Filed: 31 October 2025 1:42 PM

D0002950HM

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	SE Ware Street Dev Pty Ltd,Respondent 1
Legal representative	Peter Meades
Legal representative reference	
Telephone	02 8289 5889

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 v SE Ware- First Respondent's Submissions dated 31 October 2025.pdf)

[attach.]

IN THE NEW SOUTH WALES COURT OF APPEAL

NSWCA 2025/376821

Kwik Flo Pty Ltd
Appellant

SE Ware Street Dev Pty Ltd
First Respondent

Edward Smithies
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS DATED 31 OCTOBER 2025

A. INTRODUCTION

1. Kwik Flo's case is—and must be for it to succeed—that the following is lawful and consistent with the scheme of the *Building & Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

   (a) The builder (here, Kwik Flo) applies for adjudication under s 17 of the Act. It includes with its adjudication application evidence as to the terms of an oral construction contract under which it claims payment.

   (b) The principal (here, SE Ware) gives an adjudication response under s 20 of the Act. It includes evidence of a different oral contract and contending that the "construction contract" is excluded from the Act.

   (c) An adjudicator accepts the appointment, considers the adjudication application and adjudication response, and gives a written determination resolving the factual dispute and making findings about the terms of the oral contract. As a result, the adjudicator finds that the construction contract is an "excluded contract" under s 7, such that the adjudicator has no jurisdiction (here, the **First Determination**).

   (d) Seemingly dissatisfied, the builder can then "withdraw" its adjudication under s 26(2)(a) on the basis that the first adjudicator has "fail[ed] to determine the adjudication application within the time allowed" within the meaning of s 26(1)(b).

(e) The builder can then by s 26(2)(b) submit a new adjudication application to a different adjudicator alleging a different contract with new evidence about the terms of the contract.

(f) The builder can then repeat steps (c) to (e) as many times as it wishes until an adjudicator accepts its factual contentions that the terms of the contract do not exclude it from the Act's operation. The adjudication determination by the last such adjudication is validly made under the Act and can then be enforced (here, the **Second Determination**).

2. The primary judge (Peden J) was correct to reject these contentions. Her Honour was correct to hold that there was no right to withdraw the adjudication application under s 26: PJ [29], [32] **(RED 15)**. Her Honour was also correct to hold that the attempt to reinvoke the processes of the Act with a second adjudication application in relation to the same issue involved an abuse of process: PJ [42] **(RED 19)**. The primary judge was therefore correct to enjoin enforcement of the Second Determination for those reasons.

B. KWIK FLO'S TWO DISCRETE ISSUES

3. Kwik Flo's two questions posed at [2]–[3] of its submissions dated 20 October 2025 (**KFS**) must be understood in the factual context of the appeal. For example, the second question (at KFS [3]) passes over the fact that enforcement of the Second Determination was enjoined because it was repetitious of the First Determination, albeit predicated on a changed case (i.e., a *different* alleged contract) and new evidence.

C. FACTS

4. SE Ware generally accepts Kwik Flo's factual summary, save in *four* respects.

5. *First* is a point of controversy. Contrary to KFS [21], whether Kwik Flo's withdrawal of its first adjudication application *after* receiving the First Determination was effective or (only) "purported" underscores consideration of both the questions posed by Kwik Flo at KFS [2]–[3] as developed throughout what follows: and see particularly PJ [9], [32], [40]–[41] **(RED 11)** *cf* also KFS [21].

6. *Second* is a point of exposition, Contrary to KFS [47], Kwik Flo passes over the fact that, throughout the Second Determination, SE Ware asserted that what was happening was

an abuse of process because **(BLUE 186)** there had already been an adjudication determination: see particularly PJ [10] **(RED 11)** *cf* also KFS [51], [59].

