DISPUTE INSIGHT LTD

ESTOPPEL IN CONSTRUCTION ADJUDICATION

USEFUL DOCTRINE, OR WEAK SUBSTITUTE FOR PROPER CONTRACT ADMINISTRATION?

In construction, estoppel often appears when the paperwork says one thing, but the project has been run another way.

A variation is instructed informally. A notice is accepted late. A payment process is handled loosely for months. Then, when the relationship breaks down, one party tries to return to the strict contractual position.

That is usually where estoppel enters the frame.

In simple terms, estoppel prevents a party from acting inconsistently with a representation, promise, or shared assumption where the other party has relied on it and it would be unfair to permit the first party to resile. In construction projects, that sounds attractive because so much site conduct is informal, practical, and often commercially driven.

But in New Zealand adjudication, estoppel has real limits. The courts have made it clear that it cannot be used casually to undermine the statutory regime under the Construction Contracts Act 2002 (CCA), which is designed keep money moving and disputes moving with it.

WHY ESTOPPEL ARISES ON PROJECTS

Construction projects are fertile ground for estoppel arguments because they are rarely administered with perfect contractual discipline. Work is often directed before formal approval catches up. Payment positions are discussed commercially before they are recorded formally. Site teams say things in emails and meetings that later sit awkwardly with the legal position.

That practical reality is exactly why estoppel keeps surfacing in disputes involving variations, time bars, payment schedules, and dispute escalation clauses. In New Zealand construction contracting, estoppel most commonly appears when one party tries to enforce strict contractual or statutory rights after having said or done something that caused the other party to proceed on a different footing.

But that does not mean estoppel is easy to establish. Courts still require disciplined proof. The party relying on estoppel needs to identify the relevant representation, promise, or shared assumption, show reliance, and then show why it would be unfair to permit departure from it. General project looseness will not do the job.

THE NEW ZEALAND POSITION STARTS WITH THE CCA, NOT EQUITY

In New Zealand, any meaningful discussion of estoppel in adjudication must start with the CCA.

> *"The Act creates the payment claim and payment schedule regime, provides a statutory right to adjudication, and contains a no-contracting-out rule*

That is because adjudication under the Act is not simply a private contractual process. It is a statutory mechanism with a clear policy purpose: regular payments, speedy dispute resolution, and interim enforceability. The Act creates the payment claim and payment schedule regime, provides a statutory right to adjudication, and contains a no-contracting-out rule in **S12 CCA. Section 26** (1) also recognises that adjudication can run alongside arbitration or other dispute resolution mechanisms, but the statutory process still has primacy in the interim.

That policy setting matters. It means estoppel may still be relevant to a substantive issue within a dispute, but it has a much harder time where it is deployed to block the statutory machinery itself.

WILLIS TRUST: YOU GENERALLY CANNOT ESTOP SOMEONE OUT OF ADJUDICATION

The clearest New Zealand authority on that point is **Willis Trust Company Ltd v Green & Anor (Holmes Construction Wellington Ltd), HC Auckland CIV-2006-404-809, 25 May 2006**. (2)

In Willis Trust, the payer argued, in substance, that the parties' earlier agreement or communications about arbitration meant the contractor should be prevented from pursuing adjudication under the CCA. The High Court rejected that argument. A central reason was that the CCA prohibition on contracting out was "unambiguous", and the statutory right to adjudicate was not displaced merely because the parties had discussed arbitration or another pathway. The Court also treated timing as important: the principal had not properly raised estoppel before the adjudicator and had not sought timely injunctive relief, which weakened the later plea that it would be inequitable to allow the adjudication process to continue.

That is an important practical point. In New Zealand, estoppel is not a shortcut around the CCA. If the effect of the argument is really to deprive a party of the Act's adjudication or payment machinery, the court is likely to treat that as impermissible. And if the point is genuine, it needs to be raised early, not after an unfavourable determination.

HALLS EARTHWORKS: ADJUDICATION ENFORCEMENT IS POWERFUL, BUT NOT ALWAYS FINAL

The second key New Zealand case is **Halls Earthworks Ltd (in liq) v Donovan Drainage and Earthmoving Ltd, HC Whangārei CIV 2007-488-000144, 18 July 2007.** (3)

This case is interesting because it deals with another common misunderstanding: the idea that once an adjudication determination is enforced, everything is finished.

> *"entry of judgment under the CCA payment pathway would not necessarily create an estoppel Construction Contracts Act."*

The Court recorded that entry of judgment under the CCA payment pathway would not necessarily create an estoppel preventing later claims where there was a proper foundation for them, such as overpayment or fraud in obtaining the determination. The Court also reinforced that allegations of fraud are exceptional and must be properly pleaded and supported.

