



Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69 (15 April 2009)

FACTS

Dualcorp subcontracted to Remo. After completing construction, Dualcorp issued 6 invoices endorsed as Payment Claims under the *Building and Construction Industry Security of Payments Act 1999* (NSW). It proceeded to adjudication. It succeeded on 2 of the 6 invoices.

Dualcorp then issued a second payment claim comprising the same 6 invoices. Remo did not respond with a Payment Schedule. Dualcorp sought judgment in the Court as no Payment Schedule had been received in response to its second Payment Claim. The Court refused to grant judgment. Dualcorp appealed.

ISSUE

Was Dualcorp entitled to judgment on its second Payment Claim in the absence of a Payment Schedule when the first adjudicator had found that it was not entitled to be paid for that work?

FINDING

The Court of Appeal held that Dualcorp was not entitled to judgment. It found that the principle of “issue estoppel” applied to adjudication decisions under the Act. Once either an entitlement to a payment or a decision as to the value of construction work has been determined by one adjudicator, that decision is binding upon a subsequent adjudicator. It also binds the Court in the circumstances of this case, where Dualcorp was relying upon the absence of a Payment Schedule to its second Payment Claim to obtain judgment by default.

QUOTE

McFarlan JA at 67:

“...if questions of entitlement have been resolved by an adjudication determination, those findings may not in my view be reopened upon a subsequent adjudication.”

[at 72]

“It is not unusual that persons seeking remedies in courts and other forums have a once only opportunity to bring forward evidence and submissions in support of their claim. This is in fact the usual situation and is consistent with what the High Court in D’Orta referred to as the “central and pervading tenet of the judicial system...that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances...”

IMPACT

Adjudication applications now have to be prepared very carefully to present the adjudicator with more than sufficient claims, submissions and evidence. There are now no second chances under the Act.

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