7. *Third* is a point of emphasis. As Kwik Flo (properly) submits at KFS [12], in its *first application*, Kwik Flo alleged an *implied* term that if the development did not proceed to completion then SE Ware would pay its costs plus a *reasonable* margin **(BLUE 12)**. Meanwhile, as Kwik Flo also (properly) submits at KFS [22], in its *second application*, Kwik Flo alleged an *express* term that if the development did not proceed to completion then SE Ware would pay its costs *plus margin* **(BLUE 146)**. This change in case was based on the new evidence of Mr Karam which Kwik Flo had prepared *after* receiving the First Determination and, in Kwik Flo's words (at KFS [22]) "anticipatorily of the arguments to be raised by SE Ware [about] … the first adjudicator's findings regarding s 7(2)(c) of the Act".[1]

8. *Fourth* is a point of elaboration. Kwik Flo's change in case and new evidence led the second adjudicator (again in Kwik Flo's words — KFS [25]) "[to make] different findings as to the terms of the parties' agreement" and ultimately "to conclude s 7(2)(c) of the Act created 'no jurisdictional impediment'". That, of itself, bespeaks an abuse of the Act's processes. As set out below, the authorities make clear that the scheme of the Act prevents the repetitious use of its processes. And the Court would not permit an adjudication certificate so obtained to be registered as a judgment of this Court.

D. GROUND 1: FIRST DETERMINATION A "DETERMINATION"

9. The primary judge considered whether the First Determination was a "determination" from PJ [17]–[30] **(RED 13)**. Her Honour concluded that it was. Her Honour's conclusion is correct for the reasons that her Honour gave.

D.1. Adjudication of Disputes: Div 2 of Pt 3 of the Act

10. Central to Kwik Flo's first ground of appeal is div 2 of pt 3 of the Act. Put shortly, div 2 of pt 3 sets up a statutory regime by which an adjudication application is to be determined.

---

[1] *Cf* also KFS [14]–[19].

11. The cases are clear that these sections should be interpreted in a way that prevents the repetitious use of the Act's processes. Some of the leading statements may be found in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190.[2]

12. For present purposes, the following aspects to the regime are significant.

13. Section 17 provides that an applicant may apply for adjudication *of a payment claim* and prescribes various conditions to so doing, none of which are presently relevant.

14. Section 17A then relevantly provides that a claimant may, *if an adjudicator has been appointed*, withdraw an adjudication application *before the application is determined*.

15. Section 19 in turn provides for appointment of an adjudicator.

16. Section 20(1) provides that the respondent *may* lodge an adjudication response either within five business days of receiving a copy of the application or instead, *later*, within two business days after receiving notice of the adjudicators acceptance of his or her appointment.

17. And significantly, s 21(1) *expressly prohibits* the adjudicator from determining the application *until after* the end of that period prescribed by s 20(1) (i.e., the time for the adjudication response). And s 21(3) *expressly prescribes* timeframes within which the adjudicator must *then* make his or her determination, relevantly (per sub-s (3)(a)(i)) within 10 business days of the respondent lodging its response or otherwise the end of the period within which the respondent was entitled to do so.

18. Then, finally, s 22 *expressly mandates* that the adjudicator is to determine the application and (per sub-s (2)) in so doing *is to consider* only certain matters, relevantly *including any adjudication response*.

19. Taken together, these provisions disclose that it is only *after* the step provided by ss 20 and 21 (i.e., the adjudication response) that the adjudicator *proceeds to determine* an adjudication application.

---

2 See particularly at [2], [16] (Allsop P), [60]–[70] (Macfarlan JA, with whom Handley AJA agreed). See also, e.g., *University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635; (2010) 26 BCL 445 at [54]–[55] (Hammerschlag J); *Urban Traders v Paul Michael* [2009] NSWSC 1072 at [59] (McDougall J); *Ku-Ring-Gai Council v Ichor Constructions Pty Ltd* [2014] NSWSC 1534 at [53] (Stevenson J).

