SUPREME COURT OF QUEENSLAND

CITATION:	*HM Hire Pty Ltd v National Plan and Equipment Pty Ltd and Anor* [2013] QSC 274
PARTIES:	**HM HIRE PTY LTD ACN 131 017 813** (applicant) **v** **NATIONAL PLANT AND EQUIPMENT PTY LTD ACN 078 654 323** (first respondent) and **PHILIP DAVENPORT** (second respondent)
FILE NO:	2398 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	8 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	24 September 2013
JUDGE:	Applegarth J
ORDERS:	**1. Declare that the applicant is estopped from continuing with the proceeding to the extent it seeks to challenge the enforceability of the adjudication decision made by the second respondent on or about 12 May 2011 ("the adjudication decision"), or seeks an order:** **(a) setting aside the adjudication decision;** **(b) setting aside the judgment obtained by the first respondent against the applicant in Proceeding D1775/11 on or about 26 May 2011 ("the judgment");** **(c) declaring that the adjudication decision or the judgment is void; or** **(d) restraining the first respondent from enforcing the judgment and the adjudication decision.** **2. This proceeding be stayed to the extent that it seeks to**

challenge the enforceability of the adjudication decision or seeks the aforesaid relief.

3. **The following paragraphs of the statement of claim filed 4 May 2012 be struck out pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld), namely paragraphs 27(b), 28(b), 29(a), 30, 31, 32, 33(a), 33(b) and 33(c)(ii), (iii) and (iv).**

4. **The funds held in court in this proceeding be paid out to the first respondent so as to satisfy the judgment obtained by the first respondent against the applicant in Proceeding D1775/11.**

I will hear the parties as to costs.

CATCHWORDS: ESTOPPEL – ESTOPPEL BY JUDGMENT – ANSHUN ESTOPPEL – GENERALLY – where applicant hired equipment from first respondent and dispute subsequently arose – where first respondent lodged a payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld) – where second respondent made adjudication decision in favour of the first respondent – where applicant commenced proceeding to have adjudication decision set aside on basis it was made without jurisdiction – where applicant was unsuccessful at first instance and on appeal – where applicant now seeks to have adjudication decision set aside on various other grounds – whether the applicant should be prevented from challenging the adjudication decision because of an *Anshun* estoppel – whether the proceeding is an abuse of process

Building and Construction Industry Payments Act 2004 (Qld), s 31, s 100
Competition and Consumer Act 2010 (Cth) Schedule 2

Agripower Australia Pty Ltd v J & D Rigging Pty Ltd [2013] QSC 164, cited
Aldi Stores Limited v WSP Group plc [2007] EWCA Civ 1260; (2008) 1 WLR 748, discussed
AON Risk Services Australia Limited v Australian National University (2009) 239 CLR 175, cited
Batistatos v Roads and Traffic Authority New South Wales (2006) 226 CLR 256, cited
Boles v Esanda Finance Corporation Ltd (1989) 18 NSWLR 666, cited
C G Maloney Pty Ltd v Noon [2011] NSWCA 397, cited
Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd [2012] QSC 388, cited
Champerslife Pty Ltd v Manojlovski (2010) NSWLR 245, followed
Clout v Klein [2001] QSC 401, followed

Equuscorp Pty Ltd v Acehand Pty Ltd [2010] VSC 89, cited
Gibbs v Kinna [1999] 2 VR 19, cited
Haines v Australian Broadcasting Corporation (1995) 43 NSWLR 404, cited
Hansen Yuncken Pty Ltd v Ericson [2011] QSC 327, cited
Henderson v Henderson (1843) 67 ER 313; (1843) 3 Hare 100, cited
HM Hire Pty Ltd v National Plant and Equipment Pty Ltd [2012] QSC 4, related
HM Hire Pty Ltd v National Plant and Equipment Pty Ltd [2013] QCA 6, related
Jeffery & Katauskas v SST Consulting (2009) 239 CLR 75, cited
John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd [2012] 2 Qd R 435, cited
Johnson v Gore Wood & Co [2002] 2 AC 1; [2001] All ER 481, followed
Kirk v Industrial Court of New South Wales (2009) 239 CLR 531, cited
Martinek Holdings Pty Ltd v Reed Constructions Pty Ltd [2009] QCA 329, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525, cited
O'Shane v Harbour Radio Pty Ltd [2013] NSWCA 315, cited
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589, considered
R J Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390, cited
Reading Australia Pty Ltd v Australian Mutual Providence Society (1999) 217 ALR 495, cited
State Asphalt Services Pty Ltd v Leighton Contractors Pty Ltd [2013] NSWSC, cited
State Bank of New South Wales Pty Ltd v Stenhouse [1997] Aust Torts Rep. 81-423, cited
SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189, cited

COUNSEL: A Musgrave for the applicant
M D Ambrose for the first respondent

SOLICITORS: Morrow Petersen for the applicant
Sparke Helmore for the first respondent

[1] The applicant ("HMH") needed to hire four dump trucks and one loader to allow it to perform a contract at a mine site. It hired that equipment from the first respondent ("NPE"). A dispute arose over payment and NPE lodged a payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act"). On 11 May 2011, the second respondent made an adjudication decision in favour of NPE for $516,586.95.

[2] HMH took almost five months to commence proceedings to have the adjudication decision declared void and set aside. It claimed the adjudication decision was made

without jurisdiction. It raised only one point. This was whether or not the payment was for "construction work" as defined in the Act. It failed in its challenge to the adjudication decision, with this Court concluding that "the adjudicator acted within his jurisdiction in making the decision challenged."[1]

[3] HMH filed an appeal (on 28 February 2012) and that appeal was dismissed (on 5 February 2013), with the Court of Appeal concluding that the primary judge "was right to hold that the adjudication was not outside the jurisdiction conferred by the Act."[2]

[4] Having lost on the only ground upon which it challenged the adjudication decision, HMH commenced these proceedings on 14 March 2012 in which it seeks to have the adjudication decision set aside on various other grounds. There is no suggestion that these grounds could not have been raised by it when it originally challenged the adjudication decision. NPE submits that they should have been and that there is an "*Anshun* estoppel" which prevents HMH from again seeking to challenge the validity of the adjudication decision. Alternatively, it submits that the prosecution of this proceeding is an abuse of process, particularly given the history of the matter and the fact the Act creates a fast-track resolution process designed to provide a party with the benefit of a progress payment that has been adjudicated, pending the final resolution of rights between the parties in other proceedings.

[5] Alternatively, NPE submits that if the court is minded to allow HMH to continue with the proceeding, the money paid into court should be paid out to it to enable it to satisfy the District Court judgment that it obtained on 26 May 2011, and which remains unsatisfied despite NPE's attempts to enforce it. NPE had to initiate enforcement proceedings, and just before this current proceeding was commenced HMH's director failed to appear on the return date of an adjourned enforcement hearing summons. The day after this proceeding was commenced, HMH failed to comply with orders with respect to the provision of further information about its financial position.

[6] HMH submits that:

(a) there is no *Anshun* estoppel, even if the issue that is said to have been determined in the earlier proceeding was the absence of jurisdictional error, because its new claims include a claim in the court's equitable jurisdiction that the adjudication decision was obtained by fraudulent representations, a claim pursuant to ss 18 and 21 of the *Australian Consumer Law* [3] and a new argument about jurisdictional error based upon a recent decision;[4]

(b) this proceeding is not an abuse of process and it would be wrong to hold that because the new claims could have been raised in the earlier proceeding they should have been so as to render the raising of them now an abuse of process;

(c) this proceeding is the type of proceeding which is permitted by s 100 of the Act; and

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1 *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd* [2012] QSC 4 at [15].
2 *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd* [2013] QCA 6 at [30].
3 *Competition and Consumer Act* 2010 (Cth), Schedule 2.
4 *Agripower Australia Pty Ltd v J & D Rigging Pty Ltd* [2013] QSC 164 ("*Agripower*").

