SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd**
Citation:	**[2022] ACTCA 42**
Hearing Date:	19 May 2022
Decision Date:	11 August 2022
Before:	Elkaim, Kennett, and Lee JJ
Decision:	The appeal is dismissed with costs.
Catchwords:	**BUILDING AND CONSTRUCTION** – SECURITY OF PAYMENT – Building and Construction Industry (Security of Payment) Act 2009 (ACT) (SOP Act) – challenge to adjudicator's decision – application of the doctrine of issue estoppel **ESTOPPEL** – ISSUE ESTOPPEL – issue estoppel does not apply to adjudication decisions under the SOP Act – SOP Act contains self-sufficient preclusion regime – "abuse of process" apt to describe preclusion under the SOP Act **ADMINISTRATIVE LAW** – JURISDICTIONAL ERROR – where issue estoppel does not apply and so does not cure admitted material error
Legislation Cited:	*Building and Construction Industry Security of Payment Act 1999* (NSW), ss 22, 32 *Building and Construction Industry (Security of Payment) Act 2009* (ACT), ss 6, 8, 10, 11, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 29, 38, 43, 44
Cases Cited:	*AE & E Australia Pty Ltd v Stowe Australia Pty Ltd* [2010] QSC 135 *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; 226 CLR 256 *Beno Excavations Pty Ltd v Harlech Enterprises Pty Ltd (No 2)* [2021] ACTSC 296; 363 FLR 238 *Beno Excavations Pty Ltd v Harlech Enterprises Pty Ltd* [2021] ACTSC 166 *Birdon Pty Ltd v Houben Marine Pty Ltd* [2011] FCAFC 126; 197 FCR 25 *Blair v Curran* (1939) 62 CLR 464 *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394; 61 NSWLR 421 *Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd* [2014] QSC 223 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190; 78 NSWLR 393 *Civil & Allied Technical Construction Pty Ltd v Resolution Institute* [2019] SASC 193 *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1 *Denham Constructions Project Company 810 Pty Ltd v Smithies* [2014] ACTSC 169; 9 ACTLR 146

Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69; 74 NSWLR 190
John Holland Pty Limited v Roads and Traffic Authority of New South Wales [2006] NSWSC 874
John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd [2010] QSC 159
Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1
Kuligowski v Metrobus [2004] HCA 34; 220 CLR 363
Ku-Ring-Gai Council v Ichor Constructions Pty Ltd [2014] NSWSC 1534
Melaleuca View Pty Ltd v Sutton Constructions [2019] QSC 226
Modscape Pty Ltd v Francis [2017] TASSC 55; 29 Tas R 288
Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd t/as Novatec Construction Systems [2009] NSWSC 416
Pines Living Pty Ltd v John O'Brien and Walton Construction Pty Limited [2013] ACTSC 156
Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd [2017] NSWCA 151; 95 NSWLR 82
Salini-Impregilo S.P.A. v Francis [2020] WASC 72
Spankie v James Trowse Constructions Pty Limited [2010] QCA 355
Steel Contracts Pty Limited v Simons t/as Little Lifter, Pointer and Adjudicate Today Pty Limited [2014] ACTSC 146
The Administration of the Territory of Papua and New Guinea v Daera Guba (1973) 130 CLR 353
The Ampthill Peerage [1977] AC 547
Tomlinson v Ramsey Food Processing Pty Limited [2015] HCA 28; 256 CLR 507
University of Sydney v Cadence Australia Pty Ltd [2009] NSWSC 635
Urban Traders v Paul Michael [2009] NSWSC 1072
Walton v Gardiner (1993) 177 CLR 378
Watpac Constructions v Austin Corp [2010] NSWSC 168

Texts

Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 15 October 2009, 4541-4543 (John Hargrave, Minister for Industrial Relations)
Explanatory Statement, *Building and Construction Industry (Security of Payment) Bill 2009* (ACT)

Parties:

Harlech Enterprises Pty Ltd atf Harlech Family Trust (Appellant)

Beno Excavations Pty Ltd t/as Benex Pipelines (First Respondent)

Jonathan H Sive (Second Respondent)

Representation:

Counsel

A Greinke (Appellant)

D Robens (First Respondent)

Solicitors

Mills Oakley (Appellant)

Joseph Tallarita Lawyers (First Respondent)

File Number:	ACTCA 60 of 2021	
Decision under appeal:	Court/Tribunal:	Supreme Court of the ACT
	Before:	Mossop J
	Date of Decision:	19 November 2021
	Case Title:	*Beno Excavations Pty Ltd v Harlech Enterprises Pty Ltd (No 2)*
	Citation:	[2021] ACTSC 296; 363 FLR 238

ELKAIM J:

1. I have had the advantage of reading, in draft form, the respective judgements of Kennett J and Lee J. Their Honours both reach the same conclusion, that the appeal should be dismissed, but arrive there by different routes.

2. I agree that the appeal should be dismissed. Without rejecting the path taken by Kennett J, I generally prefer that taken by Lee J, in particular his reliance on the terms of the *Building and Construction Industry (Security of Payment) Act 2009* (ACT), as summarised at paragraph 96.

3. The result is that the appeal is dismissed with costs.

I certify that the preceding three [3] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Elkaim

Associate:

Date:

KENNETT J:

4. I have had the considerable advantage of reading the reasons of Lee J in draft.

5. I gratefully adopt his Honour's summaries of the factual background and the scheme of the SOP Act, and his explanation of why the appeal turns on the question whether the adjudicator was correct in concluding that the Beno contentions could not be raised before him by reason of principles of issue estoppel. In these reasons I will use the same abbreviations and defined terms as his Honour.

6. I agree that the central question must be answered negatively and the appeal must be dismissed, but prefer to state my reasons slightly differently.

Principles and doctrines

7. The preclusionary doctrines surveyed by Lee J operate to serve a common end, namely supporting the fundamental legal value of finality of decisions. However, they operate in different domains and in different ways.

8. The principle of advocate's immunity confirmed in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1 defines a class of case where no cause of action

arises in negligence against a legal practitioner involved in a contentious matter. Its justification is the need for finality of judicial decisions but its direct effect is to protect a practitioner rather than a party.

9. Success of an action means that the cause of action merges in the judgment and there is no longer a cause of action: *Blair v Curran* (1939) 62 CLR 464, 532 (Dixon J); *Tomlinson v Ramsay Food Processing Pty Ltd* [2015] HCA 28; 256 CLR 507 (*Tomlinson*), [20] (French CJ, Bell, Gageler and Keane JJ). That is an aspect of the legal effect of the judgment.

10. Estoppel, as the majority observed in *Tomlinson*, is of a different nature. As their Honours said at [21]:

> Estoppel in relation to judicial determinations is of a different nature. It is a common law doctrine informed, in its relevant application, by similar considerations of finality and fairnesshttps://jade.io/ - _ftn30. Yet its operation is not confined to an exercise of judicial power; it also operates in the context of a final judgment having been rendered in other adversarial proceedings. It operates in such a context as estoppel operates in other contexts: as a rule of law, to preclude the assertion of a right or obligation or the raising of an issue of fact or law.
>
> (citations omitted)

11. Their Honours then outlined (at [22]) the various forms of estoppel recognised as potentially arising from a final judgment in an adversarial proceeding, in a passage that is set out in the reasons of Lee J.

12. Issue estoppel, importantly, is a common law doctrine that governs the rights of parties *inter se*. If an estoppel arises, it does so as a result of prior dealings between the parties to a dispute and creates substantive legal rights (see *Queensland v Commonwealth* (1977) 139 CLR 585, 614–615 (Aickin J)) as between them.

