Managing the Administration of Construction Contracts to Avoid the Abuse of Process And Ethics

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Ethics: Greek and Roman Philosophers

Ethics is the major branch of philosophy that encompasses proper conduct and good living. It includes more than the common conception of ethics as the analysis of right and wrong[1]. In the social sciences, ethics can be best understood by distinguishing normative ethics from metaethics. Normative ethics derives from the practical purpose of guiding how we ought to live and inquires into the proper guidelines of conduct for a responsible human being. Metaethics asks what ethics is, how it can be distinguished from other forms of human practice, and where it finds its proper place.[2]

Ethics remains a subject of immense difference in opinion, despite all the time and effort that has been devoted to the study of it[3]. The study of ethics can be traced to the great Ancient Greek and Roman philosophers. Most ancient philosophers focused on virtue-based eudaemonistic ethics. That is to say, human well-being (*eudaimonia*) is the highest aim of moral thought and conduct; the virtues (*aretê*= 'excellence') are the requisite skills and character traits.[4]

Socrates was one of the first Greek philosophers to encourage both scholars and laymen to focus their attention to the internal condition of man.[5] He unsuccessfully sought to elucidate the definitions of virtues, such as courage and justice, through *elenchus*, or cross-examining people who professed to have understanding of them.[6] He conceived that people will naturally do what is good, only if they know what is right. Thus, evil or bad actions are the result of ignorance. Since he associated knowledge with virtue and virtue with happiness, he posited the truly wise man will know what is right, do what is good and therefore be happy.[7]

Aristotle suggested an ethical system whereby a person will do good deeds and be content when they act in accordance with their nature and realise their full potential. Thus, unhappiness and frustration are caused by the unrealised potential of a person, leading to failed goals and a poor life. Happiness was considered to be the ultimate goal. Therefore, in order to be content and complete, it is imperative for humans to act in accordance with their nature and develop their latent talents.[8]

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[1] Singer, *Practical Ethics*, 2nd ed, 1993, 10.
[2] William Darity (ed), *International Encyclopedia of the Social Sciences* (2008).
[3] Internet Encyclopedia of Philosophy, *Philosophy* (2006) <http://www.iep.utm.edu/g/greekphi.htm> at 27 February 2009.
[4] Stanford Encyclopedia of Philosophy, *Plato's Ethics* (2003) Stanford University <http://plato.stanford.edu/entries/plato-ethics/> at 1 March 2009.
[5] William Sahakian & Mabel Sahakian, *Ideas of the Great Philosophers* (1993) 32-33.
[6] Above n 3.
[7] Above n 5, 32-33.
[8] Ibid, 33-35.

Along with his student, Aristotle, and his mentor, Socrates, **Plato** helped to lay the foundations of Western philosophy.[9] Plato's underlying philosophical motivation was ethical. Though occasionally mystical in tone, Plato was essentially a rationalist, devoted to the idea that the highest form can only be obtained by the soul's activity within itself, that is, by the exercise of reason.[10]

Epicurus observed that indiscriminate indulgence can be destructive to pleasure and can even lead to pain. Exercised through restraint and caution, the *summum bonum*, or greatest good, was prudence. Epicurus used logic, and reasoned that if there was an afterlife, the fear of death was irrational. Similarly, if there was no afterlife, then the person would not exist to suffer, fear or worry. He suggested it is irrational to worry over situations that do not exist and placed his ethical emphasis on present acts.[11]

Epictetus, the Stoic philosopher posited that contentment and serenity were the greatest good. Peace of mind, or *apatheia*, was of the highest value, and self-mastery over one's desires and emotions leads to spiritual peace. The "unconquerable will" is central to his philosophy.[12]

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[9] Encyclopedia Britannica, *Plato* (2002).
[10] Above n 3.
[11] Above n 5, 32-33.
[12] Ibid, 33.

Ethics in Court

In May 2006, the High Court dismissed two highly contentious test cases, one brought by 25-year-old Alexia **Harriton**[13] and the other by five-year-old Keeden **Waller.**[14] Both are severely disabled. Alexia's mother was incorrectly informed that she did not have rubella during Alexia's pregnancy. In Keeden's case, IVF doctors failed to warn his parents of the risk of being born with a hereditary genetic condition.

The legal question was: if the parents of a child were given negligent medical advice, which resulted in losing the option of termination, should children who are subsequently born with a disability be able to sue the doctors? Effectively, the court was asked whether we should allow a 'wrongful life' action in Australia.

