SUPREME COURT OF QUEENSLAND

CITATION:	*Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous & Ors* [2016] QSC 96
PARTIES:	**WIGGINS ISLAND COAL EXPORT TERMINAL PTY LTD ACN 131 210 038** (applicant) v **MONADELPHOUS ENGINEERING PTY LTD ACN 010 305 923 AND MUHIBBAH CONSTRUCTION PTY LTD ACN 073 412 012 TRADING AS MONADELPHOUS MUHIBBAH MARINE ABN 79 609 605 632** (respondents)
FILE NO/S:	BS9298/15
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	4 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	12-13 November 2015
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. An injunction is granted and the respondents are restrained from pursuing V0247 in the adjudication of adjudication application number QBCC 6345.** **2. An injunction is granted and the respondents are restrained from pursuing that part of V0582 that relates to the period from 14 July 2014 to 15 August 2014 in the adjudication of adjudication application number QBCC 6345.** **3. The parties may make submissions as to costs in writing of not more than 3 pages within 14 days.**
CATCHWORDS:	ESTOPPEL – ESTOPPEL BY JUDGMENT – ISSUE ESTOPPEL – APPLICATION OF ESTOPPEL TO WHAT MATTERS – MATTERS NOT DIRECTLY ADJUDICATED ON – where the parties contracted to construct a coal export terminal including an offshore wharf and a jetty road connecting the shore to the wharf – where construction of the wharf and jetty was to commence at the same time, and all labour, plant and equipment would be supplied over water until the jetty road was complete – where

completion of the jetty road was delayed – where the respondents served payment claims under the Building and Construction Industry Payments Act 2004 (Qld) ("Payments Act") and several adjudication decisions were made – where the respondents made claims in both Payment Claim 34 and Payment Claim 38 relating to delay and disruption costs that included increased labour, plant and transportation required for two hours each day, and were calculated using a similar methodology – where the claim for such delay or disruption costs in Payment Claim 34 was withdrawn from the adjudication decision for that payment claim – where claims relating to the additional period of delay as a result of being unable to access the wharf work front via the jetty road were made in Payment Claim 34 and Payment Claim 38 – where the earlier claim sought an extension of time whereas the later claim did not, and also different rates, number of hours per day and periods were used to calculate the claims – where the earlier claim was disallowed in the adjudication decision because of a lack of jurisdiction – where claims were made in Payment Claim 34 and considered in the adjudication decision for that claim relating to inclement weather causing delay and a further inclement weather claim was included in Payment Claim 38 for an overlapping period – whether an issue that was essential to an earlier adjudication decision was re-agitated such that an issue estoppel available under the Payments Act arose

ESTOPPEL – ESTOPPEL BY JUDGMENT – ANSHUN ESTOPPEL – PARTICULAR CASES – where both parties accepted that an *Anshun* estoppel was available to preclude a claim under the Payments Act – where the respondents made claims in Payment Claim 34 and Payment Claim 38 relating to delay and disruption costs that raised largely the same issues – where the relevant claim in Payment Claim 34 was withdrawn by the respondents from the adjudication decision for that claim – where the respondents made claims as a result of being unable to access the wharf work front via the jetty road in both Payment Claim 34 and Payment Claim 38 that related to different periods of time – whether it was unreasonable for the respondents not to have raised such claims in an earlier payment claim, such that they are precluded from doing so

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where both parties accepted that where there is an abuse of process under the Payments Act an order may be made staying the process of an adjudication decision or enjoining a claimant from proceeding upon an adjudication application – where several claims in Payment Claim 38 were re-agitated, or allegedly re-agitated, in the sense that they were either the same as or similar to previous claims that had

already been adjudicated upon – where the respondents did not include some of the re-agitated claims in the adjudication application – where the applicant submitted that it was an abuse of the processes of the Payments Act to serve and pursue Payment Claim 38 and so require them to respond to those claims that were not included in the adjudication application – whether the duplication was sufficient to take Payment Claim 38 outside the meaning of a "payment claim" under s 17 of the Payments Act – whether there was alternatively a discretionary procedural power or supervisory jurisdiction for the Supreme Court to interfere where there is an abuse of the Payments Act's processes

Building and Construction Industry Payments Act 2004 (Qld), ss 7, 8, 17, 18, 19, 20, 20A, 21
Building and Construction Industry Security of Payment Act 1999 (NSW)
Constitution of Queensland 2001 (Qld), s 58
Supreme Court Act 1970 (NSW), s 23
Judicial Review Act 1991 (Qld), s 18(2), sch 1
Acts Interpretation Act 1954 (Qld), s 14A

AE & E Australia Pty Ltd v Stowe Australia Pty Ltd [2010] QSC 135, applied
Buying Systems (Aust) Pty Ltd v Tien Mah Litho Printing Co (Pte) Ltd (1986) 5 NSWLR 317, cited
Cadiz Waterworks Company v Barnett (1874) LR 19 Eq 182, cited
Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd [2014] QSC 223, cited
Dualcorp Pty Ltd v Remo Constructions Pty Ltd (2009) 74 NSWLR 190; [2009] NSWCA 69, considered
Henderson v Henderson (1843) 3 Hare 100; 67 ER 313, cited
Herron v McGregor (1986) 6 NSWLR 246, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, cited
Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd [2009] NSWSC 416, explained
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; [1981] HCA 45, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Spankie v James Trowse Constructions Pty Ltd [2010] QCA 355, applied
Sunshine Coast Regional Council v Earthpro Pty Ltd [2015] QSC 168, cited
University of Sydney v Cadence Australia Pty Ltd [2009] NSWSC 635, distinguished
Urban Traders v Michael [2009] NSWSC 1072, cited
Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77, explained
Watpac Constructions v Austin Corp [2010] NSWSC 168,

applied

COUNSEL: P Franco QC with B Porter for the applicant
K Downes QC with S Whitten for the respondents

SOLICITORS: Minter Ellison for the applicant
CDI Lawyers for the respondents

[1] **JACKSON J**: The applicant seeks a declaration that a purported payment claim made by the respondents under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Payments Act") is not a valid payment claim and an order enjoining the respondents to serve a notice of discontinuation of the adjudication application made in respect of the payment claim. Alternatively, the applicant applies for orders enjoining the respondents to notify the adjudicator that particular claims are withdrawn from the adjudication application and ancillary relief.

[2] The applicant is constructing a coal export terminal at Golding Point at the Port of Gladstone. Broadly speaking, the terminal will function to load coal onto ships. From the onshore stockyard, reclaimed coal will be carried by conveyors to a jetty. The jetty extends from the landward end to an offshore wharf approximately 1.8 km from the land. A road has been constructed on top of the jetty to give access to and from the wharf. At the wharf, conveyors will transfer the coal onto a shiploader located on the wharf that will load the coal into the holds of a ship.

[3] The applicant and the respondents are parties to a contract for construction work to be carried out at the terminal described as the "GC12" contract. The work under GC12 consists of the construction of offshore plant and infrastructure associated with the first stage of the terminal, including the jetty and the wharf. The jetty was constructed from the shore towards the wharf. The construction of the wharf and associated structures commenced at about the same time as construction of the jetty. Accordingly, for a significant period, the construction work fronts were accessed and supplied over water.

[4] The original contract sum, after revisions, was the total of $287,985,044.60 and US$41,311,832.40. The adjusted contract sum and payments under it are now sums far in excess of that. Relevantly to this proceeding, there have been payment claims and adjudications made under the Payments Act prior to the one presently in dispute.

[5] On 23 May 2014, the respondents served Payment Claim 31 for construction work carried out under GC12.

[6] On 23 June 2014, the respondents applied for adjudication of Payment Claim 31 ("first adjudication application").

[7] On 1 August, 2014, the adjudicator decided the first adjudication application ("first adjudication decision").

[8] On 25 August 2014, the respondents served Payment Claim 34 for construction work carried out under GC12.

[9] On 22 September 2014, the respondents applied for adjudication of Payment Claim 34 ("second adjudication application").

[10] On 12 January 2015, the adjudicator decided the second adjudication application ("second adjudication decision").

[11] On 31 July 2015, the respondents served Payment Claim 38 for construction work carried out under GC12.

[12] On 27 August 2015, the applicant's solicitors wrote to the respondents' solicitors. In "Annexure A" to the letter, they identified a number of claims contained in Payment Claim 38 that the applicant contended were an abuse of process. They sought an undertaking that those claims would not be pursued in an adjudication application.

[13] On 31 August 2015, the respondents applied for adjudication of Payment Claim 38 ("third adjudication application"). Nearly all of the claims identified in Annexure A to the 27 August 2015 letter were not included in the third adjudication application.

[14] On 14 September 2015, the applicant's solicitors again wrote to the respondents' solicitors, identifying further claims included in the third adjudication application that the applicant contends are an abuse of process. Those claims are V0604, V0247, V0428B and V0582 (in part).

[15] The respondents did not provide an undertaking to withdraw those claims from adjudication of the third adjudication application.

[16] On 17 September 2015, the applicant commenced this proceeding.

[17] On 23 September 2015, it was ordered that any relief sought in respect to of V0604 be adjourned to a date to be fixed. Otherwise, the proceeding was set down for hearing.

Abuse of process – payment claim as a whole

[18] The applicant's first argument is that service and pursuit of Payment Claim 38, considered as a whole, was an abuse of process. It submits that the court should order the respondents to serve a notice of discontinuation[1] of the whole of the third adjudication application.