20. In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 (on which Kwik Flo relies — returned to from [43] below) McDougall J put it (at [192]): "Section 22(1) sets out what it is that an adjudicator is to do and s 22(2) [to] s 22(4) set out how the adjudicator is to carry out that task. *The 'determination' is the performance of the tasks described in s 22(1)…*" (emphasis added). More recently, in *Ceerose v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225 (cited by Kwik Flo at [32] fn 43) Payne JA expressed it (at [77]):

> 77. *It is the dispute* between the maker of the payment claim and the recipient of that claim *which is referred for adjudication*. In the light of this express restriction on the contents of the adjudication response, an *adjudicator is not required to go beyond* the terms of the payment schedule, repeated in *an adjudication response*, in accepting all or part of the payment claim. The *requirement in s 22(1)*, that the adjudicator is to determine "the amount of the progress payment (if any) to be paid" by the respondent to the claimant, *in context, is a requirement to determine the amount of the progress payment arising from the dispute submitted* by the parties for adjudication…

(Emphasis added.)

21. Thus, where the adjudication process terminates *before* the step prescribed more specifically by ss 20(1) and 21(3)(a)(i) (i.e., the adjudication response) then there will be no "dispute … referred for adjudication". That is, there will be no determination. This is because, simply, any determination thereafter will not have been made in accordance with the statutory commands of ss 17 through to 22. There cannot be because ss 21(1) and 22 specifically, together, provide that the adjudicator *cannot* make a determination *prior to* the respondent providing its response or otherwise the expiration of the time period for it so doing.

22. Here, the First Determination was made in accordance with the statutory commands of ss 17 through to 22. It follows it was a 'valid' determination for the purposes of the Act.

D.2. Kwik Flo Is Wrong: Authority, Principle, and Purpose

23. Kwik Flo's contention in this Court is inconsistent with the first instance decisions, as well as intermediate appellate authority. In order to succeed, this Court must reason (as Kwik Flo itself submits at KFS [7], [32], [39], [43]) that those decisions are wrong.

24. Conversely, SE Ware's contention explains and is consistent with each of these decisions.

25. It is convenient to start with *Forte Sydney Carlingford Development Pty Ltd v Li* [2022] FCA 1499 (***Forte First Instance***) which is closest to the present. It is also seemingly the

only decision that has been the subject of intermediate appellate review. There, a joint venturer (**FSCD**) submitted an adjudication application for payment from another joint venture entity (**Forte Sydney**) (see at [15]); after Forte Sydney had served its adjudication response (see at [19]—"…the parties' respective submissions and evidence…"),[3] the adjudicator issued a determination (**Mr Tozer's Determination**) finding the agreement was not a "construction contract" within the meaning of the Act and alternatively was exempt by reason of s 7 (see at [19]–[20]);[4] FSCD then informed the adjudication body that it withdrew its application and resubmitted it (see at [21]); Forte Sydney then sought an urgent interlocutory injunction enjoining the adjudication body from referring the second application to an adjudicator for adjudication under s 17(6) (see at [27]); FSCD then withdrew the second application and made a third application to a different authorised nominating body, ABCDRS (see at [27]–[28]); by consent, ABCDRS was enjoined from referring that third application so as to enable a further interlocutory application to be determined (at [29]). In the result, the primary judge (Stewart J) granted the injunction. In so doing, his Honour found (at [35]) that Mr Tozer's Determination *was a valid "determination"* within the meaning of the Act. The same is so of the First Determination here.

26. FSCD sought leave to appeal: *Forte Sydney Carlingford Development Pty Ltd v Forte Sydney Carlingford Pty Ltd* [2024] FCAFC 9 (***Forte Appeal***). Markovic and Halley JJ (with whom Derrington J agreed) surveyed several decisions and ultimately affirmed his Honour's decision, including his Honour's finding that Mr Tozer's Determination was a valid "determination" within the meaning of the Act: see at [79]–[91].