John Pavlakis,[15] lawyer for the doctors in both cases, acknowledged that Kirby J was the one judge who regarded 'wrongful life' as a value-loaded term and instead suggested it would be proper to use the term 'wrongful suffering'. He characterised the question that the court had to decide as: who should pay for suffering, loss and damage that flow from a defendant's carelessness or negligence on the agreed facts.[16] The perhaps unanswerable ethical quandary remains whether one is worse off by not being born and not existing, or is one worse off having a life with severe disability. The High Court considered whether damages were claimable for medical negligence resulting in 'wrongful life' and by a 6:1 majority rejected such a claim.

The High Court made another momentous decision in **Melchior v Cattanach,**[17] by a 4:3 majority, in the controversial area of damages for the costs of raising a healthy child. In the event of medical negligence where a pregnancy arises, in this case a failed sterilisation, a majority of the Court enabled the parents to recover the costs of raising the healthy, but unplanned, child. This case raised difficult ethical and legal issues and forced the court to explore the criteria for assessment of costs related to unwanted life and whether to award damages based on ethical, economic, intuitive or logical legal principles.

As Michael Regos[18] summarises:

> For the majority, McHugh & Gummow JJ relied largely on logic to conclude that there was no reason in principle for disallowing child rearing costs for healthy children, when the costs of raising an unhealthy child were permissible. Callinan J relied in part on the special principles of recovery for pure economic loss in negligence law to entitle the parents to recover the costs. Among Kirby J's many reasons for allowing the claim was the conclusion that it was not necessary to resort to these special principles because the loss in this case should be characterised not as 'pure' economic loss but as loss consequential on the related physical injury suffered by the mother in this case.

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[13] *Harriton v Stephens* (2006) 226 CLR 52.
[14] *Waller v James* (2002) 226 CLR 136.
[15] Partner, Blake Dawson Waldron.
[16] ABC Radio, 'Wrongful Life Actions', *The Law Report*, 16 May 2006 <http://www.abc.net.au/rn/lawreport/stories/2006/1636890.htm> at 27 February 2009.
[17] *Melchior v Cattanach* (2003) 215 CLR 1.
[18] Michael Regos, *Where Ethics and Law Collide* (2003) FindLaw <http://www.findlaw.com.au/article/9652.htm> at 1 March 2009.

> For the minority, one of Gleeson CJ's reasons for rejecting the parents' claim was that it offended the special rules of recovery regarding economic loss. He found the liability sought to be imposed was indeterminate and difficult to relate coherently to other rules of common law and statute. It was based upon an imprecise concept of financial harm and incapable of rational assessment. Hayne J's judgment was guided by a reluctance to allow recovery which might implicitly treat the child as a commodity, to be given a market value. Heydon J, in a similar vein concluded that recovery in this case would be to permit conduct inconsistent with the parent's duty to nurture children.[19]

The contentious ethical issue regarding damages that the judges were forced to answer, and ultimately allowed, was the costs associated with raising and maintaining the child until he/she reaches the age of 18.

In **Marion's case,**[20] the High Court was forced to decide whether a child has the capacity to make decisions for them, and when this is not possible, who may make decisions for them regarding major medical procedures.

'Marion' suffered from intellectual disabilities, severe deafness, epilepsy and other disorders. Her parents sought an order from the Family Court of Australia authorising them to have Marion undergo an operation with the practical effects of sterilisation.

The main legal issue was whether the parents (as legal guardians of their daughter), Marion, or only by order of a competent court, such as the Family Court of Australia have the legal authority to authorise the operation.

A majority of the High Court endorsed the House of Lords' decision in *Gillick*[21] and found, quoting from that decision, that a child is capable of giving consent to medical treatment when she 'achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'. The Court has further accepted that parental control diminishes as a child matures and it has consequently recognised the concept of the 'mature' minor.

Thus, it is evident that difficult ethical issues are encountered in the legal profession. However, it is crucial to note that since opinions on ethics itself are not universal, it is obvious that when contentious ethical dilemmas are met in practice that a consensus is unlikely to be reached.

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[19] Above n 18.
[20] Common name for the case *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.
[21] *Gillick v West Norfolk and Wisbech Area Health Authority* (1985) 3 All ER 402.

Honourable Women and Men of the Law

In the last twenty years there have been growing concerns by a better-informed public in relation to the conduct of lawyers and an increased acknowledgment by judges, law reform agencies and legal academics of the significance of legal ethics, or perhaps more correctly, professional responsibility, in the teaching and practice of law.