[19] The legal starting point for this argument is that *Walton v Gardiner*[2] established or confirmed that a Supreme Court of a State has the power to order the stay of a proceeding before a professional disciplinary tribunal where the proceeding is an abuse of process. In *Walton*, that was the power of the Supreme Court of New South Wales acting in the exercise of that court's "supervisory jurisdiction".[3] The abuse of process in *Walton* was unfairness caused by the time that had elapsed between the events the subject of the charge and the commencement of the proceeding.[4] It did not concern any question of abuse of process because of re-agitation of a prior decision between the same parties or because it was

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1 *Building and Construction Industry Payments Act* 2004 (Qld), s 35B(a).
2 (1993) 177 CLR 378.
3 (1993) 177 CLR 378, 388-395, 406 and 421.
4 (1993) 177 CLR 378, 389-390.

unreasonable not to have brought forward all the relevant claims at the time of a prior decision between the same parties.[5]

[20] Next, in *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd*[6] it was held that the Supreme Court of New South Wales has power to stay the process of determination of an adjudication application under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("NSW Payments Act").[7] Rein J relied on *Walton* and *Buying Systems (Aust) Pty Ltd v Tien Mah Litho Printing Co (Pte) Ltd*.[8] The latter case concerned the power of a Supreme Court of a State to grant a quia timet injunction to restrain the filing of a winding up application where the proceeding would be an abuse of process, a jurisdiction recognised since the 19th century.[9]

[21] However, the respondents did not challenge the power of this court[10] to make an order staying the process of an adjudication decision under the Payments Act. Consistently with that, *AE & E Australia Pty Ltd v Stowe Australia Pty Ltd*[11] (*"AE & E"*) proceeded on the footing that an order may be made preventing a further adjudication where there is an abuse of process under the Payments Act. The respondent did not submit that such an order could not be made. It is not necessary to consider that question.

[22] Therefore, I proceed on the assumption that abuse of process in the sense described in the cases just mentioned can be a basis for an order staying the process of an adjudication decision or enjoining a claimant proceeding upon an adjudication application, although I note that the application of this concept of abuse of process under the NSW Payments Act was left undecided by the Court of Appeal of New South Wales in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (*"Dualcorp"*).[12]

[23] However, later it will be necessary to analyse further the precise legal basis of the order applied for that the respondents serve a notice of discontinuation of the whole of the third adjudication application on the adjudicator and the applicant.

[24] The factual grounds for the alleged abuse of process by serving and pursuing Payment Claim 38 as a whole are summarised by the applicant as follows:

> "[36] Payment Claim 38 sought payment of over $144 million for 16 claims that were simply a repetition of claims advanced by [the respondents] in prior adjudications. Those claims are listed in the 27 August 2015 letter in Annexure A. To take the three largest claims as an example:

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5 It should not be overlooked that in *Walton*, the High Court refused an application to add to the grounds of appeal that there was no power to order the stay of a proceeding before the professional disciplinary tribunal: at 389-391. That point had been decided in an earlier case in the Court of Appeal: *Herron v McGregor* (1986) 6 NSWLR 246, 251-252.

6 [2009] NSWSC 416.

7 [2009] NSWSC 416, [48]-[50].

8 (1986) 5 NSWLR 317.

9 For example, *Cadiz Waterworks Company v Barnett* (1874) LR 19 Eq 182.

10 *Constitution of Queensland* 2001 (Qld), s 58 corresponds to s 23 of the *Supreme Court Act* 1970 (NSW) relied on in *Herron v McGregor* (1986) 6 NSWLR 246, 252.

11 [2010] QSC 135, [17] and [48]-[49].

12 (2009) 74 NSWLR 190, 206 [68].

(a) Payment Claim 38 sought $98,757,758.42 for V0414 Delay claims. This is simply the difference between the amount claimed by [the respondents] in Payment Claim 34 ($120,987,043.75) and the amount awarded by the Adjudicator in the Second Adjudication Decision ($22,229,285.34);

(b) Payment Claim 38 sought $26,143,227.06 for V0414 Part C, Item 17. This is simply the difference between the amount claimed by [the respondents] in Payment Claim 34 ($30,047,633.00) and the amount awarded in the second adjudication decision ($3,904,406.40);

(c) Payment Claim 38 sought $11,506,633.35 for V0187. This is the same amount claimed by [the respondents] in Payment Claim 31 (the Payment Claim which led to the First Adjudication). The Adjudicator allowed a nil amount for V0187 claim in the First Adjudication Decision.

[37] In addition, the Payment Claim included a further six claims that had been adjudicated upon in prior adjudications, but where the amount claimed in the Payment Claim differed from the amount claimed previously. Depending on the view taken of the alternative claim in the Payment Claim 38 for V0414 Part A, these six claims totalled either over $10 million or over $200 million.

[38] [The respondents] abandoned all 22 claims when it filed its Third Adjudication Application.

[39] Further, in the event that the Court concludes that pursuing V0247 is an abuse of process, there will be a further $30.7 million of the claim advanced in Payment Claim 38 which comprises an abuse of process of the Payments Act. Similarly for V0428B and the first part of V0582 to the extent of some $4.92 million." (footnotes omitted)

[25] For present purposes, those factual grounds may for the most part be accepted in the applicant's favour. The respondents' written submissions:

(a) accept that 16 claims made in Payment Claim 38 were previously claimed and adjudicated upon;

(b) accept that six of the other claims made were similar to claims previously adjudicated upon although they were for different claimed amounts; and

(c) dispute that V0247, V0428B and V0582 are the same as previous claims that had been adjudicated upon.

[26] The applicant's reference to what view might be taken of V0414 Part A need not be examined closely. It was not included in the amount claimed by Payment Claim 38.

[27] Further, as to the six claims made that were similar to claims previously made but for different amounts, their total value was $10,736,004.89 and US$3,763,629.95.

[28] It thus appears as common ground that by Payment Claim 38, as served, the respondents were seeking to re-agitate 22 of the claims made in prior payment claims that had been determined in earlier adjudication decisions.

[29] However, the respondents did not include most of the 22 agreed previously agitated claims in the third adjudication application. Contrary to the applicant's submissions, perhaps, the respondents did include V0414 Part B Item 4 in the third adjudication application. With that exception, I will collectively describe the 22 claims as the "not included claims".

[30] As well, I will describe V0247, V0428B and V0582 as the "disputed re-agitated claims" to signify the specific disputes about those claims. The applicant submits that each of the disputed re-agitated claims pursued in the third adjudication decision re-agitates a claim determined in an earlier adjudication decision.

[31] It is important to note at the outset that the applicant's argument that pursuit of the whole of Payment Claim 38 was an abuse of process is logically founded on the content of Payment Claim 38, not the content of the third adjudication application. The applicant does not submit that pursuit of the whole of the third adjudication application, taken alone, was an abuse of process because of the comparison between the subject of that application, including the disputed re-agitated claims, and the earlier adjudication decisions. It was fundamental to the applicant's first argument that Payment Claim 38 was made for the not included claims as well as the disputed re-agitated claims and other claims.

[32] The applicant relied on *University of Sydney v Cadence Australia Pty Ltd*.[13] In that case, a claimant's payment claim under the NSW Payments Act included an item for delay costs under the contract. The adjudicator disallowed the item in an adjudication determination. After that adjudication determination, the claimant's next payment claim re-claimed the disallowed item and added some more costs of the same kind. The claimant made a second adjudication application. The respondent sought an order to have the second adjudication application withdrawn and an injunction.

[33] The relevant passage from Hammerschlag J's reasons is as follows:

> "The terms of the present application make it clear that the first defendant having failed to substantiate its claim for delay costs wishes to re-agitate it on the basis that the 'claims/details attached as Attachment 4 to the Adjudication Application now provide this information'.
>
> The fact that it claims costs for periods of delay beyond those earlier claimed for does not detract from the fact that it is, as Allsop P in *Dualcorp* at [2] described, seeking '… to re-ignite the adjudication process at will in order to have a second or third or fourth go at the process provided by the Act merely because it is dissatisfied with the result of the first adjudication.'

13 [2009] NSWSC 635.

> Section 13(6) of the Act does not overcome this problem for the first defendant. The section does not in my view have in contemplation a payment claim for an amount which has previously been claimed and which has been adjudicated upon and rejected.
>
> The second claim and the present application accordingly have as their object the obtaining of an advantage beyond what the law offers and together they are an abuse of process.
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> In addition, given that the Act gives no right to re-make a payment claim which has earlier been made and adjudicated upon, the second claim, to the extent that it seeks to do so is not a payment claim within the meaning of the Act. It may be that where there is duplication of a part but not the whole of an earlier claim, whether there is sufficient duplication to fairly take a second claim outside the definition of payment claim is a matter of fact and degree. If it is, that requirement is clearly satisfied here by reason of the significant degree of overlap. No one suggested that it was possible or feasible for the adjudicator to deal with only part of the present application. Dealing with the present application would require the adjudicator to re-perform a statutory function which he has already discharged. It follows that the first defendant has no right to apply for the adjudication of the second claim and, contrary to what the first defendant put, the second defendant has no jurisdiction to adjudicate it."[14]

[34] In my view, the "degree of overlap" part of that reasoning is obiter dicta. The respondents submit that it was not binding and that doubt has been expressed about it.[15] For present purposes, it is enough to observe that the reasoning turned on the contents of the second payment claim and the conclusion that because of "the degree of overlap" the second payment claim is not a "payment claim" within the meaning of s 17 of the Payments Act, not on the content of any subsequent adjudication application.

[35] It is not suggested that either the not included claims or the disputed re-agitated claims comprised the whole of Payment Claim 38. Nevertheless, the applicant submits that the whole was an abuse of process in this case and relied on the sum of the monetary values of the not included claims and disputed re-agitated claims, measured against the total value of the payment claim.

[36] The applicant submits that it is a matter of fact and degree whether there is sufficient duplication between a first and second payment claim to fairly make the second an abuse of process, and that in this case that test is satisfied. But if the reasoning in *Cadence* is the basis of the argument, the duplication must also be such as to take the second payment claim outside the meaning of what is a "payment claim" under s 17 of the Payments Act, properly construed.