27. SE Ware accepts that Stewart J made this finding only on an interlocutory hearing. However, it pays to note that his Honour specifically reasoned (at [35]): "… there is no realistic possibility that a different ultimate decision would have been made in view of the operation of s 7(3)(c)(iii). I am therefore satisfied that the Owner *not only has a case at the level of a serious issue to be tried* on this question, *but that Mr Tozer's determination* that he lacked jurisdiction *is not vitiated* by jurisdictional error and *is*

[3] See also *Forte Appeal* [2024] FCAFC 9 at [81]: "Here, the parties joined issue on the question of whether there was a construction contract … *in its adjudication response Forte Sydney contended* that the arrangement between FSCD and it was not a construction contract for the purposes of s 7(1) of the SOP Act. Mr Tozer determined that question…" (emphasis added).

[4] It appears that the builder had also made another application and obtained another determination even *earlier*: see at [17].

valid." (emphasis added). That is, as indicated by the emphasis, his Honour expressly couched this finding in terms of finality, not merely serious arguability.

28. Similarly, SE Ware accepts that the Full Court refused leave to appeal. As such, generally, the Court's reasons are not binding.[5] However, leave was heard concurrently with the appeal. It is ultimately unnecessary in this case to engage further with the rules concerning the precedential value of reasons of an intermediate appellate court refusing leave to appeal where there has been argument as on appeal. Bell P considered the principles in *Secretary of the Department of Planning, Industry And Environment v Blacktown City Council* [2021] NSWCA 145. It is unnecessary because the reasoning is sound. It is also consistent with SE Ware's contention. It is inconsistent with Kwik Flo's contention.

29. As noted, Kwik Flo contends (because it must) that these decisions are wrong.

30. Next is *Alucity Architectural Produce Supply Pty Ltd v Australian Solutions Centre* [2016] NSWSC 608 (***Alucity***).[6] The issue was somewhat removed from the present (i.e., entitlement of an adjudicator to payment of his fee) but the reasoning squarely applies.

31. There, the adjudicator had issued a "determination" in which he had concluded that he did not have jurisdiction because the relevant payment claim was invalid under s 13(5). He only did so after the respondent (Empire Windows) had served its adjudication response: see at [26]. Rather than seeking judicial review of the determination, Alucity sued the adjudicator and the authorised nominating authority for damages and restitution of the adjudication fees which it had paid to them. Relevantly, Alucity argued that the adjudicator had not made a "determination" under s 22 and so was not entitled to payment: see particularly at [50]. Hammerschlag J described the claim (at [55]) as "without merit" and (at [56]) that "[e]ach of the premises upon which it rests is false.". His Honour succinctly expressed it (at [58]) thus: "Section 22(1)(a) requires the adjudicator to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant. 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.".

---

5 See particularly, e.g., *X v DPP (Vic)* [1995] 2 VR 622 at 626 (Callaway JA).

6 And considered in *Forte Appeal* [2024] FCAFC 9 at [81]–[81].

32. Kwik Flo attempts (at KFS [32]) to distinguish or otherwise avoid *Alucity* on the basis that the ultimate issue there concerned the adjudicator's fees and s 29 of the Act. Kwik Flo's attempt is unconvincing and should be rejected. His Honour's reasoning concerning s 22 was "a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him" and is therefore *ratio*.[7] It applies equally to other provisions across the statutory regime. Indeed, Kwik Flo's submission, if accepted, would have a curious result: a determination could be a "determination" within the meaning of s 22 for the purposes of s 29, but not a "determination" within the meaning of s 22 for the purposes of *other* sections of the Act. As Kwik Flo itself submits (at KFS [39]): "Whether something is a 'determination' under the Act must *depend upon how it is characterised under the Act*." (emphasis added). That is, specifically, how it is characterised under s 22. Whether something is characterised as a "determination" under s 22 should not depend upon—and certainly the answer should not be different depending upon—whether one is asking the (statutory) question for the purposes of s 17A, or s 21, or s 26, or s 29.[8] Contrary to KFS [39], the only "difficult situation" arises on Kwik Flo's own case.