A legal practitioner will come across several ethical problems in their career, due to the nature of divided loyalties, which involves owing a duty to the court, while at the same time owing a duty to the client. It is obvious that these duties will be in conflict occasionally, in which case, the lawyer is required to fulfill his or her obligations to the court.[22]

Legal ethics are critical to the profession given that lawyers are integral to the fulfilment of the law, and the 'Rule of Law' itself is founded on principles of justice, fairness and equity. Second, lawyers are professionals, and as such, the earning of remuneration is not the only objective, distinct from a trade or business. Rather, service is the ideal, and the financial gain must always be subservient to this main purpose. Thirdly, lawyers are admitted as officers of the court and hence have a duty to serve the court and the administration of justice. Finally, lawyers are a privileged group who may, for reward, take on the causes of others and bring them before the courts.[23]

The obligations of lawyers are commonly articulated in a Code of Ethics or Rules of Practice, which illustrate the high standards on which reputations for professionalism rest.

Law Society: Solicitors

A Statement of Ethics by the Council of the Law Society of New South Wales identifies a sense of responsibility to the community to observe the highest standards of integrity, honesty and fairness in all dealings with the courts, clients and fellow practitioners.

According to this statement, as individuals engaged in the profession, legal practitioners must:

- Primarily serve the interests of justice.
- Act competently and diligently in the service of clients.
- Advance clients' interests above own interests.
- Act confidentially and in the protection of all client information.
- Act together for the mutual benefit of the legal profession.
- Avoid any conflict of interest
- Observe strictly the duty to the Court to ensure the proper and efficient administration of justice.[24]

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[22] Peter MacFarlane, 'The Importance of Ethics and the Application of Ethical Principles to the Legal Profession' (2002) 6 *Journal of South Pacific Law* <http://www.paclii.org/journals/fJSPL/vol06/8.shtml> at 27 February 2009.
[23] Ibid.

[24] Statement of Ethics Proclaimed by the Council of the Law Society of New South Wales (2003) Law Society of NSW <http://www.lawsociety.com.au/page.asp?partID=547> at 28 February 2009.

Further, the Law Society of New South Wales Professional Conduct and Practice Rules and the Legal Profession Act 2004 and its Regulations identify duties of solicitors regarding relations with clients, practitioner's duties to the Court, relations with other practitioners and third parties, and legal practice. There is an emphasis on ethical practices and upholding a standard of honourable service to the community in the administration of justice.

The Bar Association: Barristers

The motto of the coat of arms of the New South Wales Bar Association, *'Servants of all yet of none'* emphasises specialised functions of barristers, which over the centuries have come to distinguish them from other legal practitioners.

All barristers in New South Wales are bound by the Legal Profession Act 2004, the Legal Profession Regulation 2005, and New South Wales Barristers' Rules and for members of the association, the Constitution of the NSW Bar Association.[25]

According to the NSW Bar Association, all barristers have a duty to their clients, whereby they must, by any legitimate means, dedicate themselves completely to clients' legal requirements. However, when they are admitted, barristers are sworn in as 'officers of the court'. As such, they must observe duties to the law and to the court. When acting as advocate and counsel, a barrister must not mislead the court or an opponent and must acquaint the court with the true state of the law whether or not it favours a client's case.[26]

Despite this, in some instances ethical predicaments will not be addressed in a manner that contributes to upholding the honour of the legal profession. Such is the case in ***The Law Society v Harvey***[27] as MacFarlane[28] explains:

> The defendant was a solicitor who was also a director and shareholder in three companies in the business of property investment. Over a period of years, clients of the defendant lent money to these companies at the suggestion of the defendant. The investments undertaken by the companies were very high risk and the clients stood to lose substantially in the event of failure. In some cases the client was only informed that his or her money had been lent to the companies after this had occurred. The investments turned bad and the clients lost money. This was an appeal on the point of whether the professional misconduct of the defendant was serious enough to warrant him being struck from the roll of solicitors.
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> Street CJ concluded:
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> > Where there is any conflict between the interests of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest... The price of being a member of an honourable profession, whose duty to his client ought not to be prejudiced in any degree,

[25] Relevant legislation governing the profession of barrister (2009) NSW Bar Association <http://www.nswbar.asn.au/docs/professional/legislation/leg_index.php> at 28 February 2009.
[26] Ibid.
[27] *The Law Society v Harvey* (1976) 2 NSWLR 154.
[28] Above n 22.

is that a solicitor is denied the freedom to take the benefit of any opportunity to deal with persons whom he has accepted as clients.

