

When enough is enough: Request for liquidator to conduct claims process denied on basis of issue estoppel (*Vastis v. Kommatas*)

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In contentious litigation, adverse parties often engage in multiple rounds of litigation, whether that be motions, trials or appeals. A party may attempt to re-argue issues addressed in an earlier round of litigation.

Res judicata is a principle which prevents the re-litigation of matters that have been previously adjudicated and finally decided. This principle is important to ensuring finality to litigation, reducing uncertainty and inconsistency in results, and conserving the resources of the parties and the court. A branch of *res judicata* is issue estoppel, which prevents the re-litigation of issues which have already been determined.

When a party is brought back to court on an issue which has already been determined, the opposing party may invoke issue estoppel to have the matter dismissed. This was the result in *Vastis v. Kommatas*, 2024 ONSC 6312.

This matter arose from a dispute between the equal shareholders of two companies. In 2022, the parties went to trial where the court ordered the winding-up and liquidation of the companies (2022 ONSC 1366). The court also ordered the appointment of a receiver and liquidator to facilitate this process and distribute the proceeds of the sale of the companies' assets under the supervision of the court.

In 2024, the defendant wrote to the liquidator indicating that a claims process would need to take place before the final wind-up of the companies. The defendant claimed that the corporations had made unequal payments to the plaintiffs prior to the appointment of the receiver and that he wished to make claims to equalize the distribution. The plaintiffs responded to this claim, asserting that it was *res judicata* as a result of the trial judge's order appointing the liquidator. The liquidator brought a motion to the court, seeking advice and direction as to whether the request for a claims process was *res judicata*, and more specifically, an instance of issue estoppel.

In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the Supreme Court held that any right, question or fact distinctly put in issue and directly determined by a court cannot be re-tried in a subsequent suit between the same parties – the right, question, or fact, once determined, must be taken to be conclusively established so long as the judgment remains (at paragraph 24).

There are three preconditions which must be met to successfully invoke issue estoppel:

1. The issue must be the same as the one decided in the prior decision;
2. The prior decision must have been final; and
3. The parties to both proceedings must be the same or their privies (*Danyluk*, at paragraph 25).

The defendant conceded that the second and third preconditions were met, but argued that the issue before the court was not the same as the one decided in the trial decision in which the court appointed the liquidator. Specifically, the defendant argued that the trial judge did not make any findings about any of the unequal

claims asserted by the defendant. Because the trial judge did not decide whether the plaintiffs received more proceeds from the companies than the defendant, the first precondition to establish issue estoppel was not satisfied.

The court disagreed with this characterization, finding that the defendant had in fact raised the issue of a claims process to the trial judge. In the defendant's closing submissions at trial, the defendant requested the appointment of a receiver who could oversee a claims process regarding the equalization of the shareholder accounts and other claims. While the trial judge granted the defendant's request for a receiver/liquidator, she did not grant his request for an order directing a claims process as a part of the liquidation.

The trial judge, at paragraph 29 of her costs decision (not on CanLII), specifically addressed the defendant's unsuccessful claim for an order for a claims process. She held that the "issue of the claims process was an important issue for [the defendant], on which he did not succeed". By making this statement, the trial judge confirmed that she decided the issue of a claims process in her trial decision – the same issue that the defendant was now attempting to re-litigate.

The court held that the preconditions of issue estoppel were satisfied.

However, once this determination is made, a court's analysis is not complete. A court must go on to consider whether it should exercise its discretion to refuse to apply the doctrine of issue estoppel.

In *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141, at paragraphs 36-37, the Court of Appeal for Ontario held that a court retains a limited discretion to refuse to apply the doctrine where the usual operation of the doctrine would work an injustice. This may occur where (1) the first proceeding was tainted by fraud or dishonesty; (2) fresh new evidence, previously unavailable, conclusively impeaches the original results; or (3) fairness dictates that the original result should not be binding.

The defendant argued that the trial judge did not analyze any of the specific claims he made and that having the liquidator analyze and review the claims through a claims process would not create overlap or result in inconsistent findings.

The court rejected this argument.

The trial judge heard evidence over a 14-day trial, including the evidence the defendant intended to rely on for the claims process. The trial judge was well-positioned to decide whether further proceedings were justified and should be ordered through a claims process. The trial judge declined to do so.

Accordingly, there was no basis to find that the usual operation of the doctrine of issue estoppel would work an injustice.

Representation by Gardiner Roberts LLP

The successful plaintiffs were represented at trial and on the motion by Kevin Fisher, James Beesley and Eli Bordman of Gardiner Roberts' Dispute Resolution Group.

Mr. Fisher is a partner with the firm. Mr. Beesley and Mr. Bordman are associates. A PDF version is available for download [here](#).

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