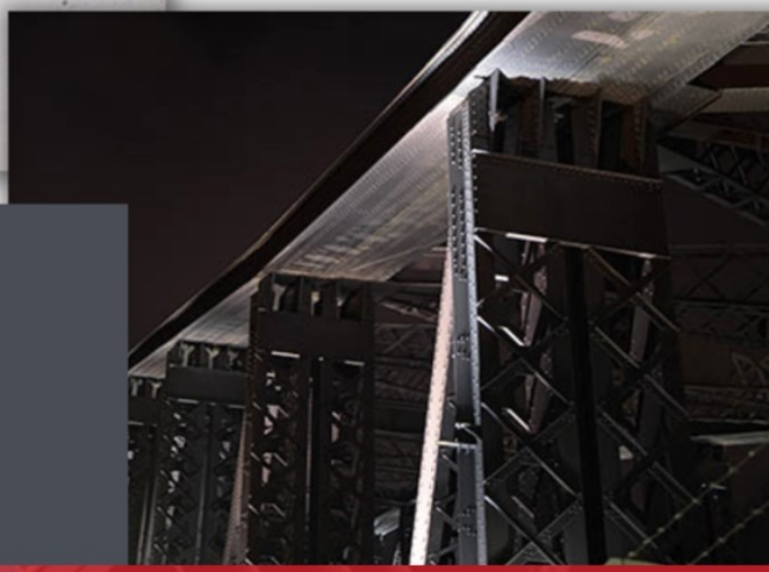
# NSW: Is an Adjudication Decision Binding on a Subsequent Adjudication?

CRISPIN LAW



## Newsletter

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**This Newsletter discusses the New South Wales' position on the issue of whether an adjudication determination is 'binding'; that is, whether a claimant/applicant is disentitled to submit a claim/application where the issue has already been determined by a previous adjudicator.**

## Introduction

The New South Wales courts have demonstrated a common agreement for the view that an adjudication determination *is* binding, where an adjudication application raises the same or sufficiently duplicate issue that has already been determined previously. The courts have also limited the ways in which an applicant may use or apply the results of and/or comments from a previous determination to the next,[1] arguably extending how 'far' adjudication determinations can go in limiting the process or scope of the next application.

The NSW Supreme Court has gone so far as to hold that adjudication determinations satisfy the High Court's formulation of the 'finality' requirement,[2] reinforcing the judicial consensus in favour of the 'binding' nature of adjudication determinations.

It must be noted the NSW courts have supported the binding nature of adjudication in two ways: first, by applying 'principles of issue estoppels' in the context of adjudications, and second, holding that re-agitating claims amounts to an abuse of process and thus, disentitles applicants from raising the same, or sufficiently same, claim.

This newsletter provides summarises of various NSW case laws that demonstrate this position.

## Importance and Relevance of this Newsletter

Adjudication is a common process that takes place, or at the very least, has strong potential to take place, when there is a contractual relationship concerning a construction project. This is because principals and contractors, or claimants and respondents, are prone to have different opinions and perspectives on the project, such as how much money they owe (or are owed) and the extent of completion of works.

As common as they are in a construction setting, it is important that parties do not exploit adjudication to the extent where they re-agitate the same claim repeatedly until they obtain their desired outcome. This may not only cost a substantial amount of money to parties, but also may be deemed an abuse of legal process which is not looked upon favourably, especially by the courts. By understanding the NSW position, that adjudication determinations *are* binding, we also get insight to the judicial perspective that adjudication applications must *not* be repeatedly made when it already has been brought before an adjudicator and a decision reached.

## NEW SOUTH WALES CASE LAW

### New South Wales Court of Appeal

[1] For example, refer to *Ku-Ring-Gai Council v Ichor Constructions Pty Ltd* [2014] NSWSC 1534 of this Newsletter.
[2] *The University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635, citing *Kuligowski v Metrobus* (2004) 220 CLR 363.

***Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009]* NSWCA 69**

This is arguably a 'hallmark' case which ignited the question of whether adjudication determinations are binding, as it was Macfarlan JA who introduced the concept of principles of issue estoppels and their applicability to adjudication determinations.

Macfarlan JA acknowledged various provisions of the NSW *Security of Payment Act*[3] in forming the view that adjudication determinations are 'relevantly conclusive', that is, conclusive as to a claimant's statutory right to progress payments. At paragraph 60, Macfarlan JA described adjudication determination as 'binding':

> '[60] These various provisions in my view indicate a legislative intent to render adjudication determinations relevantly conclusive. Such determinations do not conclude contractual rights… The Act however creates special statutory rights to progress payments. When a claim is made, a dispute arises, and an adjudication determination resolves that dispute. **I consider that determination to be final and binding between the parties as to the issues determined,** except to the extent that the Act allows the determination to be revisited. It would in my view **be quite contrary to the scheme of the Act to permit claimants simply to resubmit the already adjudicated claims if they were dissatisfied with the adjudication.**'

On this basis, Macfarlan JA held that principles of issue estoppel can apply in preventing the claimant from resubmitting a claim that has already been decided by an adjudicator.