The defendant's professional misconduct was serious and sustained involving many clients and large amounts of money. His conduct was motivated by greed and self interest in deliberate and flagrant disregard of his duty to his clients, and demonstrates that he is unfit to be a solicitor, or to be employed in a solicitor's office in any capacity, and that his name should be removed from the roll of solicitors.

A Case Study: Hitachi v ODG- How *not* to get into hot water.

In *Hitachi Ltd v O'Donnell Griffin Pty Ltd,* the Queensland Supreme Court was asked to declare void an adjudicator's decision under the Building and Construction Industry Payments Act 2004 (the Act). The decision of Skoien AJ involved the hearing of two applications together. Both applications arose out of an engineering subcontract between Hitachi Ltd ("Hitachi"), as head contractor, and O'Donnell Griffin Pty Ltd ("ODG"), as subcontractor.

The case deals with separate applications to have two different adjudication decisions by two different adjudicators declared void. Both adjudications concerned the same project.

The grounds in support of **Hitachi's** application were as follows:

i. The adjudicator failed to consider the payment schedule and submissions properly made in the adjudication response, as required of the Second Respondent by the BCIPA, s 26(2)(d);
ii. The adjudicator failed to include reasons for the adjudication decision, as required by BCIPA s 26(3)(b);
iii. The adjudicator failed to provide the measure of natural justice required to be dispensed by adjudicators acting under the BCIPA; and
iv. The adjudicator failed to act reasonably, and bona fide, in making the adjudication decision.

His Honour considered the grounds and seems to have accepted that the grounds referred to in the NSW decisions referred to herein were available in Queensland. He rejected each ground in the circumstances of that case.

His Honour then considered the **ODG** application. His Honour gave some detailed consideration to the scope for arguments of abuse of process and denial of natural justice in applications for declaratory relief. His Honour concluded that for the reasons that he gave, Hitachi had committed a material abuse of process in the second adjudication application which led to a denial of natural justice to ODG, and that the adjudication decision therefore had to be set aside. His Honour also concluded that there was a denial of natural justice by reason of apprehended bias in relation to the second adjudication decision, which was the subject of the application by ODG. His Honour declared the adjudication decision of the second adjudicator as void, and of no effect, and ordered that it be set aside.[29]

[29] Peter Bickford, 'Review of Adjudication Decisions under the Building and Construction Industry Payments Act 2004' (2008) 30 *The electronic Journal of the Bar association of Queensland* <http://www.hearsay.org.au/index.php?option=com_content&task=view&id=412&Itemid=45> at 27 February 2009.

The First Adjudication

The attack against the first was that the adjudicator had assessed the larger variation claims but had, for lack of time, not set out an individual assessment of numerous smaller claims. The Court decided that a failure to do so was not fatal to the validity of the adjudicator's decision and was not a failure to comply with the requirement in the Act that the adjudicator consider all submissions.

The Second Adjudication

The decision was declared void on two separate grounds. First, it was held that Hitachi committed an abuse of process, amounting to a denial of natural justice. The abuse of process was that Hitachi had made submissions to the court, which were contrary to those it had made to the adjudicator. In the second adjudication, Hitachi had submitted that the first adjudicator had valued all variations and therefore under the Act the second adjudicator was bound by those valuations.

However, in the court proceedings Hitachi submitted that the first adjudication decision was void because the adjudicator had not valued all of the variations. The court took the view that the result of this abuse of process was that the adjudicator's decision was void.

The second ground concerned a letter from Hitachi to the adjudicator. As commonly occurs, the adjudicator had asked the parties for an extension of time to consider the voluminous submissions and issue his determination. Hitachi's letter to the adjudicator suggested that more time was not required. The submissions, so Hitachi said, related to claims, "Which have been valued" by the first adjudicator. Since the adjudicator was bound by the first adjudicator's valuation there was no need to read those submissions. The content of this letter was incorrect since the first adjudicator had not valued the variations in question. The court held that since this letter may have influenced the adjudicator, it amounted to a denial of natural justice and as a result the adjudication decision was void.

The court's reasoning seems to have been that the adjudicator may have been attracted to accept an incorrect submission by the fact that it would make reading and considering all of the submissions unnecessary.[30]

[30] Rob Leacock, *Overturning the Decisions of Adjudicators* (2008) TressCox Lawyers Construction Newsletter <www.tresscox.com.au/file/document/resource/359/NL_Construction_July_2008_v2.pdf> at 27 February 2009.

