

# SUPREME COURT OF QUEENSLAND

CITATION: *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159

PARTIES: **JOHN HOLLAND PTY LIMITED**  
(applicant)  
v  
**SCHNEIDER ELECTRIC BUILDINGS AUSTRALIA PTY LTD (FORMERLY TAC PACIFIC PTY LTD)**  
(respondent)

FILE NO: 4490 of 2010

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 14 May 2010

DELIVERED AT: Brisbane

HEARING DATE: 5 May 2010

JUDGE: Applegarth J

ORDERS: **1. The respondent be restrained from serving upon the applicant any adjudication application lodged with an authorised nominating authority under the *Building and Construction Industry Payments Act (Qld) 2004* in respect of the Payment Claim dated 30 March 2010, a copy of which is Exhibit TJL-6 to the affidavit of Troy Jonathan Lewis filed herein on 27 April 2010.**

**2. The respondent pay the applicant's costs of and incidental to the application to be assessed on a standard basis.**

CATCHWORDS: BUILDING AND ENGINEERING CONTRACTS – *Building and Construction Industry Payments Act 2004* (Qld) – whether payment claim sought to re-agitate issues decided by previous adjudicator – nature of previous adjudicator's decision – whether the Act precludes re-agitation of same issues- whether issue estoppel arises from adjudicator's decision –whether claimant should be restrained from serving an adjudication application

CASES: *ACN 060 559 971 Pty Ltd v O'Brien* [2008] 2 Qd R 396  
*AE & E Australia Pty Ltd v Stowe Australia Pty Ltd* [2010] QSC 135 followed

*Australian Securities Commission v Marlborough Gold Mines Limited* (1993) 177 CLR 485 cited  
*Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 considered  
*Gett v Tabet* [2009] NSWCA 76 followed  
*John Goss Projects Pty Ltd v Leighton Contractors* (2006) 66 NSWLR 707 cited  
*Marshall v Director-General, Department of Transport* (2001) 205 CLR 603 cited  
*Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211 cited  
*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 cited  
*Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151 cited  
*Urban Traders Pty Ltd v Paul Michael* [2009] NSWSC 1072 followed  
*Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 cited  
*Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168 followed

LEGISLATION: *Building & Construction Industry Payments Act* (Qld) 2004  
*Building and Construction Industry Security of Payment Act* (NSW) 1999

COUNSEL: P Dunning SC and G Beacham for the applicant  
M Christie SC and L Shipway for the respondent

SOLICITORS: Holding Redlich for the applicant  
McCullough Robertson as agent for Baker Mackenzie for the respondent

- [1] The applicant (“John Holland”) seeks an injunction to restrain the respondent (“Schneider”) from serving upon it any adjudication application lodged with an authorised nominating authority under the *Building & Construction Industry Payments Act* (Qld) 2004 (“the Act”) in respect of a payment claim dated 30 March 2010.
- [2] An earlier payment claim dated 14 September 2009 (“the September 2009 Claim”) was referred to adjudication. In its Adjudication Application dated 12 October 2009 Schneider addressed John Holland’s contention that the September 2009 Claim contravened s 17(5) of the Act because Schneider had already used the only “reference date” available to it under the construction contract. Section 17(5) provides:
- “A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.”
- [3] In paragraphs 22 to 42 to its Adjudication Application Schneider advanced substantial contentions to the effect that s 17(5) did not apply. In paragraphs 5.1 to 5.26 of its Adjudication Response dated 19 October 2009 John Holland contended that the September 2009 Claim contravened s 17(5) of the Act because

there was no available reference date upon which to base the claim. It submitted on this basis that the September 2009 Claim was invalid and “ought to be disregarded by the adjudicator”. John Holland’s contention in relation to reference dates and the operation of s 17(5) of the Act was one of a number of grounds upon which it submitted in its Adjudication Response that “no amount is due and payable ... to the Claimant pursuant to the Act”.

- [4] The authorised nominating authority, Adjudicate Today, appointed Mr Sean O’Sullivan to adjudicate Schneider’s application. On 9 November 2009 Mr O’Sullivan requested Adjudicate Today to send a letter to the parties in the following terms:

“Having reviewed the detailed submissions of the parties (and in particular the submissions of the Claimant at paras [22] to [42] of the application and those of the Respondent at paras [5.1] to [5.26] of the response), I am now of the view that I do not have jurisdiction to decide this matter on the basis that I consider that the Claimant has served more than one payment claim in respect of a reference date, contrary to section 17(5) of the Act.”

I shall refer to this statement as “the Adjudicator’s Statement”. Mr O’Sullivan also informed Adjudicate Today that notwithstanding that he had spent many hours on the matter, he did not think that he could charge for it, and that the parties should be advised accordingly.