(d) the money paid into court should not be paid out since, while it remains in court, both parties are protected, and, in any event, there is no jurisdiction to order a payment out of court in advance of the determination of the proceeding to set aside the judgment.

Issues

[7] The substantial issues are as follows:

1. what issue was determined in the first proceeding, and are the new claims closely associated with the subject matter of that proceeding?

2. was it unreasonable or unjustifiable to not raise those claims together with the initial claim in 2011, even if only to permit the court to decide whether or not the first claim should be heard and determined as a separate and prior issue?

3. does bringing or continuing this proceeding give rise to an *Anshun* estoppel or constitute an abuse of process?

4. if so, should the proceeding be permanently stayed?

5. should the money paid into court be paid out?

***Anshun* estoppel and abuse of process**

[8] A party may be estopped from raising a claim which it could have litigated in a previous proceeding if it was unreasonable for the claim not to have been so litigated.[5] An *Anshun* estoppel is founded on unreasonable conduct, not abuse of process. The concepts are, however, not dissimilar.[6]

[9] *Anshun* estoppel may be described as an extended *res judicata* doctrine. The High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [7] quoted the following passage from *Henderson v Henderson*:

> "where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. **The plea of *res judicata* applies**, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but **to every point which properly belonged to the subject of litigation, and which**

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5 *Clout v Klein* [2001] QSC 401 at [42].

6 *Champerslife Pty Ltd v Manojlovski* (2010) NSWLR 245 at 262 [89] ("*Champerslife")*.

7 (1981) 147 CLR 589 at 598 ("*Anshun*").

> **the parties, exercising reasonable diligence, might have brought forward at the time**."[8] (emphasis added)

In addressing whether or not a defence should have been raised in an earlier action, Gibbs CJ, Mason J and Aickin J in *Anshun* posed the test of whether the defence was "so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it."[9] It has been questioned whether it is helpful to speak of relevance in the context of a failure to advance a claim (as opposed to a defence) in an earlier proceeding.[10] But as Allsop P has observed, there are at least two related assessments to be made: "Was the matter **so relevant** [to the subject matter of the first proceeding] that it can be said to have been **unreasonable** not to rely upon it in the first proceeding?"[11]

[10] It is a mistake both in the context of *Anshun* estoppel and in the context of abuse of process to suppose that because a matter **could** have been raised in the earlier proceeding that it **should** have been.[12] In *Anshun*, the reasons of the plurality noted that there are a variety of circumstances why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings, and gave as examples expense, importance of the particular issue, and motives extraneous to the actual litigation. The following passage from the speech of Lord Bingham in *Johnson v Gore Wood & Co* is highly instructive:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. **The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole**. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. **It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.** That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the

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8 (1843) 67 ER 313 at 319; (1843) 3 Hare 100 at 115.

9 *Anshun* at 602.

10 *Boles v Esanda Finance Corporation Ltd* (1989) 18 NSWLR 666 at 674; *Gibbs v Kinna* [1999] 2 VR 19 at 27 [24]; *Clout v Klein* (supra) at [42].

11 *Champerslife* (supra) at 246.

12 *Anshun* (supra) at 601-602; *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

> case, focusing attention on **the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before**. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."[13] (emphasis added)

[11] An important factor in determining whether there is an *Anshun* estoppel is whether the second proceeding may lead to conflicting judgments. By "conflicting judgments" the plurality in *Anshun* referred to judgments which are "contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction."[14] In this regard, NPE contends that the first proceeding resulted in a judgment which rejected HMH's claim that the adjudication decision was invalid. A second judgment which declared the adjudication decision to be invalid and set it aside would amount to an inconsistent judgment.

[12] The *Anshun* doctrine is not based on proof of abuse of process. It creates a test of unreasonableness, and requires proof that it was unreasonable not to have brought forward the claim in the earlier proceeding. The question of unreasonableness involves a broad merits-based judgment which takes account of the "public and private interest involved and also takes account of all of the facts of the case".[15] The earlier quoted observations of Lord Bingham refer to the public interest which underlie various forms of estoppel, namely that there should be "finality in litigation and that a party should not be twice vexed in the same matter." This public interest was said to be reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole. More recently, the New South Wales Court of Appeal has confirmed that in deciding whether it can be said to have been unreasonable not to rely upon a matter in the first proceeding, there is a "value judgment to be made referable to the proper conduct of modern litigation".[16]

[13] One aspect of the proper conduct of modern litigation is the just and expeditious resolution of disputes at a minimum of expense. The proper conduct of modern litigation is characterised by case management and is informed by the principles discussed in *AON Risk Services Australia Limited v Australian National*

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13 *Johnson v Gore Wood & Co* (supra) at 31.

14 *Anshun* (supra) at 603-604.

15 *Champerslife* (supra) at 246 [3] citing *Johnson v Gore Wood & Co* (supra).

16 *C G Maloney Pty Ltd v Noon* [2011] NSWCA 397 at [62], [159] ("*Noon*").

University.[17] That decision was concerned with amendment of pleadings, and in that context emphasised the importance of an explanation being given where there is a delay in applying for amendment.[18] In the present context, an assessment of unreasonableness may be informed by evidence by which a party explains why it did not bring forward its new claims in the original proceeding.

[14] Efficiency and economy in the conduct of litigation may not be advanced by all possible claims being litigated in one final hearing if such a course is apt to prolong the proceedings, complicate them and add to expense. Efficiency in the use of private and public resources may make it not unreasonable to litigate a simple claim first. But an apparently simple claim may not be so simple and its resolution may not assist greatly in the resolution of the parties' rights. The litigation of one claim at a time raises the spectre of multiple proceedings, multiple appeals and delay.

[15] The idea of launching only one of many claims may seem to a litigant to be a good idea at the time. But it may not be a good idea at all. If it is a good idea, there can be no real harm in sharing the idea with the other party against which successive claims may be brought, and with the court in which such proceedings will be brought. If a respondent makes no complaint about an apparently simple claim being litigated first, and the court has no objection to such a course, then it is unlikely to be unreasonable for the claimant to do what it proposed. If, however, the proposed course of litigating several claims at different stages is objected to, then the reasonableness of such a proposal can be determined.

[16] Case management by this court is not confined to complex commercial litigation and matters that are placed on supervised lists. It is embedded in the rules.[19] In *Aldi Stores Limited v WSP Group plc*, the English Court of Appeal was concerned with an abuse of process argument in the context of complex commercial litigation, and the problem that arises when there are existing proceedings and a party may wish to pursue other proceedings.[20] The court stated that in such an event the proper course is to raise the issue with the court, at which point the court would, at the very least, be able to "express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation."[21] The court observed that it is "plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this be done" and that there can be no excuse for failure to do so in the future.[22] Similar considerations apply in the present case, even if it is not characterised as "complex commercial litigation" of the kind encountered in *Aldi Stores*. It involves commercial litigation in the context of legislation which creates a system for an adjudicator to determine whether a claimant has established a statutory right to a progress payment and to speedily value that right, and to vindicate that right in the form of a court judgment.

[17] A party against whom an adjudication is made is entitled to challenge the validity and enforceability of any such decision. But where the legislation creates a fast-track procedure for adjudications so as to facilitate the cash-flow of contractors, one would not ordinarily countenance a leisurely approach to litigation which challenges

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17 (2009) 239 CLR 175 ("*AON*").
18 Ibid at 214-215 [102].
19 *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), Chapter 10, Part 1; Chapter 13, Part 5.
20 [2007] EWCA Civ 1260; (2008) 1 WLR 748 ("*Aldi Stores*").
21 Ibid at [30].
22 Ibid at [31].

such adjudication decisions. If a party against whom an adjudication decision is made considers that there are various legal bases upon which the enforcement of the adjudication decision can be challenged, then one would expect those grounds would be previewed to the party which has the benefit of the adjudication decision and raised with the court in which such claims might be brought. Such a requirement would not necessitate complex pleadings. The nature of the claims to be raised could be described briefly in an affidavit or letter.

