



**CC No 1 & Anor v Reed [2010] NSWSC 294
6 May 2010**

FACTS:

CC No 1 (“the Plaintiff”), engaged Reed Constructions Pty Ltd (“the Defendant”) to undertake construction work at the Chatswood Chase retail development in Sydney. The progress claims under the contract had mostly been dealt with under the contract provisions and not under the *Building and Construction Industry Security of Payment Act (NSW) 1999* (“the Act”).

The 21st progress claim was made under the Act. The payment schedule scheduled an amount substantially less than the claimed amount. Notwithstanding, the claim was not pursued to adjudication and the scheduled amount was paid to the defendant.

Other payment claims were served by the defendant on the plaintiff. One of these payment claims included an amount that had previously been the subject of an earlier payment claim, but not an adjudication.

ISSUES:

Whether the inclusion of an amount which was previously the subject of an earlier payment claim, was an abuse of process?

FINDING:

The Supreme Court found that the inclusion of a previously claimed but unpaid amount in a new payment schedule did not amount to an abuse of process.

QUOTE:

Macready AsJ [at 31]...

“...The [Payment Claim] had a new reference date even though the construction work was completed towards the end of 2009. This is permitted under the Act...As has been frequently said it is not simply a repetition by itself which leads to an abuse. There must be something in all the circumstances for the abuse to arise. Here it is plain that the additional amounts now sought to be recovered in respect of variations which were the subject of the earlier claims is for a different amount. The amount is a distinct item of cost which was not claimed in the earlier claims...”

IMPACT:

The case illustrates that the inclusion of an amount which was previously the subject of an earlier payment claim, in a later payment claim, does not amount to an abuse of process, and is facilitated by the wording of the Act. This case will have an immediate impact on contractors who will be continue to be able to claim amounts previously claimed under the Act but which remain unpaid, so long as those claims comply with the balance of the requirements under the Act.

© Doyles Construction Lawyers 2010

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