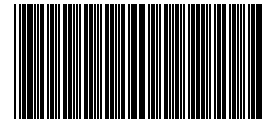




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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00376821

TITLE OF PROCEEDINGS

First Appellant	Kwik Flo Pty Ltd ACN 131073204
First Respondent	SE Ware Street Dev Pty Ltd ACN 601608539
Second Respondent	Edward Smithies

FILING DETAILS

Filed for	Kwik Flo Pty Ltd, Appellant 1
Legal representative	David Robert Jury
Legal representative reference	
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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Kwik Flo - Appeal Submissions (20 October 2025).pdf)

[attach.]

SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

No. 376821 of 2025

Kwik Flo Pty Ltd

Appellant

SE Ware Street Dev Pty Ltd & Anor

Respondents

APPELLANT'S SUBMISSIONS

A. Two discrete issues

1. This appeal involves two discrete questions concerning the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**).
2. *First*, does an adjudicator's decision to decline to exercise jurisdiction amount to a "determination" under the Act depending on when the decision is made or the complexity of its reasoning?
3. *Secondly*, should the Court restrain the enforcement of an adjudication determination as an abuse of process if it is valid and has not been set aside?

B. Summary

4. This is an appeal from Peden J's judgment in *SE Ware Street Dev Pty Ltd v Kwik Flo Pty Ltd* [2025] NSWSC 1060 (**J**).
5. Her Honour found that an adjudication (referred to below as **the First Determination**) issued under the Act, in which the adjudicator found the Act did not apply by reason of s 7(2)(c), and therefore he did not have jurisdiction to determine the appropriate amount payable, was nevertheless a "determination" under the Act: J[30] (Red 16G). Her Honour then held, in consequence, that it was an abuse of process for the Appellant to seek to register or enforce a second adjudication (referred to below as **the Second Determination**) which it had subsequently obtained from a different adjudicator who had found that the Act did apply and determined an amount payable of \$1.2 million: J[42]

(Red 19M). In the result, her Honour concluded that the Appellant should be restrained from seeking to register or enforce the Second Determination: J[47] (Red 20S).

6. The Appellant submits that her Honour erred in two respects in reaching this conclusion.
7. **First**, the First Determination was not a “determination” within the meaning of the Act. This Court held in *Dualcorp* that “the matters determined by an earlier adjudication which are binding on a subsequent adjudicator” were not exhaustively stated in s 22(4) of the Act.¹ A finding, however, that the Act does not apply, such that there is no jurisdiction to make a determination is not such a matter. This is consistent with Ball J’s (as his Honour then was) decision in *Olympia Group*² at [14]-[21], where his Honour (applying Spigelman CJ’s decision in *Chase Oyster*³) explained that an adjudicator’s finding that the Act did not apply to a construction contract by reason of s 7(4) of the Act was not a “determination” and therefore a second application could be made under the Act. Peden J erred at J[25]-[29] (Red 14V-16F) in distinguishing *Olympia Group* and otherwise not following it because her Honour: (i) at J[25] (Red 14V) mistook Ball J’s decision as being based upon certain facts rather than the matters of principle identified by Spigelman CJ in *Chase Oyster*; (ii) at J[27]-[28] (Red 15L) applied the reasoning of the Full Court of the Federal Court in the *Forte Sydney*,⁴ which reasoning is similarly problematic and should not be followed; and (iii) at J[29] (Red 15X) mischaracterised the outcome of the First Determination as the product of substantive consideration of the adjudication materials rather than a preliminary or threshold issue regarding jurisdiction. These matters are the subject of Appeal Ground 1 (see Part D below).
8. **Secondly**, and in any event, it cannot be an abuse of process to enforce a determination under the Act which is not otherwise impugned as invalid, as is the case here: see J[38]-

¹ *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69; 74 NSWLR 190, [67] (Macfarlan JA, Handley AJA agreeing).

² *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165

³ *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190; (2010) 78 NSWLR 393 at [36].

⁴ *Forte Sydney Carlingford Development Pty Ltd v Forte Sydney Carlingford Pty Ltd* [2024] FCAFC 9

[41] (Red 18I-19W). As Peden J observed at J[41] (Red 19C-G), the ordinary course available to a party objecting to a second adjudication is to seek to restrain (by way of a stay) the adjudication before it reaches the point of a determination. To restrain an otherwise valid or unchallenged determination obtained, as a result of an adjudication process which has run its course under the Act, on the basis that it otherwise constitutes an abuse of process, is contrary to the policy and purpose of the Act reflected in the many decisions of this Court to the effect that the grounds for challenging such a determination are narrow. Moreover, the inappropriateness of such an injunction is *a fortiori* in the present case where the First Determination (which was confined to the threshold and preliminary question of jurisdiction) did not involve a decision on the substantive merits of the Appellant's claim whereas the Second Determination did. These matters are the subject of Appeal Ground 2 (see Part E below).