[37] The respondents submit that the applicant overestimated the sum of the monetary values of the not included claims and the disputed re-agitated claims, and rely on

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14 *University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635, [52]-[56].

15 *Watpac Constructions v Austin Corp* [2010] NSWSC 168, [59]-[65].

the fact that numerically they represent a small number of claims (about 25) in comparison to the total number of claims in Payment Claim 38 (950). Given that the alleged value of the not included claims and the disputed re-agitated claims still exceeds $150 million on any view, there is not much attraction in the comparison of the number of claims, irrespective of value.

[38] It seems obvious, but if a purported payment claim does not constitute a "payment claim" within the meaning of s 17, it is not necessary to resort to the concept of abuse of process as the basis of an order to restrain a claimant from pursuing the processes of the Payments Act. The consequential rights of a claimant and obligations of a respondent under the Payments Act follow service of a payment claim within the meaning of s 17. If the payment claim is invalid, they are not engaged.

[39] In particular, unless there is a valid payment claim, a respondent is neither empowered nor obliged to serve a payment schedule under s 18 and is not obliged to pay any amount under s 19. The claimant would not have any of the subsequent rights that follow under the scheme of ss 19-20A and would have no right to apply for adjudication under s 21. None of this depends on the analytical legal step that an invalid payment claim is an abuse of process. It follows from the proper construction of the sections of the Payments Act themselves. To deploy the concept of "abuse of process" to describe such a case seems superfluous.

[40] The applicant seeks to characterise the respondents' conduct in serving Payment Claim 38 with the duplication it contained as a deliberate or reckless abuse of the processes of the Payments Act. But if the basis of invalidity is that Payment Claim 38 is not a "payment claim" within the meaning of s 17, it is irrelevant to characterise the respondents' conduct in that way.

[41] It is unnecessary, in those circumstances, to make any findings as to the extent of the time and cost involved in the applicant responding in the payments schedule to the not included claims or the disputed re-agitated claims, as compared to the other claims made by Payment Claim 38. In any event, as the respondents submit, the applicant did not adduce any evidence as to the extent of the wasted time or costs relating to those claims.

[42] The applicant also seeks to rely on the consequences of the respondent being permitted to serve a payment claim that includes "illegitimate" (ie duplicative) claims. Some of those submissions depend on the assumption that Payment Claim 38 was a valid "payment claim" within the meaning of s 17. If, however, Payment Claim 38 was not a payment claim, then as explained above the applicant was neither obliged to serve a payment schedule under s 18 nor to incur the cost of doing so. Equally, the applicant was not exposed to the risk of a statutory debt arising under s 19 if it did not serve a payment schedule.

[43] In fact, when faced with the service of Payment Claim 38, the applicant did not take the risk that it was not invalid. Instead of relying on invalidity, it served a payment schedule and asserted that some of the claims made against it were invalidly made. The respondents then did not include nearly all of the claims to which objection was originally taken in the third adjudication application. The applicant submits that the respondents thereby abused the processes of the Payments Act, yet were seeking to evade the consequences of doing so.

[44] To clarify, the relevant processes for this point started when the respondents served Payment Claim 38. Next, the applicant served a payment schedule in response. Next, the respondents served the adjudication application and submissions in which they did not pursue the not included claims. So viewed, the applicant's case on this point is that it was an abuse of the processes of the Payments Act for the applicant to be required to respond in the payment schedule to the not included claims and an attempt to evade the consequences by the respondents to not include them in the third adjudication application.

[45] In *Watpac Constructions v Austin Corp*, McDougall J said:

> "There are difficulties in concluding that resubmission of a claim that has been the subject of an earlier claim and adjudication means that the whole of the later claim is not a payment claim for the purposes of the Act, so as to fall within the second of the five categories of basic and essential requirements listed by Hodgson JA in *Brodyn* at 441 [53]. At most, it seems to me, any invalidity (whether sufficient to bring the matter within the second of those categories or not) could apply only to the extent of the repetition. That seems to follow from the result in *Dualcorp*, where the Court of Appeal upheld the decision of the primary judge to grant summary judgment for the amount of the two invoices (out of the total of six that had been submitted in each of the earlier and the later payment claims) that had not been the subject of the earlier adjudication."[16]

[46] It is obvious that if Payment Claim 38 was invalid, it made no difference that the respondents did not pursue some of the re-agitated claims by not including them in the third adjudication application, unless that served to cure the invalidity. On the other hand, if the payment claim was not invalid, it is difficult to understand why the respondents' actions in not including some of the re-agitated claims should be characterised as evading the consequences of its conduct in serving the payment claim in the first place.

[47] Equally, in my view, the applicant's submission that "[i]n the exercise of its supervisory jurisdiction, the Court should seek to deter abusive conduct" is difficult to accept in a case such as this. The supervisory jurisdiction referred to has been exercised in other cases where an order is sought to restrain an adjudication decision being made or to declare invalidity of an adjudication decision by exercising the power of the court upon judicial review for jurisdictional error.

[48] Concepts of deterrence have nothing to do with it. In this context, the court is not engaged in exercising a discretionary procedural power. If the label "abuse of process" is attached to facts by which a claimant or respondent purports to engage the processes under the Payments Act invalidly, this court's power to interfere at the stage before an adjudication decision is made must in most cases involve a threat of jurisdictional error by an adjudicator as the repository of power under the Payments Act.[17]

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16 [2010] NSWSC 168, [74].

17 That conclusion follows from the inclusion of "*Building and Construction Industry Payments Act* 2004, part 3, division 2" in Pt 2 of Sch 1 to the *Judicial Review Act* 1991 (Qld) and s 18(2) of that Act which provides that it does not apply to a decision made, proposed to be made or required to be made under an enactment mentioned in Sch 1, Pt 2. The effect is that this court's power in the

[49] In my view, it is unnecessary to resolve any doubt about the authority of *Cadence* to decide the present case. The Payments Act does not expressly provide what is the consequence of including claims in a payment claim which the Act impliedly prohibits.

[50] If such a payment claim proceeds to an adjudication decision, even though the Act impliedly prohibits the adjudicator from including the impermissible claim in a progress payment and adjudication amount, s 100(4) provides that the court may allow the part of the decision not affected by jurisdictional error to remain binding.

[51] The express object of the Payments Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person undertakes to carry out construction work under a construction contract[18] and that object is to be achieved by granting an entitlement to progress payments and establishing a procedure for making a payment claim and going through the statutory process to decision by adjudication of a disputed claim.[19]

[52] The purpose of the provisions of the Payments Act, including s 17, as stated in the express objects, is not best achieved by an interpretation of those provisions that the inclusion of an impermissible claim in a payment claim invalidates an otherwise valid payment claim.[20]

[53] In *Project Blue Sky Inc v Australian Broadcasting Authority*,[21] the plurality said:

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'."[22] (footnotes omitted)

[54] Having regard to these factors, in my view, there is a sufficient difference between this case and *Cadence* to decide that the alleged duplication in this case was not so significant as to draw the conclusion that Payment Claim 38 was not a payment claim within the meaning of s 17 of the Payments Act.

[55] In my view, putting to one side any question of "issue estoppel" or "*Anshun* estoppel" considered below, there is no discretionary procedural power to stay that arose upon the making of Payment Claim 38, as an abuse of process, and there is no invalidity that attached to the third adjudication application as an adjudication application.

[56] Accordingly, I would dismiss that part of the application that is based on abuse of process because of serving and pursuing Payment Claim 38 as a whole.

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supervisory jurisdiction is probably not wider than the scope of judicial review for jurisdictional error discussed in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525.

18 *Building and Construction Industry Payments Act* 2004 (Qld), s 7(a).

19 *Building and Construction Industry Payments Act* 2004 (Qld), s 8.

20 *Acts Interpretation Act* 1954 (Qld), s 14A.

21 (1998) 194 CLR 355.

22 (1998) 194 CLR 355, 390 [93].

Issue estoppel

[57] The applicant's second argument is that the respondents are precluded by an issue estoppel from pursuing each of the disputed re-agitated claims made in Payment Claim 38 and the third adjudication application. The applicant submits that they were decided by the prior adjudication decisions in a way that raises an issue estoppel.

[58] The application of issue estoppel, a concept derived from the common law as to finality of a decision by a court, to the administrative decision of an adjudicator under the Payments Act may seem counterintuitive, but is supported by intermediate appellate court authority. The leading case is *Dualcorp*. The extent of the principles for which it stands as authority may be debated to some extent. But they were summarised in relevant respects in the Court of Appeal of this court in *Spankie v James Trowse Constructions Pty Ltd*,[23] as follows:

> "Of course the re-agitation of a payment claim may be impermissible for other reasons. In particular, it may be impermissible in particular cases where a previous payment claim has been the subject of a valid adjudication determination. In *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* … the claimant … served a payment claim … attaching six invoices … without identification of the relevant reference date. The claimant was dissatisfied with an adjudication determination for that payment claim … [T]he claimant issued a further payment claim which attached the same six invoices the subject of the previous adjudication. With reference to the [NSW Payments Act], the relevant provisions of which are very similar to those of [the Payments Act], Macfarlan JA, with whose reasons Handley AJA agreed, concluded that principles of issue estoppel were applicable, **that the issues relevant to the claimant's rights to progress payments in respect of the amounts in the invoices had been determined by the adjudicator**, and that the claimant's application for summary judgment was rightly refused as being inconsistent with that determination."[24] (emphasis added) (footnotes omitted)

[59] A helpful discussion of the operation of "issue estoppel" in this context appears in *Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd*.[25] Philip McMurdo J said:

> "Although Macfarlan JA described the outcome as a result of an issue estoppel, it is clear that his Honour had in mind something less than the operation of the common law doctrine of issue estoppel as it is usually understood. The doctrine of issue estoppel has been said to reflect 'a central and pervading tenet of the judicial system [which] is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances'. Where the doctrine does apply, then subject to any qualification by legislation or agreement, it

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23 [2010] QCA 355.
24 [2010] QCA 355, [25].
25 [2014] QSC 223, [48]-[55].