The practical lesson is straightforward. CCA enforcement has teeth, but it does not automatically convert an interim payment outcome into a final merits' determination. In that sense, New Zealand adjudication still reflects the familiar commercial position: **pay now, argue later.**

SO HOW IS ESTOPPEL ACTUALLY TREATED IN NZ ADJUDICATION?

In practical terms, estoppel in New Zealand adjudication sits in a narrow lane. It may be relevant where the dispute is about what the parties said, agreed, accepted, or assumed during the project. It may be relevant to valuation, notice compliance, variation treatment, or whether one party led another to proceed in a certain way. But it does not sit above the Act, and it cannot be used as a broad weapon to stop adjudication from happening in the first place where the Act otherwise applies.

That distinction matters. There is a difference between: saying an adjudicator can consider an estoppel argument as part of the underlying dispute, and saying a party is estopped from using the statutory regime at all.

The first proposition is plausible. The second runs head-first into **S12,CCA.**

TIMING MATTERS MORE THAN MANY PARTIES REALISE

One of the strongest threads running through NZ cases is procedural discipline.
Caselaw emphasises that delayed estoppel arguments are vulnerable, especially where they are first pushed in court after the adjudication has already run its course. The same material also notes that if a party genuinely believes there is a jurisdictional or equitable basis to restrain the process, it should be raised before the adjudicator and, if

necessary, supported by timely interim relief. Courts are unlikely to be sympathetic to a "wait and see" approach.

That is a point worth stressing for industry readers. Estoppel is not just about legal theory. It is also about forensic timing. Although estoppel is an equitable doctrine, a party that sits on the point may find equity has little interest in helping it later.

> *"Although estoppel is an equitable doctrine, a party that sits on the point may find equity has little interest in helping it later."*

WHERE ESTOPPEL STILL MATTERS ON PROJECTS

None of this means estoppel is irrelevant. Far from it.

It still matters in the day-to-day reality of project administration. It may become highly relevant where someone says a notice is fine, authorises work informally, repeatedly accepts a course of dealing, or makes payment or certification representations that another party relies on. In New Zealand it may be wise to make use of anti-waiver wording, service provisions, reservation-of-rights protocols, and disciplined variation processes to help reduce estoppel risk, although they do not eliminate it altogether.

That is probably the most commercially useful way to understand the doctrine. Estoppel is often less about clever advocacy after the event and more about what your team did, said, accepted, or failed to reserve during the project.

A BRIEF COMPARISON: UK AND AUSTRALIA

The UK and Australia are useful comparators, but they do not displace the New Zealand analysis.

In the UK, **A & V Building Solutions Ltd v J & B Hopkins Ltd [2023] EWCA Civ 54** (4) is a strong recent reminder that adjudication remains a "pay now, argue later" regime. The Court of Appeal indicated that estoppel may arise where a payer has clearly treated an application as valid without reservation, but and stressed that an isolated prior departure from the contract is usually too equivocal to establish estoppel.

In Australia, the discussion is slightly different. **Waltons Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387** (5) remains foundational for equitable estoppel and its focus on reliance and unconscionability. But in the security of payment context, cases such as **Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd [2022] ACTCA 42 (**6) show a reluctance to treat adjudication determinations as creating issue estoppel because they lack true finality.

The comparison helps make the New Zealand point clearer, not weaker. Across all three jurisdictions, the courts are cautious about allowing estoppel to interfere with fast-track statutory payment regimes.

WHAT THIS MEANS IN PRACTICE

For contractors, principals, and consultants, the real message is not that estoppel is unavailable. It is that estoppel is a doctrine of evidence and conduct, not wishful thinking.

If you want to rely on it, you will need a clear factual foundation.

If you want to avoid being caught by it, administer the contract properly: reserve rights clearly, issue notices on time, document changes properly, be careful what project staff say in writing and do not assume an informal concession today can be reversed tomorrow without consequence

For parties in adjudication, the lesson is even simpler. If estoppel is genuinely part of the case, raise it early. Do not keep it in your back pocket for the enforcement stage and hope equity will rescue you.

FINAL THOUGHT

In New Zealand construction disputes, estoppel still matters, but it does not outrank the Construction Contracts Act.

The courts have made that much clear. Willis Trust shows that estoppel will not usually be allowed to sidestep the statutory right to adjudicate. Halls Earthworks shows that enforcement is powerful, but not always final. Together, they point to a practical conclusion:

In New Zealand adjudication, estoppel may influence the dispute, but it rarely defeats the regime.

References

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