- [5] On 10 November 2009 Adjudicate Today forwarded by facsimile to the parties and their legal representatives the terms of the Adjudicator’s Statement, and advised that the relevant file was to be closed with no fees incurred.
- [6] On 30 March 2010 Schneider made another payment claim (“the March 2010 Claim”). John Holland’s Payment Schedule dated 14 April 2010 contended, amongst other things, that the March 2010 Claim was invalid on the basis of issue estoppel in that an adjudicator had already determined that Schneider did not have a valid reference date available to it upon which to ground any further claims pursuant to the Act. On 15 April 2010 John Holland served its Payment Schedule under cover of a letter that asserted that the March 2010 Claim was merely a re-agitation of Schneider’s previous claim that had been previously dealt with by Mr O’Sullivan in the adjudication of the September 2009 Claim. John Holland contended that the re-agitation amounted to an abuse of process, that the issues previously adjudicated upon were the subject of an issue estoppel and that their re-agitation at adjudication was precluded under the Act in accordance with the decision in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (“*Dualcorp*”).<sup>1</sup>
- [7] On 27 April 2010 John Holland filed an Originating Application seeking declaratory and injunctive relief. Upon John Holland giving the usual undertaking as to damages, Wilson J on 27 April 2010 ordered by consent that Schneider be restrained until 5.00 pm on 5 May 2010 from serving on John Holland any adjudication application lodged or made in respect of the March 2010 Claim. The matter was argued before me on 5 May 2010. At the end of the hearing and upon John Holland giving the usual undertaking to damages, the parties agreed to the

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<sup>1</sup> (2009) 74 NSWLR 190.

continuation of that restraint until 5.00 pm on the day of the determination of John Holland's application.

### The issues

[8] In its Amended Originating Application filed by leave on 5 May 2010, John Holland seeks a permanent restraint upon Schneider serving any adjudication application lodged in respect of the March 2010 Claim with an authorised nominating authority under the Act. It does so on the basis of submissions that:

- (a) service of the March 2010 Claim is precluded by an issue estoppel arising from the adjudicator's determination that no further reference dates arise under the construction contract; or
- (b) alternatively, the March 2010 Claim involves the repetitious re-agitation of the same issue, namely whether further reference dates arise under the construction contract.

It relies upon *Dualcorp* in respect of principles of issue estoppel and abuse of process in the context of the Act.

[9] Schneider responds by submitting that:

- (a) the Adjudicator's Statement does not constitute an "adjudication decision" for the purposes of the Act;
- (b) alternatively, *Dualcorp* should not be followed because its reasoning is contrary to the decision of Mullins J in *ACN 060 559 971 Pty Ltd v O'Brien*<sup>2</sup> ("*O'Brien*");
- (c) in any event, the relevant reasoning in *Dualcorp* is in error and ought not to be followed in Queensland.

In essence, Schneider submits that *Dualcorp* is in error to the extent that it rests on the general proposition that a previous adjudication that has determined issues in dispute binds a later adjudicator.

[10] Neither party submits that it is necessary or appropriate for me to determine the "reference date" issue that was argued in their competing submissions to the adjudicator. I accept this approach to the resolution of the application before me. The issues for my determination may be summarised as follows:

1. Is the Adjudicator's Statement an "adjudication decision" for the purposes of the Act?
2. The nature of the Adjudicator's Statement and whether it should be characterised as one in which the adjudicator:
  - (a) decided that he had no jurisdiction to determine the adjudication application because there was no valid payment claim; or

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<sup>2</sup> [2008] 2 Qd R 396.

- (b) determined a preliminary point in favour of John Holland, which had the practical consequence that the adjudication application could not proceed further.
- 3. The basis of the decision in *O'Brien* and whether *Dualcorp* should not be followed because of the decision in *O'Brien*.
- 4. Whether *Dualcorp* should be followed.

### The Adjudicator's Statement

[11] An adjudicator who is appointed is required to consider the matters contained in s 26(2) in deciding an adjudication application. These matters include the provisions of the Act, the provisions of the construction contract from which the application arose, the Payment Claim to which the application relates, the Payment Schedule to which the application relates and all submissions properly made by the claimant or the respondent. An adjudicator is to decide:

- (a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the **adjudicated amount**); and
- (b) the date on which any amount became or becomes payable; and
- (c) the rate of interest payable on any amount.<sup>3</sup>

Section 26(3) provides that the adjudicator's decision must:

- (a) be in writing; and
- (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.

