SUPREME COURT OF QUEENSLAND

CITATION:	*Spankie & Ors v James Trowse Constructions Pty Limited* [2010] QCA 355
PARTIES:	**DAVID SPANKIE** (first applicant/first appellant) **GAI SPANKIE** (second applicant/second appellant) **NORTHERN INVESTMENT HOLDINGS PTY LIMITED** (third applicant/third appellant) **v** **JAMES TROWSE CONSTRUCTIONS PTY LTD** (respondent)
FILE NO/S:	Appeal No 8324 of 2010 SC No 7397 of 2010
DIVISION:	Court of Appeal
PROCEEDINGS:	General Civil Appeal
ORIGINATING COURTS:	Supreme Court at Brisbane
DELIVERED ON:	14 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	17 September 2010
JUDGES:	Holmes and Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PAYMENT CLAIMS – where the appellants and respondent entered into a construction contract and the respondent served a payment claim on the appellants – where the payment claim was adjudicated under *Building and Construction Industry Payments Act* 2004 (Qld) ('BCIPA') – where adjudication decision declared void – where the respondent served on the appellants a subsequent payment claim, claiming an unpaid amount from the earlier claim – where the appellant's applied for a declaration that the subsequent payment claim was void as an abuse of process or as a second payment claim in contravention of s 17(5) of BCIPA – where the primary judge dismissed the application – whether there is a general implication in BCIPA against the re-agitation of a payment

claim in a subsequent claim – whether the respondent's subsequent payment claim contravened s 17 of BCIPA – whether s 32 of BCIPA excluded the respondent's right to make the subsequent payment claim for an amount subject to a void adjudication determination

Acts Interpretation Act 1954 (Qld), s 14A
Building and Construction Industry Payments Act 2004 (Qld), s 7, s 8, s 12, s 13, s 17, s 17(1), s 17(2), s 17(5), s 17(6), s 18, s 19, s 20, s 21, s 29, s 31, s 32, s 33
Building and Construction Industry Security of Payment Act 1999 (NSW), s 8(2)(b), s 13(5)

David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd & Ors (No. 2) [2010] QSC 166, related
Doolan v Rubikcon (Qld) Pty Ltd [2008] 2 Qd R 117; [2007] QSC 168, distinguished
Dualcorp Pty Ltd v Remo Constructions Pty Ltd (2009) 74 NSWLR 190; [2009] NSWCA 69, discussed
Emergency Services Superannuation Board v Robert Sundercomb & Anor [2004] NSWSC 405, cited
John Holland Pty Ltd v Made Contracting Pty Ltd [2008] NSWSC 374, cited
John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd [2010] QSC 159, cited
Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140, cited
Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd trading as Novatec Construction Systems [2009] NSWSC 416, cited
Simcorp Developments and Constructions P/L v Gold Coast Titans Property P/L [2010] QSC 162, cited
Spankie & Ors v James Trowse Constructions Pty Ltd & Ors [2010] QSC 336, related
The University of Sydney v Cadence Australia Pty Ltd & Anor [2009] NSWSC 635, cited
Timwin Construction v Facade Innovations [2005] NSWSC 548, cited
Quasar Constructions v Demtech Pty Ltd [2004] NSWSC 116, cited
Watpac Constructions v Austin Corp [2010] NSWSC 168, discussed

COUNSEL: P Dunning SC, with M Ambrose, for the appellants
L Kelly SC, with G Handran, for the respondent

SOLICITORS: Holding Redlich for the appellants
Dowd & Company for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and with the order he proposes.

[2] **FRASER JA:** In July 2008 the appellant (as principal) and the respondent (as contractor) entered into a construction contract for works to be carried out at the Homestead Tavern at Boondall. The contract was a "construction contract" for the purposes of the *Building and Construction Industry Payments Act* 2004 (Qld) ("BCIPA").