C. The facts

9. The Appellant (**Kwik Flo**) and the First Respondent (**SE Ware**) were party to an agreement for the development of land owned by SE Ware (the terms of which were disputed).⁵ Kwik Flo carried out some work on the land, but no construction certificate for the development was ever obtained and the land remained undeveloped.⁶

C.1 Payment claim and payment schedule

10. On 16 April 2025, Kwik Flo served on SE Ware a payment claim under s 13(1) of the Act for costs totalling \$912,394 incurred in connection with the development, including architectural, engineering and consultancy services, certifying, water coordination, town planning, surveying, legal fees, project management, equipment hire, and energy.⁷ The claim also included over \$2 million for "[d]evelopment proceeds under the contract".

⁵ J[2] (Red 10F).

⁶ J[5] (Red 10V).

⁷ Blue 1-3.

11. On 5 May 2025, SW Ware served a payment schedule for *nil*.⁸ Among other things, the payment schedule contended that:
- (a) “the maximum extent of [Kwik Flo’s] statutory entitlement to payment is limited to construction work, and not alleged future profit, performed up to the date of termination that falls under the jurisdiction of the Act” (Blue 6R);
 - (b) that under the parties’ agreement “the Claimant was to fund all costs of the Development” and “[SE Ware] would not be required to make any financial contribution to or be liable for the costs the Claimant would incur in bringing the Development to completion” (Blue 7G-M); and
 - (c) “[n]ot all of the costs claimed by the Claimant appear to have incurred by it” (Blue 7N).

C.2 First Determination

12. On 15 May 2025, Kwik Flo lodged its first adjudication application with Adjudicate Today.⁹ In that application, Kwik Flo contended *inter alia* that the “essential terms” of the parties’ agreement included:¹⁰ (i) that SE Ware would pay 30% of Kwik Flo’s costs associated with obtaining a construction certificate; (ii) Kwik Flo would finance the costs of the development pending completion; and (iii) that in consideration for Kwik Flo undertaking the development it would be paid by way of payment of the proceeds from the sale of all lots except for certain retail, commercial, and parking lots. Kwik Flo also contended that it was an “implied term” that if the development did not proceed to completion then SE Ware would pay its costs and a reasonable margin.¹¹
13. Kwik Flo’s application then set out at length the quantum of its claim, including the nature of the work/services provided, the identity of the provider, the amounts invoiced to Kwik Flo by the provider, and the amount claimed by way of the adjudication

⁸ Blue 5-7.

⁹ J[6], Red 11C; Blue 8.

¹⁰ Blue 12I-R.

¹¹ Blue 12W-13X.

application (including a reconciliation of any differences between amounts invoiced, the amounts the subject of the payment claim, and the amounts the subject of the adjudication application).¹² The application further included a statutory declaration from its managing director, Mr Tannous, setting out *inter alia* the background to the development, the parties' agreement¹³ and an account of the works carried out by Kwik Flo (and earlier demands it made for payment of those works prior to the issue of its payment claim).¹⁴

14. On 22 May 2025, SE Ware lodged its response to the first adjudication application.¹⁵ That response contended *inter alia*: (i) that the Act did not apply to the parties' contract by reason of s 7(2)(c);¹⁶ and (ii) that the quantum of the costs claimed by Kwik Flo was overstated by 40% according to the opinion of an architect (Mr Beraldo) who provided a statutory declaration in support.¹⁷ The response was further supported by statutory declarations from its directors (Messrs Juantas and Juantas) directed among other things to the terms of the parties' agreement.

15. Section 7(2)(c) of the Act provides that the Act does not apply to:

a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

16. In late May 2025, each of the parties provided further submissions in response to a request from the adjudicator concerning the s 7(2)(c) issue raised by SE Ware.¹⁸

¹² Blue 16T-32N.

¹³ Blue 35G-39R.

¹⁴ Blue 39S-54Q.

¹⁵ Blue 58.

¹⁶ Blue 61H-63D.

¹⁷ Blue 74W-75D.

¹⁸ Blue 92-107.

17. On 12 June 2025, the first adjudicator issued the First Determination.¹⁹ He identified each of the “Adjudicated Amount”, “Due Date for Payment”, and “Rate of Interest” as “Not Applicable – see paragraph 40”. At [39], he summarised his findings:²⁰

[T]he Act does not apply to the “construction contract” entered into by the parties. As such the Claimant had no entitlement to serve a payment claim under the Act and, as the Claimant had no such entitlement, then I have no jurisdiction to make a determination in relation to the present adjudication application.