[12] Schneider's submission that Mr O'Sullivan did not make what it describes as an "adjudication decision" for the purposes of the Act was originally based upon the fact that John Holland's affidavit material relied upon Adjudicate Today's facsimile of 10 November 2009, which did not evidence in admissible form the contents of Mr O'Sullivan's actual decision, but merely reported what Mr O'Sullivan had stated. This evidentiary point was overcome in the course of the hearing by the tender of a document from Mr O'Sullivan which evidenced his decision. Schneider still submits that the Adjudicator's Statement is not an "adjudication decision" for the purposes of the Act, and submits that, instead, it was a statement to the effect that he did not propose to make an adjudication decision because he concluded that he did not have jurisdiction to do so.

[13] The Adjudicator's Statement complies with the formal requirements of s 26(3) for an "adjudicator's decision". Section 26(3) uses the term "adjudicator's decision" rather than "adjudication decision". In its context the term "adjudicator's decision" in s 26(3) refers to the decision made by the adjudicator in "deciding an adjudication application", having considered the matters described in s 26(2) and having complied with the other procedures for adjudication contained in the Act.

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<sup>3</sup> Section 26(1) of the Act.

- [14] Schneider submits that the manner in which the Adjudicator's Statement was conveyed to the parties is problematic concerning the date of the decision and the running of time. However, the relevant time period under the Act runs from the date on which the adjudicator's decision is served on the respondent or a later date if the adjudicator decides a later date under s 26(1)(b).
- [15] Whether or not the Adjudicator's Statement is an "adjudicator's decision" within the meaning of s 26 does not depend upon the way in which it was communicated to the parties or the brevity with which the adjudicator expressed his reasons. It depends upon the content of his decision. The Adjudicator's Statement did not state in terms that Schneider had not established an entitlement to be paid a progress payment on the basis of the September 2009 Claim. It stated, in effect, that the adjudicator would not determine the issue of Schneider's claimed entitlement to be paid in respect of the September 2009 Claim because that claim was not authorised by the Act.
- [16] Because the adjudicator reached the conclusion, based upon the parties' submissions, that the September 2009 Claim was not permitted by s 17(5) of the Act, he did not proceed to determine the merits of Schneider's claim and, for instance, did not decide the amount of the progress payment. This is because he decided that the September 2009 Claim was unauthorised. To the extent that the adjudicator did not decide "the amount of the progress payment, if any, to be paid" by John Holland to Schneider it can be said that he did not decide an "adjudicated amount", as contemplated by s 26(1)(a). He did, however, make a decision by determining the adjudication application and the effect of his decision was to terminate the adjudication application in John Holland's favour.
- [17] Schneider does not submit that the decision the adjudicator reached was one that he was not authorised to make. There is scope to debate the proper characterisation of the decision as one going to the adjudicator's "jurisdiction". This is the next issue for consideration. However, the adjudicator did make a substantive decision in the course of the adjudication application. It was not to the effect that he was not willing to embark upon the adjudication process. It was that, having reviewed the parties' detailed submissions, he came to a conclusion that meant that the adjudication application could not proceed further.
- [18] The fact that the Adjudicator's Statement did not in terms decide that John Holland had no entitlement to the amount claimed by it may have implications for the possible application of the doctrine of issue estoppel or the principles of abuse of process if I decide to follow the majority judgment in *Dualcorp*. If the majority judgment in *Dualcorp* is to be followed it will be necessary to define the issue that the adjudicator determined and which John Holland contends Schneider is precluded from re-agitating before the same or another adjudicator. The alternative approach adopted by Allsop P in *Dualcorp* is that in a case such as this the prohibition in s 17(5)<sup>4</sup> simply precludes adjudication of another purported claim in respect of the same reference date as the prior claim.
- [19] On the first issue, I conclude that the adjudicator made a decision that complies with the formal requirements of s 26(3) in the course of deciding the adjudication application. I choose not to describe his decision as an "adjudication decision"

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<sup>4</sup> The equivalent of s 13(5) of the *Building and Construction Industry Security of Payment Act* (NSW) 1999 ("the NSW Act").

because that term is slightly ambiguous and might be understood as meaning a decision in which an adjudicator expressly decides the amount of the progress payment, if any, to be paid by the respondent to the claimant. In this instance, the adjudicator did not determine any amount to be paid. The adjudicator did, however, decide a substantive issue in deciding the adjudication application.

