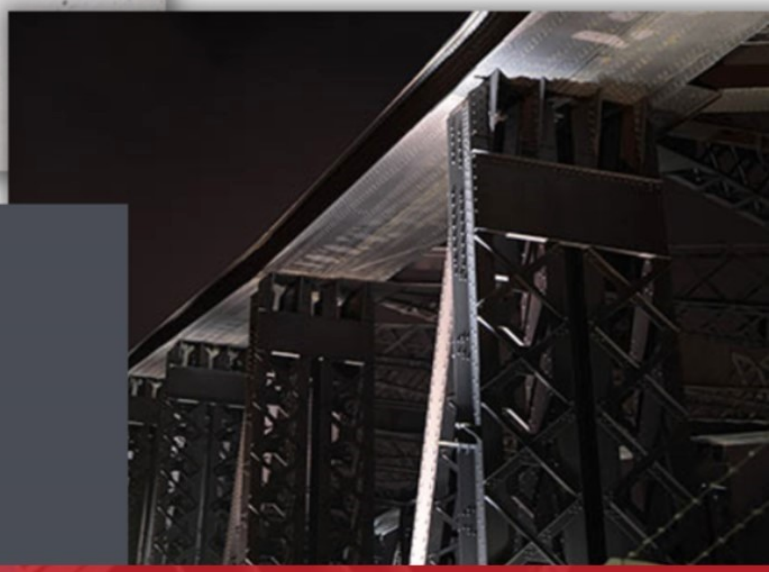
The *Harlech* (ACT) Decision and implications: are Adjudication Decisions Binding?

CRISPIN LAW



Newsletter

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This Newsletter discusses the Australian Capital Territory decision in the case *Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd* [2022] ACTCA 42. We delve into how this case demonstrates where the ACT court stand concerning the issue of whether adjudication decisions are binding.

Introduction

The Australian Capital Territory, compared with New South Wales,[1] seems to endorse a similar position; that adjudication determinations are binding. However, the two positions are not identical. In NSW, courts have viewed adjudication determinations as binding, in two ways. First, principles of issue estoppels apply in the context of adjudication determinations and second, re-agitating a same or sufficiently same claim constitutes an abuse of process of the SOP Act.

In the decision of *Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd*[2], the ACT Court of Appeal partially rejected, and therefore only partially accepted, the NSW position. The Court notably rejected the applicability of principles of issue estoppels to adjudication decisions. However, it agreed with the NSW courts that it *would* be an abuse of process if a subsequent adjudication application was made in relation to the same issue. Interestingly, while holding that issue estoppel does not apply, the ACT Court of Appeal *expressly* stated that the decision in *Dualcorp* was correct. Therefore, there is room to discuss whether the ACT's position is a partial rejection, or something more ambiguous and complex than the NSW position.

Despite the notable *Harlech* decision, with only a few other case laws available on the issue, there is merit in saying that the issue is yet to be explored further and/or fully established, once there has been more judicial discussion around the topic. Nonetheless, the decision is something that must not be ignored, especially as the Court demonstrates a heightened focus on the wording of the legislation itself, rather than applying 'external' concepts such as the issue estoppel.

Importance and relevance of this Newsletter

It is interesting to see that NSW and ACT slightly differ in their perspectives as to whether an adjudication decision is binding, especially considering their Security of Payment Acts are almost identical, if not very similar to one another.[3] While it is difficult to pinpoint the reason behind the judiciary's conflicting opinions, it is nonetheless important to know what is accepted and rejected by each jurisdiction, especially if one is in the position of a claimant seeking to resubmit an adjudication claim already determined, as the outcome will be depend on the jurisdiction the claim is brought forward.

By rejecting the applicability of issue estoppel, *Harlech* decision shifts the focus away from legal 'concepts' such as issue estoppel but focuses more on the words of the legislation itself. Furthermore, the ACT courts' support of the view that a repetitive claim will be an abuse of process of the SOP Act provides an important reminder to the claimants that they must prepare their arguments and/or documents with care and meticulously when bringing a claim,

[1] To find more about the NSW position and how they consider adjudication determinations to be binding, please refer to Issue 1 of Crisp Law's September 2023 Newsletter.
[2] [2022] ACTCA 42.
[3] Refer to *Building and Construction Industry Security of Payment Act 1999* (NSW) and *Building and Construction Industry (Security of Payment) Act 2009* (ACT).

as not doing so will constitute an abuse of process and therefore will not be viewed favourably by the courts.

Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd [2022] ACTCA 42

Rejected principles of issue estoppels, but accepted abuse of process

The ACT Court of Appeal in this case rejected the idea that principles of issue estoppel can apply in the context of adjudication determination. This notable decision therefore challenged the approach taken by the NSW courts for *thirteen* years, since the NSW case of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*[4] (which first introduced the idea of applying issue estoppel in adjudications). However, it accepted the idea that a repetitious claim will constitute an abuse of process.

Kennett J

In coming to this decision, Kennett J made strong emphasis on section 38(1)(b) of the ACT SOP Act[5]; that is, because section 38(1)(b) has the effect that an adjudication decision does not affect any right a party may have to a progress payment under the SOP Act, and a right to a progress payment arising out of a contract is not affected by a previous adjudication. S 38(1)(b) 'leaves **no room for any issue estoppel** to arise at common law, in an adjudication, in respect of issues decided in a prior adjudication'.[6] Therefore, Kennett J was of the view that the extent to which adjudication determinations is considered final must be *circumscribed*. Paragraphs 26-27 of the judgment captures his view:

> '[26] … nothing in the SOP Act suggests that a decision on an adjudication is intended to be conclusive of rights under the contract. To the contrary, s 38(1) of the SOP Act provides that nothing in Part 4 (which includes all of the provisions for making and responding to claims, and the provisions for adjudication) affects any right that a party to a construction contract may have under the contract… **The extent to which an adjudication is final is, therefore, circumscribed.**
>
> [27] Clearly, therefore, nothing decided in an adjudication prevents any argument to the contrary being advanced or accepted in proceedings to enforce the contract**. The SOP Act is not a regime for enforcing contracts. Rather, it is a regime providing interim payments**, saving contractual litigation for later, erected to protect a class of enterprises for which cash flow is often critical to survival…'

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[4] [2009] NSWCA 69.

[5] *Building and Construction Industry (Security of Payment) Act 2009* (ACT). S 38(1)(b) provides:

> (1) Nothing in this part affects any right that a party to a construction contract –
> (b) may have under part 3 (Right to progress payments) in relation to the contract.

[6] *Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd* [2022] ACTCA 42 ('***Harlech***'), 35 (Kennett J).

Further to Kennett J *rejecting* the applicability of issue estoppels, Kennett J added that adjudications will be an 'inimical'[7] process *if* determinations were binding, by which he also relied on certain provisions of the ACT SOP Act. Relating these provisions to the legislative purpose of the ACT SOP Act, Kennett J held (at paragraph 36):

> 'The legislature is simply unlikely to have intended that findings reached in a "rough and ready" adjudication on one claim for a progress payment would – even if clearly incorrect – bind the parties in relation to all subsequent claims relating to the same contract.'

His reasoning behind why binding adjudications will be 'inimical' is summarised below:

- Adjudication decisions must be made within a very short period of time (s 23(3));
- Adjudication decisions are based on a strictly defined body of material (s 24(2)), and parties to the adjudication also have limited time to prepare those materials (ss 19(3), 22(1));
- Questions of interpretation of the contract often arise, and yet it is not necessary for the adjudicator to be legally qualified.

However, Kennett J was in strong agreement with a view that a repetitious claim under the SOP Act constitutes an *abuse of process*, expressed at paragraph 19:

> 'The possibility that a repetitious claim under the SOP Act or the re-agitation of contentions previously rejected **could be properly characterised as an abuse of process**, and this Court might grant injunctive relief on that basis, **can be accepted**. That would follow from application of a doctrine that has as its foundation protection of the scarce resources and institutional integrity of courts and tribunals.'