33. In both *Forte First Instance* [2022] FCA 1499 (and *Forte Appeal* [2024] FCAFC 9) and *Alucity* [2016] NSWSC 608 the adjudications had progressed beyond the mere submission of an adjudication application under s 20. Importantly, in both, the respondent had served its adjudication response; the adjudicator had accepted appointment, and had been left to perform the tasks described in s 22(1).

34. This brings the argument to *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165, on which Kwik Flo substantially relies (at KFS [7], [33]–[43], [45]).[9]

35. That decision concerned a subcontract by which Olympia agreed to refurbish a building in connection with the redevelopment of HMAS Creswell. HMAS Creswell is a shore establishment of the Royal Australian Navy located on the southwest shores of Jervis Bay: see at [1]. In the events which happened, Olympia made an adjudication application: see at [5]. Two days later, Hansen Yuncken wrote to the adjudication body drawing its

---

7 R Cross and J W Harris, *Precedent in English Law* (Clarendon Press, 4th ed, 1991) 72.
8 Consider *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716.
9 And considered in *Forte Appeal* [2024] FCAFC 9 at [83]–[90].

attention to the fact HMAS Creswell was situated in the Jervis Bay Territory (i.e., outside New South Wales) and to s 7(4) of the Act. Section 7(4) relevantly provides that the Act does not apply to a construction contract to the extent the contract deals with construction work carried out outside New South Wales: see at [6]. Four days later (i.e., 21 February 2011) an adjudicator was appointed. There had been some further correspondence in the meanwhile: see at [7]–[8]. *The next day* (i.e., 22 February 2011) the adjudication body wrote to the parties indicating the adjudicator had determined the construction contract was not one to which the Act applied: see at [9].

36. One issue considered by Ball J was whether the adjudicator had made a "determination". His Honour held that he had not. Specifically, his Honour reasoned (at [14]):

> 14. In my opinion, the *adjudicator's decision was not a determination of the type contemplated by s 22* of [the Act]. *Rather, it was a decision whether [the Act] applied to the claim* made by Olympia having regard to where the relevant construction work was carried out. The *adjudicator had to make a decision about that question because it was an essential precondition to the exercise of the powers granted to him* by the Act. But is [sic] *does not follow that, in making that decision, he was exercising a power to make a determination* of the type *required by s 22…*

(Emphasis added.)

37. Initially, this might appear to tell against SE Ware's contention in this Court. Certainly, Kwik Flo says it does.

38. However, his Honour's reasoning is entirely consistent with the preceding. It was not a "determination" because it was not based on, or from, the adjudication procedure "required by s 22": Hansen Yuncken never provided an adjudication response, nor did the time prescribed for it to do pass before the decision was made — ss 20(b) and 21(1) gave Hansen Yucken *two days* from the adjudicator's appointment and (again) prohibited the making of a determination until *after* then. But the adjudicator decided he did not have jurisdiction *on the very next day* after he was appointed. Additionally, the adjudicator did not need to resolve any disputes between the parties to come to the conclusion that he would not have jurisdiction if he did so.

39. This fully meets Kwik Flo's submission at KFS [7] that the primary judge erred (at PJ [25]–[29] **(RED 14)**) "in distinguishing *Olympia Group* and otherwise not following it because her Honour … mistook Ball J's decision as being based upon certain facts…": *cf* also KFS [36]. It is so that her Honour distinguished *Olympia Group*; and obviously

enough her Honour did so on the facts. But her Honour was correct to do so for the reasons here explained.

40. It also fully meets, for the same reason, Kwik Flo's submission at KFS [7] that the Full Court's reasoning is "similarly problematic": *cf* also KFS [37]–[38]. Indeed, as is apparent from the very passage of reasoning excerpted at KFS [37], the Full Court expressly distinguished *Olympia Group* on this basis.

41. Likewise, it meets Kwik Flo's "form over substance" submission at KFS [39]. It is not form over substance because, in substance, the adjudicator in *Olympia Group* did not undertake the procedure mandated by s 22: *cf* also KFS [43].