[18] Such a course would at least expose the fact that the applicant has more than one iron in the fire, and proposes to use only one of them at that time. If a party wishes to keep a number of irons in the fire, and chooses not to disclose their existence to the other party and to the court, then it opens itself to a finding of unreasonable conduct in respect of the first proceeding it brings and to a finding that its later litigation of the other claims amounts to an abuse of process.

Anshun estoppel and unreasonableness

[19] In assessing unreasonableness in the context of *Anshun* estoppel, an issue may arise as to whether the matter sought to be litigated in the later proceeding was relevant to the subject matter of the first proceeding. This is cast sometimes in terms of whether the new claim "properly belonged to the subject of litigation" in the earlier proceeding.[23] In addressing that matter, the relevant evidence is not restricted to the pleadings in both proceedings and the reasons for judgment in the earlier matter.[24]

[20] In some circumstances, a matter may be so relevant to the subject matter of the first proceeding that it can be said to have been unreasonable not to rely upon it in the first proceeding. Even where such a close association is not established, and even where there will not be inconsistent judgments in the sense earlier discussed, a consideration of all of the relevant facts may result in a conclusion that it was unreasonable for the party not to have litigated the matter in the first proceeding.[25] The relevant facts might include "the character of the previous proceeding, the scope of any pleadings, the length and complexity of any trial, any real or reasonably perceived difficulties in raising the relevant claim earlier, and any other explanation for the failure to raise the claim previously".[26] A merits-based judgment about the proper conduct of litigation may result in the conclusion that it was not unreasonable to defer litigating a claim. *Gibbs v Kinna* exemplifies such a case.[27] It was not unreasonable for the claimant to pursue a statutory claim for wrongful termination of employment before a judicial registrar. The bringing of additional claims for damages for breach of contract would have complicated and, in all likelihood, delayed the relatively straightforward and speedy adjudication of the initial claim in a jurisdiction that required it to be determined without undue formality and with regard to the need to avoid unnecessary cost to the parties. Some of the later claims were outside the jurisdiction of the judicial registrar.

[21] In determining whether there is an *Anshun* estoppel in a case such as this, the issue is whether it was **unreasonable** to not bring forward the claims which are now sought to be litigated, if only to permit the court to decide whether one claim should

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23 *Henderson v Henderson* (supra); *Champerslife* (supra) at 264 [107].
24 *Noon* at [68], [156].
25 *Gibbs v Kinna* (supra) at 28 [28].
26 Ibid.
27 Ibid.

be heard and determined in advance of the others. The issue is not whether it would have been **reasonable** to bring forward all of the claims. The party seeking to establish the *Anshun* estoppel must prove that it was unreasonable to not do so and instead to litigate in the first proceeding only one of a number of claims. Bringing forward and litigating all possible claims at one hearing "can be a recipe for complex and unwieldy litigation."[28] The successive litigation of claims at different hearings, with its potential for multiple appeals, also may be a recipe for complex and unwieldy litigation. The principle that was applied in *Anshun* "is designed to foster public and private interests by encouraging parties to advance all their related claims or defences at the one time, thereby diminishing unnecessary duplication of curial and other effort".[29] It advances the underlying public interest in finality in litigation and that a party should not be twice vexed in the same matter. A finding of *Anshun* estoppel terminates what would otherwise be a party's right to obtain a judicial determination upon the merits of a claim. A conclusion of unreasonableness should not be lightly reached. It should not be reached simply on the basis of a predisposition that the interests of justice in the efficient and fair conduct of litigation requires all claims to be litigated in the one proceeding so as to avoid multiplicity of proceedings, and that all claims should be finally determined at the same hearing. The conclusion that an *Anshun* estoppel exists depends upon proof of unreasonableness, taking account of all of the facts of a case.

Abuse of process

[22] The court's inherent power to prevent an abuse of process may be exercised to prevent re-litigation of issues, notwithstanding the principles of estoppel do not apply. The discretion to stay proceedings as an abuse of process should be exercised fearlessly where it is required, but is to be exercised with great caution.[30] The onus of satisfying the court that there is an abuse of process is a heavy one.[31]

[23] The categories of abuse of process are not closed, but that does not mean that abuse of process is "a term at large and without meaning."[32] One category is when the use of the court's procedures is unjustifiably oppressive to one of the parties. Attention is directed to the burdensome effect upon the defendant of permitting the plaintiff's case to proceed and whether it would inflict unjustified harassment on the defendant.[33] An abuse of process may occur if a party seeks to litigate in a later proceeding an issue that was determined in the earlier proceeding.[34] As French CJ noted in *Aon*: "Abuse of process principles may be invoked to prevent attempts to litigate that which should have been litigated in earlier proceedings as well as attempts to re-litigate that which has already been determined."[35] The passage earlier quoted from the speech of Lord Bingham in *Johnson v Gore Wood & Co* emphasises that it would be wrong to hold that because a matter could have been raised in earlier proceedings that it should have been, so as to render the raising of it in later proceedings necessarily abusive. The existence of some improper purpose

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28 *Aldi Stores* (supra) at [39].
29 *Gibbs v Kinna* (supra) at 29 [33].
30 *Clout v Klein* (supra) at [54].
31 *O'Shane v Harbour Radio Pty Ltd* [2013] NSWCA 315 at [111].
32 *Jeffery & Katauskas v SST Consulting* (2009) 239 CLR 75 at 93-94 [28].
33 *Batistatos v Roads and Traffic Authority New South Wales* (2006) 226 CLR 256 at 266-267 [14]-[15] 281 [69].
34 *Haines v Australian Broadcasting Corporation* (1995) 43 NSWLR 404 at 414.
35 Supra at 193 [33].

in advancing the later proceeding or an intention to oppress may be decisive. However, the absence of an improper purpose does not preclude a finding that the later proceeding involves an unjust harassment of a party and constitutes an abuse of process.

[24] In *State Bank of New South Wales Pty Ltd v Stenhouse* Giles J stated the following considerations:

> "The guiding considerations are oppression and unfairness to the other party to the litigation and concern for the integrity of the system of administration of justice, and amongst the matters to which regard may be had are –
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> (a) the importance of the issue in and to the earlier proceedings, including whether it is an evidentiary issue or ultimate issue;
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> (b) the opportunity available and taken to fully litigate the issue;
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> (c) the terms and finality of the finding as to the issue;
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> (d) the identity between the relevant issues in the two proceedings;
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> (e) any plea of fresh evidence, including the nature and significance of the evidence and the reason why it was not part of the earlier proceedings; all part of -
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> (f) the extent of the oppression and unfairness to the other party if the issue was re-litigated and the impact of relitigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and
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> (g) an overall balancing of justice to the alleged abuser against the matters supported for abuse of process." [36]

[25] Some authorities have suggested that the abuse of process principles, being based on considerations of oppression and unfairness and concern for the administration of justice, may be broader than *Anshun* estoppel principles.[37] It is unnecessary to decide that point. Gibbs CJ, Mason J and Aickin J in *Anshun* stated that it was "not of great utility" to ask in the context of estoppel whether it would be an abuse of process to allow a new proceeding. Both *Anshun* estoppel and abuse of process require a value judgment to be made as to the proper conduct of litigation. The focus of *Anshun* estoppel is whether it was unreasonable to not litigate a claim in the earlier proceeding. The focus of abuse of process in a case such as the present is whether continuation of the new proceeding is oppressive and unfair to the other party, but issues of finality of litigation and public confidence in the administration of justice also arise. The crucial question is whether, in all the circumstances, a party "is misusing or abusing the process of the court by seeking to raise before it

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36 [1997] Aust Torts Rep. 81-423 at 64-089; cited with approval in *Clout v Klein* (supra) at [56] and in numerous other authorities.

