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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00376821

TITLE OF PROCEEDINGS

First Appellant	Kwik Flo Pty Ltd ACN 131073204
First Respondent	SE Ware Street Dev Pty Ltd ACN 601608539
Second Respondent	Edward Smithies

FILING DETAILS

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In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (KwikFlo - Appeal Reply Submissions (12 November 2025).pdf)

[attach.]

SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

No. 376821 of 2025

Kwik Flo Pty Ltd

Appellant

SE Ware Street Dev Pty Ltd & Anor

Respondents

APPELLANT'S REPLY SUBMISSIONS[1]

A. Introduction

1. Absent from the summary of matters in RS [1]-[8] is any mention of the deliberate strategy adopted by SE Ware in respect of the Second Determination. That strategy comprised the voluntary and active engagement with the process under the Act leading to the Second Determination, and was only abandoned after an unfavourable outcome was obtained to the dissatisfaction of SE Ware. This bespeaks (if anything) of an abuse of process of the Act by SE Ware.

2. This is not *tu quoque* reasoning or a plea of hypocrisy. As RS [3] rightly observes, the matters in this appeal must be understood in their factual context. SE Ware's conduct is a critical part of that context. As McDougall J observed in *Urban Traders* (at [42]):

> [W]hether or not the repetition of a claim amounts to an abuse of process requires consideration of all relevant contextual facts. In addition, it requires consideration of the reasons why the courts intervene to prevent abuse of process. Those reasons include intervention to prevent a person from being vexed by having to reargue an issue already authoritatively decided. Thus, in deciding whether a repetition of a claim amounts to abuse of process, it may be relevant to take into consideration whether, because of fresh claims that are advanced, the respondent will be required to defend itself in any event.

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[1] These submissions are in reply to those of First Respondent filed 31 October 2025 (**RS**) and are further to those of the Appellant filed 20 October 2025 (**AS**). The same definitions are adopted unless stated otherwise.

His Honour then explained (at [43]) that "it would be inconsistent with the provisions of the Act … to hold that repetition, by itself and without more, always amounts to abuse of process".

3. In the present case (and leaving to one side whether an issue was "authoritatively decided"[2]), there is and was no occasion to "prevent [SE Ware] from being vexed by having to reargue an issue". SE Ware was not vexed by anything: it chose to participate and argue the issues in the Second Determination and to defend itself in the adjudication. SE Ware's argument and defence included making arguments in respect of the substance of the new evidence (*cf* RS [7]) obtained relied upon by Kwik Flo (including that of the parties' intermediary, Mr Karam).[3] It was vexed by the outcome of the Second Determination, not the 'process'.

4. SE Ware must have known that seeking to restrain the adjudication was an option available to it.[4] And yet SE Ware chose not to take that course. Instead, it opted for a strategy whereby the dispute between it and Kwik Flo was referred to and decided by the second adjudicator within the scheme of the Act—just as Payne JA described in *Ceerose* at [77]: *cf* RS [20]. The voluntary engagement by both parties willingly in the process of the Act in this way, running to the conclusion of determination (here, the Second Determination) by an adjudicator, cannot subsequently be decried by one of those parties as an abuse of process of the Act. Nor should the enforcement of a determination so obtained thereafter be considered an abuse of process of the Court. If there was an abuse of process, it was long ago cured in this way.

B. Appeal Ground 1 (RS Part D)

5. The central proposition relied upon by SE Ware is that the structure of the Act prevents an adjudicator from determining an application until after certain steps have occurred: see RS [17]-[21]. That proposition is then argued by SE Ware to distinguish *Olympia*

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[2] This being the focus of the parties arguments in respect of Appeal Ground 1.

[3] Blue 194-196.

[4] See, eg, the references in SE Ware's adjudication response referring to both *Urban Traders* and *Ichor*, where that was the very relief sought and obtained: Blue 192D-194J.

Group because, in that case, those steps had not yet all occurred: see RS [38]-[41]. But the argument is flawed for two reasons.