42. The fulcrum of Kwik Flo's submissions concerning *Olympia Group* is that, as a matter of *ratio*, Ball J held that the adjudicator's "determination" was not a determination within the meaning of s 22 because it was a determination that the construction contract was not one covered by the Act, and thus he did not have jurisdiction: see KFS at [33]–[34].

43. This brings the argument to *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393.

44. *Chase Oyster* concerned three questions removed into this Court raising two, fairly fundamental, issues: whether adjudicators' determinations are amenable to relief in the nature of *certiorari* for jurisdictional error; and whether, on the facts of that case, the adjudicator's determination was vitiated by jurisdictional error. In short, this Court's decision in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 had been taken as authority that adjudicators were not amenable to *certiorari* for jurisdictional error of law; but it was thought that that was inconsistent with the High Court's decision in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

45. Kwik Flo reaches for *Chase Oyster* (as it does *Olympia Group*) to contend that, here, the First Determination was not a "determination" at all because it was a determination that the adjudicator *did not have jurisdiction*. That is, it was a decision that the Act does not apply and so not a decision under the Act. This proposition underlies much of Kwik Flo's case in this Court; indeed, it is perhaps really the essence of it (see particularly KFS [7], [32]–[39], [41], [44]–[45]).

46. For present purposes, SE Ware can accept the proposition falling from *Chase Oyster*. It can do so because it reveals what may be described as the logical flaw in Kwik Flo's argument.

47. Kwik Flo's argument seems to be (or even must be) that a decision that the Act does not apply (i.e., as here) is the same as some other decision tainted by jurisdictional error (i.e., as in *Chase Oyster*). That is, each is a decision made 'outside' the Act: the former simply because it is a finding the Act does not apply; the latter also so because jurisdictional error vitiates it, in the sense that it is a decision made beyond the decision-making competence reposed in the adjudicator by the Act: *cf* particularly KFS [33], [39].

48. A problem on this theme divided this Court in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716. At [10], Basten JA (in dissent) put it succinctly thus: "The tightly constrained scheme of [the Act] suffers from a significant omission: *there is no provision dealing with the possibility (or consequences) of proceedings by either party challenging the validity of any earlier (pre-judgment) step* taken under the Act, including, as in this case, an adjudicator's determination." (emphasis added). His Honour (at [40]) also succinctly pointed out that, "[t]he assumption that a decision made without jurisdiction must be without any legal status or effect is false.".

49. Indeed, the entire point in *Chase Oyster* was whether the Court *could* (and *ought*) set aside by way of relief in the nature of *certiorari* an adjudication determination tainted by jurisdictional error. That is, again, one made beyond the jurisdiction conferred by the Act: *cf* particularly KFS [33], [39]. And, Kwik Flo has never sought to set aside the First Determination: see particularly PJ [43] **(RED 19)**. Of course, Kwik Flo seemingly considers the First Determination is wrong, in the sense that it considers the adjudicator's finding about the terms of the construction contract are not correct. But it has never alleged *error* in the specific sense of seeking judicial review of the determination.

50. Indeed, recent authority of this Court indicates that Kwik Flo would almost certainly fail in so doing. As Payne JA explained in *Ceerose* (2023) 112 NSWLR 225 (at [75]): "The 'true construction of the contract' … are, by reason of the structure of the *Security of Payment Act* … matters where an error by an adjudicator will not be jurisdictional."