> precludes the reagitation in any forum of the same issue. Yet, the estoppel for which Allstate contends, in attempted reliance upon *Dualcorp*, at its highest is one in which the issue could be reagitated in some forums but not others. It is a remarkable species of issue estoppel where, having regard to s 32 of the [NSW Payments Act], the 'entitlements inter se under the contract' are unaffected by it. The source of this more limited estoppel must be found, if at all, within the legislation. In my view, the legislation does not provide it. A contrary indication is that such an estoppel would be problematical in many ways. Take, for example, a case where a court declares the effect of the parties' contract, inconsistent with an adjudicator's decision. Is a future adjudicator, dealing with another claim under that contract, bound by the decision of the earlier adjudication (if not set aside) or that of the court?
>
> The limited finality described by Macfarlan JA was founded, as his Honour explained, upon the combined effect of several provisions within this statute. Contrary to the submission for Allstate, the judgment of Macfarlan JA did not hold that the doctrine of issue estoppel applies in this context in all respects. The judgment identifies **a finality of an adjudicator's decision in the sense of precluding a claimant from pursuing a progress payment inconsistently with determination of an issue by an adjudicator which was fundamental to that decision**."[26] (emphasis added) (footnotes omitted)

[60] In *Sunshine Coast Regional Council v Earthpro Pty Ltd*,[27] Byrne SJA considered the re-agitation in a later payment claim and adjudication decision of an extension of time with costs under cls 35.5 and 36 of the general conditions of AS2124-1992 based on the same factual issues as decided in an earlier adjudication decision for a claim for a variation under cl 40.1. It was held that the adjudicator exceeded his jurisdiction in allowing the re-agitated claim as an extension of time claim. His Honour said:

> "However, the Act inferentially precludes re-agitation of the same issue where that issue was essential to a determination in an earlier adjudication".[28]

[61] Having regard to those cases, any issue estoppel that arises under the Payments Act is a unique species of estoppel. For brevity, I will call it "*Dualcorp* issue estoppel".

V0247

[62] First, the applicant submits that the claim for V0247 made in Payment Claim 38 is precluded by a *Dualcorp* issue estoppel arising from the second adjudication decision.

[63] As stated earlier, the project involved the construction of an offshore wharf and a 1.8 km jetty to connect the shore to the wharf. The jetty and the road on it were to

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26 [2014] QSC 223, [54]-[55].
27 [2015] QSC 168.
28 [2015] QSC 168, [42].

be constructed from the shore to the wharf. The wharf was to be constructed at the same time. Until connection, supply of labour, plant and other things to the wharf was required to be over water. After the jetty and jetty road were constructed, the continuation of work at the wharf would be supplied via the jetty road.

[64] The jetty road was programmed to be open to traffic on 16 November 2013. As a consequence of delays to both the commencement and progression of the jetty works the jetty road was not completed until 266 days later – 8 August 2014. I will call it the "jetty road delay".

[65] During the period of the jetty road delay the respondents allege that they suffered increased labour, plant and other costs. As the respondents describe it:

> "During the period of the Jetty Road Delay, [the respondents were] required to transport personnel and materials to and from the wharf work front by sea, rather than by the jetty road. This involved increased travel times, increased loading and unloading times and the need for crew transfer vessels and barges to remain on site after the date by which the jetty road had been scheduled for completion."

[66] Payment Claim 38 included a claim for V0247 in the amount of $30,747,613. It was made as a claim under cl 40 of the GC12 general conditions of contract (that are similar to AS2124-1992). It was a claim for the costs of the additional resources expended over the full period of the jetty road delay as a result of the lack of availability of the jetty road as programmed.

[67] Calculation of the labour and most of the plant and other costs was made on the basis of an estimate of increased activity of two hours each day for labour and plant travelling to and from the wharf and logistics labour spent supplying the wharf, taken over the full period of the jetty road delay.

[68] On 18 March 2015, the respondents wrote to the applicant making a claim for V0247. The letter said that the claim was made "under clause 40 and 33.1". At that time, the value of the claim was $45,534,972 (in comparison to the amount of $30,747,613 included in Payment Claim 38 four months later). It said further that the submission of the variation "has been amended from the previous valuation as incorporated in V0414 item 3 (reference 4)". On p 4 the letter continued:

> "As documented above and in numerous prior correspondences; the Contractor has incurred additional costs with respect to re-sequencing of the Wharf works due to the delayed completion of the Jetty Road. In implementing re-sequencing measures to overcome the Principal caused delays the Contractor also suffered disruption to the Wharf work fronts for the structural, mechanical and electrical works. V0247 has now been categorised into five (5) items to value these impacts as detailed in the attached claim breakdown and as summarised herein."

[69] The attached claim breakdown included ten pages divided into various periods, cost categories and quantities. It is necessary to explain the methodology in a little more detail.

[70] That methodology started by breaking the claim into three separate activity areas, described as "Direct Wharf Costs", "Direct Wharf Equipment Costs" and "Additional Land Support". Second, the overall jetty road delay (originally 266 days, now 289 or 290 days) was broken into two separate periods, based on whether the shift hours during that period were 10.5 hours or 11.5 hours respectively.

[71] Next, the classes of relevant workers involved in the re-sequencing and disruption were listed for each of the separate activity areas. Those employees were chosen from the classes or categories of workers in Schedule 2.2.1, a "Schedule of Daywork Labour". For example for the first period, from 16 November 2013 to 8 August 2014, in the area of "Direct Wharf Costs", one relevant class of worker was "Area Manager", item 5 in the list in Schedule 2.2.1. One such manager was allocated to the claim. The number of hours per day for that manager was two hours. Therefore, the total daily hours for that class of worker was calculated and then extended over the first period of 205 days, resulting in 410 total working hours claimed at the applicable rate per hour.

[72] A similar process was followed for each of the workers in each of the relevant classes allocated to the claim for re-sequencing and disruption.

[73] Also, a similar process was followed for each of the relevant items of plant selected from Schedule 2.2.2, a schedule of "Daywork Constructional Plant Rates", including boats, barges, a tug boat and many other items.

[74] The "Direct Wharf Equipment Costs" area was similarly compiled, and calculated, although it did not include any labour. The classes of plant were still selected from Schedule 2.2.2 but the number of hours per day allocated was 9.5 hours in the case of the longer shift and eight hours in the case of the shorter shift.

[75] The "Additional Land Support Costs" area was compiled from the same Schedules 2.2.1 and 2.2.2 and over the full 290 day period on the basis of two hours per day for the employees and plant within that area.

[76] In each instance the rates were taken from the schedules of daywork rates for work ordered and done under GC12.

[77] The claim summary for V0247, which was attached to the 18 March letter, appears in the table below:

"V0247 CLAIM SUMMARY

Item Ref	Description	Staff	Labour	Plant	Total Claim
3.1	Direct Wharf Costs while operating 11.5 hours shifts	$3,611,452	$5,448,010	$7,305,512	$16,364,984
3.2	Direct Wharf Costs while operating 10 hour shifts	$1,894,240	$4,997,926	$3,247,170	$10,139,335
3.3	Additional Wharf Equipment Costs while operating 11.5 hours shifts	$0	$0	$10,865,103	$10,865,103
3.4	Additional Wharf Equipment Costs while operating 10 hours shifts	$0	$0	$4,963,802	$4,963,802
3.5	Additional Land	$3,201,749	$0	$0	$3,201,749

Support	
TOTAL V0247 CLAIM	**$45,534,972"**

[78] Note that the reference to "Additional Wharf Equipment Costs" appears to correspond to what was entitled "Direct Wharf and Equipment Costs" in the claim breakdown.

V0414 Part B Item 3

[79] The respondents had previously made claims based on the delay and disruption caused by the jetty road delay.

[80] On 25 August 2014, when the respondents submitted Payment Claim 34 to the applicant, it included a claim for V0414, a variation claim of many parts and items. By a letter from the respondents also dated 25 August 2014 ("25 August 2014 letter") further details were given of V0414. Hundreds of pages of calculations were attached or included.

[81] A summary page attached to the 25 August 2014 letter (page 1) was headed "V0414 – GC12 Acceleration, Delay, Re-sequencing and Variations Claim Summary (SUBMISSION REV 2)".

[82] It contained an entry describing what the parties in this application referred to as "V0414 Part B Item 3". That was stated in the summary page as based on "clause 33.1 (Resequencing)" and, importantly, "clause 40 (Variation Works)". The claim description in the summary page was "Resequencing and Additional works caused by Jetty Road Access". The amount of the claim was $43,776,601.

[83] One section of the supporting pages (page 46) under the words "Activity Name" had a heading or description "Re-sequencing and Disruption Costs Caused by Jetty Access Road Access" for the period of 266 days calculated on the basis of two hours per day. It was in similar form to the calculation that later supported V0247 in Payment Claim 38.

[84] Having referred to the jetty road delay period the section stated:

> "As a consequence, the Contractor was required to mobilise additional marine plant and implement a strategy to supply the Wharf construction via sea rather than land. This resulted in:
> (a) [e]xtra travel time, due to the need to transfer the crew…
> (b) [e]xtra effort and equipment to transfer materials and inefficiencies experienced during breakdown and retrieval of missing equipment."