[3] Clause 37.1 of the contract provided that the contractor should claim payment progressively in accordance with item 28 and that each progress claim should include details of the value of "*WUC* done." The contract defined "*WUC* (from "work under the Contract")" as meaning, "the *work* which the *Contractor* is or may be required to carry out and complete under the *Contract*". Item 28 specified the "[t]imes for progress claims" as "28th day of each month for *WUC* done to the end of that month".

[4] On 1 September 2009 the respondent served upon the appellant payment claim 14 for $539,194.57. Practical completion of the works was achieved on 25 September 2009. Payment claim 14 was referred to adjudication under BCIPA and an adjudication decision was delivered on 2 November 2009. On 19 May 2010 McMurdo J held that "the purported adjudication is of no effect, because it did not satisfy an essential condition for a valid determination which was that the adjudicator provide the measure of natural justice which the Act requires to be given" and declared that the adjudication decision was void.[1]

[5] On 4 June 2010 the respondent served upon the appellant payment claim 16 for $332,286.23. Payment claim 16 claimed only an unpaid amount that had been part of the larger amount claimed in payment claim 14 for work done before that payment claim.

[6] The primary judge dismissed the appellants' application for a declaration that payment claim 16 was void as an abuse of process or as being a second payment claim in contravention of s 17(5) of BCIPA.[2]

[7] It was held in *Doolan v Rubikcon (Qld) Pty Ltd*[3] that a payment claim that claimed only an amount that had been claimed in a previous payment claim was not authorised by the relevant provisions of BCIPA. The primary judge reached the contrary conclusion and did not follow *Doolan v Rubikcon (Qld) Pty Ltd*. The primary judge also rejected the appellant's argument that the respondent's only remedy for the consequences of the adjudication of payment claim 14 being held void was that provided by s 32 of BCIPA, to withdraw the adjudication application and make a new adjudication application. The respondent had not done so within the time limit specified in that section.

***Building and Construction Industry Payments Act* 2004 (Qld)**

[8] The issues in this appeal may more readily be understood if I first refer to relevant provisions of BCIPA.

[9] The object of BCIPA is expressed in s 7. It is to ensure that a person who undertakes to carry out construction work or to supply related goods and services

---

1 *David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd & Ors* (No. 2) [2010] QSC 166 at [17].

2 *Spankie & Ors v James Trowse Constructions Pty Ltd & Ors* [2010] QSC 336.

3 [2008] 2 Qd R 117, followed in *Simcorp Developments and Constructions P/L v Gold Coast Titans Property P/L* [2010] QSC 162.

under a construction contract is "entitled to receive" and "able to recover" progress payments. Section 8 provides that the object is to be achieved by granting an entitlement to progress payments, whether or not that is provided in the contract, and by establishing a procedure that involves the making of a payment claim, response by way of a payment schedule, referral of a disputed or unpaid claim to an adjudicator, and payment of the progress payment decided by the adjudicator.

[10] The first aspect of the statutory object, the entitlement to progress payments, is created by s 12, which is in Part 2 ("Rights to progress payments"). Section 12 provides that "From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract". The expression "reference date, under a construction contract" is defined to mean, so far as is presently relevant, "a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract". Section 13 relevantly provides that the amount of a progress payment to which a person is entitled in relation to a construction contract is the amount calculated under the contract.

[11] The second aspect of the statutory object, to ensure that the relevant person is able to recover progress payments, is implemented in Part 3 ("Procedure for recovering progress payments"). Section 17 provides:

> "**17 Payment claims**
>
> (1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the ***respondent***).
>
> (2) A payment claim—
>
> (a) must identify the construction work or related goods and services to which the progress payment relates; and
>
> (b) must state the amount of the progress payment that the claimant claims to be payable (the ***claimed amount***); and
>
> (c) must state that it is made under this Act.
>
> . . .
>
> (4) A payment claim may be served only within the later of—
>
> (a) the period worked out under the construction contract; or
>
> (b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim."