And then at [40], he explained:²¹

Because I have concluded that the present “construction contract” falls within the exception set out in 7(2)(c) of the Act, it follows that the Respondent is not required to pay any amount to the Claimant in relation to the payment that the Claimant had referred to adjudication. It also follows that as no adjudicated amount is able to be determined and nor can any determinations be made in relation to the due date for payment or the applicable interest rate.

18. Earlier, the adjudicator had identified the relevant factual dispute between the parties concerning the terms of their agreement. He explained at [18] that “[t]he matter is further complicated because some of the negotiations that ultimately led to the ‘*construction contract*’ were negotiated through an intermediary, Mr Karam, who has however provided no direct evidence” but then proceeded “nevertheless” to make findings as to the express terms of the contract “doing best the I can, and based on the evidence” before him.²² Those terms, as the adjudicator found, were consistent with SE Ware’s evidence and case—and included a finding that it was “[m]ore probable than not [that SE Ware] had never agreed to make any monetary contribution” to the development costs.²³ This finding then further justified a conclusion by the adjudicator at [27] that there was no

¹⁹ Blue 108 and 110.

²⁰ Blue 139I.

²¹ Blue 139L.

²² Blue 119U-121B.

²³ Blue 120X-121B.

“implied term”, as contended by Kwik Flo, to the effect that if the development did not proceed to completion then SE Ware would pay its costs and a reasonable margin.²⁴

19. At [28]-[38], the adjudicator considered at some length the issue of whether the Act applied to the parties’ contract or was excluded by operation of s 7(2)(c), including by reference to the further submissions he had called from the parties.²⁵ He explained (under the heading “My Determination”) at [35] that he considered, in light of SE Ware having raised the matter in its adjudication response, that “it was necessary for me to be satisfied as to this threshold jurisdictional issue”.²⁶ He then set out at [38] his reasoning leading to the conclusions at [39] and [40] (extracted above). He explained:

[W]hat the parties had agreed was that once the development was completed the outcome of the project would be split such that [Kwik Flo] would receive the title to 54 residential units and some car spaces. The nature of that agreement, however, provided no clarity as to the development costs, nor any clarity as to the size of the residential units, how many any of the units were to be 1, 2 or 3 bedroom nor as to what materials and finishes were to be incorporated into the development so as to enable any assessment to be made as to the value of the 54 residential units relative to the construction work carried out/related goods and services supplied. Indeed, there is no evidence that at the time when the parties entered into the “construction contract” that the parties had before them any documentation that had set out the expected construction costs ... Thus, in the present context, the notion of entitlement to the title of 54 residential units is fundamentally inconsistent with the concept of value or valuation ... The agreement that the parties entered into was loosely scoped and even though neither party had little information on the costs associated with the development costs, each party was prepared to proceed knowing the risks that each would bear under such arrangement because they believed that the reward each would receive from such an agreement would be sufficiently attractive. In the case of [Kwik Flo], it was prepared to assume the risk associated with the construction of the Project because it believed that receiving the title to 54 residential units upon completion would be an acceptable reward. In my view, however, such an agreement fell within the exemption set out in s7(2)(c) of the Act.

²⁴ Blue 125K-127I.

²⁵ Blue 127K-139H.

²⁶ Blue 136M-O.

20. The First Determination did not otherwise engage with the matters in the adjudication application or response, including the Kwik Flo’s identification and valuation of the costs it had incurred and SE Ware’s response to those matters and the evidence of Mr Beraldo.

C.3 Second Determination

21. On 20 June 2025, Kwik Flo withdrew its adjudication application from Adjudicate Today²⁷ and made a second application to a different adjudication body, Australian Solutions Centre.²⁸ Peden J characterised the withdrawal as “purported” (in consequence of her Honour’s later finding that Kwik Flo had not entitlement to withdraw it, or to make a new application: J[32], Red 16R), though nothing ultimately turns upon this as the Second Determination was not challenged or found to be invalid on this basis: see J[40]-[41] (Red 18P-19J).
22. The second application contended that the First Determination was not a determination under the Act, and then engaged (anticipatorily of the arguments to be raised by SE Ware in its adjudication response) with the first adjudicator’s findings regarding s 7(2)(c) of the Act.²⁹ It further explained that, in light of the shortcomings in the parties’ evidence identified by the first adjudicator—and, specifically, the absence of any evidence from the intermediary negotiator, Mr Karam—Kwik Flo had obtained evidence from Mr Karam himself which confirmed the content of the parties’ agreement as including an express term that, if the Project did not proceed to completion, SE Ware would pay Kwik Flo its costs incurred plus margin.³⁰ Mr Karam’s accompanying statutory declaration deposed that he was an accountant who acted for each of SE Ware and Kwik Flo, and that he had been engaged by SE Ware to advise on the development and thereafter approached Kwik Flo, culminating in a meeting between the parties where term were agreed.³¹ Mr Karam’s evidence included: (i) the parties agreed that SE Ware would

²⁷ Blue 138.