13. Like any other common law doctrine, estoppel may be excluded or modified by statute. However, it is not something that relies for its existence on an express or implied conferral by statute. Proper understanding of the SOP Act is critical in a case such as the present, but not because the party asserting an issue estoppel must find an intention to create that estoppel expressed or implied in its text. Rather, the SOP Act needs to be understood in order to ascertain what (if any) are the matters conclusively settled between the parties by an adjudication. If the necessary conclusiveness is found, the common law may create an estoppel. In that way, the statute is the starting point. Analytically, therefore, the provisions which Lee J describes as the "preclusion regime" of the SOP Act do one of two things: either they add to the preclusion (if any) afforded by issue estoppel; or they evince, by implication, a legislative intention to exclude that common law doctrine.

14. Consequently, I would not frame the question (as Macfarlan JA did, in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69; 74 NSWLR 190 (*Dualcorp*) at [50]) as whether the SOP Act "manifests an intention to confer a sufficient degree of finality on [a determination] to attract" principles of *res judicata* and issue estoppel. In my view the necessary questions are:

    (a) what degree of finality the SOP Act does confer on a determination by an adjudicator;

    (b) whether that is sufficient to attract the principles of issue estoppel; and

(c) if the nature of the decision is such as to attract the principles, whether anything in the SOP Act abrogates them or limits their application. (At first blush this question may appear to overlap substantially if not completely with the first. However, the character of the decision and the exclusion of issue estoppel are distinct issues, as will appear below.)

15. Before turning to these questions, it is necessary to say something about the concept of abuse of process, which (in some of its applications) also supports finality of decisions.

16. That concept informs two areas of the general law. One is the tort of collateral abuse of process, which founds a cause of action sounding in damages. The other is the jurisdiction of superior courts to prevent their own processes (and those of inferior courts and tribunals) being used for improper purposes, by staying proceedings. Both were considered by the High Court in *Williams v Spautz* (1992) 174 CLR 509 (*Williams*). The latter doctrine has been invoked by single Judges in New South Wales, in granting injunctive relief to restrain the pursuit of repetitious claims under the cognate legislation in that state: *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWSC 416 (Rein J); *University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635 (Hammerschlag J); *Urban Traders v Paul Michael* [2009] NSWSC 1072 (McDougall J). There was no attempt to restrain the pursuit of a claim here. The party that invoked preclusionary doctrines (Harlech) was the party advancing the claim, not the party resisting it. Harlech relied on those doctrines in seeking to have the case decided in a particular way, which the adjudicator did.

17. In the law of tort, the notion of abuse of process involves use of a curial or other legal process for a predominant purpose that is improper (ie, not for the purpose of bringing about a result for which the law provides): *Williams* at 526–527. The paradigm case of abuse is where proceedings are commenced, not with the aim of prosecuting them to a successful result, but to vex or put pressure on the other party. In the context of a superior court's inherent power to stay proceedings before it, the concept (or at least the label) of abuse of process has been extended to include a case that is foredoomed to fail or attempts to relitigate a matter that has been decided in earlier proceedings: *Walton v Gardiner* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ). In that context, also, what amounts to an abuse of process has been said to be "insusceptible of a formulation comprising closed categories": *Batistatos v Roads and Traffic Authority (NSW)* [2006] HCA 27, 226 CLR 256, [9] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

18. In principle, a procedural step taken by the respondent in a proceeding (such as filing a defence) can be characterised as an abuse of process: *O'Shane v Harbour Radio Pty Ltd* [2013] NSWCA 315; 85 NSWLR 698, [103] (Beazley P (McColl JA and Tobias AJA agreeing)). Harlech might therefore have contended that the raising of the Beno contentions for the second time amounted to an abuse of the process of the SOP Act. However, it did not, and the adjudicator did not decide the matter on that basis. Abuse of process (if made out) would potentially have established a basis upon which this Court could have intervened, had an application been made to it. Some tribunals have express statutory powers to deal with abuse of their processes, but adjudicators under the SOP Act do not.

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. But that does not answer the question whether issue estoppel, with its distinct concerns and doctrinal foundations, limits the contentions that parties are allowed to rely on in an adjudication. That, given the adjudicator's reliance on issue estoppel, is the question that must be grappled with.

The SOP Act and issue estoppel

20. The matter that may be submitted for adjudication under s 19 of the SOP Act is "a payment claim". What the adjudicator must decide, under s 24(1), is "the amount of the progress payment, if any, to be paid by the respondent to the claimant", together with the date for payment and the rate of interest on that amount.

21. A "payment claim" is a claim under s 15(1) (see the Dictionary). It is a claim submitted by a person who claims to be "entitled to a progress payment under section 10(1)" to the person who is or may be liable to make that payment.

22. A "progress payment"—which is central to both the content of a claim and the issue to be decided by the adjudicator—is a payment provided for by s 10 (again, see the Dictionary). Section 10(1) provides:

> **10 Right to progress payments**
>
> (1) On and from each reference date under a construction contract, a person is entitled to a payment (a progress payment) if the person has undertaken, under the contract, to—
>
> (a) carry out construction work; or
>
> (b) supply related goods and services.

23. Section 10 thus creates the right to a progress payment. It does so by reference to certain characteristics of a contract, namely whether there is a contract to carry out "construction work" and the passing of a "reference date" (which, as defined in s 10(3), may be a date provided for in the contract). The amount of the progress payment, by operation of s 11, is the amount worked out under the contract or, if there is no such amount, a valuation of the work done or to be done.

24. In adjudicating the amount of the "progress payment" payable under the SOP Act, therefore, the adjudicator must identify a contract and analyse the rights under that contract to some extent, as well as deciding questions of fact.

25. The respondent to the claim is required to pay the amount determined by the adjudicator, normally within five business days: s 25. If that is not done, the claimant may give a notice (s 26(2)(b)) and then suspend work (s 29). The claimant may also obtain an adjudication certificate (s 26(2)(a)), which can be filed and enforced as a judgment for a debt in a court of competent jurisdiction (s 27).

26. However, 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; under Part 3 (which includes s 10(1)); or for things done or omitted to be done under the contract. The extent to which an adjudication is final is, therefore, circumscribed. Subsection

(2) makes the position even plainer by providing that nothing done under Part 4 affects any civil proceeding arising under a construction contract, except that (as provided for by sub-s (3)) the court hearing such a proceeding must, in making its orders, take into account any amount paid by a party under Part 4.

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 (see the cases cited by Lee J at [48]). If a claim proceeds to adjudication, the amount that must be paid pursuant to the statute is the amount decided by the adjudicator.

28. In *Kuligowski v Metrobus* [2004] HCA 34; 220 CLR 363 (*Kuligowski*) at [21], a unanimous High Court treated as uncontroversial the following statement by Lord Guest of the requirements for issue estoppel to arise:

> (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.

29. The Court went on to consider the second requirement (finality) in relation to a decision by a review officer under workers' compensation legislation. Having referred to earlier authority, the Court observed that a "final" decision is one which is "not of an interlocutory character, but is completely effective unless and until rescinded, altered or amended" (at [25], [39]). A decision by an adjudicator under the SOP Act meets that description. The Court also observed that matters including the speedy and informal process required to be followed, exclusion of legal representatives and inapplicability of rules of evidence—matters which find resonance in ss 23–24 of the SOP Act—were "neutral" as to whether the decision was relevantly final (at [32]).

30. An adjudication determination under the SOP Act is "final", in the sense discussed in *Kuligowski*, even though it only decides entitlement to a statutory progress payment. It resolves a dispute between the claimant and the respondent as to whether a progress payment is required to be paid in relation to a particular reference date and the amount of that payment. The result is binding except to the extent that the Act allows the determination to be revisited (which is limited: see ss 43–44).