While Allsop P agreed that the NSW SOP Act was not intended to permit the repetitious use of the adjudication process, his Honour did not think it necessary to apply principles of estoppel to reach such conclusion; he thought it was sufficient to focus on the provisions of the SOP Act. Allsop P particularly focused on s 13(5), which limits a claimant to one payment claim in respect of *each reference date* – and thus found that this provision was sufficient of itself to bar the claimant from bringing more than one claim relating to the same works.

***Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190**

The Court of Appeal (McDougall J specifically) expressly described an adjudicator's determination as binding. At paragraph 259:

> '[259] In short, the ***Security of Payment Act*** **gives to an adjudicator legal authority to make a binding determination as to an entitlement to a progress payment.** The limited finality of that decision, considered in conjunction with the issue estoppels that it creates, has a real and present effect on the legal rights of the claimant and the respondent. **The claimant is not entitled to more than the adjudicated amount, and may be estopped from asserting any different entitlement, in respect of the same payment claim, in a subsequent payment claim**. The respondent is bound to pay the adjudicated amount and is estopped from denying liability for it in respect of

[3] *Building and Construction Industry Security of Payment Act 1999* (NSW), s 3, 13(5), 22(4), 23(3), 24, 25, 26 and 32.

any subsequent payment claim. All those consequences follow from, and only from, the *Security of Payment Act*.'

## New South Wales Supreme Court

### 1. Emphasis on an identical, or sufficiently duplicate, claim

***The University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635**

This case demonstrates that an adjudication determination *is* binding to the extent that a subsequent claim cannot be made again where the same claim, or a claim of sufficient duplication (which is to be determined by matter of fact and degree) has already been adjudicated by a previous adjudicator.

In this case, Hammerschlag J held that where a subsequent adjudication application requires the adjudicator to 're-perform a statutory function which he has already discharged',[4] a party bringing a claim (which was already subject to a previous claim) would be held to have 'exhausted its statutory entitlement', having no right to make that application.[5] Another consequence would be that the adjudicator has no jurisdiction to adjudicate the claim.[6] When there is a *partial*, and not whole, duplication of an earlier claim, whether there is sufficient duplication as to bar the application from being made is a matter of fact and degree.[7]

Importantly, Hammerschlag J rejected the first defendant's argument that the majority decision in *Dualcorp* (regarding the applicability of issue estoppel) was obiter dictum. Hammerschlag J's view was that there *was* a decision made to the effect that an adjudication determination under the SOP Act. Even though an adjudication is unable to bring about a res judicata and an adjudicator does not have jurisdiction to conclusively decide a matter between the parties, it satisfies the finality requirement as expressed in the High Court in *Kuligowski v Metrobus* (2004) 220 CLR 363.[8]

Hammerschlag J's decision also suggests that where a party has not adduced evidence to make out a claim, and where the previous adjudicator had not established whether a party has that claim, that party can 'undoubtedly sue in the ordinary course in a court of law and prove its claim there'.[9]

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[4] *The University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635, 56.
[5] Ibid, 51.
[6] Ibid, 56.
[7] Ibid.
[8] The finality requirement was described by the High Court in the following terms, at paragraph [21] of the judgment.
(1) that the same question has been decided;
(2) that the judicial decision which is said to create the estoppel was final; and
(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
In *Dualcorp*, the Court added (in paragraph [47] that the requirements for issue estoppel incorporate a like requirement of finality as expressed in the *Kuligowski* decision.

## 2. Abuse of process.

***Ku-Ring-Gai Council v Ichor Constructions Pty Ltd* [2014] NSWSC 1534**

This case continued *Dualcorp*'s analysis of the applicability of principles of issue estoppels, where Stevenson J (and thus the Court) held that issue estoppel in the context of the SOP Act, and thus adjudications, can only arise *where an issue has already been decided*. In this case, because the adjudicator had *not decided* on the claimant's claim (who stated 'this should not be interpreted to mean that I have assessed [the delay damages claim] as Nil') the Court was not prepared to apply principles of issue estoppel.

Further, Stevenson J added that whether an adjudicator had reached a determination is a matter of substance, rather than form – meaning, if an adjudicator stated, 'I will not value this claim', but in substance rejected it, the courts will likely conclude that the adjudicator *has* determined the issue to say that an issue estoppel does arise.

Importantly, Stevenson J held where a party *repetitively* uses the adjudication process, requiring the adjudicator or successive adjudicators to execute the same statutory task, it will amount to an *abuse of process*. Stevenson J pointed to Allsop P's judgment in *Dualcorp* to reiterate what the essence of 'abuse of process' entails, provided below:[10]

> (a) 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 or successive occasions;
> (b) 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; or
> (c) repetitious re-agitation of the same issues.

Applying the above, Stevenson J held there *was* an abuse of process in this case, as the claimant sought a second adjudication application which (a) not only repeated the earlier claim, but also (b) used the first adjudicator's observation as *advice* to 'better' its claim in the second adjudication.