[85] The 12 pages of calculations for V0414 Part B Item 3 that followed proceeded in a way that broadly corresponded with the later calculations for V0247. However there were some differences. First, the period of the jetty road delay was 266 days not 289 days, the difference being due to the additional period (in V0247) from 9 August 2014 to 10 September 2014. Second, the calculation did not break down the results between the periods of shorter and longer shifts, of 10.5 hours and 11.5 hours. Third, the calculation was broken down into areas of "Direct Wharf Costs", "Additional Logistics Costs" and "Additional Land Support Costs". Fourth, there

were some different allocations of labour and plant costs, in both the overall and different area break downs.

[86] At root, however, it was a claim for costs, as the respondents submit in this application, that:

> "[The] costs represent two hours at the agreed contract rates for each day relevant personnel and equipment were required to be transported to and from the wharf work front by sea over the full 266 day period of the Jetty Road Delay."

[87] However, by the second adjudication application, the respondents decided not to pursue the claim for V0414 Part B Item 3 in that adjudication. The adjudicator noted that it was not pursued and made no determination about it in the second adjudication decision.

[88] The applicant submits that V0247 is in substance the same as V0414 Part B Item 3.

[89] The respondents accept that the amounts claimed under V0247 were calculated based on a similar methodology to that used to calculate V0414 Part B Item 3. They submit that the differences were because estimates were used in the calculation for V0414 Part B Item 3. They were replaced with more precise data for the calculations in V0247.

[90] The respondents also submit that V0247 is not a claim for "delay costs". As already described, it is a claim of an amount based on an estimate or assessment of additional hours of work per day in the relevant activity areas over the period of the jetty road delay. It is not a claim for an extension of time or the costs of an extension of time allowed under cl 36 of the GC12 general conditions of contract. The respondents also submit that V0247 should be seen as a claim for a variation under cl 40 of the GC12 general conditions of contract. As previously noted, the claim on its face was originally described as one made under cl 33.1 as well. But in any event, as *Sunshine Coast Regional Council* shows, simply re-agitating an earlier claim as one under cl 40 (variation) as opposed to one under cl 33.1 (disruption or delay) will not repel a finding of issue estoppel.

[91] It is an inescapable conclusion, in my view, that V0247 is the re-agitation of the claim that was made in V0414 Part B Item 3. The changes made in the later claim are relatively insignificant.

[92] If V0414 Part B Item 3 had been determined by the second adjudication decision, I would have had little doubt that V0247 would be the subject of a *Dualcorp* issue estoppel. But that is not what happened. The respondents withdrew V0414 Part B Item 3 from adjudication. Accordingly, it cannot form the basis for a *Dualcorp* issue estoppel. Because there has been no adjudication decision upon V0414 Part B Item 3, there has been no determination of any fundamental or essential issue or question upon V0414 Part B Item 3.

[93] Later in these reasons, it will be necessary to further consider V0414 Part B Item 3, because of the applicant's alternative argument that an extended or *Anshun* estoppel precludes the respondents from further pursuing V0247.

DC–JETTYRD1 & DC–JETTYRD2

[94] The basis for the issue estoppel claimed by the applicant against the respondents pursuing V0247 stems from two other claims that were made in Payment Claim 34 and adjudicated in the second adjudication decision.

[95] Another schedule summary attached to the 25 August 2014 letter (submitted with Payment Claim 34) (page 1 of 139) was headed "GC12 – OFFSHORE MARINE WORKS: APPROACH JETTY & SHIP BERTH – V0414 DELAY COSTS Clause 36".

[96] It included two items identified as "DC–JETTYRD1" and "DC–JETTYRD2". In particular, DC–JETTYRD2 was a claim for an event described as "Period of work where the Jetty Road was not complete so Wharf fitout done via barge". A delay to the critical path of the project of 73 days was claimed. An additional period described as a float delay, of nine days, was also claimed. The total costs claimed over those days was $48,858,717.30.

[97] It is necessary to briefly describe the methodology by which DC–JETTYRD2 was compiled. There are three pages of calculations (pages 38 - 40 of 139). Like V0247, they begin with a list of relevant classes of workers from Schedule 2.2.1, this time including all 73 different classes, many more than in V0247. Second, like V0247, the calculation follows with a list of relevant plant from Schedule 2.2.2, this time including nearly all of 131 classes, many more than in V0247. Third, whereas V0247 generally proceeds on a calculation of two hours per day as the notional added time (in fact that claim does not seek an extension of time – it is a claim for disruption costs) DC–JETTYRD2 did not proceed on the same basis.

[98] It claimed an extension of time of 73 days, but the calculation of costs was stated to be for a period of 189 days over the days between 1 February 2014 and 8 August 2014. So, starting with the Schedule of Daywork Labour, the costs were calculated in general by reference to the hourly rate for each category of worker. The total number of employed hours in that category were calculated as the product of the number of workers, the period of 11.5 hours per day and the period of delay of 189 days. The amount claimed for the category of worker was the product of the total number of hours so derived and the hourly rate for the category.[29]

[99] Although many of the same categories of costs were used to compile the costs claimed in DC–JETTYRD2 and V0247, the overlap is easily overstated. The rates, hours per day and period over which the claims are made differ in every category. A simple example of the extent of the differences is that the item of constructional plant designated in Schedule 2.2.2 as "123 Hammerhead Tug Boat Permanent Day Shift" was given no value in the claim under DC–JETTYRD2. In contrast, in the various areas of V0247, the total amount claimed for that one item is $3,677,352.

[100] In the submission accompanying the second adjudication application, the respondents said this about DC–JETTYRD2:

> "475. DC–JETTYRD2 relates to delays caused to the wharf work front as a result of not being able to access the wharf work front via the jetty road…

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29 Although this was the general method, not all the numbers precisely calculate using the inputs of 11.5 hours per day and a period of 189 days.

477. …

(f) as a result of lack of access to the wharf work front by way of the Jetty Road, the wharf work front lost 2 hours per shift, or 4 hours per day based on a day shift and night shift.

478. The time impact of the lack of access to the wharf work front by way of the jetty road in respect of personnel, transport of materials, equipment and plant, and breaking down equipment is addressed in detail in the statutory declaration of Nathan Meulman."

[101] The statutory declaration of Mr Meulman referred to contained a detailed section dealing with DC–JETTYRD1 and DC–JETTYRD2 for the period of work where the jetty road was not complete and the wharf fitout access continued to be over water via barge.

[102] The second adjudication decision included a section headed "414 Jetty Road Delay Claims" that dealt with DC–JETTYRD1 and DC–JETTYRD2. The adjudicator referred in some detail to Mr Meulman's statutory declaration. He continued:

"480 The claimant is claiming for delayed access to the Jetty Road (because the road was not completed on time). **This delayed access did not prevent the claimant from building the Wharf. This is because the claimant had intended building the Wharf, with the logistic route via the sea, until the Jetty Road was complete … Hence, the Wharf does not appear to have been delayed significantly and any delay to the completion of the Wharf is obviously interconnected with other delays, dealt with elsewhere in this Decision.**

481. I accept that delayed access via the Jetty Road to the Wharf would have otherwise delayed the claimant's work on the Wharf front. Had the claimant not taken mitigation steps, corrective action and re-sequenced work, then the delay would have been abundantly evident. In this respect, I accept that the claimant might have otherwise been entitled to an EOT.

482. However, I find that **the claimant's costs are claimed in respect to inefficiencies and (on my examination) these costs are in fact disruption costs.**

483. For the reasons given in respect to the 'GCC 36 Delay and Disruption' … I find that the claimant is claiming an EOT and delay costs based on disruption and, therefore, I have no jurisdiction to assess this claim.…

485. At the end of the day, the method that the claimant has employed to substantiate this claim has failed as a matter of evidence and as a matter of explanation.

> 486. I therefore find against the claimant and value this claim at **Nil**. I find the claimant is entitled to **0** days EOT." (emphasis added)

[103] The applicant submits that this passage in the second adjudication decision raises a *Dualcorp* issue estoppel that precludes the respondents from raising V0247 in the third adjudication application.

[104] The applicant submits that the estoppel is raised for the following reasons:

(a) V0247 asserts an entitlement to costs under the contract resulting from the jetty road delay in circumstances where the adjudicator determined that the respondents had no entitlement to a progress payment in respect of the jetty road delay, or alternatively no entitlement to the relevant costs in respect of the jetty road delay; or

(b) the respondents assert an entitlement to disruption costs resulting from the jetty road delay in circumstances where the adjudicator has determined that the respondents have no entitlement to a progress payment in respect of any disruption costs for the jetty road delay; or

(c) it was unreasonable for the respondents not to pursue V0247 in the second adjudication application.

[105] The third of those submissions belongs in the category of an extended or *Anshun* estoppel and I will consider it there.

[106] There is a point of common origin for V0247 and DC–JETTYRD1 and DC–JETTYRD2, because each is a claim caused by the jetty road delay. But the three claims are not in respect of the same costs. On the one hand, DC–JETTYRD2 was a claim for an extension of time to the GC12 contract period of 73 days (leaving aside the float) with associated costs.

[107] On the other hand, the claim for V0247 is not based on an extension of time and costs associated with that extension at all. It was based on additional resources in the form of additional hours of labour and items of plant and equipment deployed during the period of the jetty road delay but without delay to the works as programmed.

[108] Second, the adjudication disallowed the claim for DC–JETTYRD2 on the footing that costs that had been compiled as costs of the period of extension claimed were not the costs relevant to the extension but were disruption costs. In other words, the adjudicator disallowed the claim on the basis that it was not one properly made for costs that were recoverable on that basis. There was no determination made of what the disruption costs incurred actually were or might have been.

[109] The adjudicator's cross-reference to disruption costs not being recoverable was to the following paragraphs:

> "121. At paragraphs 599 to 604 of its application submissions, the claimant discusses an 'Alternative entitlement to disruption costs for float only delay' and says '… where only float was

consumed, yet not enough float for an activity to become critical, the works were plainly disrupted notwithstanding that the float delay did not become critical path delay, as is the case with the other claimed delays'.