### **The nature of the adjudicator's decision**

- [20] The adjudicator decided that because Schneider had served more than one payment claim in respect of a reference date, contrary to the prohibition in s 17(5) of the Act, he did not have “jurisdiction” to decide the adjudication application. Having regard to the submissions of the parties about reference dates and s 17(5) to which the adjudicator referred in his decision, I interpret the word “jurisdiction” in his reasons as meaning that, having reached the view that he did on the reference date issue, he was not authorised to proceed to reach a decision about the amount of the progress payment, if any, to be paid by John Holland to Schneider.
- [21] The adjudicator reached a conclusion about a matter that was a pre-condition to the valid exercise of his power to adjudicate the September 2009 Claim. That conclusion was that service of the September 2009 Claim was not permitted by s 17(5) of the Act. The adjudicator's decision can be characterised as a decision about his jurisdiction. For the purposes of deciding this application it is necessary to move beyond simply labelling the decision as one about “jurisdiction” or one about a “preliminary point”, and to identify the issue that he decided.
- [22] The adjudicator decided the issue joined between the parties concerning an available reference date and, as a result, concluded that s 17(5) applied. Because s 17(5) was found to apply, service of the September 2009 Claim was prohibited. As a consequence, the adjudicator was not authorised to proceed further to exercise the power to adjudicate the September 2009 Claim.

### **Schneider's challenge to the decision in *Dualcorp***

- [23] I had occasion to recently consider the decision of the New South Wales Court of Appeal in *Dualcorp*. In *AE & E Australia Pty Ltd v Stowe Australia Pty Ltd*<sup>5</sup> I respectfully followed the decision in *Dualcorp*, subject to certain qualifications. The qualifications were to certain general statements in the majority judgment of Macfarlan JA that I considered required qualification for the reasons given by McDougall J in *Urban Traders Pty Ltd v Paul Michael*<sup>6</sup> and *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd*.<sup>7</sup> I adopted, with respect, the principles applied by McDougall J in *Urban Traders* and *Watpac* and applied them to the Queensland Act, which is in practically identical terms to the New South Wales legislation.
- [24] In *AE & E* I was not referred to the decision of Mullins J in *O'Brien*. Schneider submits that the principle in *Dualcorp* relied upon by John Holland is contrary to *O'Brien* and, in any event, ought not be followed in Queensland. In broad outline, Schneider submits that, contrary to *Dualcorp*:

<sup>5</sup> [2010] QSC 135 (*AE & E*).

<sup>6</sup> [2009] NSWSC 1072 (*Urban Traders*).

<sup>7</sup> [2010] NSWSC 168 (*Watpac*).

- The extent to which matters determined by an earlier adjudicator bind a subsequent adjudicator is governed only by s 22(4) of the NSW Act/ s 27 of the Queensland Act;
- A prior adjudication does not bind a later adjudication on entitlement issues;
- *Dualcorp* is in error and its interpretation of the NSW Act renders s 22(4) of that Act superfluous.

### **The decision in *O'Brien***

- [25] Mr O'Brien adjudicated an application under the Act, the primary focus of which was an item in a payment claim for delay and disruption costs of approximately \$2,000,000. An earlier adjudicator, Mr Uher, had adjudicated an earlier claim for different items. The parties to the construction contract were in dispute about the date for practical completion of the works under the construction contract, as varied. The applicant in the judicial review proceedings before Mullins J ("the applicant") contended that it was entitled to deduct liquidated damages. Mr Uher declined to make a deduction for liquidated damages from the amount that was payable for construction work under the contract because he considered that there was insufficient material before him to reach a conclusion about the date for practical completion, and hence, the applicant's claim for liquidated damages.<sup>8</sup>
- [26] The new payment claim that was adjudicated by Mr O'Brien several months later raised issues about SSM's entitlement to costs it claimed for delay and disruption, and a contention by the applicant that it was entitled to deduct the amount of \$250,000 (plus GST) for liquidated damages from any progress payment due to SSM. The materials and submissions before Mr O'Brien were not limited to those that were before Mr Uher. However, Mr O'Brien did not determine the date for practical completion and the applicant's claim for liquidated damages on the basis of the materials and submissions before him. Instead, in error, he relied upon s 27 of the Act as a reason for not departing from Mr Uher's decision over the applicant's claim to liquidated damages.
- [27] On the application for judicial review the applicant contended that Mr O'Brien's reliance on s 27 of the Act was an error of law. Mullins J followed the approach of McDougall J in *Rothnere*<sup>9</sup> and *Goss Projects*<sup>10</sup> to the construction of s 22(4) of the NSW Act. Section 22(4) of the NSW Act is the equivalent provision to s 27 of the Queensland Act. The construction of s 22(4) of the NSW Act adopted by McDougall J related to the clear distinction between "the calculation of the amount of a progress payment (which is, ultimately, what the adjudicator is required to do) and the valuation of construction work".<sup>11</sup>
- [28] Any claim by the applicant to liquidated damages was relevant to the entitlement of SSM to the quantum of the progress claim that was determined by Mr Uher, but not the value of any construction work carried out under the contract that was determined by him.<sup>12</sup> Section 27 did not provide a reason to not depart from

<sup>8</sup> *O'Brien* at 403 I 25 [25]; 405 I 35 [36].