51. Notably, in *Olympia Group* [2011] NSWSC 165, it was the *adjudication applicant* (i.e., Olympia) that sought to set aside the determination arguing the adjudicator had *wrongly*

determined that the Act did not apply to the construction contract there in issue. In so doing, Olympia expressly argued the same or similar as Kwik Flo does in this Court. To that, it should also be noted that the point made by SE Ware here provides an alternative, dispositive route to decision in *Olympia Group*. Ball J himself explained this (at [19]):

> 19. In my opinion, the conclusion that the adjudicator did not make a determination under s 22 of the SOP Act is supported by what the adjudicator actually did. *He was asked to make a decision* on the question of jurisdiction *before he accepted his nomination*. Faced with that request, he accepted his nomination but, *on the same day*, caused ASC to write to the parties to say that he accepted that he did not have jurisdiction. *He did not wait for an adjudication response as he was required to do before making a determination under s 22*. Nor does it appear that he examined the payment claim or the payment schedule in arriving at his decision. *Rather, what he relied on was* the fact that the construction site was located outside New South Wales. *It seems clear from those facts that the adjudicator — correctly, in my view — was not purporting to make a determination under s 22*.
>
> (Emphasis added.)

52. Accordingly, that is also *ratio*[10] and *Olympia Group* sits comfortably with the other cases, on the basis SE Ware contends in this Court.

53. In this connection is *Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd* [2020] NSWCA 172 (cited by Kwik Flo at [61]). There, the adjudicator expressly, simply *declined to determine* the amount (if any) to which the claimant was entitled: see particularly at [25]–[27]. The appeal asserted error by the primary judge (Ball J) in finding that this earlier determination was void in circumstances that the adjudicator had failed to perform his statutory function; and, alternatively, assuming that earlier determination was void, that the later determination should have been declared void because the contract counterparty had proceeded to obtain it without first approaching the court for declaratory relief: see at [7]–[11], [14], [20]–[24], [26]–[27].

54. At [45], this Court (Meagher, Leeming, and Payne JJA) said: "… It is sufficient for present purposes to rest our decision on *the absence of any obligation … to approach a court before applying for the second adjudication*.". (emphasis added).

55. That may be read as indicating support for Kwik Flo's case here. It does not, for the reasons explained by their Honours immediately after: "It would be highly unusual *if unresolved claims* as to persons' rights in any way prevented the application of statute,

especially where the person who enjoyed the statutory entitlement rightly *contended that the adjudication was void* … the premise of this ground is that the first adjudication was void; how can there be an abuse of process in applying for a second adjudication *in those circumstances?*".

56. As indicated by the emphasis, the circumstances here are the *opposite*: the first adjudicator did *not* leave anything "unresolved"— he *determined* that the alleged construction contract was not covered by the Act and *thus that Kwik Flo had no entitlement*. In that sense, his determination concluded the entire adjudication. Returning to *Forte First Instance* [2022] FCA 1499, as Stewart J explained (at [37]):

> 37. However, where, as here … *the whole of the claim is excluded from adjudication* under the Act … That is to say, the payment obligation or liability under the indemnity is excluded from the application of the Act with the *result that there is no remaining payment obligation in the relevant contract or arrangement to which the progress payment regime* under the Act *can apply*.

(Emphasis added.)

57. Similarly, contrary to in *Parrwood*, Kwik Flo has again never contended that the First Determination was void, in the precise sense of vitiated by jurisdictional error.

58. If only for completeness, none of the preceding (nor does disposition of the appeal) turns on any issue whether the party's submissions are "'detailed'", nor does it on "idiosyncratic outcomes based on procedural or timing difference", nor does it on "[extent of] engagement[ment] with the materials before [the adjudicator]" (*cf* KFS [20], [41]–[42], [44]). Likewise, SE Ware's contention also "leads to a clear and uniform answer in every case" (*cf* KFS [41]): where a finding that the Act does not apply is made in the "determination" following the steps prescribed from s 17 to s 22 then that *is* a "determination" under the Act.

59. Ground 1 should be rejected: the First Determination was (and, indeed, still is) a "determination" within the meaning of the Act.

E. GROUND 2: ABUSE OF PROCESS AND INJUNCTION

60. Much of what has been covered above applies equally to the second ground of appeal. As such, Kwik Flo's contentions in this Court can be dealt with shortly.

61. The immediate point is again one of logic: the Second Determination was enjoined not because of error by the second adjudicator, but because of Kwik Flo's conduct. The distinction is obvious enough.