122. The claimant also provided a working definition of 'disruption'. This includes '… disturbances to a contractor's activities which cause the contractor to work less efficiently'; and 'Disruption is not delay. Although disruption may cause delay, and it may be caused by delay, delay is not a precondition of disruption and, indeed, disruption may occur when the progress of the works is not only delayed but when it is in fact accelerated.'

123. I find that I do not have jurisdiction to assess disruption costs under the contract or the Act (see also the previous Decision at paragraph 365).

124. This is because the:

(i) The first paragraph of 'Clause 36 Delay and Disruption Costs' provides 'Where the [claimant] has been granted an extension of time under Clause 35.5 for any delay caused by an event listed in Clause 35.5(b)(i), the [respondent] shall pay to the [claimant] such extra Direct Costs as are necessarily incurred by the [claimant] by reason of the delay and for on-Site overheads attributable to the delay valued by the [respondent's] representative under Clause 40.5.' This paragraph provides no entitlement to disruption costs due to any delay event listed in GCC 35.5(b)(i);

(ii) The second paragraph of 'Clause 36 Delay and Disruption Costs' provides … 'Where the [claimant] has been granted an extension of time under Clause 35.5 for a delay caused by any other event for which payment of extra costs for delay or disruption is provided for in Annexure Part A or elsewhere in the Contract, the [respondent] shall pay to the [claimant] such extra Direct Costs as are necessarily incurred by the [claimant] by reason of the delay and for on-Site overheads attributable to the delay valued by the [respondent's] representative under Clause 40.5'. This paragraph provides an entitlement to disruption costs, only if:
   (a) Annexure Part A (or elsewhere in the contract) provides events for which the respondent will pay extra costs for disruption; and
   (b) The respondent has granted EOT for a delay caused by one of those events provided in Annexure A.

(iii) In the previous Decision, I recorded:

> 'Given that 'Annexure A – provides 'Nil' events for 'Extra costs for Delay or Disruption (Clause 36)' and that there is no other express provision in the contract providing payment for disruption cost, I find that the claimant has no entitlement to disruption costs.'

125. Given that the claimant claims at least $56,646,821.52 (excl. GST) for purported disruption costs, I consider the point again. I note that GCC 36 recognises that the payment of disruption costs can constitute an event for which the respondent can grant an EOT. Therefore, where there is a series of purported losses of productivity or efficiencies in the deployment of resources, then under GCC 36 the total disruption (that is, the loss of productivity or efficiency) can contractually result in delay that prolongs the work and this delay can form the basis for an EOT and possibly delay costs.

126. However, the transition of a disruption cost entitlement to an EOT entitlement (and possible delay costs) depends upon which events the parties have specifically inserted into Annexure Part A. As recorded in paragraph 365 of the previous Decision, the parties have specifically inserted 'Nil' into the relevant Item in Annexure Part A. Therefore, I find that the claimant has no entitlement to EOT based on disruption alone.

127. For example, the claimant's model (for this and many of other EOT/delay claims) is based on:

(i) The respondent directing a variation, or there being a change to the scope or to the contemplated construction methodology;

(ii) The respondent often pays the claimant for the variation;

(iii) However, due to the variation or the change, there is also a loss of productivity or efficiency in the claimant's deployment of its own resources; and

(iv) The claimant then claims an EOT and delay costs for time that the claimant says it has lost because of lost productivity or efficiency (that is, disruption).

128. If the parties had agreed, when they entered into the contract, on which variations or changes (whether or not the respondent directed them) would give rise to claims for disruption costs and inserted particulars of those variations and changes into Annexure Part A, then the claimant would be entitled to claim an EOT (and possible delay costs) under GCC 36.

129. However, the parties have inserted Nil and, therefore, I find I do not have any jurisdiction to assess the claimant's claims for

> EOT and delay costs where the claimant alleges that disruption has first prolonged the work.
>
> 130. Furthermore, there is no standalone clause in the contract that provides an entitlement to disruption costs, whether due to delay, variation or any other cause. Whilst the claimant may have some claim to damages at common law, I obviously have no jurisdiction to assess such claims.
>
> 131. On a final point, the respondent has not persuaded me that the claimant could have reasonably avoided the delays for which I have found (below) the claimant is entitled to EOTs and delay costs." (footnotes omitted)

[110] The respondents submit that the adjudicator's findings were no more than that the costs claimed were disruption costs which the respondents were not entitled to claim as delay costs under cl 36 of the GC12 general conditions of contract. Second, they submit further that the only relevant items determined for the purposes of issue estoppel were the costs sought in the claims for DC–JETTYRD1 or DC–JETTYRD2, which were the cost of the prolonged engagement of personnel and equipment on the wharf work front as a consequence of the increased travel times and associated disruption to the supply of the wharf work front caused by the absence of the jetty road. Third, they submit that the issue for determination for the DC–JETTYRD claims was entitlement to delay costs under cl 36 whereas V0247 is a claim for variation costs under cl 40 as described previously.

[111] In my view, these circumstances do not amount to a determination of a fundamental or essential issue in DC–JETTYRD1 or DC–JETTYRD2 inconsistent with pursuit of the claim in V0247.

[112] Accordingly, there is no *Dualcorp* issue estoppel that precludes the respondents from pursuing V0247.

[113] However, it also will be necessary to consider DC–JETTYRD1 and DC–JETTYRD2 as relevant to the applicant's contentions based on *Anshun* estoppel.

V0428B and V0582

[114] As a separate ground, the applicant submits that the claims for V0428B and V0582 made in Payment Claim 38 are precluded by a *Dualcorp* issue estoppel arising from the second adjudication decision or that decision and the first adjudication decision.

[115] V0428B was described in Payment Claim 38 as "Item 4 – Inclement Weather (April 2014 to July 2014)" in the amount of $1,872,224. From the statutory declaration accompanying the claim, it appears that the precise period of V0428B is 1 May 2014 to 14 July 2014.

[116] The payment claim also included V0582 described as "Inclement Weather from 14 July 2014 Onwards (work up to PC)" in the amount of $5,002,321. From the statutory declaration, it appears that the period of V0582 is 15 July 2014 to 31 January 2015.

[117] The statutory declaration explained the basis of both claims. Reordered into a logical sequence, that explanation starts with reference to cl 42.1 of the GC12 general conditions of contract by which the parties agreed that the respondents took the risk of inclement weather causing delay and costs for a fixed amount to be paid progressively.

[118] The works were delayed by a delay in site access to start and continue the works caused by the applicant. On 9 November 2012, an extension of time, known as EOT005, was granted due to the delay in site access. It extended the date for practical completion by 121 days.

[119] Clauses 35.5 and 36 of the GC12 general conditions of contract provided that where there is an extension of the time for practical completion due to some causes the respondents are to be entitled to some costs. The respondents claimed that the extension allowed under EOT005 of 121 days entitled it to payment for additional costs under cl 36.

[120] One of the consequences of the extension of time under EOT005 was that the contract period extended into additional wet weather periods. The respondents claimed increases in costs over those periods because of the effects of wet weather. The claim in V0428B is based on the extension of time under EOT005, at least in part. However, the claim period of V0582 is longer than the current extended date for practical completion.

V0428

[121] Payment Claim 31 was made on 23 May 2014 for the amounts of $136,788,580.30 and US$6,695,003.82. It included V0428 in the amount of $9,666,140.19. The respondents describe V0428 as a claim for additional delay costs they incurred as a result of the increased exposure of its peak workforce on the jetty and the wharf to inclement weather over the wet weather season from December 2013 to April 2014. The basis was that activities that would have been completed during the dry season on the original program were pushed into the wet season.

[122] The first adjudication application dealt with the detail of the claim for V0428 (pages 107-114). As described in that application, the methodology of the claim was that the number of days that the respondents were exposed to inclement weather in the second wet season into which the works had extended over December 2013 to April 2014 (39) was multiplied by the amount of the daily standby costs ascertained in accordance with agreed standby rates ($243,076.59) resulting in the total amount of $9,479,987.01.

[123] The first adjudication decision also dealt with the claim for V0428 (pages 95-98). The adjudicator referred to V0024, an earlier variation claim associated with the wet weather risk and delay. He found that it resulted in an agreed variation order and that any amount for inclement weather was excluded from the variation. V0428 followed.

[124] The adjudicator allowed the amount of $3,412,500. The adjudicator's reasons accepted that the claim was based on EOT005 and the 121 day extension time that entitled the respondents to delay costs under cl 36 of the GC12 general conditions of contract, to be valued under cl 40. The adjudicator found that: "the compensable

cause of the delay was the [claimant] failing to give access to the site on time, this resulted in EOT005".

[125] The methodology for V0428, as allowed by the adjudicator, was to accept the evidence of the respondents as to the inclement weather, but not to accept the rates claimed, described as the "standby rates", per se. That was because cl 36 referred to "direct costs". A standby rate was not a measure of direct cost but an agreed rate that applied to a different set of circumstances.

[126] Having reviewed the individual rates that may be applicable to the alleged resources and other factors the adjudicator found that $87,500 was a reasonable rate for the purposes of cl 40.5(c) of the GC12 conditions of contract which applied to the assessment of direct costs under cl 36.

[127] The product of 39 days of exposure to inclement weather and direct costs of $87,500 per day was $3,412,500, the amount allowed.

[128] The applicant made no direct submission that the determination of V0428 in the first adjudication decision raised an issue estoppel that precludes the respondents from pursuing V0428B. That is understandable. That there is no issue estoppel follows from the fact that V0428 related only to 39 days of costs said to have been incurred over the period from December 2013 through to April 2014.

[129] The claim for delay costs in V0428B is confined to alleged delay over the period from 1 May 2014 to 14 July 2014. Those costs are relevant to the issue estoppel alleged to arise from the second adjudication decision and V0414 Part A Item 19, dealt with next.