<sup>9</sup> *Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151.

<sup>10</sup> *John Goss Projects Pty Ltd v Leighton Contractors* (2006) 66 NSWLR 707.

<sup>11</sup> *O'Brien* at [33] citing *Goss Projects* at 715-716 [40].

<sup>12</sup> *Ibid* at [34].

Mr Uher’s decision on the applicant’s claim to liquidated damages and Mr O’Brien was obliged to decide the issue of liquidated damages on the basis of the materials and submissions before him.

- [29] Schneider submits that Mullins J held that “a previous adjudicator’s decision did not bind a later adjudicator, unless the previous adjudicator’s decision was on a matter concerned with the *value* of construction work, which was not the position on the facts in that case.” I do not consider that this accurately states the basis of the decision in *O’Brien*. The basis of the decision was that Mr O’Brien erred in relying on s 27. A further basis was that, Mr Uher having not decided the issues of the date for practical completion and the applicant’s claim to liquidated damages because of the insufficiency of the evidence before him, Mr O’Brien was to decide a later claim on the basis of the different materials and submissions before him about the date for practical completion and the deduction of liquidated damages.
- [30] Mullins J was not required to decide the broader issue of the extent to which a previous adjudicator’s decision binds a later adjudicator’s decision on a matter that is not concerned with the value of construction work. However, an essential part of her Honour’s reasons is the fact that Mr Uher’s decision did not determine the date of practical completion and the deduction of liquidated damages because of the insufficiency of materials before him. That fact did not preclude Mr O’Brien from determining a different claim, including the issue of the date for practical completion and the deduction of liquidated damages, on the basis of different materials and different submissions. To that extent the decision in *O’Brien* involves a previous adjudication that was determined, in part, on the basis of the insufficiency of evidence, this aspect draws attention to some passages in *Dualcorp* concerning the determination of an adjudication application upon the basis that there is insufficient evidence to accept the claim, or where a claim has been “rejected for want of evidence.”<sup>13</sup> However, those passages relate to circumstances in which a payment claim is rejected or not accepted by an adjudicator because the claimant does not bring forward evidence and submissions in support of the payment claim. In *O’Brien*, Mr Uher’s adjudication was not of that kind. He did not determine a deduction for liquidated damages because there was insufficient material for him to determine the date of practical completion and, as a consequence, the quantum of liquidated damages. Therefore, he did not determine those issues. He did not reject a payment claim for want of evidence, but, instead, adjudicated it in circumstances in which he was not able to determine the amount, if any, that should be deducted on account of liquidated damages.
- [31] Mullins J was not required to decide, and did not decide, the broader issues canvassed in *Dualcorp*. *Dualcorp* is authority for the general proposition that the Act manifests an intention to prevent the re-agitation of the same issues that have been determined at a previous adjudication. The decision in *O’Brien* is not inconsistent with that proposition. As Mr Uher did not decide the issue of the date for practical completion and any issue of entitlement to liquidated damages, Mr O’Brien was not called upon to decide the “same issues” and instead was required to decide the factual and legal issues in contest before him. *O’Brien* is not authority for the broad proposition advanced by Schneider. I do not accept Schneider’s submission that the principle in *Dualcorp* relied upon by John Holland is contrary to *O’Brien*.

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<sup>13</sup> *Dualcorp* at [35], [71].

### Should *Dualcorp* be followed?

- [32] Schneider submits that I am not bound by *Dualcorp*, unlike the single judges of the New South Wales Supreme Court who have followed it in cases that include *United Traders* and *Watpac*. Schneider rejects the contention that I am bound to follow *Dualcorp* unless I am of the view that it is “plainly wrong”. It accepts that as a decision of an intermediate appellate court, I would find it a persuasive authority, but submits that for various reasons I should not follow it.
- [33] John Holland submits that I should follow *Dualcorp* in the interests of uniformity of decision, and cites *Australian Securities Commission v Marlborough Gold Mines Limited*.<sup>14</sup> Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is “plainly wrong”.<sup>15</sup>
- [34] The Act that I am required to construe is not a Commonwealth law or part of national uniform legislation. It is, however, in practically identical terms to the NSW Act considered in *Dualcorp*. I observe that caution is required in construing modern Australian legislation by reference to “principles” derived from a body of case law that may be built up in various jurisdictions where there are in force statutes in the same terms or, at least, in relevantly similar terms.<sup>16</sup> McHugh J in *Marshall v Director General, Department of Transport*<sup>17</sup> referred to the similarity in the terms of legislation governing the acquisition of land and continued:

“But that does not mean that the courts of Queensland, when construing the legislation of that State, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court’s jurisdiction. Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation.”