6. *First*, the argument is revisionist of *Olympia Group*. The proposition as relied upon by SE Ware (see especially at RS [38]) was raised before Ball J as a fact supportive of the conclusion that "[t]he decisions [of the adjudicator], whatever they were, were not a determination of the claims" (see *Olympia Group* at [12]). But it was not the primary argument and did not ultimately form part of Ball J's reasoning at [14] ("the adjudicator's decision was not a determination of the type contemplated by s 22") or at [17] ("the question whether there was a construction contract to which the Act applies … is not a question the determination of which forms part of the exercise of that jurisdiction").

7. *Secondly*, the argument involves a false syllogism. SE Ware appears to suggest (see RS [21]-[22] and [33]) that because a decision cannot be a determination before certain steps have occurred under the Act, a decision made after those steps have occurred must therefore be a determination. That cannot be right. The point made in AS [33]-[41] is that the answer to the question, "Is the Act excluded by a matter in s 7?", is not a "determination" under s 22 of the Act having regard to the purpose, language, and structure of the Act. That was the view taken by Ball J in *Olympia Group* applying *Chase Oyster*. It was also the view of Lee J (Elkaim J agreeing) in *Harlech* at [108]-[112].

8. The answer is not a matter of timing—including timing relative to other steps which may or may not yet have occurred under the Act.

9. SE Ware does not engage with what Lee J said in *Harlech*. There, his Honour explained that the Act's "purpose is to facilitate security of payment … [i]t is not to protect the broader findings of adjudicators" (at [109]). He also stated that "the only issue which cannot resurface and be reconsidered in a subsequent adjudication is the question of value of work with respect to a particular reference date" (at [111]), and (at [112]):

> The decision in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 (at [53] per Hodgson JA, Mason P and Giles JA agreeing) also set out a list of jurisdictional matters that must be determined by each adjudicator to provide a valid decision, relevantly including: the

> existence of a construction contract (ss 7 and 9[5]) and the determination of the application by determining the amount of the progress payment, the date on which is becomes or became due and the rate of interest payable (s 24). These are essential preconditions to an adjudicator's determination. If, as Harlech contends, an adjudicator is bound to a previous adjudicator's determination as to (a) the existence of a contract within the meaning of s 8; (b) the construction of that contract; and (c) the agreed rate of payment under that contract, they are unable to turn their mind to the prerequisites to the exercise of their power.

10. As to *Chase Oyster*, the argument in RS [45]-[49] is misplaced. The point is not, as put by RS [45] and [47], that the particular answer given to the s 7 question ("a determination that the adjudicator did not have jurisdiction" or "a decision that the Act does not apply") controls whether or not there has been a determination under the Act. The point is, instead, that the s 7 question (whatever the answer may be) is not a matter that is determined within the meaning of s 22 of the Act. That was the point made by Ball J in *Olympia Group* applying Spigelman CJ's reasoning in *Chase Oyster* as to the proper construction of the Act.

11. Basten JA's general observation at [40] of *Cardinal Project Services* (see the final sentence of RS [48]) does not assist SE Ware. This Court said in *Parrwood* at [36] (emphasis added):

> Thus while a decision made outside jurisdiction may yet have some status in law, **it is "a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as 'no decision at all'"**: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34 at [24].

12. Kwik Flo was not required to seek to set aside the First Determination or allege error in the sense of seeking judicial review of it: see *Parrwood* at [38]-[43]; *cf* RS [49]. It could (and did) withdraw it, which would be an oddity if it could not then file another application.

13. RS [49] involves a subtle sleight of hand insofar as it suggests that Kwik Flo's case is that the First Determination was "made beyond the jurisdiction conferred by the Act". Framing Kwik Flo's case in that way frames an argument that the first adjudicator set about making a determination—but in doing so did something which he did not have the

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[5] In the *Building and Construction Industry (Security of Payment) Act 2009* (ACT): s 7 is the equivalent of s 5 under the (NSW) Act, s 8 is the equivalent of s 5, and s 9 is the equivalent of s 9.

power to do and therefore went "beyond" the jurisdiction of which he was seized and fell into "jurisdictional error".

