



Trying Adjudication Again or Abusing the Security of Payment Process? Case Note: *Kwik Flo Pty Ltd v SE Ware Street Dev Pty Ltd* [2026] NSWCA 9

Executive Summary

This case serves as a warning to contracting parties that, once an adjudicator has determined they lack jurisdiction, that determination will usually stand as a valid determination under security of payment legislation, closing off the option of “having another go” with a fresh adjudication application on the same claim and issues. This means parties need to frame their first adjudication application and any jurisdictional arguments carefully, because trying to secure a more favourable second determination on the same payment claim is likely to be treated as an abuse of process and restrained by the Court.

Facts

Kwik Flo Pty Ltd (**Kwik Flo**) and SE Ware Street Dev Pty Ltd (**SE Ware**) agreed to jointly develop land in Fairfield in Sydney. SE Ware owned the land, and Kwik Flo agreed to construct a mixed-use development on it. They fell into dispute concerning the terms of their agreement, which was never reduced to writing. Relevantly, Kwik Flo alleged that SE Ware agreed to pay 30% of the costs it incurred to obtain the construction certificate and that, if the project did not proceed, that SE Ware agreed to pay Kwik Flo its costs and a reasonable margin.

In the end, the project never proceeded. Accordingly, Kwik Flo made a payment claim against SE Ware for the work that it had performed plus lost profits. SE Ware did not pay the amount claimed.

Two adjudication applications of the same payment claim then followed under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**).

The adjudicator of the first application determined that he did not have jurisdiction under SOPA to determine it. He found that the parties had agreed to calculate the value of the work on a different basis than the work performed or the goods and services supplied such as output or performance milestones. This precluded the payment dispute being determined under SOPA pursuant to section 7(2)(c).

Not content with this outcome, Kwik Flo asserted that the first adjudication determination was not a “determination”

under SOPA. It withdrew its first adjudication application under section 26(3) of the SOPA (which allows that to occur where an adjudicator fails to make a determination) and made a second application. The second adjudicator then made a determination in Kwik Flo's favour.

SE Ware commenced proceedings to quash the second determination on the basis that the first determination was valid, which was successful. Kwik Flo then appealed, seeking the second determination be declared valid.

Issues

The first issue before the Court of Appeal was whether the first adjudicator's conclusion that he lacked jurisdiction was a valid determination.

If that were the case, then a second issue arose as to whether the second adjudication application was an abuse of process and therefore whether the second determination which resulted was void.

Court of Appeal Decision

The Court of Appeal found the determination by the first adjudicator was valid. It held that an adjudicator who determines that they lack jurisdiction after considering all the materials before them, is taken to have made a "determination" within the meaning of SOPA. SE Ware was not entitled to withdraw the first application and make the second application rearguing the same matters put to, and rejected by, the first adjudicator. The second application was therefore an abuse of process, and Kwik Flo was enjoined from enforcing the second determination in its favour which had resulted.

The Court of Appeal did make the point that Kwik Flo did not argue that the first determination was affected by jurisdictional error (i.e. that the first adjudicator failed in its statutory function to make a determination).

In other words, if the first determination was invalid due to jurisdictional error, then the second determination would likely have been valid and upheld in Kwik Flo's favour.

Key Takeaways

The decision in Kwik Flo means that an adjudicator's decision that they lack jurisdiction can still be a valid "determination" under SOPA, provided it is not affected by jurisdictional error.

Accordingly, builders and developers are reminded that the same payment claim cannot be adjudicated twice on the basis that the earlier adjudicator validly determined that it did not have jurisdiction, provided that determination was not itself affected by jurisdictional error.

Any attempt to recommence another adjudication on the same grounds is likely to be characterised as an abuse of process, and therefore a claimant who has received a more favourable second determination will likely be restrained from enforcing it.

It is well-established that adjudicators can make errors in their determinations, and many of them will not be "jurisdictional". There are only very limited circumstances where a determination will be considered affected by "jurisdictional error" so as to quash it.

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