This statement was approved by Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*.<sup>18</sup> Allsop P in *Gett v Tabet*<sup>19</sup> stated that the precise scope of the dictum of McHugh J in *Marshall* remains to be elucidated and continued:

<sup>14</sup> (1993) 177 CLR 485.

<sup>15</sup> *Ibid*, 492; see also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [135].

<sup>16</sup> *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 270 [30] – [31].

<sup>17</sup> (2001) 205 CLR 603 at 632 – 633 [62].

<sup>18</sup> *Supra*.

<sup>19</sup> [2009] NSWCA 76 at [289].

“It is not, for example, directed to general law principles. *Marshall* was concerned with a line of English authority, with respect to a phrase found in the Queensland legislation, which the High Court declined to follow. Somewhat different principles may apply in circumstances where two Australian legislatures, largely contemporaneously, adopt similar or identical language in pursuit of a common statutory purpose. In such circumstances, the coherent development of the law within Australia would not be promoted by the courts of one jurisdiction adopting a different construction to those of another. On the other hand, *Walker Corporation* indicates that a more relaxed approach might be adopted in such circumstances than would be the case with respect to federal laws or national uniform legislation.”<sup>20</sup>

[35] I accept that I am not bound to follow *Dualcorp* or the single judge decisions of the New South Wales Supreme Court that have followed it. However, *Dualcorp* concerned the construction of a statute in practically identical terms to the Queensland Act and both Acts pursue a common statutory purpose.<sup>21</sup> The Court in *Dualcorp* concluded in respect of the NSW Act that:

- (a) The Act as a whole generally manifests an intention to prevent re-agitation of the same issues;
- (b) Section 22(4) should not be regarded as an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator.

I must construe the statute that I am required to apply, not “slavishly follow” decisions of courts of another jurisdiction. However, the decision which Schneider invites me to not follow was a decision about the construction of a statute upon which the Queensland Act was based, and I would require a high degree of persuasion that its construction should not be followed. The coherent development of the law within Australia that applies to entities conducting their business affairs in more than one Australian jurisdiction would not be promoted by adopting a different construction. Parties to adjudications and adjudicators benefit from consistency in the interpretation of statutes that adopt similar or identical language in the pursuit of a common statutory purpose.

### **Alleged errors in *Dualcorp***

[36] In *Dualcorp* Macfarlan JA (with whom Handley AJA agreed) had regard to various provisions of the NSW Act and concluded that they indicate “a legislative intent to render adjudication determinations relevantly conclusive”.<sup>22</sup> These features of the Act indicated the degree of finality intended to be attached by the Act to adjudicators’ determinations for the purpose of considering doctrines of issue estoppel and abuse of process in the context of the Act. Macfarlan JA did not consider that s 22(4) of the NSW Act should be regarded “as an exhaustive statement of the matters determined by an earlier adjudication which are binding on

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<sup>20</sup> Ibid.

<sup>21</sup> Ss 7 and 8 of the Act and s 3 of the NSW Act.

<sup>22</sup> *Dualcorp* at [60].

a subsequent adjudicator.”<sup>23</sup> Schneider submits that Macfarlan JA’s reference to the objects of the Act and the operation of s 22(4) were in error. It submits that the objects of the Act must be viewed against the specific provisions which deal with the manner in which an earlier adjudication binds a later adjudicator, namely s 22(4) of the NSW Act and s 27 of the Queensland Act, and that regard should be had to the legislative history of s 22(4).

### **The objects of the Act**

- [37] For the reasons given by McDougall J in *Urban Traders* and *Watpac*, certain statements by Macfarlan JA in *Dualcorp* at [53] may require qualification. Section 17(6) of the Queensland Act, like s 13(6) of the NSW Act, permits the inclusion in a later payment claim of an amount that has been the subject of an earlier payment claim. Schneider submits that the reservations expressed by McDougall J in *Watpac* at [60] and which I respectfully adopted in *AE & E*, leave *Dualcorp* on shaky foundations. I do not agree with this submission. The fact that the prohibition in s 13(5) of the NSW Act does not prevent a claimant from including in a payment claim an amount that has been the subject of a previous claim, and the fact that s 22(4) contemplates that a claimant may seek to have a later adjudicator revalue work on appropriate evidence in certain circumstances, do not alter the essential points made by Macfarlan JA in *Dualcorp* at [52] and [53].
- [38] The provisions of the Act indicate an intent that it provide “a simple and quick means of contractors obtaining progress payments, with a mechanism being provided for the speedy resolution of disputes.”<sup>24</sup> It would be inconsistent with this objective to allow a claimant who was dissatisfied with an adjudication of its claim to obtain a reconsideration of issues that had been determined at an earlier adjudication, especially if there was no limit to the number of times that a claimant could seek to have this reconsideration occur. The provisions of the legislation, including those canvassed at [52] – [59] of the judgment of Macfarlan JA, support the conclusion that, except to the extent that s 22(4) of the NSW Act allows the determination to be revisited, an adjudication determination that resolves a dispute is binding between the parties for the purposes of the Act. Such a determination does not affect any right that a party to a construction contract may have under the contract or under the general law.<sup>25</sup>
- [39] Allsop P expressed agreement with Macfarlan JA by stating that the NSW Act:
- “... was not intended to permit the repetitious use of the adjudication process to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions. A party in the position of the applicant (*Dualcorp*), here, should not be able to re-ignite the adjudication process at will in order to have a second or third or fourth go at the process provided by the Act merely because it is dissatisfied with the result of the first adjudication.”<sup>26</sup>