²⁸ Blue 142; J[9], Red 11N.

²⁹ Blue 144C-147C.

³⁰ Blue 146S.

³¹ Blue 175-180.

contribute 30% of the costs associated with obtaining a construction certificate;³² and (ii) he raised the issue of what would be done if the development did not reach completion and proposed that SE Ware pay Kwik Flo's costs plus a margin in that event—and the parties agreed.³³

23. The second application otherwise repeated the substance of Kwik Flo's earlier application concerning the quantum of its claim.³⁴
24. SE Ware engaged in the second adjudication, both in terms of substance concerning the parties' agreement and the payment claim, but also asserting an abuse of process by reason of the First Determination: J[10] (Red 11R). It did not, however, seek to respond to Mr Karam's evidence concerning what was agreed in the event of non-completion—other than to say that the “new evidence ... contains several inconsistencies that add to the lack of credibility with such evidence”,³⁵ though no inconsistencies in Mr Karam's evidence on the issue were actually identified.
25. The second adjudicator issued the Second Determination on 14 July 2025 in Kwik Flo's favour for the amount of \$1.2 million. He made different findings as to the terms of the parties' agreement (J[11], Red 11V) including because of the evidence of Mr Karam, who he described as acting in an “intermediary capacity” and whose “attestation as to the terms of the contract should [therefore] be given substantial weight”.³⁶ He found that it was discussed and agreed that if the development did not proceed to completion then Kwik Flo would be able to recover its costs of date plus a margin.³⁷ He also found—including by reason of an admission made by SE Ware—that it was a term of the agreement that SE Ware would pay 30% of the costs required to achieve a construction

³² Blue 178S.

³³ Blue 179J-U.

³⁴ Blue 153Q-169M.

³⁵ Blue 194Q.

³⁶ Blue 244H.

³⁷ Blue 246W.

certificate.³⁸ This led him to conclude that s 7(2)(c) of the Act did created “no jurisdictional impediment” because:

[T]he requirement for [SE Ware] to part fund the contract work up to the point of the construction certificate means that the development part of the contract work was based on the value of the work carried out, thereby meaning that the contract is not captured by the exclusion identified in Section 7(2)(c) of the Act.

26. The second adjudicator then proceeded to consider Kwik Flo’s claim for the value of its work.³⁹ He rejected Kwik Flo’s primary claim for nearly \$3 million comprising both its development costs (plus margin) and “development proceeds”. He accepted, however, the alternative claim for \$1.069 million for development costs (plus margin) only, and rejected SE Ware’s submission (based upon Mr Beraldo’s evidence) that these costs were overstated.⁴⁰ The second adjudicator further explained that he had reviewed Kwik Flo’s “detailed reconciliation of the costs claimed with the supporting supplier / consultant invoices” and “consider[ed] that [Kwik Flo] has demonstrated that the costs claimed are an accurate valuation of the work”.⁴¹ Thus, the second adjudicator determined the amount of \$1.069 million (plus GST) was payable with interest from the due date of 12 May 2025.⁴²

D. Appeal Ground 1 – First Determination not a “determination” under the Act

27. Peden J held that the Second Determination was an abuse of process because the First Determination was a “determination” under the Act which had not been found to be invalid: J[15] (Red 12R).
28. The question as to what is a “determination” under the Act must be answered by first having regard to the terms of the Act. Section 22(1) of the Act provides:

22 Adjudicator’s determination

³⁸ Blue 244X (See also Blue 236K-P).

³⁹ Blue 259-268.

⁴⁰ Blue 266D-X.

⁴¹ Blue 267S-U.

⁴² Blue 268-269.

(1) An adjudicator is to determine—

- (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 such amount became or becomes payable, and
- (c) the rate of interest payable on any such amount.

29. Section 22(4) then provides:

(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.

30. In *Dualcorp* at [67], Macfarlan JA (Handley AJA agreeing) explained that s 22(4) was not “an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator” and that “if questions of entitlement have been resolved by an adjudication determination, those findings may not in my view be reopened upon a subsequent adjudication”. First instance decisions have subsequently treated the “questions of entitlement resolved by an adjudication determination” as matters disposing of the substantial merits of a claim: see, eg, *University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635, [51]-[55] (Hammerschlag J, as the Chief Judge in Equity then was); *Urban Traders v Paul Michael* [2009] NSWSC 1072, [58]-[59] (McDougall J); *Ku-Ring-Gai Council v Ichor Constructions Pty Ltd* [2014] NSWSC 1534, [35]-[42] (Stevenson J); and *Arconic Australia Rolled Products Pty Limited v McMahon Services Australia Pty Ltd* [2017] NSWSC 1114, [29]-[33] (McDougall J).