37 *Equuscorp Pty Ltd v Acehand Pty Ltd* [2010] VSC 89 at [32].

the issue which could have been raised before."[38] The question is whether in all the circumstances a party's conduct is an abuse.

[26] A party's conduct of litigation is unlikely to be regarded as an abuse of process where there is no impropriety or culpable conduct on its part and the course that it steered in the earlier proceeding was "(a) commercially reasonable; (b) forensically legitimate; and (c) reasonably transparent".[39]

***Anshun* estoppel and abuse of process in the context of the Act**

[27] It is necessary to have regard to the issue that was litigated in the first proceeding and the extent to which the new claims are associated with the subject matter of that proceeding. An issue is whether it was unreasonable for HMH to not bring forward the claims which it now seeks to litigate at the same time as its initial claim. Another issue is whether NPE would be oppressed and unjustly harassed if the present proceeding was allowed to continue. These issues arise in respect of successive challenges to an adjudication decision under the Act. It is appropriate to consider the nature of an adjudication decision under the Act and permissible grounds upon which such an adjudication decision might be challenged.

[28] The purpose of the Act is to provide a statutory mechanism for the recovery of progress payments for the carrying out of "construction work." The scheme of the Act has been summarised in a number of leading decisions, and it is unnecessary to repeat what was said in those cases.[40] Jackson J recently stated:

> "The essential operative effect of BCIPA is that it confers a statutory right to a provisional progress payment upon a claimant who qualifies for that right, with provisions to speedily value and establish the right without curial proceedings and to vindicate the established right by enforcing it as a court judgment. Commercially, that outcome has an important cash-flow effect."[41]

[29] The purpose of the Act is that the process of adjudication established under it will provide a speedy and effective means of ensuring cash-flow to a party from the party with which it contracts. It reflects an appreciation by the legislature that an assured cash-flow is essential to the commercial survival of builders.[42]

[30] The regime under the Act is "essentially interim in nature"[43]. Section 100 provides that nothing in Part 3 of the Act (adjudication decisions) affects any right that a party to a construction contract may have under the contract or may have under Part 2 (right to progress payments) or apart from the Act in relation to anything done or omitted to be done under the contract. Section 100(2) provides that nothing done under or for Part 3 affects any civil proceedings arising under a construction contract, whether under Part 3 or otherwise, except as provided by subsection (3).

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38 *Johnson v Gore Wood & Co* (supra) at 31.

39 *Aldi Stores* (supra) at [34].

40 They include *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 546-550 at [52]-[66]; *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd* [2012] 2 Qd R 435 at 441– 442 [15] – [19].

41 *Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd* [2013] 2 Qd R 1 at 9 [41]; [2012] QSC 388 at [41].

42 *R J Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 at 400-401 [39] – [40].

43 *Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at 550 [66].

Subsection 100(3) provides that in any proceeding before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for Part 3 in any order or award it makes in those proceedings; 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 proceedings.

In short, if the adjudication decision is wrong in concluding that a party is entitled to be paid an amount under a construction contract, and the amount assessed in the adjudication decision is paid, then the payment may be reversed.

[31] Adjudications which do not comply with the essential statutory requirements may be declared void and the court may, when non-compliance has been demonstrated, make declarations and grant injunctions to prevent the adjudication being acted on. The court exercises a supervisory jurisdiction over adjudication decisions under the Act. The court's supervisory jurisdiction is not affected by s 18(2) of the *Judicial Review Act* 1991 (Qld). The court retains its supervisory jurisdiction to grant relief in the nature of *certiorari*. *Certiorari* may be granted when there has been jurisdictional error or where the relevant decision has been obtained through fraud.[44] *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* establishes that an adjudication decision may be challenged in this court if it is established the adjudicator has not acted in "good faith," failed to accord natural justice or otherwise fallen into jurisdictional error. [45]

[32] In simple terms, a party is entitled to take advantage of a favourable adjudication decision as a means of ensuring its cash-flow. The adjudication decision is part of a statutory scheme for the making of interim, not final, payments. The advantage of obtaining payment pursuant to an adjudication decision depends upon the adjudicator having acted in good faith, accorded natural justice and otherwise acted within jurisdiction.

[33] In addition to an adjudication decision being open to challenge in the exercise of the court's supervisory jurisdiction on the grounds of jurisdictional error or being obtained through the fraud of a party, a party who contends that an adjudication decision was obtained by fraud may seek to have the adjudication decision (and any judgment entered in reliance upon it) set aside in the exercise of the court's equitable jurisdiction.[46]

[34] Other forms of unlawful conduct by a party in the course of making a payment claim, or in proceedings for an adjudication under the Act, may result in the granting of relief under a statutory remedy, for example remedial orders under the *Australian Consumer Law* for misleading and deceptive conduct or unconscionable conduct.[47] One form of relief might be to set aside the adjudication decision if it

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44 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 197 [18]; *Kirk v Industrial Court of New South Wales* (2009) 239 CLR 531 at 567 [56], 580 [97].

45 Supra.

46 *Hansen Yuncken Pty Ltd v Ericson* [2011] QSC 327 at [132] – [135].

47 *State Asphalt Services Pty Ltd v Leighton Contractors Pty Ltd* [2013] NSWSC 528 at [111].

was found to be the result of conduct that contravened provisions which prohibit misleading and deceptive conduct or unconscionable conduct.

HMH's s 100 point

[35] HMH contended to the adjudicator that NPE had no contractual entitlement to be paid the amount which he assessed. It contends that the adjudicator erred in concluding there was such an entitlement. The payment to which NPE is entitled pursuant to the adjudication decision does not preclude HMH from re-litigating the arguments upon which it failed before the adjudicator, arguing that NPE was not entitled to be paid, asserting rights that HMH has under its contract and other rights which it may have in relation to anything done or omitted to be done under the contract. HMH's rights to have such issues determined in a court or tribunal are confirmed by s 100 of the Act. In finally determining the rights of the parties a court or tribunal 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. This would include an order that the adjudication decision not be enforced.

[36] A stay upon NPE mounting a further claim in this proceeding to have the adjudication decision declared void or set aside would not preclude it from arguing that the adjudication decision was wrong and any amount paid pursuant to it should be repaid, or taken account of in any order or award that is made. Section 100 leaves it free to argue that it did not owe the money which the adjudicator decided, that it is entitled to damages or compensation or that NPE engaged in fraud or some other unlawful conduct in representing that it was owed the amount claimed by it.

[37] The fruits of the adjudication decision can be recovered pursuant to s 100(3) without the necessity to obtain an order setting aside the adjudication decision if, for example, HMH establishes that its arguments concerning entitlements under the contract were right and, as a consequence, the adjudication decision was wrong.

[38] HMH submits that if NPE's application to establish an *Anshun* estoppel or to stay the proceedings as an abuse of process is successful, then s 100 is not given any operation. It submits that s 100(2) of the Act actually envisages that the scheme created by the Act permits a party to bring more than one proceeding under Part 3 of the Act.

[39] Section 100 does not exhaustively state the range of civil proceedings arising under a construction contract, whether under Part 3 or otherwise, which may be brought. Such civil proceedings would include civil proceedings to challenge the adjudication decision in the court's supervisory jurisdiction, in its equitable jurisdiction and in civil proceedings for a final determination of the parties' rights under the contract or their rights in relation to it. The claims would include remedies for fraud and contravention of statute.

[40] The present issue is not whether the Act, and s 100 in particular, permits a broad range of civil proceedings to be brought. Clearly it does. The issue is whether having brought one civil proceeding by way of challenge to an adjudication decision, HMH should be allowed to advance the present proceeding which seeks to challenge the adjudication decision on additional grounds. The issue is whether it is precluded from doing so because of an *Anshun* estoppel or because to do so would amount to an abuse or process in all the circumstances.