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<sup>23</sup> Ibid at [67].

<sup>24</sup> Ibid at [52].

<sup>25</sup> The Act, s 100; cf NSW Act s 32.

<sup>26</sup> Ibid at [2]; see also [16].

[40] I agree with the conclusions reached in *Dualcorp* about the objects of the NSW Act. The same conclusions apply in respect of the objects of the Queensland Act.

**Section 22(4) of the NSW Act/Section 27 of the Queensland Act**

[41] Section 22(4) of the NSW Act provides:

**“22 Adjudicator’s determination**

(4) 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.”

[42] In *Dualcorp* Macfarlan JA reached the conclusion that s 22(4) of the NSW Act should not be regarded as an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator. Schneider submits that, on this approach, the introduction of s 22(4) by way of amendment in 2002 was unnecessary because the NSW Act when read as a whole already prevented the very thing that s 22(4) prevents. It further submits that the approach of Macfarlan JA renders s 22(4) superfluous, and that it is a rule in the interpretation of statutes that such a provision should not prove superfluous.<sup>27</sup> Schneider also submits that the approach of Macfarlan JA does not pay sufficient regard to legislative history.

[43] Section 22(4) of the NSW Act was introduced by the *Building and Construction Industry Security of Payment Amendment Act 2002*. Extrinsic material pointed to by Schneider indicates that it was intended to address “adjudicator shopping”. However, I do not consider that this legislative history compels the conclusion that s 22(4) should be regarded as an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator.

[44] The text of s 22(4) and the statutory context in which it appears do not suggest that it was intended by the legislature to operate as a complete statement of the circumstances in which a previous adjudication binds a subsequent adjudicator. Section 22(4) may be seen to “regulate” (to adopt the word used by Senior Counsel

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<sup>27</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71].

for John Holland) one aspect of the re-agitation of matters decided in an earlier determination, namely the *value* of construction work or any related goods and services.

- [45] The legislature apparently chose to regulate the re-agitation of “valuation” issues by the express provisions of s 22(4), and the re-agitation of other issues by principles based on the construction of the Act and the application, if required, in the context of the Act of doctrines of issue estoppel and abuse of process. A legislative choice to leave principles governing the re-agitation of issues other than valuation issues to be worked out by courts in interpreting the Act is understandable. The extent to which adjudication decisions about the valuation of work etc. should bind a later adjudicator and the circumstances in which they should not were capable of simple formulation in s 22(4). Rather than enact what purported to be an exhaustive statement of the circumstances in which a variety of other adjudication decisions would bind a later adjudicator, the legislature apparently left those circumstances to be worked out by an interpretation of the Act, applying, as required, doctrines of issue estoppel and abuse of process in the context of the Act.
- [46] The construction of the Act adopted in *Dualcorp* makes s 22(4) pertinent, rather than superfluous. It creates a regime in respect of the valuation of work etc. that is capable of being understood and applied by parties to adjudications and adjudicators. The special provisions governing the re-agitation of valuation issues may not necessarily reflect the way in which the re-agitation of valuation issues would be governed by the application of doctrines of issue estoppel and abuse of process. The legislature has created a rule in respect of the valuation of work etc. which is subject to a specific exception 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 decision. A rule against re-agitation of issues in a later adjudication that is subject to an exception cast in those terms may not have been developed in those precise terms by a court construing the Act’s provisions. The legislature may have concluded that the matter was sufficiently uncertain to justify the enactment of a specific regime in relation to the re-agitation of valuation issues. Section 22(4) is not superfluous and its enactment may have been thought necessary to provide a simple and fairly certain rule about the circumstances in which valuation issues may be re-agitated in a later adjudication.
- [47] The enactment of specific rules about the re-agitation of valuation issues does not mean that s 22(4) of the NSW Act should be regarded as an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator. It means only that the legislature chose to make specific provision with respect to re-agitation of valuation issues.