[12] The effect of ss 18 to 20, in summary, is to entitle a respondent served with a payment claim to serve a payment schedule stating the amount the respondent proposes to pay and reasons for withholding payment of any of the claimed amount, to render a respondent liable to pay a claimed amount in default of timely service of a payment schedule, and to entitle the claimant either to recover judgment for any unpaid amount the respondent proposed to pay or was made liable to pay or to make an adjudication application in relation to the payment claim, and to suspend work under s 33.

[13] In Division 2 of Part 3, s 21 entitles a claimant to apply for adjudication of the payment claim where the scheduled amount in a duly served payment schedule is less than the claimed amount, or the respondent fails to pay the scheduled amount by the due date, or the respondent fails to serve a timely payment schedule and fails to pay the claimed amount by the due date. Subsequent sections in Division 2 regulate adjudication applications, the appointment of adjudicators, adjudication responses by the respondent, the adjudication procedure, and the adjudicator's decision. Section 29 obliges the respondent to pay an adjudicated amount by a specified date. Sections 30 and 31 set out the procedure for the recovery of that amount as a judgment debt. Section 32 provides, so far as is presently relevant:

"32 Claimant may make new application in certain circumstances

(1) This section applies if—

(a) a claimant does not receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made; or

(b) an adjudicator who accepts an adjudication application does not decide the application within the time allowed by section 25(3).

(2) In either of those circumstances, the claimant—

(a) may withdraw the application, by notice served on the adjudicator or authorised nominating authority to whom the application was made; and

(b) may make a new adjudication application under section 21.

(3) Despite section 21(3)(c), a new adjudication application may be made at any time within

> 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2)."

Summary of the primary judge's reasons

[14] The primary judge rejected the appellant's contention that in the present circumstances BCIPA precluded the making of successive payment claims for identical amounts for the same work where the second payment claim related to a new reference date after the reference date for the first claim. His Honour distinguished decisions in which it was held that a second claim for a greater amount could not be made when there had been an adjudication of an earlier claim on the same basis. Those decisions were inapplicable in this case because the purported adjudication of payment claim 14 was void. The primary judge considered that the effect of ss 12, 13, and 17 was that, as at each reference date, a person who had undertaken to carry out construction work was entitled to a progress payment in the amount calculated under the contract, that the person's right was limited by s 17(5) to the making of only one claim in relation to a particular reference date, but that s 17(6) envisaged that after another reference date had passed a fresh claim might be made for an amount that had been the subject of a previous claim.

[15] The appellant's argument accepted that a payment claim could claim an amount that had been the subject of a previous claim provided that the payment claim also claimed another amount. The primary judge considered that it was difficult to see why the legislature would intend to permit the making of such of claim but to prevent the making of a claim which related only to an amount that had been the subject of a previous claim. His Honour considered that in the context of s 17(2), which identified matters that must appear in a progress claim, to say that the payment claim might "include" an amount the subject of the previous claim did not necessarily convey that some additional amount must also be claimed. The primary judge held that the construction which allowed the respondent's claim was demanded by s 14A of the *Acts Interpretation Act* 1954 (Qld), which requires that the interpretation that will best achieve the purpose of an Act is to be preferred to any other interpretation. The primary judge also rejected the appellant's argument that s 32 excluded the respondent's right to make a subsequent payment claim for an amount the subject of the void adjudication determination.

Summary of the arguments

[16] The appellant argued that the primary judge inverted the correct enquiry by asking whether BCIPA precluded the second claim rather than by asking whether it permitted "multiple" claims. In the appellant's submission, the word "including" in s 17(6) was inconsistent with an entitlement to make a payment claim only for an amount which had been the subject of a previous claim; it was a misuse of language to say that a payment claim included an amount that had been the subject of a previous claim when that amount was the only amount claimed. The appellant referred to dictionaries that defined "include" as meaning comprise, contain, or embrace "as part of a whole".[4] The appellant argued that payment claim 16 was impermissible because it related to the same reference date as payment claim 14. According to the appellant's argument, BCIPA is generally opposed to the

---

[4] *The New Oxford Dictionary* (2nd Ed, 2005); *The Shorter Oxford English Dictionary* (1st Ed, 1993); and *The Macquarie Dictionary* (2nd Ed, 1991).