31. Accordingly, unless something in the SOP Act displaces the rule, the common law erects an estoppel between the parties preventing re-agitation between them of the fundamental issues in the dispute which formed the basis for the adjudicator's decision. As it was put in the classical statement in *Blair v Curran* (at 531–532 (Dixon J)):

> The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion…
>
> Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. … [The] judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the later claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

32. The first adjudication, in upholding the claim made by Harlech, necessarily involved the rejection of the Beno contentions. Subject to any statutory exclusion of the doctrine, therefore, issue estoppel prevented Beno from raising those same contentions as to the nature of the contract between it and Harlech (and the application of the SOP Act thereto) in any future dispute between the same parties. The critical question is therefore whether anything in the SOP Act excludes the application of issue estoppel.

33. Speaking of provisions equivalent to s 38(1)(a) and (2), Philip McMurdo J said in *Caltex Refineries (Qld) Ltd v Allstate Access (Australia) Pty Ltd* [2014] QSC 223 (*Caltex Refineries*) at [54]:

> Where the doctrine does apply, then subject to any qualification by legislation or agreement, it precludes the reagitation in any forum of the same issue. Yet, the estoppel for which Allstate contends, in attempted reliance on *Dualcorp*, at its highest is one in which the issue could be reagitated in some forums but not in others. It is a remarkable species of issue estoppel where, having regard to s 32 of the New South Wales Act, the "entitlements inter se under the contract" are unaffected by it.

34. His Honour went on to say that the source of this "more limited estoppel" would need to be found in the Act. For my part, I do not think that follows from the previous point. There is no particular conceptual difficulty in concluding that the legislation overrides or excludes issue estoppel in some circumstances but not others. However, the extent to which the SOP Act does that needs to be analysed. In particular, s 38(1)(b) also needs to be considered.

35. Importantly for present purposes, s 38(1)(b) provides that nothing in Part 4 (which includes the provisions for adjudication) affects any rights a person may have under Part 3 (which is where s 10 is located). It thus has the effect that an adjudication decision does not affect any right that a party may have to a progress payment under the SOP Act. In other words, a right to a progress payment said to arise out of a contract (which is necessarily the subject matter of any adjudication under the SOP Act) is not affected by a previous adjudication. Read in this way, 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.

36. This reading is supported by the following aspects of the statutory context.

    (a) Aspects of the adjudication process are inimical to the kind of hearing that parties would normally expect to have available to them, if they are to be bound by the decision-maker's conclusions on all essential issues. The decision must be made within a very short time (s 23(3)) and based on a strictly defined body of documentary material (s 24(2)) which the parties have limited time to prepare (ss 19(3), 22(1)), even though (as McDougall J pointed out in the passage cited by Lee J at [54]) claims may be extremely complex and involve substantial volumes of documents. The adjudicator need not be legally qualified; yet questions of interpretation of the contract may arise. As I have noted above, these factors are not inconsistent with the decision being "final" in the sense that attracts issue estoppel at common law. However, they support an understanding that, in enacting s 38, the legislature intended to limit very substantially (if not eliminate) the coverage of that doctrine. 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.

(b) As Lee J explains, the SOP Act includes provisions that expressly or impliedly prevent repetitious claims from being made. Section 24(4), in particular, would have little or no work to do if conclusions by an adjudicator were already binding as a result of estoppel arising between the parties. More generally, the "preclusion regime" indicates that the legislature was concerned to legislate against particular instances of re-agitation of settled issues rather than leave the field to be governed by general common law principles.

(c) If an issue estoppel arising from an adjudication decision is capable of binding the parties in future disputes about progress payments under the SOP Act (including future adjudications), the conundrum posed by Philip McMurdo J in *Caltex Refineries* at [54] may arise. Parties in a future adjudication could be bound by competing estoppels arising from an earlier adjudication and a decision of a court dealing with a contract claim.

37. To the extent that the majority in *Dualcorp* saw the result in that case as flowing from principles of issue estoppel, I respectfully disagree. In my view, those principles are excluded from operation in relation to an adjudication decision. The decision in *Dualcorp* is correct for the reasons given by Allsop P at [8] and [14]–[16], which are founded on the statutory provisions precluding repeat claims and have no application to the present case.

38. The course of decisions since *Dualcorp* has been surveyed by Lee J. It does not include any further decisions at appellate level. There are only two single judge decisions in which *Dualcorp* has been treated as authority for the proposition that issue estoppel can arise against a respondent in an adjudication: *Modscape Pty Ltd v Francis* [2017] TASSC 55; 29 Tas R 288 and *Salini-Impregilo S.P.A. v Francis* [2020] WASC 72. It will be apparent from what I have said above that I do not agree with that reasoning. The other decided cases have concluded to the contrary of that view (*Caltex Refineries* (above)) or have involved repetitious claims, which are precluded by provisions of the SOP Act.

39. For these reasons, I agree that the primary judge did not fall into error. The orders of the Court should be those proposed by Lee J at [117].

I certify that the preceding thirty-six [36] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Kennett

Associate:

Date:

LEE J:

A Introduction and Relevant Background

40. Although both parties to this appeal were content to describe the determinative issue on this appeal as being how the "principles of issue estoppel" relate to adjudications under *Building and Construction Industry (Security of Payment) Act 2009* (ACT) (**SOP Act**), for reasons that will become evident, this is somewhat of an oversimplification.

41. Before explaining in detail the focus of the appeal, the relevant background requires some preliminary explanation. This background was detailed at some length, and in a manner that is uncontentious, in the judgment below: *Beno Excavations Pty Ltd v Harlech Enterprises Pty Ltd (No 2)* [2021] ACTSC 296; 363 FLR 238 (**primary judgment** or **PJ**) (at [2]–[67]). It is unnecessary to repeat all that detail here, save to provide the following summary:

    (a) The appellant, Harlech Enterprises Pty Ltd (**Harlech**), was the vehicle through which the respondent, Beno Excavations Pty Ltd (**Beno**), a civil contracting company, engaged its general manager until 2020.

    (b) Harlech made a payment claim under the SOP Act against Beno, claiming an amount for work in 2020 of approximately $60,000 (**first payment claim**). In accordance with the SOP Act, Beno provided a payment schedule, which identified that the amount it would pay in response to the payment claim was nil (**first payment schedule**), providing the following reasons for non-payment (collectively, the **Beno contentions**):

        1. There was no construction contract in place with the claimant
        2. There was no agreement implied or otherwise to pay instalments
        3. The Act has no application to the agreement in place between the claimant and Beno Excavations P/L
        4. The Claimant was [paid] for management and consulting services provided by Mr Benjamin Moseley who was personally designated and responsible for being the General Manager for Beno Excavations P/L
        5. If the Act does apply (which is denied) the figures used by the claimant are not correct, and there was no agreement at the relevant time to profit share.

    (c) An application and response (**first response**) were then exchanged and a determination by the second respondent (**adjudicator**) took place, resulting in an adjudication determination that the full amount claimed by Harlech was payable (**first adjudication**).

    (d) Harlech served two further payment claims for approximately $150,000 for work in 2017 (**second payment claim**) and approximately $450,000 for work conducted in late 2017 and 2018 (**third payment claim**). Again, Beno served a payment schedule indicating that the amount it would pay was nil (**second payment schedule**), repeating the Beno contentions but supplementing them with the following:

        6. These claims have come after Mr Moseley had left Benex Pipelines employment, he left in March 2020 with no notice. Works were done in 2017-2018.
        7. Mr Moseley [*sic*] employment commenced with Benex Pipelines on 15th March 2017 as our Construction Manager, as he had no experience in the Trenchless Industry, Mr Mosley had to learn on the job, and familiarise himself with [*sic*] services Benex provided to ICON Water. Mr Moseley had walked

> into the ongoing project of Icon Water CX-13. There was no agreement implied or otherwise for Mr Moseley to receive any type of profit for either Icon Water CX-13 or Icon Water CX-14.