In relation to point (b), the first adjudicator had observed the claimant did not provide enough evidence to prove his claim. The claimant then 'used' this as advice, seeking to provide more evidence in the second adjudication. Stevenson J held this was an abuse of process, and the claimant is not entitled to use the adjudication process in this manner. This is captured in paragraphs 50, 52 and 53 of the judgment:

> '[50] Now, Ichor [the claimant] has, by the Second Adjudicator Application, made the same claim and seeks to have it determined by the Second Adjudicator. It now seeks to deploy, in addition to the iSet Report placed before the First Adjudicator, a second

[9] *The University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635, 49.
[10] *Ku-Ring-Gai Council v Ichor Constructions Pty Ltd* [2014] NSWSC 1534, 32.

report which Ichor acknowledges has been prepared to overcome the 'shortcomings' identified by the First Adjudicator.'

…

[52] Sections 13(6) and 22(4) of the Act do contemplate that, in some circumstances, a payment might include an amount that has been the subject of a previous payment claim and work the subject of one adjudication application might be further considered in a later adjudication application. Further, as McDougall J[11] observed, mere repetition of a claim does not necessarily bespeak an abuse of process.

[53] However, **this case involves more than a mere repetition of a claim earlier made**. The reason Ichor is repeating its claim before the Second Adjudicator is that it failed to establish the same claim before the First Adjudicator because it deployed evidence inadequate to the task… The First Adjudicator drew attention to the shortcomings in that evidence. Ichor is now making a second attempt to prove its case by supplementing that material with further evidence that, according to its description in the Second Adjudicator Application, seeks to overcome the particular problems identified by the First Adjudicator. **In effect, Ichor has used the First Adjudicator's observations as an advice on evidence and is now making a second attempt to prove the same case… This is in my opinion an abuse of process. It is akin to a party, having read a judge's reasons for rejecting its claim for want of evidence, seeking to re-open to re-agitate the issue and to make good the identified shortcomings in the evidence.**'

This case seems to fortify the finality element adjudication determinations carry; not only are claimants disentitled from bringing the same, or sufficiently duplicate claim, but claimants also cannot use the previous adjudicator's observations or comments as advice to increase his or her chances of success in the next adjudication. Therefore, it lends further support to the observation that the NSW courts are willing to conclude, and favourable of the view, that an adjudicator's determination *is* binding.

### 3. Limitation – not every repetition will amount to an abuse of process

***Urban Traders v Paul Michael*** **[2009] NSWSC 1072**

This case provided an important 'limitation' that applies when enforcing the binding nature of adjudication determinations. McDougall J warned not every repetition of an adjudication claim will constitute an abuse of process, and what amounts to an abuse of process is a matter of considering all *contextual factors*. This is explained at paragraphs 41 and 42:

'[41] 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 even if that earlier payment claim has been the subject of an adjudicator's determination. **The relevant concept is not abuse of**

[11] Refer to the next case: *Urban Traders v Paul Michael* [2009] NSWSC 1072 for further discussion on this observation.

**process at large. It is abuse of the processes of the Act**: specifically, the processes of the Act designed to ensure that builders and subcontractors (and of course others) received prompt and progressive payment for construction work performed or related goods and services provided. **The question of whether there has been an abuse of processes of the Act must take into account relevant provisions of the Act. Specifically:**

(1) **s 13(6) of the Act** recognises that a claimant may include in a payment claim an amount that has been the subject of a previous payment claim; and
(2) **s 22(4) of the Act** deals, to an extent, with a repeated claim by providing that if particular construction work or related goods and services have been valued by an adjudicator, an adjudicator in a subsequent adjudication application is to give them the same value unless satisfied that the value has changed since that previous determination.

[42] **Further, whether or not the repetition of claim amounts to an abuse of process requires consideration of all relevant contextual factors.** 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.**'

Apart from what was mentioned in paragraph 42, McDougall did not provide any factors that may be taken into account, stating it is "not possible" to exhaustively list a combination of factors which may deem a claim to constitute an abuse of process.[12]

Therefore, while this case reduces the 'force' an adjudication decision has, in the sense that it does not deem every single repetitious claim to be an abuse of process, it arguably does not assist – maybe even complicates – the complainants' task of figuring out if his/her application will be deemed an abuse of process. The case suggests that it is entirely up the court's discretion to deem whether a repetitious claim is an abuse of process, without providing clear guidance nor a list of possible factors. Nevertheless, McDougall J offers an insightful observation; that a reading of the SOP Act provisions is consistent with the conclusion that repetition will not always necessarily amount to abuse of process.[13]

## Conclusion and Implications

Overall, it is evident that a large volume of NSW case laws supports the proposition that adjudication determinations are binding, to the extent where there is a same, or sufficiently duplicate, claim that has already been determined by an adjudicator.

[12] *Urban Traders v Paul Michael* [2009] NSWSC 1072, 42.
[13] Ibid, 43.

It also impressive to observe that there has been a substantial amount of judicial discussion on the matter, ranging from applying the principles of issue estoppel, considering abuse of process, and how the concept of 'abuse of process' is subject to certain limitations. Taking this into account, it is all the more pertinent that claimants in NSW take caution and care in submitting a subsequent adjudication application when the issue put forward has already been addressed and determined by an adjudicator.