Lee J

Lee J also ultimately concluded the concept of issue estoppels does not apply. Lee J referred to the applicability of issue estoppels as 'preclusions' instead because submissions on appeal spoke of issue estoppel in a way that tended to suggest it as a form of standalone or exhaustive principle.[8]

Lee J was of the view that preclusions only arise in limited circumstances; that is, with respect to issues that a court or tribunal has actually addressed and determined,[9] and in relation to a 'final and conclusive decision on the merits'.[10] Taking into account Macfarlan JA's judgment at 203[60] of *Dualcorp*, Lee J was of the opinion that the extent of preclusions only apply to the extent identified by Allsop P in *Dualcorp* – that is, where there is a repeated claim, potentially obtaining double adjudication, where to do so would be a form of abuse of the process.[11] This is reflected in paragraph 92 of Lee J's judgment:

[7] *Harlech,* 36 (Kennett J).
[8] *Harlech*, 61 (Lee J).
[9] *Harlech*, 66 (Lee J).
[10] *Harlech*, 67 (Lee J).
[11] *Harlech*, 91-92 (Lee J).

> '[92] *Secondly*, there would, in any event, **be a form of abuse of the process before a judgment on a second or subsequent adjudication was obtained**. A party would abuse the processes of the Act by purporting to re-agitate a claim which had already been decided.'

Overall, Lee J held the common law concept of 'issue estoppel' must only operate to complement acts of Parliament, rather than to overwhelm them.[12] Lee J, like Kennedy J, was of the opinion that the source of any preclusion must be the SOP Act itself, rather than operating as a common law principle.[13]

Elkaim J

Elkaim J also dismissed the appeal, holding:

> '… without rejecting the path taken by Kennett J, I prefer that taken by Lee J.'[14]

Not a complete rejection of *Dualcorp*?

Strictly speaking, the ACT Court of Appeal's rejection of principles of issue estoppel in adjudication determinations is neither a critical challenge nor a complete rejection of the NSW position. This is because in *Dualcorp*[15]– the NSW case which introduced the applicability of principles of issue estoppels in an adjudication context – Allsop P, unlike MacFarlan JA, found it unnecessary to apply the principles of issue estoppel, but rather found that statutory provisions under the NSW SOP Act (specifically s 13(5), (6) and s 22(4)) were sufficient to prevent repetitious re-agitation of the same issues. Therefore, it is possible to say the ACT court share *some* sentiments with what has been expressed by the NSW courts.

Further, while the concept of 'issue estoppel' was rejected, the ACT Court of Appeal, interestingly, did not take the further step of declaring that *Dualcorp* was wrongly decided. Kennett J specifically expressed that *Dualcorp* was different and has no application to the case at hand. This was on the basis that *Dualcorp* concerned a specific prohibition on making *more than one claim* for the same reference date. The court in *Harlech* concerned a situation where *one* payment claim has been made in respect of a particular reference date and had been determined by an adjudicator – whereby the result will be that this is the one and only claim that can be made. This arguably complicates the ACT court's decision and leaves scope for more discussion to arise, in relation to whether then, the concept of issue estoppel *does indeed* apply to situations where more than one payment claim is made, as the ACT court did not comment on this matter.

Concluding Remarks and Implications of the *Harlech* Decision

Overall, it is possible to draw an inference that the ACT court(s) do not support the binding nature of adjudication determinations *as strongly as* the NSW courts. This is for two reasons:

[12] *Harlech,* 96 (Lee J).
[13] Ibid.
[14] *Harlech,* 3 (Elkaim J).
[15] [2009] NSWCA 69.

first, the ACT Court of Appeal has rejected the applicability of issue estoppels in adjudication determinations and second, notwithstanding the aforementioned rejection, it agreed that a repetitious claim under the SOP Act will constitute an abuse of process. Kennett J's expression neatly summarises the ACT position – the extent to which adjudication determinations is considered final must be '*circumscribed'*.

Arguably, the focus of the *Harlech* case was predominantly on the discussion of 'issue estoppels', rather than discussing whether adjudication decisions are binding. As a matter of fact, the ACT Court of Appeal did make any express comments on whether adjudication decisions are binding. Inferences can only be drawn about the ACT position on the issue.

On top of this, the finding that the *Dualcorp* decision was 'correct' adds complexity in understanding whether the principle of issue estoppel is rejected *altogether* for all adjudications, or if it can apply to other situations that differ from the facts in *Harlech*.

Therefore, there is much merit in concluding that the issue of 'binding' adjudications remains to be explored further, and awaits a clear, explicit, and decisive resolution by the ACT courts.