14. But that is not the argument. The argument is, instead, that the first adjudicator was never seized of the relevant jurisdiction in the first place—he did not undertake the task at all of making a determination under the Act—because he decided he could not. That decision, using the above language from *Parrwood*, was one which is properly to be regarded for the purposes of the Act as 'no decision at all'. The argument does not rely upon jurisdictional error as suggested by SE Ware, nor does it need to.

15. RS [50] exposes the difficult consequence of SE Ware's argument that jars with the beneficial policy of the Act. If, as SE Ware contends, an adjudicator's view of the true construction of the contract under s 7 of the Act is forever binding on other adjudicators and is beyond correction by the Court, then an erroneous finding by an adjudicator early on in a project, that one of the exceptions in s 7 applies, would have the effect of forever depriving a builder of access to the Act for the life of that project. That problem does not arise if Ball J's decision in *Olympia Group* and Lee J's decision in *Harlech* are followed because such a finding would not be a "determination" under the Act. As Lee J explained in *Harlech* at [112], each subsequent adjudicator is required to turn their mind to the prerequisites to the exercise of their power under the Act. One adjudicator should not jurisdictionally deprive all subsequent adjudicators of exercising jurisdiction.

16. Thus, and contrary to RS [56]-[57], the circumstances of this case are not one in which there was a determination affected by jurisdictional error. The point is simply that there was no determination under s 22 at all, and it is unnecessary to go any further than that.

17. SE Ware's emphasis on the word "determined" in the first sentence of RS [56] circularly answers the question it asks. That an adjudicator's decision that the Act does not apply by reason of s 7 has the effect of there being no entitlement does not mean that the decision was therefore a "determination" under s 22—with all the consequences that flow from it being so; relevantly here, the inability to withdraw the application and issue a new one under s 26.

18. The result of the s 7 decision does not drive its characterisation under the Act.

19. Instead, whether such a decision is a "determination" under s 22 (and what a party in the position of Kwik Flo can do in the face of such a decision, including pursuant to s 26) must be answered having regard to the purpose, language, and structure of the Act. Those support the conclusion that it is not a "determination" under s 22. That was what was held in *Olympia Group* and *Harlech,* and this Court should follow that authority as correctly decided.

C. Appeal Ground 2 (RS Part E)

20. If the First Determination was not a "determination" under s 22 of the Act, then the Second Determination should not be considered an abuse of process (*cf* RS [60]). As this Court rhetorically asked in *Parrwood* at [45], if the First Determination was void (in that it did not comprise the task required by s 22 of the Act: see *Parrwood* at [26]-[27]) then "[H]ow can there be an abuse of process in applying for a second adjudication in those circumstances?".

21. RS [1]-[8] and[61] directs attention to Kwik Flo's conduct without any mention of SE Ware's own conduct (see paragraphs 1 to 4 of these submissions above). The suggestion that SE Ware itself has engaged in an abuse of process is not made facetiously. It has been accepted that a defendant can commit an abuse of process in the manner they defend proceedings: see, eg, *Leerdam v Noori* (2009) 255 ALR 553; [2009] NSWCA 90 at [36] (Spigelman CJ).

22. RS [62]-[63] does not grapple with the gravamen of AS [48]-[51]. It is not to the point that the cases concerned with adjudication determinations being set aside say "little to nought about the present circumstances". What is to the point is that the application of the abuse of process concept should not jar with those cases and the policy and purpose of the Act. If SE Ware is correct, then it will mean a new and further ground (for setting aside otherwise validly obtained determinations under the Act) will have been recognised: abuse of process.

23. There is an important distinction that is largely untouched by SE Ware. That distinction is between an "abuse of process of the Act" as compared to an "abuse of process of the Court".

24. Peden J identified the distinction at J[35] (Red 17I) and then explained "as to the first class of case" (J[36]; Red 17P) that "there are authorities where an attempted second adjudication has been stayed before it was completed because it would be an abuse of process" (at J[41]; Red 19C) and so the Second Determination could not "now be set aside by reason of abuse of process" (at J[41]; Red 19G).