(e) A further application and response (**second response**) were then exchanged and the second and third payment claims were subject to a further adjudication before the adjudicator who determined that almost the total amount claimed by Harlech was payable by Beno (**second adjudication decision**).

(f) In doing so, the adjudicator concluded that of the seven reasons provided by Beno in the second payment schedule, all but one were the same reasons previously presented. The primary judge found this to be on the basis that the Beno contentions were the same, and that the substance of item 6 had been raised as part of the first response. The adjudicator then continued (at [6]):

> Reasons 1 to 6 of the payment schedule are the same issues decided in the [first adjudication]. I am unable to agree with [Beno]'s suggestions made in the [second] response. The principle of "issue estoppel" applies.

(g) The adjudicator also made the following two, apparently related, points (at [7] and at [68]–[69]):

> 7. Although a decision made under the [SOP] Act represents an interim decision about a progress payment, the case authorities consider the issues decided in the adjudication of a payment claim to be finally decided on an interim basis. *J Hutchison Pty Ltd v Galform Pty Ltd and Ors* [2008] QSC 205 and *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 are authorities from different jurisdictions that discuss the impacts and consequences of *res judicata* and *issue estoppel* when a previous decision has resolved the same issue being presented to a new adjudicator. I am satisfied that no submission could have been made that would produce a different result with respect to matters previously decided. The procedural risk of an adjudicator electing not to request further submissions exists essentially in this issue to be decided, especially here since the respondent elected to resubmit verbatim the same reasons that were previously decided against the respondent …
>
> …
>
> 68. Section 24(4) of the [SOP] Act is reasonably interpreted to say that new claims or new approaches taken in a subsequent adjudication that closely resemble claims or approaches taken in a previous decision become unreasonable. The claim or approach taken in the subsequent proceeding, whether the same or new, must yield to, or otherwise be excluded by, the prejudicial statutory requirement that same values as previously decided must be followed unless new or additional facts are alleged that satisfies the adjudicator concerned that the value of the work or the methodology used in valuing the performance has changed or should not be followed as in the previous decision.
>
> 69. Therefore, once a value has been decided in accordance with section 12 of the [SOP] Act, section 24 of the Act bars the respondent from raising issues that were part of the considerations used in valuing the claim in a subsequent matter. [Beno] is unable to re-agitate issues 1 to 6 simply because these are the same issues considered in [the first adjudication].

(h) An adjudication certificate was then filed pursuant to s 27(1) of the SOP Act and became a judgment of the Court.

(i) Beno brought an application in this Court for prerogative relief. The primary judge granted an extension of time but a condition of that grant of leave was

that the grounds of challenge were limited to the adjudicator's interpretation of the operation of s 24(4) of the SOP Act and issue estoppel: see *Beno Excavations Pty Ltd v Harlech Enterprises Pty Ltd* [2021] ACTSC 166 (*Beno Excavations (No 1)* (at [63]).

42. Beno correctly conceded below that the adjudicator's understanding and application of s 24(4) of the SOP Act was erroneous. But it also contended that for Harlech to obtain prerogative relief in the nature of certiorari, it was required to demonstrate that the error was material. The primary judge reasoned if the adjudicator was bound to adopt the relevant "key findings" in the first adjudication in determining the second adjudication, the adjudicator's misunderstanding as to the scope of s 24(4) was immaterial, and did not constitute jurisdictional error. Put another way, the determinative issue on the question of relief was the correctness or otherwise of Harlech's submissions as to the scope of what was described as the "principles of issue estoppel". After a careful analysis of the relevant principles as they apply in the present context of the SOP Act, his Honour rejected Harlech's submissions and granted prerogative relief.

43. Harlech now appeals against the orders made by the primary judge.

44. Having explained how the appeal arises, it is convenient to consider its merits by reference to the following headings:

B The SOP Act Generally;

C Preclusion Generally;

D The Principled Approach; and

E The Appeal.

45. For the reasons explained below, the primary judge did not err in granting relief to Beno and the appeal must be dismissed.

B The SOP Act Generally

Overview

46. In all Australian jurisdictions, a contractor and subcontractor's entitlement to payment for building and construction work is protected by legislation. The SOP Act is one such statute. It is based upon the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**NSW Act**), and largely similar to the acts across all other states: *Pines Living Pty Ltd v John O'Brien and Walton Construction Pty Limited* [2013] ACTSC 156 (at [18] per Mossop M).

47. The SOP Act was intended to establish a system for the rapid adjudication and interim resolution of payment disputes. It provides a "minimalist, hands-off" alternative to "costly and protracted" court proceedings, with the aim of alleviating pressure on subcontractors and small business operators: Presentation Speech, Hansard (Thursday 15 October 2009) (at 4541–4543); Explanatory Statement, *Building and Construction Industry (Security of Payment) Bill 2009* (ACT) (at 3). The statute is commercial in focus, designed to protect against the failure of any one party in a chain of "cascading payment obligations" to pay for work, goods or services: Presentation Speech (at 4541). The building and construction industry is particularly

vulnerable to security of payment issues because it is uniquely reliant on subcontracting relationships with inherent imbalances in bargaining power: Explanatory Statement (at 3).

48. When the nature of this "pay now, argue later" scheme is appreciated, it is unsurprising that a cardinal component of the statutory regime is that the SOP Act does not decide final rights: it preserves them for later resolution: *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151; 95 NSWLR 82 (at 106–107 [102] per McColl JA, Beazley ACJ and Macfarlan JA agreeing at 85 [1] and 116 [146] respectively); *John Holland Pty Limited v Roads and Traffic Authority of New South Wales* [2006] NSWSC 874 (at [33] per McDougall J). To this end, s 38 provides:

> **38 Effect of part on civil proceedings**
>
> (1) 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 3 (Right to progress payments) in relation to the contract; or
>
> (c) may have apart from this Act for anything done or omitted to be done under the contract.
>
> (2) Nothing done under this part affects any civil proceeding arising under a construction contract, whether under this part or otherwise, except as provided by subsection (3).
>
> (3) In any proceeding before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—
>
> (a) must in any order or award it makes in the proceeding, take into account any amount paid to a party to the contract under or for the purposes of this part; and
>
> (b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceeding.

Payment Claims

49. More specifically, in furtherance of the statutory purpose, the SOP Act creates an entitlement to progress payments for work completed and the supply of related goods and services under construction contracts: ss 6, 10 SOP Act. It also sets out a process for how progress payment claims are to be made. Section 15 relevantly provides:

> **15 Payment claim**
>
> …
>
> (4) A payment claim may be given only before the later of—
>
> (a) the end of the period worked out under the construction contract; and
>
> (b) the end of 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 must not give more than 1 payment claim for 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.

50. The term "reference date" is defined in s 10(3)(a) to mean a date stated in, or worked out under, the contract. If the contract does not provide for such a date, the "reference date" is the last day of the calendar month in which the work was first carried out, or the related goods or services supplied, and the last day of each subsequent named month: s 10(3)(b) SOP Act.

51. While a claimant is limited to one payment claim in respect of each reference date, a claimant may include in another payment claim (necessarily by reference to another reference date) an amount that has been the subject of a previous claim: ss 15(5)–(6); *Dualcorp* (at 193 [8] per Allsop P).