### ***Dualcorp* – conclusion**

- [48] I adopt, with respect, the conclusions reached by the Court in *Dualcorp* that the NSW Act as a whole generally manifests an intention to prevent repetitious re-agitation of the same issues.<sup>28</sup> The same construction should be applied to the Queensland Act. The conclusion that, subject to certain exceptions, the Act precludes the re-agitation of the same issues that have been earlier determined does not mean that the same issue may not arise in a later adjudication. The issue that is

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<sup>28</sup> *Dualcorp* at [16], [67], [76].

later sought to be re-agitated must have been earlier determined for the principle of issue estoppel to apply.<sup>29</sup> As Macfarlan JA observed by way of illustration in *Dualcorp*, if 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. A further illustration arises in the facts of *O'Brien* in which the first adjudicator did not determine the date for practical completion and therefore the entitlement of the applicant to liquidated damages. It was therefore open to seek a determination from a later adjudicator about the date of practical completion and a claimed entitlement to deduct any liquidated damages on the hearing of a later, different claim, and on the basis of additional material and submissions.

- [49] The reservation expressed by McDougall J in *Urban Traders* and in *Watpac* about certain statements in the majority judgment in *Dualcorp*, being a reservation that I respectfully adopted in *AE & E*, does not detract from the point of substance determined in *Dualcorp*. I should follow *Dualcorp* in respect of the parallel provisions of the Queensland Act. The Queensland Act as a whole manifests an intention to preclude the re-agitation of the same issues and, subject to s 27, does not permit the re-agitation of the same issues that have been determined by an earlier adjudicator.

### **The suggested analogy with certificates of practical completion in construction contracts**

- [50] Schneider's submissions finally make some observations about the finality of progress claims in construction law. When exercising a certifying function a superintendent must act honestly and impartially.<sup>30</sup> Any analogy between an adjudication under the Act and the "temporary finality"<sup>31</sup> of certificates issued by a superintendent or certifier in response to a progress claim cannot be pressed too far. This is because the Act creates its own regime for the entitlement to make a progress claim under the Act, the adjudication of disputes and the enforcement of adjudication decisions. If, however, there is an analogy it is reflected in the "temporary finality" of adjudicator's decisions under the Act. Subject to statutory exceptions, adjudications that determine questions of entitlement or questions of quantification, or both, have a quality of finality. They finally determine for the purposes of the Act issues in dispute between the parties. They do not, however, finally determine the parties' rights in other respects, and those rights may be determined in civil proceedings. An adjudicator's determination, however, generally has a degree of finality for the purposes of the Act and *Dualcorp* was, with respect, correct in concluding that this degree of finality generally precludes an issue which has earlier been determined being re-agitated in a later adjudication application.

### **Disposition of the application**

- [51] The adjudicator determined a disputed issue concerning available reference dates under the construction contract. Section 17(5) precludes a further payment claim in respect of the same reference date. In accordance with the majority judgment in

<sup>29</sup> *Dualcorp* at [69].

<sup>30</sup> *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211 at [50].

<sup>31</sup> Schneider's submissions use the term that appears in I.N. Duncan Wallace QC *Hudson's Building and Engineering Contracts* 11<sup>th</sup> ed 1994 vol 1 p 861 para 6.204.

*Dualcorp* and the doctrines of issue estoppel and abuse of process that apply in the context of the Act, it is not open to Schneider to re-agitate the same issue of reference dates that was determined as a preliminary issue by Mr O'Sullivan.

- [52] Schneider did not address any argument that I should not issue a restraint in the terms sought by John Holland if I found, contrary to Schneider's submissions, that Mr O'Sullivan's statement was an adjudicator's decision for the purpose of the Act and that the Queensland Act should be construed in accordance with *Dualcorp* so as to preclude a further adjudication of issues that were determined by an earlier adjudicator.

### **Conclusion**

- [53] An appointed adjudicator determined that the September 2009 Claim was prohibited by s 17(5) of the Act because no new reference date was available to support it.
- [54] Section 27 of the Queensland Act is not an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator.
- [55] The Queensland Act, like the NSW Act, should be construed as indicating an intention to prevent repetitious re-agitation of the same issues.
- [56] Schneider should not be permitted to re-agitate the same issue of reference dates under the construction contract that was determined by Mr O'Sullivan's decision.
- [57] Subject to hearing the parties on the question of costs, the orders will be:
1. The respondent be restrained from serving upon the applicant any adjudication application lodged with an authorised nominating authority under the *Building and Construction Industry Payments Act (Qld)* 2004 in respect of the Payment Claim dated 30 March 2010, a copy of which is Exhibit TJL-6 to the affidavit of Troy Jonathan Lewis filed herein on 27 April 2010.
  2. The respondent pay the applicant's costs of and incidental to the application to be assessed on a standard basis.