



**Urban Traders v Paul Michael [2009] NSWSC 1072
New South Wales Supreme Court 15 October 2009**

FACTS:

Urban Traders (the Plaintiff) was the proprietor of a property in Bayview, New South Wales, and had engaged Paul Michael (the Defendant) to undertake certain construction work on that property.

During the construction work the Defendant served a statutory payment claim (no.18) (pursuant to the *Building and Construction Industry Security of Payment Act (NSW) 1999*) (“the Act”) on the Plaintiff, and succeeded at adjudication of that payment claim. The Plaintiff failed to pay the adjudicated amount, so the Defendant was entitled to enter judgement in the District Court of New South Wales on the basis of that adjudication but it did not do so.

The Defendant subsequently served further statutory payment claims (no. 19 and no. 20) pursuant to the Act. There was some overlap between the amount claimed in payment claim no. 20 and the amounts claimed in payment claims no. 18 and no. 19.

The Defendant then served an further payment claim (no. 21), with yet still some overlap with the preceding payment claims (18, 19 and 20). The Plaintiff continually scheduled an amount of nil payable to the Defendant.

The Defendant then applied for adjudication of payment claim 21, which the Plaintiff seeks to stop, prior to the adjudication issuing.

ISSUES:

Whether by submitting a payment claim with some overlap to a preceding payment claim amounts to an abuse of process, where the previous payment claim has not proceeded to adjudication.

FINDING:

The Court found that there is not a sufficient degree of finality arising under the provisions of the Act where there has been no adjudication entitling a party to pursue its claim in a court of competent jurisdiction to give rise to an estoppel.

QUOTE:

Mc Dougall J [at 93 and 94]...

[94] In the present case, there has been no adjudication of the claim raised by the payment claim 19. It is not a case where the builder is seeking to have another adjudicator do what a previous adjudicator failed to do to its satisfaction. It is not a case where the builder is seeking to use the process of the Act repetitiously, in an attempt to get a better outcome. On the contrary, if the builder’s contention is correct, it has obtained the best outcome that it can get, in respect of the particular payment claim...By repeating the claim in a subsequent payment claim, the builder gave the proprietors another opportunity to provide a payment schedule. In that payment schedule, the proprietors were entitled to answer not only the fresh aspects of the claim, but also those aspects that (as permitted by s 13(6)) had been included in the earlier payment claim.

IMPACT:

The case illustrates the Court’s attempt to give effect to the parliament’s intention to free up the cash flow in the construction industry, and appears to concentrate on whether the conduct is abusive not merely overlapping. Careful management of the claim process is essential.

© Doyles Construction Lawyers 2009

This publication is intended to be a topical report on recent cases in the construction, development and engineering industries. This publication is not intended to be a substitute for professional advice, and no liability is accepted. This publication may be reproduced with full acknowledgement.

Jim Doyle

1800 888 783

jdoyle@doylesconstructionlawyers.com

www.doylesconstructionlawyers.com