52. A respondent given a payment claim may reply by giving a payment schedule to the claimant: s 16 SOP Act. The respondent is liable to pay the claimed amount on the due date for the progress payment if it does not provide a payment schedule within the time required by the contract, or ten business days after the payment claim is given, whichever is earlier: s 16(4) SOP Act.

53. Where a respondent has not paid a claimed amount, one course of action a claimant may take is to make an adjudication application in relation to the payment claim: ss 17(2)(a)(ii), 18(2)(a)(ii), 19(1)(b) SOP Act.

The Adjudication Process

54. Again, consistently with the statutory purpose generally, Pt 4, Div 4.2 of the SOP Act provides for the rough and ready adjudication of payment claim disputes. The process has been described as "Draconian", because, as McDougall J reflected in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190; 78 NSWLR 393 (at 437 [208]):

> It imposes a mandatory regime regardless of the parties' contract … It provides extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses. It provides a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents …

55. Section 24 sets out the formal and substantive requirements for an adjudicator's decision. The section frames each adjudication as an independent exercise. For example, s 24(2) sets out a list of mandatory considerations, including but not limited to the SOP Act, the adjudication application and the contract, payment claim and payment schedule in question. This list does not include previous adjudication decisions. Further, s 24(4) mandates that where an adjudicator has valued construction work or related goods or services, that adjudicator and any other adjudicator must not disturb that valuation in a later adjudication:

> **24 Adjudicator's decision**
>
> …
>
> (4) If the adjudicator values construction work or related goods and services under section 12, the adjudicator and any other adjudicator must give the work, or the goods and services—
>
> (a) in a later adjudication involving the valuation of the work or of the goods and services—the same value as the value decided by the adjudicator; or
>
> (b) if the claimant or respondent satisfies the adjudicator that the value of the work, or the goods and services, has changed since the valuation—a different value to the value decided by the adjudicator.

56. Section 24(4) expressly contemplates the circumstances in which the decision of a previous adjudicator will bind a subsequent adjudicator, expressly referring only to circumstances where an adjudicator has valued construction work or related goods and services. In *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69; 74 NSWLR 190, a decision surveyed at length below (at [33]–[38]), Macfarlan JA (at 205 [67], with whom Handley JA agreed (at 207 [76]), and Allsop P agreed on this point (at 194 [16])) did not consider that the equivalent section in the NSW Act:

> … should be regarded as an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator … I consider that the Act when read as a whole manifests an intention to preclude reagitation of the same issue.

57. If a respondent fails to pay an adjudicated amount, the claimant may ask the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate: s 26(2)(a) SOP Act. The adjudication certificate may be filed as a judgment for debt and enforced in any court of competent jurisdiction: s 27(1) SOP Act. If the respondent instigates proceedings to have the judgment set aside, the respondent is not entitled to bring a cross-claim against the claimant, raise a defence or challenge the adjudicator's decision in the proceeding: s 27(4)(a) SOP Act. The respondent is required to pay into the court as security the unpaid part of the adjudicated amount, pending the final decision of the proceeding: s 27(4)(b) SOP Act.

Judicial Review

58. Given the focus of this appeal, and the emphasis in oral and written submissions upon decisions concerning the analogue statutory schemes in other Australian jurisdictions, it is noteworthy that there is a difference between the SOP Act and its cognates. The SOP Act stands alone in that it expressly prohibits judicial review on the ground of an error of fact or law on the face of the decision: s 43(1) SOP Act.

59. However, notwithstanding the existence of s 43, this Court has the power to grant prerogative relief in respect of an adjudication decision by an order in the nature of certiorari: *Steel Contracts Pty Limited v Simons t/as Little Lifter, Pointer and Adjudicate Today Pty Limited* [2014] ACTSC 146 (at [45] per Refshauge J).

60. For completeness, it is also worth noting (although it is irrelevant for present purposes) that the SOP Act also creates an express right to appeal to this Court on any question of law arising out of an adjudication decision, with the consent of the parties or the leave of the Court: s 43(2)–(3) SOP Act.

C Preclusion Generally

61. I mentioned at the outset of these reasons that the parties focussed their arguments by reference to the metes and bounds of what they described as the "principles of issue estoppel". Despite this, I have referred to *preclusion* rather than issue estoppel because the submissions on appeal spoke of issue estoppel in a way that tended to suggest it is some form of standalone or exhaustive principle. But it is necessary to conceptualise it and consider its application within a much broader legal context.

62. This conceptualisation starts with the principle of finality, which is fundamental. It dictates that once controversies have been judicially resolved, they are not to be reopened except in limited circumstances: *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1 (at 17 [34] per Gleeson CJ, Gummow, Hayne and Heydon

JJ). The principle can be justified on two bases. *First*, it protects parties' private interests by ensuring that litigants are not vexed in the same matter twice. *Secondly*, it safeguards integrity in the administration of justice by conserving the court's finite recourses and minimising the potential of inconsistent judgments: see *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (at 31 per Lord Bingham of Cornhill). As Lord Wilberforce put it in *The Ampthill Peerage* [1977] AC 547 (at 569):

> Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book.

63. Issue estoppel is one of a number of legal rules directed to the same end of facilitating the overriding goal of finality. As Gleeson CJ, Gummow, Hayne and Heydon JJ explained in *D'Orta-Ekenaike v Victoria Legal Aid* (at 17–18 [34]–[36]), the tenet of finality:

> … finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding.
>
> The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules about when further evidence may be called in an appeal (in particular, the so-called 'fresh evidence rule') are all rules based on the need for finality …
>
> The rules based on the need for finality of judicial determination are not confined to rules like those mentioned above. Those are rules which operate between the parties to a proceeding that has been determined. Other rules of law, which affect persons other than the parties to the original proceeding, also find their justification in considerations of the need for finality in judicial decisions. And some of those rules are rules of immunity from suit.
>
> (Citations omitted.)

64. The interrelationship between legal estoppel and related principles was also the subject of discussion by the High Court in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28; 256 CLR 507, where French CJ, Bell, Gageler and Keane JJ explained (at 517–518 [22]):

> Three forms of estoppel have now been recognised by the common law of Australia as having the potential to result from the rendering of a final judgment in an adversarial proceeding. The first is sometimes referred to as "cause of action estoppel". Estoppel in that form operates to preclude assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceeding and which was determined by the judgment. It is largely redundant where the final judgment was rendered in the exercise of judicial power, and where res judicata in the strict sense therefore applies to result in the merger of the right or obligation in the judgment. The second form of estoppel is almost always now referred to as "issue estoppel". Estoppel in that form operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a "judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies". The third form of estoppel is now most often referred to as "Anshun estoppel…. That third form of

> estoppel is an extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding. The extended form has been treated in Australia as a "true estoppel" and not as a form of res judicata in the strict sense. **Considerations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument.**
>
> (Citations omitted, emphasis added.)

65. Their Honours went on to explain (at 518–519 [25]) that abuse of process "which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel". Hence, there may be circumstances which do not fall strictly within any of the three forms of estoppel, but which nevertheless entail reopening controversies (or parts of controversies) that have been quelled. Abuse of process has a flexibility to enable the court to reach the conclusion that justice and public policy dictate in the particular circumstances of the case: *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; 226 CLR 256 (at 265 [9], 266–267 [14]–[15] per Gleeson CJ, Gummow, Hayne and Crennan JJ).

66. When the foundation of issue estoppel and its relationship to related principles are understood, it becomes apparent that it can arise only with respect to issues that a court or tribunal has actually addressed and determined, and only if the issues were essential to the disposition of the cause in question: *Blair v Curran* (1939) 62 CLR 464 (at 531–2 per Dixon J).

