



# Restraining repeat SOPA claims in SE Ware Street v Kwik Flo

Case Note: SE Ware Street Dev Pty Ltd v Kwik Flo Pty Ltd [2025] NSWSC 1060

## Executive Summary

An adjudicator determined there was no jurisdiction to hear a SOPA claim. A second adjudication application was then made for the same claim where \$1.2M was awarded. However, the Court then restrained the successful party from enforcing this adjudication.

## Introduction

In this case, the contractor was restrained from enforcing a second adjudication decision under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOPA), because it was about the same work as a previous claim, even where a previous adjudicator determined that he did not have jurisdiction to hear the claim. Despite some reluctance from various Courts of Appeal to recognise the ability for parties to re-argue issues of fact already decided, and where adjudicators themselves lack the power to make findings of abuse of process, parties may still apply to the Courts to restrain subsequent adjudications concerning the same subject matter.

## Facts

In 2022, SE Ware Street Dev Pty Ltd (the Plaintiff) and Kwik Flo Pty Ltd (the Defendant) discussed a joint development of the Plaintiff's land. The Defendant claimed the agreement comprised of the construction of a mixed-use development wherein it would take all necessary steps to obtain a construction certificate and that the Plaintiff

would pay 30% of the costs associated with obtaining the construction certificate.

The Defendant lodged an adjudication application (the First Determination) where the adjudicator issued a determination concluding that it did not have jurisdiction

on the basis of section 7(2)(c) of the Act (because payment was to be made according to the price of the construction certificate rather than the price of the works).

The Defendant then purported to “withdraw” its first application (after the First Determination had been made) and made a new application where the Defendant was awarded \$1.2M (the Second Determination) by a different Adjudicator.

## Issues

The Court was asked to determine the following questions:

1. Was the First Determination a “determination” under s 22 of SOPA?
2. Could the Defendant validly withdraw and lodge a second application under s 26?
3. Did the Second Determination constitute an abuse of process or create issue estoppel?
4. What relief should be granted (certiorari, injunction, or otherwise)?

## Supreme Court Decision

The Court ruled the First Determination was a valid determination under SOPA, so the Defendant was not entitled to withdraw its first application. The Court granted an injunction restraining the Defendant from taking steps to register or enforce the Second Determination on the basis that the Second Determination amounted to an abuse of process.

## Legal Reasoning

The Court held that the First Determination was a valid determination under SOPA. The Court reasoned that even a determination that no amount is payable is still a determination under s 22(1)(a) of SOPA.

It follows from the First Determination being valid that the Defendant was not entitled to withdraw its adjudication application and resubmit it to a different adjudication body.

The Court found that it can amount to an abuse of process under SOPA if a claimant attempts to re-agitate a claim which has already been decided. As the First Determination was valid under SOPA, the Defendant’s resubmission to a different adjudication body amounted to an abuse of process, due to the commonality of issues across both applications.

The Court accepted that allowing the Defendant to enforce the Second Determination would be an abuse of process and issued an injunction against the Defendant to restrain such re-agitation. It was relevant that the Plaintiff had consistently maintained throughout the second adjudication that it considered that the second adjudication was an abuse of process.

## Key Takeaways

1. A finding that an adjudicator has no jurisdiction is still a determination.
2. S 17A of SOPA permits withdrawal of an adjudication application only before a determination is made.
3. Abuse of process can arise if a party seeks to re-agitate issues already decided by an adjudicator.
4. If you are facing repeated adjudication applications on the same subject matter, the Courts may issue an injunction restraining enforcement, should an abuse of process be made out, but the objection should be made early.

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