[41] Section 100 may permit a multiplicity of proceedings under Part 3 of the Act or otherwise. It does not, however, authorise the bringing of a civil proceeding in circumstances where an *Anshun* estoppel is established or where to do so would constitute an abuse of process.

[42] If NPE's application is successful then HMH might be precluded from claiming that the adjudication decision should be set aside but free to pursue certain other claims in this or other proceedings. Section 100 would still have an operation. HMH could still pursue civil proceedings for a final determination of its rights under the contract and its rights under the general law in relation to matters arising under the construction contract. The granting of the application would have the effect of precluding it from making successive claims to the effect that the adjudication decision itself is unenforceable and should be set aside.

The past and present challenges to the enforcement of the adjudication decision

[43] As noted, in its first proceeding HMH sought a declaration that the adjudication decision was void and of no effect by reason of it being made without jurisdiction. It sought an order setting aside the adjudication decision. The basis for its challenge to the jurisdiction of the adjudicator related to whether or not the work carried out for which payment was sought by NPE was "construction work" within the meaning of the Act.

[44] In the present proceeding HMH again seeks an order setting aside the adjudication decision. It also seeks an order setting aside the judgment that was entered as a consequence of the adjudication decision. It pleads that the adjudication decision was affected by jurisdictional error in that the adjudicator did not *bona fide* attempt to exercise the relevant powers of an adjudicator under the Act and that he denied, in a substantial way, natural justice to HMH.

[45] HMH's statement of claim pleads that the hire agreements were subject to certain terms including implied terms, that there were deficiencies in the performance of the equipment that was hired, that an agreement was reached between the parties in February 2011 and that NPE breached that agreement and engaged in other conduct during the relevant contracts that is said to have been unfair and not done in good faith. Next, HMH addresses the reasons which it gave for disputing NPE's payment claim and the fact that NPE represented to the adjudicator that these reasons and the facts alleged by HMH in respect of the dispute were untrue. NPE's submissions to the adjudicator in respect of the reasons are themselves alleged to have been untrue. NPE's representations in that regard are alleged to have contravened s 18 and s 21 of the *Australian Consumer Law* because they were misleading and deceptive or likely to mislead and deceive or to have amounted to unconscionable conduct. NPE is also alleged to have omitted to disclose certain matters and thereby contravened those provisions.

[46] HMH further pleads that the representations made by NPE in the adjudication proceeding were made knowing they were untrue or with a reckless disregard as to their truth or falsity.

[47] In addition to seeking orders that the adjudication decision and the judgment be set aside, HMH claims declaratory and other relief in respect of the alleged contraventions of the *Australian Consumer Law* and such further relief at law, in equity or by statute as the court thinks appropriate.

[48] In its submissions HMH advanced another ground of alleged jurisdictional error which it has yet to plead. It says that it is entitled to agitate an argument based upon the decision of Margaret Wilson J in *Agripower Australia Pty Ltd v J & D Rigging Pty Ltd* on the basis that the works were to form land that was a mining lease, and that, as a result this was not "construction work" within the meaning of the Act.[48] It acknowledges that there is a conflict between the *Agripower* case and other authorities dealing with work in connection with mining developments.

[49] In summary, and so far as the present proceeding seeks orders to set aside the adjudication decision, those orders are sought on the basis of claims that the adjudication decision was affected by jurisdictional error for lack of good faith, denial of natural justice and the yet-to-be pleaded, *Agripower* point. HMH also seeks to set aside the adjudication decision on the grounds that it was obtained by fraud and was the result of conduct in breach of the *Australian Consumer Law*.

What issue was determined in the first proceeding and are the new claims associated with the subject matter of that proceeding?

[50] The substantial issues that I have earlier identified include whether it was unreasonable for HMH to not bring those claims forward together with its initial claim to set aside the adjudication decision. Subsidiary issues include the relevance of these additional matters to the subject matter of the first proceeding. The resolution of those substantial and subsidiary issues depend upon the way in which the subject matter of the first proceeding is described.

[51] It is possible to frame the subject matter of the first proceeding and the issue it decided at various levels of generality. For example, the first proceeding could be said to concern the validity of the adjudication decision, its enforcement and whether it should be set aside. A narrower, and more specific formulation would be that the subject matter of the first proceeding was whether the adjudication decision was made within jurisdiction. A still narrower formulation would be whether the adjudication decision was affected by the particular jurisdictional error alleged in the first proceeding.

[52] Depending upon the level of specificity adopted, different conclusions are yielded to certain questions. If the subject matter of the first proceeding is stated in general terms then the new claims, even claims for contravention of statute and equitable relief, can be said to re-litigate the same subject matter as the first proceeding, namely the enforceability of the adjudication decision and whether an order should be made to set it aside. If, however, the subject matter of the first proceeding is narrowly defined as the precise ground of jurisdictional error that was argued then new grounds of jurisdictional error, and possibly even the *Agripower* argument that there was no "construction work" would not fall within the subject matter of the first proceeding.

[53] An outcome of the present proceeding's jurisdictional challenges which concluded that the adjudication decision was made without jurisdiction would appear, to some eyes at least, to conflict with the earlier judgment, as upheld on appeal, that the adjudication decision was made within jurisdiction. To other eyes there is no conflict between a judgment which finds that a decision was made within jurisdiction because the only ground of jurisdictional challenge fails and a later

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48 Supra.

judgment that finds that the same decision was not within jurisdiction because of newly-argued grounds. I prefer the former view, namely that success on those claims would give the appearance of conflicting judgments. In any case, the absence of conflicting judgments in the sense discussed does not preclude a finding of unreasonableness. And one basis upon which unreasonableness may be proved is if the matter now being argued was so relevant to the subject matter of the first proceeding that it was unreasonable not to rely upon it.

[54] The issue that was determined in the first proceeding was whether the adjudication decision should be set aside because the adjudicator acted outside of his jurisdiction. Some of the new claims are closely associated with the subject matter of that proceeding. The foreshadowed *Agripower* point is because it seeks to re-agitate the issue of whether the work in respect of the payment claim was "construction work" within the meaning of the Act. Challenges to the adjudication decision on the grounds of lack of *bona fides* and denial of natural justice are pleaded to have resulted in the adjudication decision being affected by jurisdictional error. Whilst these precise grounds upon which jurisdictional error are now alleged were not raised in the first proceeding they are closely associated with the subject matter of that proceeding, namely the jurisdiction of the adjudicator and the enforceability of the adjudication decision.

[55] Other new claims in which HMH seeks orders for the adjudication decision to be set aside, and a declaration that the adjudication decision is void are not so closely associated with the issue of jurisdiction. The new claim that the adjudication decision was procured as a result of fraudulent representations is one which might have founded relief under the court's supervisory jurisdiction in the nature of *certiorari*. Resort to the court's equitable jurisdiction to achieve the same result, namely a setting aside of the adjudication decision, does not depend upon proof of the absence of jurisdiction. Still, a claim that the adjudication decision should be set aside on the ground that it was brought about by fraud has an association with the subject matter of the first proceeding, which concerned the enforceability of the adjudication decision. It can be said to be associated with the subject matter of the first proceeding because it seeks in the exercise of the court's equitable jurisdiction the same relief as might have been obtained in the exercise of its supervisory jurisdiction to control decisions which are procured by fraud.

[56] The claim for the adjudication decision to be set aside as a remedy for contravention of the *Australian Consumer Law* does not depend upon the adjudication decision being made without jurisdiction. The relief sought by HMH would be available even if the adjudication decision was made within jurisdiction. It concerns the conduct of the adjudication process rather than the adjudicator's jurisdiction. An order setting aside the adjudication decision on the grounds that it was obtained as a result of a contravention of statute would not be a "conflicting judgment" with a judgment which, in effect, declared that the decision was made within jurisdiction. This is so even if many persons without legal training would apprehend a conflict between an earlier judgment which declined to set aside the adjudication decision and a later judgment which did.