67. It is also apparent why it only arises in relation to a *final and conclusive decision on the merits*, being a decision that is effective unless and until rescinded, altered or amended (recognising that the fact that an appeal is available does not make it any less final: *The Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 (at 454 per Gibbs J)). Consistently with this requirement, the cause of action must be extinguished by the decision which is said to create the estoppel and the "defining feature of a final decision [is] complete effectiveness unless and until it can be amended", irrespective of the character of the decision-making body, or the process by which the decision was reached: *Kuligowski v Metrobus* [2004] HCA 34; 220 CLR 363 (at 374–377 [25]–[32] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

68. Having understood how issue estoppel and related principles operate within a broader legal context, it is now appropriate to turn to their present relevance and application. For reasons I will explain below, a contextual reference to the "principles of issue estoppel" has caused some difficulty in understanding the source and extent of the preclusion of reagitation in the context of the SOP Act.

D The Principled Approach

69. It is convenient to commence by briefly identifying the submissions made by the appellant on the "principles of issue estoppel" as they apply to the SOP Act. I will come to why I consider those submissions are misconceived in more detail in Part E.

70. Harlech submitted that the principles of issue estoppel are generally applicable to findings of fact and law by adjudicators, except to the extent that the SOP Act permits a determination to be revisited pursuant to s 24(4)(b) or s 38. In making this argument, Harlech relied on the line of authorities springing from the decision of the

New South Wales Court of Appeal in *Dualcorp,* the first decision to recognise the application of the "principles of issue estoppel" in the context of Australian security of payment legislation.

71. A survey of the authorities and the terms of the SOP Act itself (in the light of the principles explained above) reveals why Harlech's central submission is unsound.

"Issue Estoppel" and the Dualcorp Line of Authorities

72. *Dualcorp* concerned a claimant who submitted progress claims for amounts the subject of a previous claim, attaching the same invoices. The respondent failed to serve a payment schedule, and the claimant subsequently applied for judgment under the NSW Act for the entire amount claimed. The primary judge refused to enter summary judgment in the full amount claimed. The Court of Appeal held that the claimant was not entitled to judgment in respect of the amounts claimed, though on different bases.

73. Macfarlan JA (with whom Handley AJA agreed at 207 [76]) observed that the starting point, in determining whether proceedings for judgment can be defeated by proving inconsistency with an earlier adjudicator's determination under s 22 of the NSW Act (the equivalent of s 24 of the SOP Act), is the relevant act itself (at 200–201 [42]). In Macfarlan JA's terms (at 200–201 [42]):

> In particular, it is necessary to determine whether the legislative intention was to confer upon adjudicators' determinations a sufficient degree of finality to attract the principles of *res judicata,* issue estoppel or of the more general concept of abuse of process.

74. Macfarlan JA canvassed the NSW equivalents of the provisions discussed above, concluding (at 203 [60]):

> These various provisions in my view indicate a legislative intent to render adjudication determinations relevantly conclusive. Such determinations do not conclude contractual rights. Section 32 [the equivalent of s 38 of the SOP Act] expressly so provides. 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.

75. In his Honour's view, adjudication determinations are *relevantly* conclusive: that is, conclusive as to a claimant's statutory right to progress payments. While Macfarlan JA stated broadly that an adjudication determination is "final and binding between the parties as to the issues determined", the sentence which follows has, on my reading, a narrowing effect, suggesting that adjudication determinations are final and binding only where a claimant subsequently seeks to agitate an already adjudicated claim.

76. On this basis, Macfarlan JA held that "principles of issue estoppel" were applicable to preclude the claimant from resubmitting a claim in respect of which an adjudication determination had already been rendered, and that the more general principle of abuse of process was probably also applicable, but it was unnecessary to reach a final view on this (at 205–206 [68]–[69]). Macfarlan JA recognised that abuse of process involves a broad concept "insusceptible of a formulation comprising closed categories" (*Batistatos v Roads and Traffic Authority* (at 265 [9] per Gleeson CJ, Gummow, Hayne and Crennan JJ)) but including within its ambit an attempt to "litigate anew a case which has formerly been disposed of by earlier proceedings":

Walton v Gardiner (1993) 177 CLR 378 (at 393 per Mason CJ, Deane and Dawson JJ).

77. President Allsop agreed that the NSW Act was not intended to permit the repetitious use of the adjudication process to require an adjudicator to "execute the same statutory task in respect of the same claim on successive occasions" (at 192 [2]). However, Allsop P did not consider it necessary to apply principles of estoppel (at 194 [16]). The provisions of the NSW Act provided a sufficient barrier to re-agitation of the claim in question (at 194 [13]–[14]). In particular, s 13(5), which limits a claimant to one payment claim in respect of each reference date, was sufficient of itself to bar the claimant from bringing more than one claim with respect to the same works (at 198 [3]). His Honour could see "no warrant" in the statute which permitted a party in the appellant's position to "create fresh reference dates by lodging the same claim for the same completed works in successive payment claims" (at 194 [13]). Allsop P agreed that s 22(4) (the equivalent of s 24(4) of the SOP Act) similarly reflected the NSW Act's general intention to prevent repetitious re-agitation of the same issues (at 194 [16]).

78. *Dualcorp* has been cited across a number of Australian jurisdictions. A careful examination of these authorities assists in clarifying the scope of the relevant preclusion identified by the majority in *Dualcorp*.

79. In *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd t/as Novatec Construction Systems* [2009] NSWSC 416, as in *Dualcorp*, a claimant dissatisfied with an adjudication determination sought to re-agitate a claim which had already been adjudicated upon. Justice Rein held that the decision of the majority in *Dualcorp* was based on estoppel, and followed it, also adopting the approach of Allsop P as "a further ground" (at [42]).

80. *Urban Traders v Paul Michael* [2009] NSWSC 1072 concerned an attempt to refer to adjudication a dispute relating to a payment claim which to some extent repeated claims that had been the subject of an earlier adjudication. Justice McDougall reasoned (at [87]) that because there is a "sufficiently" final determination of the interim statutory right to receive a progress payment, there is "sufficient finality to attract the principle of issue estoppel".

81. *Watpac Constructions v Austin Corp* [2010] NSWSC 168 broadened the reach of issue estoppel under the NSW Act to include the extended principle of issue estoppel, "Anshun estoppel" (at [109] per McDougall J). On this view, issue estoppel is available where an action if successful would result in a judgment that conflicts with an earlier judgment (at [97] per McDougall J): see also *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159 (at [32] per Applegarth J). At [104] McDougall J observed:

> To conclude otherwise would permit a party to retain the opportunity to resubmit claims, until finally it got an advantageous outcome, by holding back part of its case each time. Except in special circumstances, a party should put the whole of its case, in support of a particular payment claim, before an adjudicator who is charged with the statutory responsibility of deciding that parties' entitlement to the amount claimed.

82. While the scope of issue estoppel under the Act may have been "extended", the issues to which preclusion could attach did not change. Justice McDougall reasoned that "in any determination, the *issue* determined by the adjudicator is the entitlement to the progress payment that is the subject of the payment claim and the adjudication application" (at [116]; emphasis added).

83. Only recently have courts – the Supreme Courts of Tasmania and Western Australia – broadened the range of "issues" to which this "issue estoppel" may apply. In *Modscape Pty Ltd v Francis* [2017] TASSC 55; 29 Tas R 288, Blow CJ held (at 293 [4]–[5]) that issue estoppel applies to findings of fact in adjudications. His Honour did not extrapolate upon this proposition, other than to limit it by the requirements derived from *Blair v Curran,* namely that the finding must be "fundamental to the decision arrived at" or "legally indispensable" to the ultimate conclusion rather than "subsidiary or collateral": see *Blair v Curran* (at 532 per Dixon J).