"re-agitation" of the same claim, subject to the narrow exception in s 17(6) as the appellant construed it, even where there has been no adjudication determination. In the appellant's submission, the statutory language is too clear to allow for any other construction or for the application of s 14A of the *Acts Interpretation Act* 1954 (Qld). The appellant argued that the construction adopted by the primary judge was unlikely to reflect the statutory purpose, because it permits a claimant to put a respondent to great inconvenience and expense by making repetitive payment claims as rehearsals for the final claim, and was inconsistent with the decision in *Doolan v Rubikcon (Qld) Pty Ltd*[5] and Allsop P's reasons in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*.[6] The appellant also argued that, having regard to the statutory scheme, s 32 is an exhaustive definition of the rights of a claimant in the respondent's position.

[17] The respondent supported the primary judge's reasoning. The respondent also submitted that the definition of "reference date" was merely a mechanism for working out a date and it did not imply reference to the date of any work. Section 17(5) served the purpose of limiting the statutory entitlement to one payment claim each month but, when read with s 17(6), it did not prevent a builder from claiming for construction work if those claims have not been determined under BCIPA. The respondent argued for absurdity in the appellant's construction which, for example, would treat as invalid a subsequent payment claim for $1 million although such a claim would be valid if the claimant simply added to it a new claim of $5.

Consideration

[18] It is not a misuse of language to say that a payment claim includes an amount even though the claimant does not claim any other amount. The appellant's argument construed s 17(6) as though it provided that subsection (5) does not prevent the claimant from including, in *an amount claimed in* a payment claim, an amount that has been the subject of a previous claim, but that is not what s 17(6) provides. Furthermore, upon the appellant's construction a payment claim for an amount previously claimed might attract the beneficial application of BCIPA in all cases except one, namely, where the payment claim does not also claim another amount. The distinct oddity of that result militates against adoption of the construction that produces it.

[19] The appellant's construction is also not readily reconcilable with the statutory scheme. Section 17 is an aspect of the procedure for enforcing the entitlement to progress payments created by s 12. Section 12 creates such an entitlement from each reference date. Section 12 is expressed in very general terms. The text is certainly broad enough to encompass an entitlement to a progress payment of an unpaid amount for work done before a previous reference date. This view of s 12 is consistent with conventional contractual provisions of the kind which appear in the contract in this case. The reference to work under the contract done "to the end of that month" in item 28 of the contract conveys that a progress payment may be claimed for unpaid amounts for work done under the contract during the whole contract period up to the end of the month of any progress claim. I would respectfully endorse the primary judge's construction of the contract that the respondent was entitled to make a progress claim on the 28th day of each month in respect of work done up to the end of that month, whether or not the work was done in that month.

---

5 [2008] 2 Qd R 117.

6 (2009) 74 NSWLR 190 at 193 to 194, paragraphs [8]-[14].

[20] Returning to the legislative provisions, there is nothing in the definition of "reference date" to cut down the broadly expressed entitlement created by s 12. The definition merely identifies the date from which each right to a progress payment accrues. These provisions do not suggest that there is any relationship between a "reference date" and the time when work under the contract is carried out. In particular, the reference in the definition to work carried out under the contract does not imply that the work the subject of a particular progress payment must have been carried out after a previous reference date. On the contrary, the generality of the concluding words of that definition, like the generality of the words in item 28 of the contract, are inconsistent with any such implication. Nor does s 13 refer to any particular period during which the relevant work under the contract was done. In short, there is no indication in Part 2 of BCIPA that the entitlement to a progress payment created by s 12 does not arise in relation to an unpaid amount for work done before an earlier reference date. To imply such a qualification would be inconsistent with the fundamental object of the legislation expressed in s 7.