31. The extension of this point in *Dualcorp* to the matters in s 7 of the Act was doubted (if not rejected) by Lee J (Elkaim J agreeing) in *Harlech Enterprises Pty Ltd v Beno*

Excavations Pty Ltd (2022) 18 ACTLR 245; [2022] ACTA 42 at [108]-[112] (see paragraphs 54 to 56) below.

32. Peden J referred at J[18]-[19] (Red 13G-T) to *Alucity Architectural Produce Supply Pty Ltd v Australian Solutions Centre* [2016] NSWSC 608. In that case, Hammerschlag J said at [58] that “[a] determination that no amount is to be paid because the claim is invalid is no less a determination than one which determines that no money is payable for some other reason”. The issue, however, was whether an adjudicator, who had concluded he did not have jurisdiction to determine an application because the relevant payment claim was invalid under s 13(5) of the Act, was entitled to retain his fees in circumstances where the dissatisfied applicant sought restitution of those fees on the basis that, absent a determination under s 22, there would be an unjust enrichment if he were to retain them. His Honour’s statement at [58] should be read in light of the observation that immediately followed at [59]: “s 29(1) provides that an adjudicator is entitled to be paid ‘for adjudicating an adjudication application’ [which] is what the adjudicator did”. The decision should be read narrowly in this respect and does not support a wider reading of what is a “determination” under the Act. (And, indeed, reliance upon the existence of a valid “determination” to justify an adjudicator’s retention of their fees is unnecessary according to this Court’s decision in *Ceeroose*.⁴³)
33. A further and important limitation on what constitutes a “determination” under the Act was identified by Ball J (as his Honour then was) in *Olympia Group*. The issue in that case was similar to that in the present case: whether a decision by an adjudicator that he did not have jurisdiction to determine an adjudication application, by reason of s 7(4) of the Act, (which provides that the Act does not apply to a construction contract to the extent it deals with construction work or related goods and services outside New South Wales) was a “determination” under the Act. His Honour held that it was not (at [14]). The reason was the principle identified by Spigelman CJ in *Chase Oyster*, where the then Chief Justice explained (at [36]) that an adjudicator has no power to determine the issue of whether s 17(2)(a) of the Act has been complied with; s 17(2)(a) being concerned

⁴³ *Ceeroose v A-Civil Aust Pty Ltd* [2023] NSWCA 215; (2023) 112 NSWLR 225, [132]- (Payne JA, Ward ACJ and Basten AJA agreeing).

with the question of whether an adjudication application has been validly made. According to Spigelman CJ, this result followed because the section “is not addressed to the adjudicator and is not a matter which he is directed to ‘determine’ within s 22(1)” of the Act though “[i]t may be that it is a matter which he must “consider” as one of the “provisions of the Act” within s 22(2)(a). However that section confers no power to determine the issue.” Basten JA (at [96]-[101]) and McDougall J (at [238] and [285]) reached the same conclusion. The point remains good law.⁴⁴

34. In *Olympia Group*, Ball J held that the same point applied to s 7(4) of the Act: “whether there was a construction contract to which the Act applies ... is a question that goes to whether the adjudicator can exercise jurisdiction. It is not a question ... which forms part of the exercise of that jurisdiction” (at [17]). This is consistent with the language of the Act: s 7(4) is not addressed to the adjudicator and is not a matter he or she is directed to “determined” within s 22(1); it is a matter for the adjudicator is to “consider” under s 22(2)(a)—though this does not confer power to “determine” the issue.
35. Ball J’s reasoning is sound and should be applied with respect to s 7(2)(c) of the Act. There is no relevant difference between that section and s 7(4). Yet it was not followed by Peden J in the present case for three reasons.
36. **First**, Peden J suggested at J[25]-[26] (Red 14V-15K) that Ball J’s decision was “based on certain facts” which led her Honour to distinguish *Olympia Group* at J[29] (Red 16F). Respectfully, however, this involved a misreading of Ball J’s reasons: it is clear from [14]-[18] that his Honour’s conclusion was based upon the application of Spigelman CJ’s point in *Chase Oyster*. He then further explained, at [19], that this conclusion (which he had already reached) was additionally supported by the facts, which showed that in coming to the conclusion that s 7(4) of the Act applied the adjudicator was not purporting to make a “determination” under s 22.
37. **Secondly**, Peden J applied the observations of the Full Court in *Forte Sydney* as “apposite” (J[28]; Red 15S). The Full Court’s analysis similarly relied upon an erroneous