Was it unreasonable or unjustifiable to not raise those claims together with the initial claim in 2011, even if only to permit the court to decide whether or not the first claim should be heard and determined as a separate and prior issue?

[57] HMH submits it was not unreasonable, and indeed it was justifiable, to refrain from litigating the issues it now litigates in this proceeding for three reasons.

[58] The first is that the original proceeding raised only matters of law and statutory construction, which were convenient to be dealt with as discrete issues, which might dispose of the adjudication decision without the need to consider any of the factual disputes raised by the second proceeding. I consider that this overstates the case. It *might* have been convenient to deal with the "construction work" issue as a preliminary issue if that had been shown to be a convenient course. The convenience or inconvenience of having that issue dealt with by way of a separate determination would have required a consideration of various factors which told for or against having one issue in relation to jurisdiction determined in advance of other issues concerning the enforcement of the adjudication decision. These factors have been discussed in authorities such as *Reading Australia Pty Ltd v Australian Mutual Providence Society*.[49] I accept that litigation of the jurisdictional error issue that was raised in the first proceeding avoided the need to consider any factual matters of the kind raised in connection with HMH's fraud claim and contravention of statute claims. But it is not self-evident that separate proceedings would shorten the litigation. It might if the jurisdictional error issue was resolved in HMH's favour and not subject to appeal. However, two proceedings (and possibly two appeals) might prolong, rather than shorten the litigation.

[59] An important point for present purposes is that the convenience or otherwise of having the jurisdictional error issue raised in the first proceeding dealt with as a separate and prior issue is a matter about which NPE is likely to have had an opinion. HMH did not give NPE or the court the opportunity to advance a different opinion.

[60] There is no suggestion that HMH was unaware of the other claims which it now advances in these proceedings. I leave to one side the *Agripower* point which it has yet to raise formally in these proceedings. That point does not arise from fresh evidence. It is a new argument inspired by a recent decision and raises a new basis to allege that the work was not "construction work." The fact that the point did not occur to HMH's lawyers or lawyers in other cases dealing with work on mining sites does not mean that HMH should be permitted to raise it now. I will return to this issue in connection with the topic of abuse of process.

[61] Claims of jurisdictional error based upon a lack of *bona fides* and a denial of natural justice would have raised additional factual issues to the ground of jurisdictional error that was agitated. However, arguments that an adjudicator did not *bona fide* attempt to exercise jurisdiction or denied a party natural justice in doing so are not unknown. *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* is but one example of such a case. Such arguments are heard and determined on the basis of the documents, including submissions, that were before the adjudicator. They do not tend to involve the examination of witnesses. Such additional grounds of

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[49] (1999) 217 ALR 495.

jurisdictional error might conveniently have been heard at the same time as the jurisdictional error argument advanced in the first proceeding.

[62] The claims in connection with fraudulent representations and misleading and deceptive conduct raised factual disputes that did not have to be considered in the first proceeding. Whether it was convenient to deal with them at the same time as other grounds, including the *bona fides* ground which required an examination of how the adjudicator dealt with those representations and competing arguments, was a matter about which views could reasonably differ.

[63] Next, HMH submits that had the issues of statutory construction raised by it in the first proceeding met with success on a "demurrer type application", the costs of raising the factual issues would have been wasted if they had been included in the original proceeding. Thus, the separation of those issues was submitted to be a legitimate strategy to contain costs in the circumstances. There is a significant difference, however, between "raising" those factual issues and fully litigating them by calling evidence and having factual disputes tried. The claims of jurisdictional error, fraud and contravention of statute which HMH seeks to litigate in this proceeding could have at least been raised in a simple form with NPE and with the court, if only to identify them and indicate that HMH wished to litigate one of its arguments in relation to jurisdictional error in advance of litigating those other claims.

[64] Thirdly, HMH submits that the discrete issues of statutory construction raised in the initial proceeding are not at all closely connected to or irretrievably bound up in the determination of the issues of equitable relief and statutory breach with which the second proceeding is concerned. This submission should be accepted.

[65] Other circumstances bear upon the issue of reasonableness and whether it was justifiable or not for HMH to not raise its additional claims in 2011, even if only to permit the court to decide if its first claim should be heard and determined as a separate and prior issue. One is the absence of any explanation by way of evidence as to why it did not do so. One might infer, in the absence of evidence, that it made commercial sense for HMH to litigate what it describes as the discrete issues of statutory construction raised in the initial proceeding in the hope of succeeding upon those issues and not having to incur the costs of litigating other claims. The course upon which HMH embarked left it with further grounds to fall back on in the event that its first proceeding failed, and the launching of successive challenges to the adjudication decision along with relief seeking to have the judgment set aside might result in a delay in the actual payment to NPE of the adjudicated amount. In that regard such a course had forensic advantages for HMH and consequential disadvantages to NPE.

[66] Another relevant circumstance is that the first proceeding was not launched in haste, before the existence of additional claims and their merit could be assessed. Almost five months passed between the adjudication decision on 11 May 2011 and the initiation of the first proceeding on 30 September 2011. In the meantime, HMH sought, without success, to have the District Court judgment set aside and failed to comply with orders to provide a statement of its financial affairs by 18 July 2011.

[67] The new claims concerning the validity and enforcement of the adjudication decision could have been formulated during the five months that it took HMH to file

the original proceeding. Those new claims relate, as did the first claim, to the enforceability of the adjudication decision, albeit it on different legal bases to the jurisdictional error argument advanced in the first proceeding.

[68] One difficulty for HMH in raising those claims in a preliminary way with NPE and with the court in September/October 2011 is that they would not share HMH's opinion that it was convenient to deal with one jurisdictional error argument in advance of its other claims.

[69] I have reached the conclusion that it was unreasonable and unjustifiable for HMH to not raise those additional claims, even in a preliminary way, at about the same time that it commenced its proceeding on 30 September 2011. In keeping its other claims to itself HMH avoided the risk of NPE submitting, or the court concluding, that it was not just and convenient for there to be more than one proceeding or more than one hearing (and possibly more than one appeal) in connection with the enforceability of the adjudication decision.

[70] I avoid *ex post facto* reasoning that arises in the light of the fact the court concluded that the adjudication decision was made within jurisdiction and that this decision was upheld on appeal. The fact the court reached that conclusion does not mean that it was unreasonable for HMH to seek to win the case on what seemed to it at the time to be a discrete issue of statutory construction. I take account of what, viewed objectively, may have seemed to be a reasonable course in the circumstances. It was unreasonable for HMH not to indicate its litigation strategy in the context of challenges to an adjudication decision which is intended to provide cash-flow to a party in whose favour a valid adjudication decision is made.

[71] If the course which HMH proposed to adopt was so compelling, then it had nothing to fear from disclosing it to NPE and to the court, and persuading NPE and the court that its proposed course was the most efficient manner in which to resolve issues in relation to the enforceability of the adjudication decision.

[72] The other claims which sought orders that the adjudication decision be set aside were sufficiently relevant to the subject matter of HMH's claim that the adjudication decision was made without jurisdiction as to make it unreasonable not to bring forward those claims, even if only to permit the court to decide if the first claim should be heard and determined in advance of the other claims.

Should this proceeding be struck out as an abuse of process?

[73] NPE seeks an order that this proceeding be struck out as an abuse of process. Before addressing the claims made in this proceeding and whether they constitute an abuse of process, it is convenient to address a claim which has yet to be made in this proceeding, but which is previewed in HMH's submissions. This is its claim that the adjudicator acted outside of his jurisdiction and that the adjudication decision is void and should be set aside, because the work carried out for which payment was sought was not "construction work" within the meaning of the Act. HMH says this argument is available to it by virtue of the decision in *Agripower*. It acknowledges that the decision conflicts with other authority concerned with construction work on mining leases, and submits that the argument in *Agripower* did not make itself apparent until the decision in that case. In the circumstances, HMH submits that it is not a case of failing to rely on a claim, argument or cause of action that was available to it and does not give rise to an *Anshun* estoppel.