[21] Accordingly, and having regard to the terms of the contract, the respondent had a statutory entitlement to a progress payment on the 28th day of each month (each "reference date") for unpaid amounts for work done under the contract up to the end of that month, whether or not the work was done in that month. The appellant therefore possessed that entitlement in relation to the different "reference dates" of 28 August 2009 and 28 May 2010.

[22] Because the evident purpose of Part 3 of BCIPA is to supply the procedure for enforcing the entitlement to a progress payment created in Part 2, it is unsurprising to find that the entitlement to serve a payment claim created by s 17(1), as qualified by s 17(5), reflects the entitlement created by s 12. Section 17(1), like s 12, is expressed in very general terms. On its natural construction, it comprehends an entitlement to claim an unpaid amount for work done before an earlier reference date, whether or not it was claimed in an earlier payment claim. Furthermore, in conformity with s 17(5) payment claims 14 and 16 were made in relation to the different "reference dates" of 28 August 2009 and 28 May 2010.

[23] I return to the provision which is critical for the appellant's argument, s 17(6). In my respectful opinion, the text of s 17(6) is wholly inapt to impose any restriction upon the generally expressed entitlement in s 17(1). When s 17(6) is read in the context of the preceding provisions, as it should be, its effect is merely to ensure that no implication may be drawn that s 17(5) precludes a claimant from making a payment claim for an unpaid amount claimed in a previous claim. Section 17(6) does not provide that a payment claim may not claim only an unpaid amount of a previous payment claim and it should not be given that construction. The prospect that claimants might cause respondents undue expense and inconvenience by using payment claims as rehearsals for a final claim is an insufficient basis for such a construction. That concern should not be exaggerated. Claimants will ordinarily have a powerful interest in putting their best foot forward in the earliest payment claim so as to obtain prompt payment. In any event, even on the appellant's construction s 17(6) permits repetitive claims if the subsequent payment claim also claims another amount. That requires rejection of the appellant's argument that there is a general implication in BCIPA against any "re-agitation" of a payment claim in a subsequent payment claim, even where there has been no adjudication determination.

[24] In *Doolan v Rubikcon (Qld) Pty Ltd*[7] Fryberg J considered that the construction now advanced by the appellant accorded with the text of s 17(6), which "permits a previous claim to be *included* in a later one"; that there was a "one-to-one relationship between the claim made and the reference date on which it is made"; and that to allow a previous payment claim to be the sole item included in a subsequent claim would "fly in the face of the words of ss 12 and 17". For the reasons I have given, in my respectful opinion the word "included" in s 17(6) is an insufficient basis for that construction, it is not required by the text of s 12 or s 17 and nor is it readily reconcilable with the statutory scheme, and there is no necessary relationship between the reference date upon which a claim is made and the time when the work the subject of the claim was carried out.

[25] 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.[8] In *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*[9] the contract provided for payment claims on the fifteenth day of each month. After the claimant had substantially completed the works and left the site it served a payment claim on 29 January 2008 attaching six invoices dated in January 2008, without identification of the relevant reference date. The claimant was dissatisfied with an adjudication determination for that payment claim. In March 2008 the claimant issued a further payment claim which attached the same six invoices the subject of the previous adjudication. With reference to the *Building and Construction Industry Security of Payment Act* 1999 (NSW), the relevant provisions of which are very similar to those of BCIPA, 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.[10] The decision in *Dualcorp* is therefore readily distinguishable from this case, in which there was no valid adjudication determination of payment claim 14.