⁴⁴ See, eg, *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339, [14] (Basten JA, Meagher and Leeming JJA agreeing); *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2017] SASCFC 2; (2017) 127 SASR 193, [19] (Blue J, Lovell J agreeing).

factual distinction of *Olympia Group* that is irrelevant in point of the principle actually applied by Ball J. The Full Court observed (at [90]) that:

In *Olympia Group*, as Ball J found to be the case, the adjudicator did not await an adjudication response nor apparently did he examine the payment claim or payment schedule. He considered the question of jurisdiction as a preliminary matter, as he was asked to do, forming a view about the issue on the same day as he accepted his nomination. That is not what happened here. Rather, in contrast, the question of existence of a construction contract and therefore jurisdiction was not raised as a preliminary or threshold issue but in detailed submissions. Mr Tozer accepted his nomination, he then considered the payment claim, payment schedule and the adjudication response and wrote a lengthy and considered determination having regard to that material.

38. This analysis (like Peden J's below) gave primacy to the matters of fact which additionally supported his Honour's conclusion in *Olympia Group* rather than Spigelman CJ's point of principle in *Chase Oyster* which his Honour applied to reach that conclusion.

39. The Full Court's analysis leads to a difficult situation which should not be followed. Whether something is a "determination" under the Act must depend upon how it is characterised under the Act. That is how Ball J approached the issue in *Olympia Group*: the application of the matters in s 7 of the Act are not matters of "determination" under the Act for the same reasons that the matters in s 17(2)(a) are not (for the reasons given in *Chase Oyster*). The characterisation of a matter under s 7 should not be ambulatory based on matters of happenstance. That is the effect of *Forte Sydney*. If the Full Court (see at [84]-[85]) is correct, then it was the fact that the respondent in *Olympia Group* wrote to the adjudication body, before submitting an adjudication response, raising jurisdictional concerns that made the relevant decision on s 7 "preliminary or threshold" in nature. On that logic, however, if the respondent in *Olympia Group* had not been as quick to identify the issue, or had instead chosen to incorporate s 7 jurisdictional matters into its formal adjudication response, the very same s 7 decision would have been a "determination" despite it being substantively identical. That cannot be correct. It would be a victory of form over substance. Whether an adjudicator's reasons are treated as "preliminary" should not be an accident of timing.

40. The characterisation of a matter under s 7 as "preliminary or threshold", rather than a "determination", should not depend upon whether, when, and how "detailed

submissions” on the matter are made by the parties. Contrary to what appears to have been suggested in *Forte Sydney* at [90] (see above), submissions were made by both parties in *Olympia Group* in the form of letters sent to the adjudication body prior to the filing of any adjudication response (see *Olympia Group* at [6]-[7]). The extent to which such submissions may be considered “detailed” is one of judgement and degree. The relevant factual contest in *Olympia Group* was a relatively simple geographic one, and so the “detail” of the submissions may be a reflection of this. But the characterisation of the s 7 matter should not depend upon whether: (i) as in *Olympia Group*, the matter is raised early in separate correspondence to the adjudication body; or (ii) as in *Forte Sydney* (see at [11]), the matter is raised in submissions contained in the parties’ respective adjudication application and response; or (iii) as in this case (see paragraphs 14 and 18 above) the matter is raised in the adjudication response and is then the subject of further submissions requested by the adjudicator.

41. In all cases the underlying question for the adjudicator is the same (ie, Is the Act excluded by a matter in s 7?) and its characterisation should not depend upon how or when it is answered. Ball J’s analysis in *Olympia Group* (applying Spigelman CJ’s point in *Chase Oyster*) leads to a clear and uniform answer in every case. A decision that the Act does not apply is not a determination under the Act. That approach does not lead to idiosyncratic outcomes based on procedural or timing difference. It is rooted in an anodyne application of the Act.
42. **Thirdly**, Peden J (in distinguishing *Olympia Group* and treating the observations in *Forte Sydney* as “apposite”) described the first adjudicator’s conclusion, that he lacked jurisdiction, as arising “only after considering Kwik Flo’s adjudication application, SE Ware’s adjudication response, and further submissions from Kwik Flo” and, further, that he “did not treat jurisdiction as merely a preliminary or threshold issue, but instead considered the issue towards the end of the substantive reasons about the payment claim”. This mischaracterises what the first adjudicator did. The extent to which the first adjudicator considered the materials before him was limited to the s 7(2)(c) issue. He did not otherwise engage with the matters in the adjudication application or response, including Kwik Flo’s identification and valuation of the costs it had incurred and SE Ware’s response to those matters and the evidence of Mr Beraldo. He did not consider or rule upon the substantial merits of the claim.