84. This view found the support of Archer J in *Salini-Impregilo S.P.A. v Francis* [2020] WASC 72 (at [374]–[389]). Her Honour deployed the term "adjudication estoppel" to refer to this species of issue estoppel, reasoning (at [387]):

> In my view, a form of issue estoppel applies under the Act to prevent, at least, the re-agitation of an issue that was fundamental to the assessment of the liability to pay and the quantum of the amount found to be payable under s 32(2)(b). The Adjudicator did not err in finding that the negative variation defence could not be re-agitated.

85. Courts have also exercised caution when applying (or at least not extending) *Dualcorp.* In *Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd* [2014] QSC 223 (at [54]–[55]), Philip McMurdo J suggested that the majority in *Dualcorp* had attributed the label of "issue estoppel" to a situation where their Honours "had in mind something less". His Honour emphasised that the common law doctrine precludes the reagitation of the same issue *in any forum,* while the species of issue estoppel identified in *Dualcorp* precludes reagitation of the same issue in some forums, but not in others. In his Honour's view, the source of this limited form of estoppel must be found in the Act, or not at all.

86. In *Civil & Allied Technical Construction Pty Ltd v Resolution Institute* [2019] SASC 193, Kourakis CJ explained the problem with the use of the term "issue estoppel" in this context. The Chief Justice reasoned that (at [63]):

> The problem of multiple determinations of the same issue by an administrative tribunal is usually addressed by a provision allowing the tribunal to dismiss frivolous or vexatious applications. That power is absent in the Security of Payment Act. There is some difficulty in adopting the principles of issue estoppel and res judicata, which are applied in the exercise of judicial power, to the administrative decisions made under the Security of Payment Act …

87. His Honour held that that difficulty arises in part from s 32 of the South Australian legislation, which is in the same terms as s 38 of the SOP Act (Effect of part on civil proceedings). The Chief Justice continued (at [64]–[65]):

> 64. It follows that the issue estoppel or abuse of process, which, on the reasoning of Macfarlan JA, operates on the adjudicative processes of Part 3 of the Security of Payment Act does not bind the parties in any subsequent judicial determinations of their contractual disputes.
>
> 65. An alternative solution to the double adjudication problem may be to treat the judgment entered in a court pursuant to s 25 of the Security of Payment Act on a second or subsequent adjudication as an abuse of process of that court.

88. A considered survey of the *Dualcorp* line of authorities reveals that "issue estoppel" in the context of security of payment legislation deviates from the principles of issue estoppel as commonly understood. Even where the doctrine has been found to operate, it is characterised as inchoate, narrow in scope, and based upon broader principles of preclusion.

"Issue Estoppel" and the Proper Construction of the SOP Act

89. It is pertinent now to turn to the SOP Act and analyse its preclusion regime. The Act manifests an intention to preclude abuse of the statutory scheme by repetitive claims for the same work or related goods or services including an abuse of the process of obtaining a judgment. This is reflected in the following provisions:

    (a) section 10(1), which provides that "[o]n and from each reference date under a construction contract, a person is entitled to *a* payment" (emphasis added). On a proper reading of this section, there can be only one payment claim with respect to each reference date, precluding a claimant from pursuing a payment claim for a reference date which has already been adjudicated upon: see also *Cadence* (at [39] per Hammerschlag J);

    (b) section 15(5), which, to much the same effect as s 10(1), but in explicit terms, provides that a claimant must not give more than one payment claim for each reference date under a construction contract: see also *Dualcorp* (at 193 [8] per Allsop P);

    (c) section 24(4), which mandates that if an adjudicator has valued construction work or related goods or services, that adjudicator and any other adjudicator is bound by that valuation in a later adjudication; and

    (d) sections 26 and 27, which provide that an adjudication certificate may be entered as a judgment for debt and enforced by a competent court. While a judgment for debt under the Act does not have the status of a judgment of a court (see *Birdon Pty Ltd v Houben Marine Pty Ltd* [2011] FCAFC 126; 197 FCR 25 (at [30]–[33] per Keane CJ); *Denham Constructions Project Company 810 Pty Ltd v Smithies* [2014] ACTSC 169; 9 ACTLR 146 (at 157 [39] per Mossop M)), a court cannot enforce a judgment for the same debt more than once. It follows that there cannot be two adjudication certificates with respect to the same work.

90. In the light of the statutory scheme, the first point to be made is as to the danger of decontextualising the "principles of issue estoppel" beyond their principled application. As one can see from the development of the principle in relation to *final and conclusive* judgments on the merits, the common law conception of "issue estoppel" is an inapt label to apply to the preclusion identified in *Dualcorp*. The majority recognised that "abuse of process" has a broad ambit suitable to capture precisely the mischief prohibited by the Act. I am of the view that the species of preclusion of present relevance is best described as an abuse of process arising in two ways.

91. *First,* I agree with Kourakis CJ that the best frame of reference to speak of the extent of preclusion that arises by reason of the double adjudication problem is to treat the judgment on a second or subsequent adjudication as an abuse of process of the court faced with an attempt to enter judgment with respect to a second or subsequent adjudication: *Civil & Allied Technical Construction Pty Ltd v Resolution Institute* (at [65]).

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. In *Urban Traders,* McDougall J reasoned (at [41]) that:

> 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 so even if that earlier payment claim has been the subject of an adjudicator's determination. **The relevant concept is not abuse of 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.
>
> (Emphasis added.)

93. The view of the primary judge (in particular at 257–258 [100]–[105]) reflects this principled approach, as do a number of the decisions surveyed above.

94. By way of example, in *Cadence*, the first defendant sought to re-agitate the same claim as part of an "expanded" second claim (at [4] per Hammerschlag J). Justice Hammerschlag was not of the view that the form of the first adjudication gave rise to an issue estoppel, but concluded that the second claim could not be legitimately pursued under the NSW Act for two reasons. *First,* though the second claim was not exactly the same as the first, a "substantial and unseverable part of it" had already been adjudicated, exhausting the first defendant's statutory entitlement to adjudication "in respect of that part" (at [5(a)]). *Secondly,* the repetitious use of the Act was an abuse of process (at [5(a)]). His Honour held that the first defendant had exhausted its statutory entitlement to claim the costs the subject of the first claim within the confines of the NSW Act, reasoning (at [56]) that:

> … given that the Act gives no right to re-make a payment claim which has earlier been made and adjudicated upon, the second claim, to the extent that it seeks to do so is not a payment claim within the meaning of the Act. It may be that where there is duplication of a part but not the whole of an earlier claim, whether there is sufficient duplication to fairly take a second claim outside the definition of payment claim is a matter of fact and degree.

95. Remarks to similar effect were made by Rein J in *Perform* (at [42], [46]), and Stevenson J in *Ku-Ring-Gai Council v Ichor Constructions Pty Ltd* [2014] NSWSC 1534 (at [32]–[33]).

96. Finally, eschewing the use of the term issue estoppel is also consistent with recognising that the starting point is the Act itself: *Dualcorp* (at 200–201 [42] per Macfarlan JA, Handley JA agreeing at 207 [76]); *Kuligowski* (at 370 [9] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). In a statutory context, common law principles operate so as to complement acts of Parliament, not to overwhelm them. The present source of any form of preclusion must be the SOP Act itself: *Caltex Refineries* (at [54] per Philip McMurdo J).

E The Appeal

The Ambit of the Appeal

97. The notice of appeal set out nine grounds. Grounds seven and nine fell away over the course of submissions, so they can be put to on side. The remaining seven grounds make piecemeal two broad contentions. The *first* is that Beno was estopped from repeating the Beno contentions in the second adjudication (**First Contention**). Harlech submits that the primary judge erred in determining not to apply "the doctrine

of issue estoppel", and correspondingly ought to have found that it applied in respect of the findings by the adjudicator in the prior determination that:

(a) there was a contract for the provision of related goods and services within the meaning of s 8 of the SOP Act;

(b) the contract was not a contract of employment; and

(c) the agreed rate of payment was 15 per cent of gross profit.