Legal Principles Relevant to Abuse of Process

The Supreme Court of Queensland, pursuant to s 58(1) of the Constitution of Queensland 2001, is vested with all the jurisdiction necessary for the administration of justice in Queensland. Pursuant to s 58(2) the court is the superior court of record in Queensland and the supreme court of general jurisdiction in and for the State and, subject to the Commonwealth Constitution, has unlimited jurisdiction at law, in equity and otherwise. As such, the Court has an inherent jurisdiction to make orders protecting inferior courts and tribunals against any abuse of their processes.

In New South Wales, however, s 23 of the Supreme Court Act 1970 applies, whereby the Supreme Court of New South Wales shall have all jurisdiction which may be necessary for the administration of justice in New South Wales. Pursuant to s 5(1) of the Civil Procedure Act 1995, nothing in this Act or the uniform rules limits the jurisdiction of the Supreme Court.

In *Herron v McGregor* (1986) 6 NSWLR 246 at 250, McHugh JA (as he then was) said:

> *"The jurisdiction of a court includes every power necessary to enable it to act effectively within the jurisdiction conferred on it by statute or charter: Connelly v Director of Public Prosecutions [1964] AC 1254 at 1301; John Fairfax & Sons Ltd v Police Tribunal of New South Wales (1986) 5 NSWLR 465. The jurisdiction of this court extends to the supervision and protection of proceedings in inferior courts and tribunals: John Fairfax & Sons Pty Ltd v McRae (1955) 93 CLR 351 at 363. The principal of necessity is an illustration of the common law doctrine that everything necessary to the effectual exercise of a power is included in its grant."*

In *Walton v Gardiner* (1993) 177 CLR 378 at 391, Mason CJ Deane and Dawson JJ said in their joint in judgment as follows:

> *"... it is now settled that the Court of Appeal's supervisory jurisdiction with respect to the administration of justice in New South Wales' extends, in the absence of legislative intervention, to the making of an order staying proceedings in the Tribunal on the ground that they constitute an abuse of the Tribunal's process."*

In referring to the exercise of the inherent power with respect to the Tribunal in question, their Honours stated (at 395):

> *"In its application to the Tribunal, the concept of abuse of process requires some adjustment to reflect the fact that the jurisdiction of the Tribunal, which is not a court in the strict sense, is essentially protective - i.e. protective of the public - in character. Nevertheless, the legal principles and the decided cases bearing upon the circumstances which will give rise to the inherent power of a superior court to stay its proceedings on the grounds of abuse of process provide guidance in determining whether, assuming jurisdiction to do so, the circumstances of a particular case are such as to warrant an order being made by the Supreme Court staying proceedings in the Tribunal on abuse of process grounds."*

The majority referred with approval to the following remarks by Richardson J in the New Zealand Court of Appeal in *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481:

> *"... public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case.*
> *It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a court of law in the future as in the case before it. This leads on the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."*

In *Rogers v The Queen* (1994) 181 CLR 251 at 255, Mason CJ said:

> *"The circumstances in which abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories. Likewise, it would be a mistake to treat the discussion in judgments of particular circumstances as necessarily confining the concept of abuse of process."*

His Honour referred to the various authorities and observed (at p 256):

> *"These statements indicate that there are two aspects to abuse of process: first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute."*

In *Hunter v Chief Constable of West Midlands* [1982] AC 529 at 536, Lord Diplock said in relation to the

doctrine of abuse of process:

> *"It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise the statutory power."*

In *Nicholas v Bantick* (1993) 3 Tas R 47 Underwood J referred with approval to the comments by IH Jacob in *The Inherent Jurisdiction of the Court* (1970) 23 Current Legal Problems 23 at 23 that the court's inherent jurisdiction *"may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways."* His Honour noted that an attempt to define the nature of this jurisdiction was made by IH Jacob Current Legal Problems (1970) 23 at 51:

> *"In this light, the inherent jurisdiction of the court may be defined as being the reserve of all funds of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."*

In discussing the meaning of the term *"abuse of process"*, I. H. Jacob wrote at 40:

> *"It connotes that the process of the Court must be used properly, honestly and in good faith, and must not be abused. It means that the Court will not allow its function as a court of law to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. Unless the Court had power to intervene summarily to prevent the misuse of legal machinery, the nature and function of the Court would be transformed from a court dispensing justice into an instrument of injustice. It follows that where an abuse of process has taken place, the intervention of the Court by stay or even dismissal of proceedings may often be required by the very essence of justice to be done..."*

His Honour further noted with approval the observations by I. H. Jacob *Current legal Problems* (1970) 23, at 42 that it is *"not easy to classify the manifold and diverse circumstances of abuse of process which may be dealt with by the summary powers of the court under its inherent jurisdiction."* Jacob proffered the suggestion that abuse of process may fall within a number of categories, the first two of which are:

a. Proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;

b. Proceedings where the process of the court is not being used fairly or honestly, but is employed for some improper purpose or in an improper way.

His Honour stated (at 87):

"There are no definitive rules prescribing the boundaries of an abuse of process. Each case depends upon its own circumstances. Where the court's function as a court of law, obliged to do justice between litigants, is being misused in some way, the court will exercise its inherent power and stop that misuse."

There are many and diverse circumstances in which an abuse of process can arise. Equally, the court may fashion the appropriate remedy to ensure that justice is done between the parties. *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169, affirmed in *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* 87 FCR 134 is but one example of the court dealing with an abuse of process by an appropriate costs order. The principle in *Henderson v Henderson* (1843) 3 Hare 100 is another instance of the exercise by the court of its jurisdiction to prevent an abuse of process. In *James Hardie & Coy Pty Ltd v Barry* [2000] NSWCA 353 at 362 Spigelman CJ observed that unlike the United States, there is no doctrine of collateral estoppel in Australian law. In his view, however, issues of abuse of process may arise in such circumstances. His Honour gave the example of a defendant who has by a single negligent act caused damage to a number of different persons who sue in separate proceedings. In such a case, a point may well arise where it constitute an abuse to put in issue of a factual matter which has been determined against that defendant in a number of proceedings.

An allied principle, however, is that referred to in *VACC Insurance Ltd v Australia Ltd* [1999] 47 NSWLR 716 in which Fitzgerald JA at 724 said:

"[A] plaintiff is not permitted to 'approbate and reprobate'. Verschures Creameries Limited v Hull & Netherlands Steamship Company Limited [1921] 2 KB 608, 612. The forecast by Lord Atkin in United Australia Limited v Barclays Bank [1941] AC 1,32, that, following

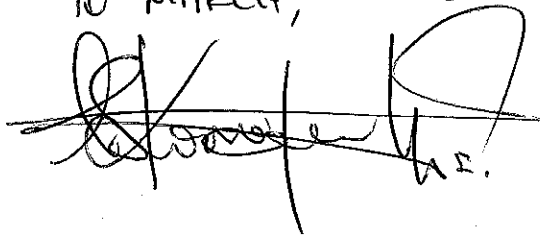
their explanation by reference to the doctrine of *equitable election by Viscount Maughan in Lissenden v CAV Bosch Limited [1941] AC 412, 417 ff, references to 'approbating and reprobating' would 'probably ... become unfashionable' has not been fulfilled. See, for example, Banque Des Marchands De Moscou (Koupetschesky) v Kindersley [1951] 1 Ch 112; Edwards v Cukairn Shire Council (1963) 64 SR (NSW) 62. In my opinion, neither Geselle nor BP can at the one time assert against VACC that Geselle is legally liable to BP for the amount of the judgment given by Kirkham DCJ in favour of BP against Geselle and dispute a matter which increased the amount of that judgment.*

It is unnecessary for present purposes to decide whether this is part of the doctrine of estoppel in pais or an independent doctrine. Cf Cave v Mills [1862] H&N 914 [158 ER 740], 927-928 per Wilde B; Edwards v Culcairn Shire Council 64 SR (NSW) 62, 70. While the classic statement concerning estoppel in pais by Dixon J in Thompson v Palmer [1993] HCA 61; (1933) 49 CLR 507, 547, see also Grundt v The Great Boulder Proprietary Gold Mine Ltd [1937] HCA 58; (1938) 59 CLR 641, 676; relates to an inconsistent departure from an assumption which formed the basis of a past exercise of rights not an attempt to act on two inconsistent bases simultaneously, I cannot identify a difference in principle."

You will find this paper and the presentation of the co-existing topic of ethics and an abuse of process something to consider when you next prepare a claim or an advice for clients in the construction and engineering practice of law.

I thank you for your audience and, most importantly, your attention.

10 MARCH, 2010



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