62. As such, SE Ware can readily—and, indeed, does— embrace (as KFS submits at [48]–[49], [51]) that this Court has repeatedly emphasised the few circumstances in which an adjudication determination will be set aside. However, this says little to nought about the present circumstances.

63. For the same reason, Kwik Flo's reach to the "policy and purpose of the Act" takes matters no further: *cf* KFS [8], [49], [51].

64. It appears that there is no decision precisely on point. However, all the reasoning—even if strictly *obiter*—cited and quoted by Kwik Flo at [52]–[55] and [57] lends support to SE Ware's argument. Most squarely is what Stewart J said in *Forte First Instance* [2022] FCA 1499 (at [39]–[40]):

> 39. There is a further consideration, which is that *it is in my view an abuse of the procedures of the Act for the Developer to seek to re-agitate a claim which has already been decided*. Indeed, two adjudicators, Mr Wood and Mr Tozer, have *each decided that the Developer is not party to a "construction contract"* with the Owner and that the contended-for contract or arrangement is *in any event relevantly exempted from the application of the Act*. *It may be*, as submitted by the Developer in reliance on *NSW Netball Association Ltd v Probuild Construction (Aust) Pty Ltd* [2015] NSWSC 1339 at [49] and *Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd* [2020] NSWCA 172 at [37]–[43], *that a determination vitiated by jurisdictional error is no determination at all* and can be ignored. *However, that does not mean that the repetitious use of the Act by resubmitting the same payment claim to successive adjudicators in the hope of a favourable outcome is not an abuse* of the processes of the Act. See *Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd* [2022] ACTCA 42 at [92]–[94] per Lee J (Elkaim J agreeing).
>
> 40. As observed by Kennett J in Harlech (at [16]), *the doctrine of abuse of process has been invoked by single judges in the Supreme Court of NSW in granting injunctive relief to restrain the pursuit of repetitious claims under the Act*: *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWSC 416 (Rein J); *University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635 (Hammerschlag J); *Urban Traders v Paul Michael* [2009] NSWSC 1072 (McDougall J). It is well-established that the Act as a whole generally manifests an intention to prevent repetitious re-agitation of the same issues: *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69; 74 NSWLR 190 at [2] (Allsop P) and [70] (Macfarlan JA, Allsop P and Handley AJA agreeing).
>
> (Emphasis added.)

65. As indicated by the emphasis, his Honour's observations are apposite, even fairly noting that that was a case in which the counterparty sought urgent, interlocutory relief *while the adjudication was ongoing*.

66. Ultimately, Kwik Flo's contention on this ground is seemingly that a party can—indeed, *must*—come to court urgently and seek an injunction while the adjudication is ongoing; but that, if it does not do so then enforcement of the very determination resulting from that abuse will not—indeed, *cannot*—be enjoined. This falls most clearly from KFS [50]–[51] and [54]. Again, this conflates Kwik Flo's abuse of process and error by an adjudicator.

67. Kwik Flo abused the process of the Act in obtaining the Second Determination as it did. Its enforcement would constitute an abuse of process of the Court. In the circumstances, the Court can—and should— permanently enjoin its enforcement.

68. Kwik Flo's argument is little more than that it can now enjoy the fruit of a poisoned tree.

F. CONCLUSION

69. It is to be noted that Kwik Flo filed its notice of appeal on 29 September 2025, by which it appeals (purportedly as of right) from the primary judge's decision, reasons for which were given on 19 September 2025. However, at the time the appeal was filed and at the time of these submissions, the primary judge has not actually made any orders other than for the exchange of proposed orders and submissions about the same **(RED 5)**. SE Ware reserves its position as to the competence of this appeal, which should in any event be dismissed with costs.

D A HUGHES
7 Wentworth Selborne
T: + 61 2 8228 2031
E: dhughes@7thfloor.com.au

S D PUTTICK
7 Wentworth Selborne
T: + 61 2 8224 3042
E: sputtick@7thfloor.com.au

Dated: 31 October 2025