98. The *second* is that the admitted error in the adjudicator's interpretation of s 24(4) in the first adjudication was not material, and so not jurisdictional, by reason of the application of issue estoppel (**Second Contention**).

99. Neither the First Contention nor the Second Contention can be accepted.

The First Contention

100. The approach outlined above in Part D suffices to dispose of the First Contention. Beno was not precluded from restating the Beno contentions in the second adjudication. Simply put, the two adjudications in question concerned different work completed years apart. There was no precluded re-agitation or attempt to value the same work anew.

101. This appeal bears a similarity to *Spankie v James Trowse Constructions Pty Limited* [2010] QCA 355, where the Court distinguished *Dualcorp* because there had been no valid adjudication determination as to the particular payment claim which the respondent sought to agitate (at [25] per Fraser JA, Holmes JA and Chesterman JA agreeing at [1] and [31] respectively): see, similarly, *Melaleuca View Pty Ltd v Sutton Constructions* [2019] QSC 226 (at [28] per Brown J).

102. For completeness, however, I will say something more of three specific arguments raised in written and oral submissions in pursuit of the First Contention, the *first* and *second* going to the notion of finality and the *third* going to the primary judge's treatment of the authorities.

103. *First,* Harlech submitted that an adjudicator's decision is "final" because it determines the statutory right to a progress payment under s 10. As would no doubt be already apparent, this submission, at this level of generality, is unsound because s 38(1)(b) provides that nothing in Part 4 of the Act (titled "Procedure for recovering progress payment" and encompassing ss 15–39) affects any right that a party to a construction contract "may have under Part 3 (Right to progress payments) in relation to the contract". Furthermore, s 38(2) states that "[n]othing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise". Read in context, the phrase "civil proceedings arising under a construction contract" is broad enough to encompass civil proceedings concerning a claimant's right to a progress payment.

104. *Secondly,* Harlech also contended that adjudication decisions are "final" because they are "immediately enforceable" by filing a judgment under s 27. This submission is also unsustainable. To read s 27 as conferring adjudication certificates with the colour of judicial power once filed and enforced as a judgment is, once again, to overlook the force of s 38: see *Birdon* (at 39 [53] per Keane CJ). As reasoned by Philip McMurdo J in *Caltex Refineries* (at [54]), such a preclusion is:

> at its highest … one in which the issue could be reagitated in some forums but not others … The source of this more limited estoppel must be found, if at all, within the legislation.

105. In making this submission, counsel for Harlech sought to analogise between the curial appellate process and the adjudication process under the SOP Act. No such analogy can be drawn without distortion. The obvious retort to Harlech's contention is that a first instance court and an appellate court perform the same judicial function. Both determine the final rights and liabilities of parties *inter se*. The only difference is that an appellate court is tasked with determining whether the primary judge fell into error when determining those final rights and liabilities. Once a court determines an issue, it cannot be re-agitated in any other forum, excepting an appeal. By contrast, each adjudication decision is, as explained above, an independent exercise.

106. Finally on this point, the parties said little on finality with respect to s 24(4), but given the centrality of this provision to the argument that issue estoppel is available under the SOP Act and its equivalents, it is important to address it: see *Dualcorp* (at 194 [16] per Allsop P and at 205 [67] per Macfarlan JA, Handley JA agreeing at 207 [76]). Section 24(4) provides that an adjudication decision is only protected from impeachment within the metes and bounds of the statutory scheme of administrative decision-making. Even then, this protection is narrow, applying only to the valuation of construction work or related goods or services for a particular reference date: s 24(4) SOP Act. Once an adjudicator fixes upon a particular amount for a particular payment claim with respect to a particular reference date, that adjudicator has exhausted the claimant's statutory right to a payment claim for a reference date.

107. *Thirdly,* Harlech submitted that the primary judge erred in failing to refer to the decision in *John Holland v Schneider,* and failing to follow *Modscape* and *Salini-Impreglio.* It is trite to say, but apparently requires restatement, that the primary judge was not required to follow or consider at length any particular decision. In *John Holland v Schneider,* Applegarth J (at [34]) recognised the importance of engaging with authorities from other jurisdictions where Australian legislatures, largely contemporaneously, adopt similar or identical language in pursuit of a common statutory purpose. That pursuit, however, is not to overpower the Court's duty to give effect to the purpose of the legislation at hand.

108. In view of the terms of the SOP Act, I am unable to agree with the proposition parties are precluded from re-agitating facts "fundamental to the decision arrived at" or "legally indispensable" to the ultimate conclusion, as contended for by Harlech, and as held in *Modscape* and *Salini-Impreglio*: *Modscape* (at 293 [4]–[5] per Blow CJ); *Salini-Impreglio* (at [387] per Archer J). It is useful to address the key provisions which lead to this conclusion in more detail.

109. The *first* is s 24(4), which provides that an adjudicator's valuation of work may only be disturbed by a subsequent adjudicator in limited circumstances. The ambit of the term "valuation" must be understood in view of the underlying purpose of the SOP Act. I am cognisant of the view taken by all three judges in *Dualcorp* that s 24(4) should not be regarded as an exhaustive statement of the matters determined by an earlier adjudication which are binding on a subsequent adjudicator. I agree that there will be matters antecedent and incidental to a valuation determination which Parliament cannot have intended be open to abuse by dissatisfied or creative claimants. But it is important also to bear in mind that the SOP Act's purpose is to facilitate security of payment: to create a claimant's right to interim payments, and to protect those

payment claims, once adjudicated upon, from interference (except pursuant to s 24(4)(b) or s 38). It is not to protect the broader findings of adjudicators. The provisions in the SOP Act favour this conclusion.

110. *Secondly*, ss 26 and 27 of the SOP Act provide that an adjudication certificate may be enforced by a court as a judgment for debt. An adjudication certificate states nothing more than the names of the parties, the adjudicated amount, the day when payment was required, and, if any part of an adjudicated amount has been paid, the amount of the part payment: s 26(3) SOP Act.

111. *Thirdly*, s 15(6) provides that a claimant may include in a payment claim an amount that has been the subject of a previous claim, necessarily by reference to another reference date. Here the SOP Act expressly permits the submission of cumulative payment claims by reference to later reference dates, another indication 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.

112. *Fourthly*, s 24(2) sets out a list of mandatory considerations for adjudicators, including but not limited to the Act, the adjudication application and the contract, payment claim and payment schedule in question. The decision in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394; 61 NSWLR 421 (at 441 [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) 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.

The Second Contention

113. The Second Contention can be dealt with briefly.

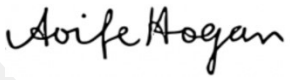
114. At the hearing, the parties were invited to make further submissions, the subject of which was, in the end, confused, confusing and beyond the scope of the notice of appeal.

115. I gleaned from the oral and written exchanges between the parties that the real contention was the interplay between the adjudicator's incorrect interpretation of s 24(4) (which both parties admit), issue estoppel and jurisdictional error.

116. Harlech submitted that even if the adjudicator fell into error, so long as issue estoppel was applicable, certiorari would be unavailable. This submission founders upon the rejection of Harlech's principal submission as to the application of the "principles of issue estoppel".

117. The primary judge did not err in granting relief to Beno. The appeal must be dismissed with costs.

I certify that the preceding seventy-eight [78] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Lee.

Associate: 

Date: