PiperAlderman

## Article Information

Author: Robert Riddell
Service: Dispute Resolution & Litigation, Planning & Environment, Projects & Construction, Property & Development, Property Development, Regulatory Compliance & Investigations, Strata & Community Title
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# Issue estoppel decontextualised. The demise of issue estoppel in the context of Security of Payment

### The application of issue estoppel in the context of adjudications under the Building and Construction Industry Security of Payment Act 1999 (NSW) (Act) is an area of law that continues to develop.

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The statute has not changed in any material respect. Instead, it has been overshowed, some might say overwhelmed by "judicial guidance". It is potentially relevant to adjudication determinations and to the enforcement of statutory debts under the Act, in the absence of a determination.

Issue estoppel is a common law principle that can prevent previously determined issues being re-agitated. It has its basis in the principle of finality that is: once controversies have been judicially resolved they are not to be reopened except in limited circumstances. The justification is to ensure that litigants are not vexed in the same matter twice. It is intended to safeguard the administration of justice by conserving the court's finite resources and minimising the potential of inconsistent judgments.

The process of surveying judicial guidance as to the application of issue estoppel, if any, in the context of the Act usually starts with Macfarlan J's judgment in the Court of Appeal decision in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69 (Dualcorp):*

> *"I consider that the Act when read as whole manifests some intention to preclude re-agitation of the same issues. Thus, if questions of entitlement have been resolved by an adjudication determination, those findings may not in my view be re-opened upon a subsequent adjudication. Likewise, if no subsequent adjudication occurs but a claimant proceeds (as here) to seek judgement following upon the failure of the other party to serve a Payment Schedule the claimant should be denied judgment to the extent that what it seeks is inconsistent with the findings of an adjudicator."*

The legal maxim of '*if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck*' has been applied in subsequent decisions to assert that this represented the application of issue estoppel by Macfarlan J, with whom Handley J agreed.

Allsop P in *Dualcorp* did not go as far, simply stating:

> *"The Act was not intended to permit a repetitious use of adjudication process to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions. A party in the position of the applicant (Dualcorp), here, should not be able to re-ignite the adjudication process at will in order to have a second or third go at the process provided by the Act clearly because it is dissatisfied with the result of the first adjudication."*

That seems to me to be describing abuse of process, not issue estoppel.

The majority position in support of the application of issue estoppel seems not particularly strong. The question arises, if did Macfarlan J did in fact determine he tip the baby out with the bath water?

Some say, including the ACT Court of Appeal that, although the outcome of *Dualcorp* was the right one, the reasoning went too far. Macfarlan J's position that, *if questions of entitlement have been resolved by an adjudication determination, those findings may not in my view be re-opened upon a subsequent adjudication* has been followed and applied in single judge decisions in NSW, Qld, Tasmania and WA.

In *Icon Co (NSW) Pty Ltd v AMA Glass Facades Pty Ltd [2009] NSWSC 250*, Stephenson J suggested that the Act requires adjudicators to follow the contractual interpretation adopted by earlier adjudicators in respect of subsequent claims arising from clauses that have been previously interpreted, even if such interpretation was erroneous. In *Watpac Constructions v Austin Corp* [2010] NSWSC 347 McDougall J estoppel's reach was held to extend to *Anshun* estoppel. That is principles of issue estoppel apply not only to issues actually raised and necessarily decided but also to issues that could (and perhaps should) have been raised but were not.

Issue estoppel had, in NSW at least, reached the high water mark. To some it seemed a storm-surge.

But alas, in other jurisdictions the courts are not so convinced. Single judges in Qld and SA have held that for this common law doctrine to apply it must be found in the Act itself. The seeds of doubt were sown and issue estoppel's application both in terms of its appropriateness and extent is far from uniform around Australia.

Cue the Court of Appeal in the Australian Capital Territory in the case *of Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd* [2022] ACTCA 42 handed down 11 August 2022 (*Harlec v Beno*). By way of background, the Claimant provided building advice the Respondent. The Claimant made a payment claim. The Respondent issued a payment schedule asserting:

- no construction contract;
- no agreement to pay by instalments;
- the SoP Act did not apply to agreement between the parties;
- the Claimant had been paid; and
- the figures claimed are incorrect [if the Act did apply].

The payment claim went to adjudication and the Claimant was 100% successful.

Further payment claims were issued by the Claimant. In response the Respondent repeated the contentions it made in the already adjudicated payment schedule and which had been decided by the previous adjudicator.

The adjudicator in the subsequent adjudication determined that all but one of the grounds were the same grounds determined in the previous adjudication application and so the principle of "*issue estoppel*" applied. So, the Claimant won, again.

The Respondent took the determination to the Supreme Court of the ACT for the ACT equivalent of judicial review on the basis that the adjudicator erred in not reconsidering the 6 grounds previously determined on the basis of issue estoppel.

The Court at first instance (Mossop J for the trainspotters) accepted that the Respondent was correct and set aside the determinations. So, the trial judge found that issue estoppel did not apply in the context of adjudications under the Act.

The Claimant appealed to the ACT Court of Appeal, and the appeal was dismissed with costs by way of an interesting combination of judgments. All 3 judges found in favour of the Respondent, but two slightly different approaches were applied. Houston, we have a plurality!

**Kennett J** identified that an adjudication decision does not affect any right that a party may have to a progress payment under the Act and so a right to a progress payment is not affected by a previous adjudication, other than in the manner identified by Allsop J in Dualcorp.

He found that this position is provided for under s.38(1)(b) of the ACT Act being precisely the same wording as s.32 of the New South Wales Act which provides:

> 32. ***Effect of Part of Civil Proceedings [NSW]***
>
> *(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract –*
>
> *(a) may have under the contract, or*

*(b) may have under Part 2 in respect of the contract, or*

*(c) may have a part from this Act in respect of anything done or omitted to be done under the contract.*

*(2) nothing done under or for the purpose of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).*"

Kennett J's judgment turned on this: the fact that s.38(1)(b) (or s.32(1)(b)) of the New South Wales Act provides that *nothing in Part 3 (or Part 4 in New South Wales), which includes the provisions for an adjudication, affects any rights a person may have under Part 3*, which is the right to make payment claims and have them determined under the Act.

Accordingly, His Honour found that an adjudication decision does not affect any right that a party may have to a progress payment under the SoP Act. His Honour held there was no room left for the operation of common law issue estoppel in an adjudication in respect of issues decided in a prior adjudication.

This he observed is supported by:

- the adjudication process being so different to the kind of hearing that parties would expect to have if they are to be bound by the decision-maker's conclusions on all essential matters, given:
    - the very short time frames;
    - the strictly defined body of documentary material despite claims often being extremely complex and involving substantial quantities of documents;
    - questions of interpretation of the contract [and jurisdiction] often arising, yet the adjudicator not being required to be legally qualified.

All of those are inconsistent with the decision being "*final*" in the sense that would attract issue estoppel at common law.

There are therefore two pillars supporting this conclusion, s.24(4) (or s.22(4) of the New South Wales Act) and the "*rough and ready*" adjudication regime being inimical to assumptions behind the application of "*issue estoppel*".

Finally, Kennett J stated that to the extent that the majority in *Dualcorp* saw the result in that case flowing from issue estoppel (if that was in fact what it did), he respectfully disagreed with the majority.

In Kennedy J's view, *Dualcorp* does not resolve the issue other than in respect of the situation where materially the same claim is submitted for adjudication repetitiously.

**Lee J** after considering the Act and its processes turned to the application of issue estoppel in that context, which he referred to as "preclusion". He noted that the preclusion can only arise with respect to issues that a court or tribunal has actually addressed [query whether this is correct given the wildcard of Anshun estoppel] and determined and only if the issues were essential to the disposition of the cause in question. It is also apparent that it only arises in relation to a "*final and conclusive decision on the merits*".

Lee J noted Macfarlan's finding in *Dualcorp* that an adjudication determination is "*final and binding between the parties as to the issues determined*", and that on that basis "*principles of issue estoppel*" were applicable. Lee J however also noted that Allsop P in *Dualcorp* didn't find it necessary to apply principles of estoppel and that the provisions of the New South Wales Act provided a sufficient barrier to the mischief identified.

For example, section 13(5) which limits a claimant to one payment claim in respect of each reference date, the absence of any entitlement under the old NSW Act permitting a party to create fresh reference dates by lodging the same claim for the same completed works in successive payment claims.

Lee J reviewed decisions in respect of the application of issue estoppel in the context of adjudication determinations since *Dualcorp* in New South Wales, Tasmania, Western Australia, South Australia and Queensland and identified support for the view that if issue estoppel did apply, then it was quite limited, and its source must be found from within the Act rather than issue estoppel as it applies curial or court action.

Lee J was concerned by the danger of decontextualising the "*principles of issue estoppel beyond their principled application*". This leading him to the conclusion that the species of preclusion referred to as issue estoppel in the SoP context is best described as *abuse of process*. This follows from a consideration of numerous exclusions within the SoP Act such as:

1. the limits upon the number payment claims that can be brought in any month;
2. requirement that a payment claim must include work performed within a given period prior to the payment claim;
3. the mandate that if an adjudicator has valued construction work that a subsequent adjudicator is bound by that

valuation in a later adjudication; and
4. limitations upon enforcing judgment debts based upon adjudication certificates, for example, court cannot enforce a judgment for the same debt more than once.

His Honour concluded that common law principals, such as "issue estoppel" are only entitled to operate to compliment Acts of Parliament, not overwhelm them. Like Kennedy CJ, Lee J found that the source of any preclusion must be the Act itself, not the common law principle. Applying those findings, Lee J noted that the two adjudications concern different work completed years apart and on that basis there was no precluded re-agitation or attempt to value the same work a new.

Lee J stated that he was unable to agree with the proposition that parties are precluded from reagitating facts "*fundamental to the decision arrived at*" or "*legally indispensable*" to the ultimate conclusion.

Further, one needs to have regard to the exclusive list of mandatory considerations of the matters which an adjudicator can consider in making a determination. These are both set out in the Act and include the jurisdictional matters to be determined by each adjudicator to provide a valid adjudication determination. If an adjudicator is bound to a previous determination as to matters such as:

- the existence of a contract;
- construction of a contract; and
- the agreed rate of payment under the contract,

they are unable to turn their mind to the matters the Act requires them to consider.

Lee J concluded that issue estoppel in its common law sense did not apply. He held that the Respondent should not have been shut out of its grounds in its payment schedule and the subsequent determination could not stand.

So, Lee J also finds that the only preclusions are the variety Allsop identified in *Dualcorp*, i.e. repeated claims and also other forms of abuse of process the source of which are found within the Act. Justice Jeffrey Kennett however observed that nothing in the Act suggests that a decision on an adjudication determination is intended to be conclusive of rights under the Contract. Indeed, quite the contrary. The extent to which the determination is final is circumscribed. It is interim and does not prevent any arguments being put in subsequent proceedings (including adjudications).

The third judge in the ACT Court of Appeal was **Elkaim J**. He also dismissed the appeal, in another short judgment finding

> *"..without rejecting the path taken by Kennett J, I prefer that taken by Lee J"*

and indicated his approval of the logic that that common law principles operate to complement the Acts of Parliament, not to overwhelm them.

The storm-surge abates.

*Dualcorp*'s position as the foundation stone for the application of issue estoppel seems quite eroded by the ACT Court of Appeal in *Harlec v Beno* as is the status of the many single court judgments that have followed Macfarlan J's approach. I expect it will temper the application of issue estoppel by adjudicators and will be the subject of practical, academic and judicial discussion for some time yet.

Perhaps the journey is not over. Although nothing has been filed as yet, *Harlec v Beno* seems a strong candidate for a special leave application. Perhaps the application of issue estoppel, if any, will soon be resolved in the High Court.

Here's hoping the parties don't settle!

This paper is based on an address by Rob Riddell to Resolution Institute's National Conference, Sheridan Wentworth, Sydney on 6 November 2022. This paper does not comprise legal or other advice and must not be relied upon without first procuring legal advice in respect of is subject matter from its author.