V0414 Part A Item 19

[130] As previously stated, Payment Claim 34 included V0414. The claims included V0414 Part A Item 19, described as "Extended Duration Onsite PC 14th July 2014 – Current Forecast PC 4th October 2014 (83 Days)" in the summary page attached to the 25 August 2014 letter (page 1) headed "V0414 – GC12 Acceleration, Delay, Re-sequencing and Variations Claims Summary (SUBMISSION REV 2)". The amount claimed to 15 August 2014 was $15,553,085.78 of a total estimate of $39,854,782 for the period between 14 July 2014 and the (then future) predicted date for practical completion of 4 October 2014.

[131] Another page that related to this item was attached to the 25 August 2014 letter submitted with Payment Claim 34 (page 164) and was headed "GC12 – OFFSHORE MARINE WORKS: APPROACH JETTY & SHIP BERTH – V0414 Clause 36 (Delay or Disruption)". It did not state a cause of delay. It stated that the claim "has been calculated using a daily rate [of] $480,178.10" for 83 days from 14 July 2014, resulting in the cost of $39,854,782. The actual claim in Payment Claim 34 for $15,553,085.78, as stated in the summary page attached to the 25 August 2014 letter, was for about 32 days (14 July 2014 to 15 August 2014).

[132] In the second adjudication application the respondents reaffirmed that the V0414 Part A Item 19 claim was only for delay between 14 July 2014 and 15 August 2014, but reduced the amount of the claim from $15, 553,085.78 to $12,097,975.00.

[133] The calculation of the daily rate of $480,178.10 was derived from the schedule entitled "GC12 – OFFSHORE MARINE WORKS: APPROACH JETTY & SHIP BERTH – V0414 Clause 36". The total number of days claimed for all of the individual items of claim for delay and extension of time was 174. The total of the costs calculated was $83,550,989.19. The amount per day using those inputs was $480,178.10, as an average. Second, it appears from the costs allocated to the various categories of labour and plant in accordance with the previously discussed methodologies, that the daily amount was intended to represent all categories of costs incurred during a period of delay.

[134] In the second adjudication decision, V0414 Part A Item 19 was dealt with by the adjudicator as follows:

> "235. The claimant claims $15,553,085.78 (excl. GST) for Item 19. This figure is a substantial amount. Furthermore, the claim appears to be somewhat complicated. I also note that the claimant's overall claim is for $39,854,782.00 based on 83 days, but the claimant is only claiming the $15,553,085.78 until 15 August 2014.
>
> 236. The claimant explains this claim by way of seven brief paragraphs (excluding two paragraphs that reproduce GCC 33.3 and GCC 36). At paragraphs 886 and 889 of the application submissions, the claimant explains the claim as follows:
>
> 'Item 19 relates to the delay costs for the balance of the delay that was not absorbed by the acceleration works. These delay cost relate to the period 14 July 2014, being the approved date for Practical Completion, to the current forecast date for Practical Completion of 4 October 2014 … The difference of 83 days between the approved date for Practical Completion of 14 July 2014 and the forecast date for Practical Completion of 4 October 2014 reflects the balance of the delay that could not be overcome by the acceleration works.'
>
> 237. At paragraphs 146 to 154 of her declaration (that is, eight short paragraphs), Ms Grewar discusses this claim and says at paragraph 153 and 154 '[the claimant's] claim for Item 19 is $39,854,782.00 ... For the purposes of the Adjudication Application, [the claimant] is only claiming its costs for Item 19 up to August 2014, being $15,553,085.78'.
>
> 238. In my view, the sensible means by which that claimant might claim for its 'EOT and Delay Costs' (which I decide) was not as an 'alternative' but in addition to the acceleration costs in Part A and in a similar manner (but not identical manner) to Item 19. The respondent also recognised the validity of delay costs in addition to acceleration costs by scheduling $8,166,133.00 (excl. GST) for Item 19 (see paragraph 26.5.4 of the response submissions).

239. For reasons set out in paragraphs 216 above, I assessed and decided the claims V0414 'EOT and delay costs' claims as the alternative to and instead of V0414 'Part A Acceleration Costs'. The claims that I decided in favour of the claimant extended the Date for PC by 86 days. However, the delay costs were decided in terms of the 'extra Delay Costs' of the delay at the time of the delay. This means that the claimant's costs of the contract works do not change, even though they may run on longer than the Date for PC. This is because the claimant has been compensated for the delay at the time of occurrence.

240. In my view, the claimant takes the above logic for Item 19 and runs it in reverse. The claimant does so by saying that because delays caused the claimant to remain on site for an 83 extra days, then the claimant is entitled to be compensated for these days. The problem is that the claimant has already been compensated for 86 days (see Schedule 1).

241. I disagree with Ms Grewar's submission 'I reiterate that [claimant's] claim for Item A is in the alternative to [the claimant's] delay cost claim under V0414. There is no double up'. This is because:

    (i) I record above at paragraph 232 that the claimant is not claiming the 'Balance of Delay Claims' in the 'alternative' to the 'EOT and Delay Cost Claims'; and
    (ii) Whether or not the Balance of Delay Claims are based on GCC 33.3 or 36, or both, I still find that there would be a double up with the EOT and Delay Cost Claims.

242. Furthermore, neither the claimant's application nor Ms Grewar's submissions persuade me that the claimant is entitled to the claim or to the quantum claimed.

243. In summary, I have assessed and decided the claim for V0414 'EOT and Delay Costs' as an alternative to V0414 Part A Acceleration Costs. Because I have decided that the claimant is entitled to 'extra Direct Costs' for the 86 days in respect to V0414 – 'EOT and Delay Costs' the claimant is not entitled to the 83 days for the 'Balance of Delay Claims' under GCC 36. This is because I find there is a double up. To put the matter into a contractual context, the fourth paragraph of GCC 36 says that 'Nothing in Clause 36 shall oblige the [respondent] to pay extra costs for delay or disruption which have already been included in the value of a variation of any other payment under the Contract'.

244. I acknowledge the respondent's scheduled amount at adjudication. However, this amount does not give me

> jurisdiction to decide a claim for which I find the claimant is not otherwise entitled." (footnotes omitted)

[135] In summary, therefore, the adjudicator dismissed claim V0414 Part A Item 19 for delay costs for the period from 14 July 2014 to 15 August 2014 because those costs were already allowed in the claim for V0414 EOT and Delay Costs and there was a "double up" of the claim for delay costs.

[136] The applicant submits that an estoppel arises from the second adjudication decision in relation to costs incurred (before or after 15 August 2014) based or grounded on the same entitling event. I reject the submission at that level of generality for several reasons.

[137] First, V0414 Part A Item 19 does not appear to have been made on the ground of any particular entitling event. It was not confined to the ground of delay in site access to start and continue the works. So there is no entitling ground of delay out of V0414 Part A Item 19 that was a fundamental or essential issue determined by the second adjudication decision.

[138] Second, to the extent that there is a claim for delay costs in a later period and payment claim for a cause of delay that was allowed in an earlier adjudication, the earlier adjudication decision will not operate as an issue estoppel against a claimant in relation to continuing costs. Thus, that the first adjudication decision allowed the delay costs claimed in V0428 based on the EOT005 extension of 121 days does not preclude the respondents from claiming later incurred costs based on the same ground or "entitling event", not inconsistently with the earlier determination and adjudication decision.

[139] Third, the decision disallowing V0414 Part A Item 19 related to costs claimed (only up to 15 August 2014) that were allowed already under another ground or grounds of claim. That does not decide that there are no allowable costs incurred under a general extension of time claim over a longer period if those other grounds do not exist in relation to future costs for the later period.

[140] The applicant also submits that the respondents are estopped from pursuing V0428B and V0582 for the period up to 15 August 2014. I reject that submission.

[141] The costs claimed in V0414 Part A Item 19 were costs for the period from 14 July 2014 and up to 15 August 2014.

[142] As to V0428B (relating to the period 1 May 2014 to 14 July 2014), all the costs claimed were incurred before 14 July 2014 but after the 39 days the subject of the costs claimed in V0428. The decision in V0414 Part A Item 19 does not relate to those costs.

[143] As to V0582 (relating to the period 15 July 2014 to 31 January 2015), only the period from 15 July 2014 to 15 August 2014 overlaps with the period of the claim in V0414 Part B Item 19.

[144] However, I accept that it was essential or fundamental to the second adjudication decision that the respondents were not entitled to delay costs under cls 36 or 33.3 for the period from 14 July 2014 to 15 August 2014. To that extent, there is a

Dualcorp issue estoppel precluding the respondents from making the claim in V0582.

[145] These conclusions say nothing about whether the claims in V0428B or V0582 might fail for any other reason.

[146] Otherwise, in my view, there is no *Dualcorp* issue estoppel that precludes the respondents from pursuing V0428B and V0582.

Extended issue estoppel or *Anshun* estoppel

[147] The third basis of the applicant's submissions was that even if there is no *Dualcorp* issue estoppel, there is a principle derived from *Dualcorp* that a claimant may be precluded from raising a claim in a payment claim that it was unreasonable not to have raised in an earlier payment claim, by analogous application of the principle of *Port of Melbourne Authority v Anshun Pty Ltd*.[30]

[148] The plurality judgment in *Anshun* accepted the principle of *Henderson v Henderson*[31] formulated thus:

> "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." [32]

[149] *Dualcorp* did not decide that an *Anshun* estoppel applied to the processes of making a payment claim or an adjudication application under the NSW Payments Act. However, subsequent cases have accepted the application of the principle.

