

Summary

On 4 May 2010, CBP were successful in Supreme Court proceedings to restrain an adjudication application from being served on a client even though the application would have related only to:

- claims that had never been valued in a prior adjudication; and
- claims that had never been the subject of a prior adjudication.

Consequently, respondents should now carefully review payment claims to determine whether there has been any attempt to reagitate claims which have previously been adjudicated upon but not been valued in the adjudication (whether because of insufficient explanation, evidence, basis of contractual entitlement or for some other reason).

Conversely, claimants would be wise to carefully review their payment claim process to enhance the quality of their submissions and minimise the risk that an adjudicator may decide he or she is unable to value a claim.

Act

The case concerned payment claims made under the *Building and Construction Industry Payments Act 2004* (Qld) (**Act**).

The Court considered that the Act is practically identical to the *Building and Construction Industry Security of Payment Act 1999* (NSW). Accordingly the case is of significance in both NSW and Queensland.

Facts

On 12 April 2010, Stowe served a payment claim on AE&E under the Act. The claim sought about \$2.6M, of which about \$2.5M related to variations which had been included in a previous adjudication application but not valued by the adjudicator (**Reagitated Variations**). Specifically, in the previous adjudication, the adjudicator:

- considered each Reagitated Variation;
- determined either that:
 - Stowe had not demonstrated an entitlement to be paid an amount in relation to each Reagitated Variation (because of insufficient explanation or a lack of contractual basis); or
 - Stowe had grounds for a claim but had provided insufficient supporting documentation to enable the adjudicator to value the claimed entitlement; and
- refused to value each Reagitated Variation.

Submissions

AE&E sought to injunct Stowe from serving any adjudication application in relation to the Reagitated Variations on the basis that its entitlement to those variations had already been determined in an adjudication and accordingly, it should be prevented from re-adjudicating them because of the legal principles of:

- "issue estoppel" (the legal doctrine that operates to prevent a party arguing matters that were raised and decided in prior proceedings);
- "*Anshun* estoppel" (an extended form of issue estoppel that operates to prevent a party arguing matters that were not raised in prior proceedings but which could and should have been raised); and
- "abuse of process" (the legal doctrine that operates to prevent a party from engaging an improper procedure and misusing statutory processes).

AE&E submitted that these principles were applicable for the reasons expressed the *Dualcorp* line of authority.

Stowe argued that the Reagitated Variations had not been valued and had not been the subject of a previous adjudication decision and accordingly, for reasons expressed in *Urban Traders* and *Watpac*, could validly be included in a payment claim and submitted to adjudication under the Act.

Decision

The Court accepted the submissions made on behalf of AE&E and granted it an injunction with costs.

Significant findings of the Court include:

- issue estoppel, *Anshun* estoppel and abuse of process operate to preclude a claimant from making an adjudication application in relation to claims where a previous adjudicator has determined that an entitlement to be paid has not been made out for one or more of a variety of reasons that include:
 - the basis for entitlement was not demonstrated;
 - there was a want of evidence; or
 - there was insufficiency of proof as to entitlement, valuation or both; and
- in such circumstances, an injunction restraining the adjudication is an appropriate remedy since:
 - a subsequent payment claim seeking to re-agitate matters determined in an earlier adjudication is not within the intent of the Act or permitted by the Act, and hence is not a payment claim for the purposes of the Act;
 - the remedy for an abuse of process or issue estoppel is a dismissal or permanent stay of the proceedings, and there is no mechanism for such an application before an adjudicator;

- where a party is vexed with a claim when it ought not to be and would therefore be required to expend time and money dealing with it, it is no answer to say that the party can raise the issue estoppel before the adjudicator, because requiring, or leaving, the party to do that is the very abuse that ought to be restrained; and
- 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.

Significance of case

This is the first case in Queensland in which the *Dualcorp* line of authority has been applied to restrain the re-adjudication of a payment claim. Accordingly, in one sense this case is Queensland's equivalent of *Dualcorp*. The case is all the more significant, given that a previous attempt to rely upon *Dualcorp* in Queensland was unsuccessful.

This is also the first case in Queensland in which the re-adjudication of a payment claim was restrained prior to a decision being issued by an adjudicator. Accordingly, in one sense this case is Queensland's equivalent of *Perform*. Prior to this case, applications in Queensland were made after a decision was issued, and attempts to restrain the re-adjudication of a payment claim prior to a decision

being issued by an adjudicator were unsuccessful and the subject of judicial disapproval.

This case goes further than *Perform*, however, because, rather than receiving an adjudication application and restraining the appointment of an adjudicator, AE&E were successful in restraining service of an adjudication application (on both an interim and final basis). This is significant, because it means that AE&E never received an adjudication application in relation to the Reagitated Claims and thus never expended time and cost preparing an adjudication response as a precaution against the Court not granting the orders it sought. It also means that AE&E should not receive an adjudication application in future in relation to the Re-agitated Claims. The time and cost savings associated with the timing of the application are therefore particularly noteworthy.

This is also the first case in which a Court was asked to determine whether a decision had been made by an adjudicator, sufficient to enliven principles of issue estoppel and abuse of process, in circumstances where an adjudicator expressly stated "I will not value this claim" and even "I consider that the claimant has grounds for a variation claim". The Court found that estoppel was enlivened in such circumstances where an adjudicator also found that the claimant had not substantiated the value of the claim or demonstrated an entitlement to the claim. The case is therefore important as an extension and clarification of the *Dualcorp* line of authority.

The case is also significant insofar as AE&E obtained broader interim orders than we have previously seen in such cases, including an order that the claimant write to any authorised nominating authority to which it makes an adjudication application informing it that the Claim is the subject of proceedings, that the claimant has been restrained from serving any adjudication application in relation to the Claim, and that it should not take any steps to serve or issue any adjudication application or appoint an adjudicator until further order.

Having regard to the similarities between the Act and its NSW equivalent, it is likely that the case will be relevant to respondents who find themselves in a similar situation whether in Queensland or in NSW.

Enquiries in relation to this decision or any other matters relating to reagitated claims should be directed to Nick Crennan, Alex Ostermayer or Julian Mellick.

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