25. Her Honour then explained, however, that because the First Determination "was a valid determination for the purposes of the SOPA and it has not been found to be invalid" it would be an abuse of process "to enforce the Second Determination as a judgment pursuant to s 25 SOPA because of the commonality of issues". Her Honour appears there to be referring to an "abuse of process of the Court"—that being the second class of case referred to at J[35] (Red 17I)—though the point is not entirely clear: her Honour earlier expressed an opinion in terms that "the second application was an abuse of process and SE Ware is entitled to injunctive relief preventing Kwik Flo from taking steps to register and enforce any judgment based upon the Second Determination".

26. One difficulty already identified with this reasoning is that her Honour's reliance at J[42] (Red 19P) on *Harlech* was misplaced because Lee J (Elkaim J agreeing) said at [112] that the abuse of process concept did not fit the commonality of issues arising in the present case: see AS [55]-[56].

27. It is not evident why a determination which has run its course, has been validly issued under the Act, and so is not then an abuse of process of the Act, should thereafter, in effect, be struck-down as an abuse of process of the Court. The Court provides the mechanism for enforcing a validly obtained determination. If the substantive part of the process under the SOPA is not impeachable, it is not apparent why the adjectival part of the process would constitute an abuse. The ultimate consequence of a SOPA determination is a judgment. To restrain a judgment being entered for a determination that has been validly determined, after parties voluntarily participated in that process, is a perversion of the process. SE Ware well knew that the process it voluntarily engaged in, rather than approaching this court to restrain it, would inevitably lead to a judgment if the adjudicator found in favour of Kwik Flo. It should not be an abuse by Kwik Flo in merely obtaining a judgment that flows from the determination. This is little different to a party participating in proceedings, without *demur*, but then seeking to restrain a

judgment being entered after the proceedings are regularly determined, because that party is unhappy with the result.

28. In a sense, the parties' voluntary and active participation in the adjudication leading to such a determination "cures" the prior abuse of process of the Act, which may otherwise have persisted, and there is nothing left for the concept of an abuse of process of the Court to bite upon.

29. This is not a case like *Dualcorp* where, after an adjudicator issued a determination under the Act, a second payment claim was issued for which no payment schedule was served in response and judgment sought to be obtained as a result. One can appreciate why, in such a case, the "more general principle of abuse of process" may be applicable (see *Dualcorp* at [68])—unlike SE Ware in the present case, the recipient of the second payment claim has not voluntarily and actively engaged with anything. It would be an abuse of process of the Court to obtain a judgment in those circumstances. But in the present case, where SE Ware conducted itself in the manner it did, and the Second Determination was obtained and its validity not impugned, the identification of an abuse of process <u>of the Court</u> is strained. That is so even accepting that the principle involves a broad concept "insusceptible of a formulation comprising closed categories": see *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; [2006] HCA 27 at [9] (cited *Dualcorp* at [68]). Mere "litigat[ion] anew [of] a case which has been formerly disposed of" (*cf* Dualcorp at [68]) cannot be enough, both for the reasons identified in Lee J in *Harlech* at [112] and also because, in the present case, the attempt carried through with SE Ware's voluntary and active participation.

30. SE Ware rolls up the two kinds of abuse of process at RS [67]. It asserts that "Kwik Flo abused the process of the Act in obtaining the Second Determination as it did". Whether Peden J made a finding in those terms is unclear, but if her Honour did, then it was an error for the reasons already identified. SE Ware then further asserts that enforcement of the Second Determination "would constitute an abuse of process of the Court". No reason is given for why that is so separate from the proposition that Second Determination was an abuse of process of the Act.

31. SE Ware's cry at [68] that Kwik Flo is attempting to "enjoy the fruit of a poisoned tree" is misplaced. If the tree was indeed ever poisoned, SE Ware cured it and allowed it to grow in the sunshine.

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12 November 2025