[150] First, in *Watpac*,[33] McDougall J considered whether there can be an "extended" (meaning *Anshun*) estoppel under the NSW Payments Act. Having referred to the reasons of McFarlan JA in *Dualcorp*, Wigram VC in *Henderson* and another English case (but not *Anshun* itself), his Honour concluded:

> "In my view, both as a matter of principle and because of the clear policy of the Act, as to the finality of determinations, identified by Macfarlan JA, the doctrine of issue estoppel, in so far as it applies to determinations of adjudicators under the Act, includes the extended principle. To conclude otherwise would permit a party to retain the

30 (1981) 147 CLR 589.
31 (1843) 3 Hare 100; 67 ER 313.
32 (1843) 3 Hare 100, 115; 67 ER 313, 319.
33 [2010] NSWSC 168.

> opportunity to resubmit claims, until finally it got an advantageous outcome, by holding back part of its case each time. Except in special circumstances, a party should put the whole of its case, in support of a particular payment claim, before an adjudicator who is charged with the statutory responsibility of deciding that parties' entitlement to the amount claimed."[34]

[151] Second, in *AE & E*, Applegarth J said:

> "It is sufficient to state the relevant principles that I intend to apply in determining this application … [t]he concept of issue estoppel, insofar as it is applicable to determinations by adjudicators under the Act, includes the *Anshun* principle."[35]

[152] However, neither case was decided on the extended or *Anshun* estoppel basis. Accordingly, those statements are obiter dicta. It is not necessary to make any decision about the correctness of the availability of extended or *Anshun* estoppel as a matter of law in the present case because both the applicant and the respondents argued the case on the basis that *Anshun* estoppel was available in law.

[153] However, the respondents submit that on the facts of the present case the applicant was unable to show that it was unreasonable for the respondents not to have brought V0247, V0428B and V0582 at the time of the earlier payment claims and adjudication decisions.

[154] As to V0247, the applicant submits that V0247 and V0414 Part B Item 3 raised largely the same issues. I agree. Second, the applicant submits that it would have been efficient for the adjudicator to consider the claims for costs for the jetty road delays all at once, meaning DC–JETTYRD1, DC–JETTYRD2 and (either V0414 Part B Item 3 or) V0247. I agree. Third, it submitted that the effect of not pursuing V0414 Part B Item 3 in the adjudication for the second adjudication decision is that the respondents are trying again just by reformulating the basis of the entitlement. To a large extent, I agree. However, there is also a different formulation for the calculation of the costs.

[155] Fourth, the applicant submits that in the context of extremely large and complex claims the applicant should not be burdened with more than one version of a claim for costs for the jetty road delay. In my view, this factor is one that raises counterbalancing considerations. It may be that either or both parties' costs and vexation are reduced by bringing one version of a claim forward before an alternative and more complex version. A requirement that all the alternatives for a claim must be propounded at the cost of being precluded from any form of re-agitation of a different alternative may serve to induce a claimant to include every possible alternative in the first available payment claim.

[156] Fifth, the applicant submits that no weight should be given to the respondents' stated reasons for not including V0414 Part B Item 3 in the application for the second adjudication decision, because they were self-serving and a claimant should not be entitled to hold back a claim which it was otherwise unreasonable not to bring forward merely to check or further substantiate the costs.

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34 [2010] NSWSC 168, [104].

35 [2010] QSC 135, [32].

[157] The respondents submit, in effect, that the onus was upon the applicant to show that it was unreasonable for the respondents not to have pursued V0414 Part B Item 3 in the second adjudication application, that it was a heavy onus and that it was not enough to show only that it would have been reasonable for the respondents to have pursued VO414 Part B Item 3. I agree.

[158] Second, the respondents submit that the decision not to do continue with V0414 Part B Item 3 in the application for the second adjudication decision was perfectly justified by the desire to formulate the costs claimed with greater precision.

[159] Generally, in my view, the court will be slow to conclude that it is unreasonable to pursue a claim for delay costs suffered for a period that was not previously the subject of a determination for delay costs on a basis that has not been previously determined against the claimant so as to preclude such a claim.

[160] The respondents' justification for withdrawing V0414 Part B Item 3 does not fully answer the sting of the applicant's submission that it was unreasonable to pursue and have DC–JETTYRD1 and DC–JETTYRD2 adjudicated while choosing to leave behind what is now V0247, a largely alternative set of costs based on the same specific cause of prolonged use of resources and cost. By way of analogy, in the context of ordinary litigation, a party would not be heard to say that it was not unreasonable to go to judgment on one alternative cause of action arising largely out of the same facts as another cause of action, yet leave the other cause of action behind for trial at a later day if the first did not succeed.

[161] If V0414 Part B Item 3 was not ready for adjudication, the respondents might have chosen not to pursue either of their claims for the costs of disruption from the 266 days of the jetty road delay. That would have avoided the risk that it would be unreasonable for them to bring the disruption claim in V0414 Part B Item 3 again if the claim made in DC–JETTYRD2 covering the same categories of costs and the same cause of those costs was not successful.

[162] Any analogy between litigation and the scope for an extended or *Anshun* estoppel under the Payments Act is imperfect, to say the least. Notwithstanding that imperfection, once it is accepted that there is a role for an extended or *Anshun* estoppel based on a concept of unreasonableness, there must be some difficult choices as to whether one case or another raises the estoppel.

[163] In the result, in my view, it was unreasonable for the respondents to re-agitate V0247 in Payment Claim 38 and it should be concluded that there is an extended or *Anshun* estoppel that precludes the applicant from doing so.

[164] As the respondents submit, "there were always two different forms of claim arising from the Jetty Road Delay, seeking different costs. The claim for variation costs ultimately pursued as V0247 was in contemplation, and made known to WICET, from the outset." I have dealt with the differences in the costs previously. I have found above that is an answer to an issue estoppel. But an overlap in the categories of costs claimed does exist.

[165] Apart from the difference in the costs, the difference between V0247 and DC–JETTYRD2 is that the former is a claim made under cl 40 whereas the latter is a claim made under cl 36 of the GC12 conditions of contract, with each claim

depending on and stemming from the jetty road delay as the cause of the costs claimed. In other words they are, and "were always", claims where to allow costs for one claim would affect the other.

[166] In my view, the respondents' submission that the claim for variation costs for the jetty road delay was always in contemplation illustrates the weakness of their position, not its strength. To say that V0247 was always in contemplation also does not fully capture what happened. The respondents did not merely contemplate V0414 Part B Item 3. They made that claim in Payment Claim 34. The applicant responded to it in the payment schedule. The respondents chose for their own reasons not to pursue the claim in the second adjudication application.

[167] The respondents take an entitled position. They contend that they were entitled to make an alternative or overlapping claim in a payment claim, then withdraw it, then re-agitate it (if they chose to do so) when the pursued alternative failed. They submit, in effect, that they were entitled to do so at least if they had a sound forensic reason for withholding the claim.

[168] I do not accept that they had that entitlement. In my view, in the particular circumstances of this case, it was unreasonable for the respondents to withdraw V0414 Part B Item 3 from the second adjudication decision on the basis that it would be entitled to re-agitate that claim later, while pursuing DC–JETTYRD2 in the second adjudication decision.

[169] Accordingly, in my view, there is an extended or *Anshun* estoppel precluding the respondents from pursuing V0247 in the third adjudication application.

[170] However, I do not consider that any extended or *Anshun* estoppel arises in relation to V0428B or V0582. The discussion of the *Dualcorp* issue estoppel in relation to those claims shows why. They are claims relating to costs alleged to have been caused over different periods that do not overlap and are not alternative to V0428.

Abuse of process – V0247, V0428B and V0582

[171] The last of the applicant's grounds is that in each case where the applicant submits that there was either a *Dualcorp* issue estoppel or an extended or *Anshun* estoppel, precluding the respondents from re-agitating V0247, V0428B and V0582, the applicant submits alternatively that it was an abuse of process for the respondents to make the claim in question.

[172] The essence of the idea of abuse of process that the applicant seeks to capture on this ground derives from a passage from *Urban Traders v Michael* where McDougall J said:

> "In the context of the Act (ie, when asking whether there has been an abuse of the processes established by the Act), the essence of abuse of process is what Allsop P in *Dualcorp* described as:
>
> (1) the 'repetitious use of the adjudication process to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions' (at [2]);

> (2) the use of the Act 'to re-ignite the adjudication process at will in order to have a second or third or fourth go at the process provided by the Act merely because [the claimant] is dissatisfied with the result of the first adjudication' (again, at [2]); or
>
> (3) 'repetitious re-agitation of the same issues' (at [16]).
>
> Similarly, in *Perform*, the essence of Rein J's reasons for concluding that there was an abuse of process was that, where an adjudication had been conducted and a determination given, the dissatisfied claimant sought to propound a claim, differently framed, for the very same works, goods or services (see at [42], [46]).
>
> Again, in *Cadence* at [56], Hammerschlag J made it clear that the abuse of process lay in the fact that the claimant was seeking to re-agitate a payment claim that had been made and adjudicated upon.
>
> It does not follow from the decisions to which I have referred that every repetition, in a subsequent payment claim, of a claim made in an earlier payment must amount to an abuse of process. That is so even if that earlier payment claim has been the subject of an adjudicator's determination. The relevant concept is not abuse of process at large. It is abuse of the processes of the Act…"[36]

[173] However, in this case there was no principle or set of relevant facts relied upon to engage abuse of process in addition to the matters relevant to decide the questions of *Dualcorp* issue estoppel or extended or *Anshun* estoppel.

[174] Although in a number of cases the concept of abuse of process is stated to be a further alternative basis to preclude or stay a claim from being pursued, in the circumstances of this case, nothing is added by resort to abuse of process more generally.

[175] The questions raised were all about re-agitation of earlier claims. In my view, such questions are properly analysed in the frameworks of the *Dualcorp* issue estoppel or extended or *Anshun* estoppel, to the extent that they operate in this field of discourse.

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[36] [2009] NSWSC 1072, [38]-[41].