



Watpac Constructions v Austin Corp [2010] NSWSC 168 New South Wales Supreme Court 19 March 2010

FACTS:

Austin Corp (“Austin”) was contracted by Watpac Constructions (“Watpac”) to undertake certain construction work including air-conditioning and mechanical services for a development in Camperdown.

Austin served various statutory payment claims, pursuant to the *Building and Construction Industry Security of Payment Act (NSW) 1999*, on Watpac. Particularly, in October 2009, Austin served a payment claim claiming an amount of \$765,647.00 (ex GST) in respect of variations only. Watpac scheduled an amount of negative \$790,813.25 (ex GST) on account of back charges.

In November 2009, Austin submitted this dispute to adjudication and this adjudicator determined the amount payable to Austin was \$nil, because the adjudicator determined that Austin’s adjudication application was based on unjust enrichment.

In December 2009, Austin submitted a further payment claiming, comprising entirely of variations, and including the same variations claimed in the October 2009 payment claim and which had been dealt with in the November determination. Watpac scheduled a negative amount, and Austin submitted that claim for adjudication.

ISSUES:

- 1) Was the December 2009 payment claim, a valid payment claim for the purposes of the Act?
- 2) Whether issue estoppel applied to prevent the claimant from submitting a further payment claim, which claims the same (in whole or part) of a previously determined payment claim?
- 3) Whether the submission of the December 2009 payment claim amounted to an abuse of process, given the repetition of and inclusion of the variation claims from the October 2009 payment claim, particularly where these items had been determined by the adjudicator in the November 2009 determination?

FINDING & QUOTES:

- 1) *...Any invalidity arising from resubmission [of the payment claim] extends only to the extent of resubmitting claim, only the resubmitted claims ... would be invalid.* [at 89 per McDougall J]
- 2) *...it is open to Watpac to rely on the extended principle of issue estoppel.* [at 110 per McDougall J]
- 3) *...I would conclude, were it necessary to do so, that the reassertion of the claims for variations 1 to 8, in the December payment claim and January application, was an abuse of processes of the Act.* [at 140 per McDougall J]

IMPACT:

Companies need to ensure that when an adjudication application is submitted that it contains all of the relevant claims, because once that application is determined, it would amount to an abuse of process to re-claim an amount which had previously been determined.

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