[26] The appellant emphasised Allsop P's reasons in *Dualcorp*, which in some respects adopted an approach which differed from that of the majority. Allsop P accepted that the legislation permitted the submission of cumulative payment claims by reference to later reference dates, which included an amount the subject of a previous claim,[11] but considered that Dualcorp had impermissibly purported "to create fresh reference dates by lodging the same claim for the same completed works in successive payment claims"; that this was not the intended operation of the last phrase of s 8(2)(b) ("and the last day of each subsequent named month"[12]); that the terms of s 13(5) of the New South Wales legislation (which is indistinguishable from s 17(5) of BCIPA) "are a prohibition", and that the words "cannot serve more than one payment claim" are a sufficiently clear statutory indication that a document

---

7 [2008] 2 Qd R 117 at 121.

8 It may be that an adverse adjudication determination will not always preclude the repetition of a payment claim, for example, where the determination is that the payment claim is premature.

9 (2009) 74 NSWLR 190.

10 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 205 to 206, paragraphs [68]-[73].

11 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 193, paragraph [8].

12 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 194, paragraph [13]. There is an equivalent provision in BCIPA in paragraph (b)(ii) of the definition of "***reference date***", which applies where the contract does not provide the dates for progress payments.

purporting to be a payment claim that is in respect of the same reference date as a previous claim is not a payment claim under the legislation.[13]

[27] Those observations should be understood in the context of his Honour's earlier statements that the legislation was not intended to permit 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, and that a party in the position of Dualcorp should not be able 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".[14] The appellant is not a party in Dualcorp's position because payment claim 14 was not the subject of a valid adjudication determination. The appellant simply adopted a legitimate response to the failure of the adjudication process. For that reason, and for the other reasons I have given, I do not regard the decision in *Dualcorp* as justifying the conclusion that the respondent's payment claim 16 was not authorised by the relevant provisions of BCIPA.

[28] The appellant also referred to *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd trading as Novatec Construction Systems*,[15] *The University of Sydney v Cadence Australia Pty Ltd & Anor*,[16] *Watpac Constructions v Austin Corp*,[17] and *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd*,[18] but they were all cases in which there had been a valid adjudication determination in relation to the relevant claim. The primary judge correctly distinguished such cases on that ground. I would add only that I regard the primary judge's construction of s 17(6) as being consistent with McDougall J's reasons in *Watpac Constructions v Austin Corp*.[19]

[29] In relation to s 32 of BCIPA, the decisions cited for the appellant[20] support the view that the respondent was entitled to withdraw the adjudication application for payment claim 14 and make a new adjudication application if and only if the respondent did so within five business days after the declaration by McMurdo J that the adjudication decision was void. Assuming that is so, it does not suggest error in the primary judge's conclusion that s 32 did not exclude the respondent's right to make a subsequent payment claim for an amount the subject of the void adjudication determination. As the primary judge held, s 32 does no more than exhaustively define the rights of the respondent in respect of a new adjudication application based upon the earlier payment claim. It does not conflict with the provisions which permit the making of a subsequent payment claim in relation to a different reference date. In my respectful opinion the primary judge was correct in holding that there was no inconsistency between the remedy conferred by s 32 and the entitlement created by s 17(1) as it was construed by his Honour.

---

13 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 194, paragraph [14].

14 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 192, paragraph [2].

15 [2009] NSWSC 416, particularly at [42].

16 [2009] NSWSC 635, particularly at [54]-[56].

17 [2010] NSWSC 168.

18 [2010] QSC 159, particularly at [48].

19 [2010] NSWSC 168, particularly at [77]-[89].

20 *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140 per Palmer J at [100]-[103], followed by Barratt J in *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116 at [38] and by Bergin J in *Emergency Services Superannuation Board v Robert Sundercomb & Anor* [2004] NSWSC 405 at [23]; *John Holland Pty Ltd v Made Contracting Pty Ltd* [2008] NSWSC 374 per Nicholas J at [32]; *Timwin Construction v Facade Innovations* [2005] NSWSC 548 per McDougall J at [50].

Proposed order

[30] The appeal should be dismissed with costs.

[31] **CHESTERMAN JA:** I agree that the appeal should be dismissed with costs for the reasons given by Fraser JA.