[74] I shall assume for the purposes of argument that it was not unreasonable for HMH to not advance a jurisdictional error argument of which it was unaware in 2011 and shall also assume that the point of law was not one which could have been identified through reasonable diligence, so that no *Anshun* estoppel applies to it. However, advancing the *Agripower* point at this stage amounts to an abuse of process, in my view, because it seeks to re-litigate the issue that was determined in the first proceeding, namely whether the work was "construction work" within the meaning of the Act. The reason the *Agripower* point was not advanced in the earlier proceeding seems to be that it did not occur to HMH or its legal advisors. But this does not make it fair to NPE to permit the issue to be re-litigated. To re-litigate the issue of jurisdictional error on the basis of a different argument undermines the principle of finality of judicial determination. It would be oppressive to NPE to allow HMH to do so. The balancing of justice to HMH in re-litigating the issue of jurisdiction on the basis of an additional argument as against the unfairness to NPE in allowing HMH to do so, along with the public interest in finality leads me to conclude that it would be an abuse of process for HMH to amend this proceeding to include a claim that the adjudication decision be set aside by virtue of the work not being "construction work" within the meaning of the Act.

[75] I turn to consider the claims which are presently made in this proceeding, and apply the principle stated by Lord Bingham and others that it would be wrong to conclude because a matter could have been raised in earlier proceedings it should have been so as to render the raising of it in later proceedings necessarily abusive.

[76] This is not a case in which it is argued that the passage of time makes a fair trial impossible. Instead, the argument that the continuation of the present proceeding amounts to an abuse of process rests upon the unfairness to NPE and the burden imposed upon it of having to again defend the enforceability of the adjudication decision. HMH submits that any sense of oppression to NPE is negated by:

(a) the role NPE has played in permitting HMH to advance the initial application in isolation of the current proceedings; and

(b) the fact of the payment into court.

As to the first matter, there is no evidence that NPE permitted HMH to advance the initial application in isolation from other claims. HMH did not preview that it had additional claims which it intended to litigate in order to seek an order that the adjudication decision was unenforceable and should be set aside, let alone bring them forward in a preliminary way as part of the civil proceeding it commenced. This proceeding was not filed until well after the first proceeding was decided by Douglas J on 31 January 2012.

[77] As to the second matter, the fact of payment into court gives NPE some measure of protection, but payment into court is a statutory pre-condition for a party in HMH's position which seeks to have a judgment set aside.[50] Payment into court does not provide the adjudicated sum to the party in whose favour an adjudication decision has been made, thereby providing it with the cash-flow intended by the Act.

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50 *Building and Construction Industry Payments Act* 2004 (Qld), s 31(4)(b).

[78] The principles of abuse of process discussed earlier indicate that there can be an abuse of process in the absence of cause of action estoppel or issue estoppel. Abuse of process principles can be invoked to prevent attempts to litigate what should have been litigated in an earlier proceeding.

[79] The subject matter of the earlier proceeding was whether the adjudication decision was outside jurisdiction and should be set aside. The additional grounds relied upon in this proceeding to allege that the adjudication decision was affected by jurisdictional error rely on other facts and arguments. But claims that the adjudication decision was affected by jurisdictional error are closely related to the subject matter of the earlier proceeding. Claims advanced in the court's equitable jurisdiction and claims for contravention of statute in connection with the adjudication process are not so closely related. However, they still relate to the enforceability of the adjudication decision and, like HMH's jurisdictional points, HMH had the opportunity to litigate those issues in 2011. There is no contention that the additional claims only arise by reason of fresh evidence.

[80] It is neither oppressive nor unfair to permit HMH to argue, directly or indirectly, that the adjudicator's decision was wrong. Section 100 of the Act envisages this very thing. There is some element of oppression and unfairness in permitting HMH to now litigate issues in connection with the adjudication process and, in particular, whether the evidence and submissions of NPE during that process were fraudulent and its conduct in that regard a contravention of the *Australian Consumer Law*. This is because HMH had the opportunity to raise those claims as part of, or in conjunction with, the original proceeding. However, the extent of any such oppression or unfairness is not great insofar as such claims seek compensation and certain forms of other relief for alleged fraud and contravention of statute. The position is otherwise insofar as HMH relies upon these claims to argue that the adjudication decision is void or voidable and should be set aside.

[81] To the extent that HMH's new claims seek compensation for alleged fraud and contravention of the *Australian Consumer Law* and relief in the nature of restitution of any amount paid pursuant to the adjudication decision, then those claims could have been brought forward in the earlier proceeding. But I am not persuaded that they should have been so as to render the raising of them in this proceeding an abuse of process. However it is an unjust harassment of NPE to re-litigate the enforceability of an adjudication decision, the benefit of which it is entitled to so as to maintain its cash-flow, subject to civil proceedings of the kind envisaged by s 100 of the Act. The subject matter of the earlier proceeding was the enforceability of the adjudication decision. The re-litigation of the issue of enforceability occurs in circumstances in which it was unreasonable to not bring forward those claims and involves unjust harassment of NPE.

[82] NPE was reasonably entitled to proceed on the basis that by September 2011 when the first proceeding was launched that HMH had identified the claims known to it upon which it would seek to have the adjudication decision set aside. A party in NPE's position should not be twice vexed by successive claims that an adjudication decision is unenforceable if those claims are known to the applicant at the time the first proceeding is commenced and it is unreasonable in all the circumstances to not bring forward the second claim, even if only to allow the court to express a view as to whether both claims should be heard at the same time.

[83] There is also a public interest in the finality in litigation, particularly litigation which seeks to challenge the enforceability of an adjudication decision upon which a contractor is reasonably entitled to rely for the purpose of its cash-flow. To permit the re-litigation of the validity and enforceability of an adjudication decision without good cause undermines the finality of a judicial determination and public confidence in the administration of justice.

[84] The exercise of the court's inherent power to prevent an abuse of process should be undertaken with great caution. I am not persuaded that the continuing litigation of all claims in this proceeding amounts to an abuse of process. However, I am persuaded that it is an abuse of process to permit HMH to re-litigate the enforceability of the adjudication decision. Taking account of all of the circumstances, including the interests of HMH in litigating claims that the adjudication decision should be set aside, the interests of NPE in not being unjustly harassed by successive claims in relation to the enforceability of the adjudication decision and the public interests involved, I conclude that HMH is abusing the process of the court in seeking to raise before it issues in relation to the enforceability of the adjudication decision which could and should have been raised before.

[85] HMH took the risk that the one shot it chose to fire would not bring down the adjudication decision. The principle of finality of judicial determination has a strong claim where HMH took five months to decide the claims which it would bring forward to challenge the enforceability of the adjudication decision. The principle of finality in protecting a party in NPE's position from unjust harassment has considerable force in the context of an adjudication decision which is intended to aid a party's cash-flow. If a party knows that it has a variety of grounds upon which to challenge such an adjudication decision then they should be brought forward at an early stage if only to permit the court to decide whether all claims should be heard and determined at the same time.

[86] A party which adopts the litigation strategy of deploying one claim at a time may deprive a party in whose favour an adjudication decision is made of the practical benefit of an interim payment for a prolonged period. The requirement to pay the adjudicated sum into court as security if the proceeding also seeks to have the judgment set aside is of some utility. But a payment into court cannot be equated with the benefit of an actual payment.

[87] Given the purpose of the Act, a challenge to an adjudication decision should be launched speedily, leaving the court ultimately to decide whether all grounds of challenge should be heard and determined at the same time. In all the circumstances NPE should not be vexed in this proceeding with claims that the adjudication decision should not be enforced and should be set aside.