43. There was, as a matter of *substance*, no relevant difference between what the first adjudicator did and what the adjudicator did in *Olympia Group*. In both instances the adjudicators' consideration and decisions were limited to the jurisdictional question. As a matter of *form*, there may have been some difference: the submissions and decision in *Olympia Group* were much shorter and quicker whereas in the present case much more effort was expended by the parties and adjudicator on it. But in both cases the underlying inquiry and outcome were the same: no jurisdiction. This tends to underscore the problem in seeking to characterise (as the Full Court did in *Forte Sydney*) whether a decision that the Act does not apply by reason of s 7(2)(c) (or 7(4), as was the issue in *Olympia Group*) is a "determination" under the Act according to how and when it happens to be raised and decided.
44. Jurisdictional decisions can be complex when, as they do under the Act, they require some degree of immersion into contractual relations. Some contracts in the construction sphere may make the task relatively straightforward. Others, not so. That should not dictate whether a decision is a "determination".
45. The better view, consistent with both *Olympia Group* and *Chase Oyster*, and the language of the Act, is that a decision with respect to s 7(2)(c) of the Act is not a "determination" under the Act.

E. Appeal Ground 2 – No abuse of process

46. Peden J did not set aside the Second Determination as invalid (whether for jurisdictional error or otherwise). Therefore, and even if the First Determination was a "determination" under the Act (which, for the reasons given with respect to Appeal Ground 1, it was not), enforcement of the Second Determination should not have been restrained.
47. The Respondent participated in the Second Determination. It waited for the outcome and, unhappy with the result, then sought to restrain it as an abuse of process. The process had run its course.
48. This Court has repeatedly emphasised the narrowness of the circumstances in which a determination issued under the Act will be set aside: see, eg, *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd* [2025] NSWCA 49, [45] (Payne JA, Gleeson JA and Griffiths AJA agreeing). In *Builtcom Constructions Pty Ltd v VSD Investments Pty Ltd*

as trustee for *The VSD Investments Trust (No 2)* [2025] NSWCA 134, Leeming JA (Free JA agreeing) explained (at [47]-[49]):

[47] Those seeking to challenge the determinations of adjudicators must bear steadily in mind that merely establishing legal error is not enough. That is so even if as here the determination will entitle one party to a construction contract to enforce, as if it were a judgment debt, a determination worth many millions of dollars and even if the practical reality is that there will not in the near future, and may never, be a judgment by a court on the contractual dispute.

[48] Indeed, it is inevitable, and entirely forgivable, that the adjudicator who need not be legally qualified and who often needs to rule on dozens or hundreds of individual disputed items, without the benefit of an oral hearing and often without the benefit of any discipline in the length of submissions or the volume of material provided, in ten business days, will make material mistakes. This is an obvious consequence of the regime. As the High Court said in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4, material mistakes, whether of fact or law, do not without more lead to the determination being set aside, for that would undercut the mechanism for a swift extra-curial means of securing cashflow.

[49] Another reason why such errors, even if they are material, do not invalidate the determination, is that the “determination” actually determines nothing finally. True it is that for some purposes a determination may be treated as if it were a judgment, but if payments are made by the party against which the determination has been made, “[t]he payments themselves are only payments on account of a liability that will be finally determined otherwise”: *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [51].

49. To restrain an otherwise valid or unchallenged determination obtained as a result of an adjudication process which has run its course under the Act, on the basis that it otherwise constitutes an abuse of process, jars with the policy and purpose of the Act expressed above. It is effectively the setting-aside of the determination in further and potentially wide-ranging circumstances which go beyond any previously recognised.
50. That is not to say that a party aggrieved by an adjudication process which it perceives to be (or may well be) an abuse of process cannot take steps to seek to restrain or stay it before it yields a determination under the Act. That is what usually occurs: see J[41] (Red 18W-19J). But once the adjudication runs its course to the point of a determination being issued, the time for seeking such restraint is over and the parties’ are left to the

narrow courses of challenge available in light of the policy and purpose of the Act. Indeed, this must be (at least) a reason in the first place for the availability of injunctive relief to restrain an adjudication prior to the issue of a determination, because if the enforcement of a determination once issued could as a matter of course be restrained by reason of an abuse of process, there would be no convenience or urgency in seeking to restrain the adjudication from running its course.

51. SE Ware did not seek to restrain the second adjudication but instead fully engaged with the process (J[10]; Red 11S). The point is not one of waiver (*cf* J[44]-[46]; Red 20E-R). Instead, the point is that as a result of the second adjudication running its course there is now the Second Determination which may only be set aside along narrow lines having regard to the policy and purpose of the Act. Restraining the enforcement of the Second Determination once issued (and thus effectively setting it aside) does not fit within that policy and purpose. SE Ware can hardly complain with this result in circumstances where it could have sought to restrain the second adjudication before it reached the stage of the Second Determination, but did not do so.
52. The cases cited by Peden J at J[42] (Red 19O-Q) do not assist SE Ware.
53. In *Civil & Allied Technical Construction Pty Ltd v Resolution Institute* [2019] SASC 193, Kourakis CJ (at [65]) commented in *obiter*, and without any detailed consideration (including of the matters discussed above) that “the double adjudication problem may be to treat the judgment entered in a court ... on a second or subsequent adjudication as an abuse of process of that court”.
54. In *Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd* (2022) 18 ACTLR 245; [2022] ACTA 42 at Lee J (at [91], Elkaim J agreeing) expressed *obiter* agreement with Kourakis CJ’s earlier comments but then observed (at [92]) that “there would, in any event, be a form of abuse of process before a judgment on a second or subsequent adjudication was obtained”, which emphasises the point that the problem can (and should) be handled prior the point of a determination being issued.
55. Moreover, later in Lee J’s judgment (at [108]) his Honour expressed the view that these matters did not preclude parties from “from re-agitating facts ‘fundamental to the decision arrived at’ or ‘legally indispensable’ to the ultimate conclusion”. His Honour noted the necessary limitations upon this Court said in *Dualcorp* about the non-

exhaustive nature of matters to be determined according to s 24(4) of the ACT legislation (the equivalent to s 22(4) of the Act), explaining (at [109]):

I am cognisant of the view taken by all three judges in *Dualcorp* that s 24(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 agree that there will be matters antecedent and incidental to a valuation determination which Parliament cannot have intended be open to abuse by dissatisfied or creative claimants. But it is important also to bear in mind that the SOP Act's purpose is to facilitate security of payment: to create a claimant's right to interim payments, and to protect those payment claims, once adjudicated upon, from interference (except pursuant to s 24(4)(b) or s 38). It is not to protect the broader findings of adjudicators. The provisions in the SOP Act favour this conclusion.

56. His Honour then rejected an argument that matters comprising “essential preconditions to an adjudicator’s determination”—including the matters in the ACT legislation equivalent of s 7 of the Act—were matters about which an adjudicator was bound to a previous adjudicator’s determination: see at [112]. So, even on his Honour’s approach to the availability of the abuse of process argument generally under the Act, it does not apply to the matters at issue in the present case.
57. Lastly, in *Goyder Wind Farm 1 Pty Ltd v GE Renewable Energy Australia Pty Ltd* [2025] SASCA 39 the South Australian Court of Appeal (Livesey P, Doyle and Bleby JJA) said (at [121]) that “the broader analysis of Lee J in *Harlech*” was persuasive before observing (at [122]) that “[t]he attempt to register any second adjudication to that effect would likely amount to an abuse of the processes of the Court” and then (at [133]) that “any putative abuse of process of the SoP Act must take its character from an identifiable assault on the principle of finality embedded in the statutory procedure for claiming progress payments and having them adjudicated” and (at [134]) that “the processes of the Act, and their concern with finality, are not concerned with what could be viewed as unreasonable commercial behaviour in the abstract”.
58. This brings into focus what actually happened as between the First Determination and the Second Determination. The First Determination was in substance limited to the question of whether s 7(2)(c) applied so as to exclude the operation of the Act and the first adjudicator’s jurisdiction. The first adjudicator noted the difficulty caused by the absence of evidence of the parties’ mutual agent, Mr Karam, in this respect. The Second Determination then went much further. It was not identical or wholly repetitive of the

First Determination. Mr Karam this time provided evidence. The second adjudicator relied upon that evidence as well as admissions made by SE Ware in coming to the view that s 7(2)(c) did not apply. He then proceeded to consider and determine the merits of Kwik Flo's claim, including by inspecting the materials provided by parties for that very purpose: for SE Ware the evidence of Mr Beraldo, and for Kwik Flo the comprehensive reconciliation of the development costs accompanied by supporting documentation. The first adjudicator had, of course, done none of this.

59. Thus, when the First Determination and the Second Determination are viewed side-by-side, the latter is not "an identifiable assault on the principle of finality embedded" in the former. That is more evident when it is recognised that SE Ware voluntarily and actively engaged with the process leading to the Second Determination and did not seek to restrain anything until it received an outcome that was unfavourable to it.
60. It was an error for Peden J to restrain the enforcement of the Second Determination and the appeal should be allowed on this basis regardless of the outcome of Appeal Ground 1.
61. Lastly, and though the point does not strictly arise because it was expressed in *obiter* below, it should be observed that Peden J's suggestion at J[43] (Red 19R) that the restraint of the Second Determination would be justified even if the First Determination were vitiated by jurisdictional error is inconsistent with this Court's decision in *Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd* [2020] NSWCA 172 at [45] (the Court; Meagher JA; Leeming JA; Payne JA).

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