[88] The consequence of preventing HMH from advancing such a form of relief in this proceeding does not preclude it from advancing claims, the outcome of which, in the event of success, is to recover any amount paid pursuant to the adjudication decision and the judgment. HMH should be free to litigate the merits of NPE's claim to be owed money under the hire agreements, along with HMH's claims that NPE made fraudulent representations or engaged in conduct contrary to statute in advancing its original payment claim and the adjudication process.

[89] In summary, if HMH wished to seek relief that the adjudication decision is void or voidable and should be set aside it should have stated that it had claims for such relief on a variety of grounds when it first challenged the enforceability of the adjudication decision. It should not be permitted to re-litigate the enforceability of the adjudication decision where this is related to the subject matter of the first proceeding and it had the opportunity to raise these issues in 2011. It is unfair to again seek an order that the adjudication decision be set aside because it was made without jurisdiction. It is also unfair to seek an order that it should be set aside on other grounds because this re-litigates the general subject matter of the original proceeding with claims it had an opportunity to raise in 2011. It is not so oppressive to litigate whether the adjudication decision was procured by fraud or was the product of a contravention of statute, provided the remedy sought is not a declaration that the adjudication decision is void or should be set aside.

Should the proceeding be permanently stayed?

[90] I have concluded that HMH is estopped from continuing with certain claims it advances in this proceeding by reason of an *Anshun* estoppel. I have also found that bringing those claims constitutes an abuse of process. I have declined to find that there is an *Anshun* estoppel or an abuse of process in respect of all the claims brought in the present proceeding. If I had concluded that HMH was estopped from continuing with all of the claims raised in this proceeding or that the proceeding in its entirety was an abuse of process, then I would have ordered the proceeding to be permanently stayed. Instead, the proceeding should be stayed in part, a declaration made in relation to the *Anshun* estoppel and orders made for striking out part of the statement of claim.

Should the money paid into court be paid out?

[91] Because in this proceeding HMH seeks an order that the judgment be set aside it was required by s 31 of the Act to pay into the court as security the unpaid portion of the adjudicated amount pending the final decision in the proceeding to have the judgment set aside. However, the orders which I intend to make will preclude HMH from seeking an order setting aside the adjudication decision and an order setting aside the judgment. There will be no final decision in this proceeding as to whether the judgment should be set aside. The purpose for which the amount was paid into court cannot be fulfilled, and NPE seeks an order that the money paid in be paid out to it.

[92] HMH opposes such an order and contends that while the monies remain in court both parties are protected, whereas once a payment out is made HMH will be prejudiced should NPE be subject to some financial failure. There is no evidence of financial difficulty for NPE. However, the risk of a party in whose favour a payment pursuant to an adjudication determination is paid not being in a position to repay the amount upon a final determination of the parties' rights should be recognised. Still, as the Court of Appeal has observed, the risk that a contractor may not be able to refund money paid pursuant to an adjudication decision is a risk which the legislature, as a matter of policy, has, *prima facie* at least, assigned to the party against whom an adjudication decision is made.[51]

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[51] *R J Neller Pty Ltd v Ainsworth* (supra) at [39] – [40]; *Martinek Holdings Pty Ltd v Reed Constructions Pty Ltd* [2009] QCA 329 at [19].

[93] In circumstances in which:

(a) HMH unreasonably delayed in bringing forward the additional claims that it relied upon to have the adjudication decision set aside;

(b) the adjudication decision was made almost two and a half years ago; and

(c) there has already been a judicial determination that the adjudication decision was made within jurisdiction,

I conclude that NPE should have the benefit of the adjudication determination in the form of an interim payment. Such a payment does not affect the rights of the parties under the contract or the entitlement of HMH to recover the amount paid. There is no material to suggest that any entitlement to be repaid the adjudicated amount is likely to prove illusory. In any event, as a matter of policy, the legislature has determined that such a risk should *prima facie* at least be assigned to a party in HMH's position, and I am not persuaded that there is any sufficient reason to displace that assignment of risk.

[94] HMH argues there is no jurisdiction to order a payment out of court in advance of the determination of the proceedings. This is said to follow from the terms of s 31(4)(b). I do not agree. Section 31(4)(b) imposes a requirement to pay into court as security the unpaid portion of the adjudicated amount in a proceeding which seeks to have the judgment obtained upon filing an adjudication certificate set aside. The amount paid into court is intended to be a security "pending the final decision" in the proceeding to have the judgment set aside. Section 31(4) does not purport to control orders made by the court in the exercise of its supervisory jurisdiction or any other jurisdiction. Although s 31(4)(b) does not add the words "or further earlier order," it does not state or imply that the money paid into court as security cannot be paid out in order to serve the interests of justice in a particular case. For example, it is possible to imagine a case in which there is a challenge to an adjudication decision and the judgment that is obtained as a result of it, but the basis for that claim is extremely weak. The challenge may not be able to be heard and determined for a substantial time and, in the meantime, the party in whose favour the adjudication decision has been made will suffer a cash-flow crisis and possible insolvency. I am unable to conclude that in such a case the court has no jurisdiction to order a payment out of court of the amount paid in pursuant to s 31(4)(b). The Act does not purport to limit the court's control over proceedings and orders that should be made to serve the interests of justice pending the final decision in those proceedings.

[95] The interests of justice in the circumstances of this particular case and in the context of the policy of the Act justify an order being made for a payment out of court.

[96] For completeness, I should add that even if I had declined to find an *Anshun* estoppel and that it was an abuse of process for HMH to pursue its claims that the adjudication decision and the judgment be set aside, I would have ordered the amount to be paid out. Shortly stated, such an order was justified by HMH's unreasonable conduct as found by me, its delay in commencing and prosecuting the present proceeding and the fact that payment into court as security did not adequately protect NPE's interest in being paid pursuant to an adjudication decision which could and should have been challenged on the grounds which HMH now

seeks to challenge it. Once a payment is made to NPE, HMH is at risk of not being able to obtain repayment of the amount in the event of success should NPE be subject to financial failure. But that is a risk which, in accordance with the policy of the Act, should be borne by HMH in all of the circumstances.

Conclusion and orders

[97] NPE has established an entitlement to declaratory and other relief, although not to the full extent sought in its application filed 13 August 2013. It has established that HMH is estopped from continuing with certain claims and certain forms of relief sought in this proceeding because of an *Anshun* estoppel. It has also established that it would be an abuse of process for HMH to continue with those claims in the circumstances. It is also entitled to an order that the funds paid into court be paid out to it in order to satisfy the judgment which NPE obtained against HMH in the District Court.

[98] Subject to hearing from the parties concerning the form of orders to be made, I propose to make the following orders:

1. Declare that the applicant is estopped from continuing with the proceeding to the extent it seeks to challenge the enforceability of the adjudication decision made by the second respondent on or about 12 May 2011 ("the adjudication decision"), or seeks an order:

   (a) setting aside the adjudication decision;

   (b) setting aside the judgment obtained by the first respondent against the applicant in Proceeding D1775/11 on or about 26 May 2011 ("the judgment");

   (c) declaring that the adjudication decision or the judgment is void; or

   (d) restraining the first respondent from enforcing the judgment and the adjudication decision.

2. Order that this proceeding be stayed to the extent that it seeks to challenge the enforceability of the adjudication decision or seeks the aforesaid relief.

3. Order that the following paragraphs of the statement of claim filed 4 May 2012 be struck out pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld), namely paragraphs 27(b), 28(b), 29(a), 30, 31, 32, 33(a), 33(b) and 33(c)(ii), (iii) and (iv).

4. Order that the funds held in court in this proceeding be paid out to the first respondent so as to satisfy the judgment obtained by the first respondent against the applicant in Proceeding D1775/11.

I will hear the parties in relation to costs. However, NPE having enjoyed substantial success, the appropriate order would appear to be that the applicant pay the costs of the first respondent of and incidental to the application filed 13 August 2013 to be assessed on the standard basis.