



Local Court
New South Wales

Citation: Kaporis v Riddington [2011] NSWLC

Hearing Date(s): 10 November 2011

Decision Date: 17 November 2011

Jurisdiction: Civil – Small Claims Division

Before: Assessor Olischlager

Decision: Judgment for the defendant. Plaintiff to pay costs of \$677 within 28 days.

Catchwords: Splitting cause of action, res judicata

Legislation Cited: Civil Procedure Act 2005
District Court Act 1858 (NSW)
County Courts Act 1846 (UK)
Local Court Act 2007
16 Vict No 11 (1852)

Cases Cited: *Brunsdon v Humphrey* (1884) 14 QBD 141
Jackson v Goldsmith (250) 81 CLR 446
In the matter of Fratelli's Fresh Pasta Pty Ltd [2011] NSWSC 576
Grimbly v Aykroyd [1847] EngR 444, (1847) 1 Exch 479
Melbourne Authority v Anshun Pty Ltd [1981]JCA 45; (1981) 147 CLR 589
Lennon v Gibson and Howes Ltd [1919] AC 709
Macquarie Bank Ltd v National Mutuai Life Association of Australia Ltd (1996) 40 NSWLR 543
Djordjevic v Australian Iron & Steel Ltd (1964) 82WN (Pt1)(NSW) 218
Pammet v Pawelski (1949) 79 CLR 406
Paff v Speed (1961) 105 CLR 549, 559
Todorovic v Waller (1981) 150 CLR 402

Texts Cited: *Ritchie's Uniform Civil Procedure NSW*
Lloyds Maritime and Commercial Law

Quarterly [1996] LMCLQ

Category: Small Claims

Parties: Georgios Kaporis (Plaintiff)
Steve Riddington (Defendant)

Legal Representation: Mr Acklind (for the plaintiff)
Mr Board (for the defendant)

File number(s): 2011/00291374

Place of Hearing: Downing Centre Local Court

Publication Restriction: Nil

JUDGMENT

- 1 This is a claim brought by the plaintiff to recover property damage arising from motor vehicle collision with the defendant on 27 January 2011. The plaintiff, ostensibly through his subrogated insurer CGU, commenced proceedings on 9 September 2011 claiming \$5,397.80 being the outstanding amount in relation to the cost of repairs.
- 2 The defendant relies on section 24 of the Civil Procedure Act 2005 and seeks judgment in accordance with that provision on the basis that the plaintiff has split his cause of action against the defendant by commencing and obtaining judgment on earlier proceedings based on the same cause of action.

Facts

- 3 The record of the earlier proceedings was before the Court. Those proceedings commenced in the Local Court on 11 July 2011 and allocated file number 2011/00223206. The parties to those proceedings are the same to those in the current proceedings. In the earlier proceedings the

while it was being repaired as a consequence of damage sustained in the collision caused by the defendant on 27 January 2011. Those proceedings were finalised on 17 August 2011 when the Registrar made orders in accordance with the consent judgment filed by the parties.

- 4 The plaintiff commenced these current proceedings on 9 September 2011. The plaintiff in these proceedings claims \$5,397.80 being the balance due in relation to repair costs arising from the same collision.
- 5 Both proceedings are brought in the name of the plaintiff. In reality, however, the current proceedings to recover the cost of repairs are commenced by the plaintiff's insurer, CGU Insurance under rights of subrogation, while the earlier proceedings were commenced on behalf of the plaintiff with the assistance of the hire car company to recover hire car costs. The plaintiff had different legal representation in the two proceedings. The first proceedings sought to recover the uninsured loss to the plaintiff while the current proceedings seeks to recovered the insured loss.
- 6 The defendant seeks judgment on the current proceedings and relies on section 24 of the Civil Procedure Act 2005. That section provides:

"Effect of splitting cause of action

(1) If:

(a) a person (the first person) splits any cause of action against another person (the other person) so as to commence proceedings, or make a cross-claim, for part only of the amount for which proceedings may be commenced on that cause, and

(b) judgment is given or entered, or a final order is made, on the proceedings or cross-claim,

the other person is entitled to judgment in any other proceedings, whether in that or any other court, with respect to the same cause of action.

(2) Despite subsection (1), if the other person has given a number of securities in respect of a claim made by the first person, the first person:
(a) may commence proceedings in any court in respect of each of those securities, or
(b) may make a cross-claim in proceedings in any court in respect of each of those securities,
as if each of those securities gave rise to a distinct cause of action, and may do so whether or not the claim made by the first person is for an amount that is more than the court's jurisdictional limit."

Submissions

7 The plaintiff submits that the section does not apply in the present case. The plaintiff states that the underlying purpose of section 24 is to prevent an abuse of process by a plaintiff splitting his cause of action in order to bring an action within the jurisdictional monetary limitations of an inferior court. The plaintiff refers to the following commentary in Ritchie's Uniform Civil Procedure NSW at [24.5]:

"The prohibition on splitting or dividing causes of action is a feature of legislation governing courts whose jurisdiction is subject to monetary limits and operates to prevent related claims being divided into multiple proceedings purely for the purpose of bringing each within the limits of the court's jurisdiction. Under s24(1), a judgment operates as a defence to any claim on a "split" component of the same cause of action: see generally Sollimano v Nolan [1921] VLR 389 and Adkin v Friend (1878) 38 LT 393."

8 The plaintiff states that the two proceedings were not brought separately in the Local Court for any improper purpose related to the jurisdictional monetary limit of the Local Court. If both proceedings had been brought in a single case the total claim would have remain well below the Local Court monetary threshold of \$100,000.

- 9 The plaintiff submits that he is entitled to bring separate proceedings for the two distinctly different claims for damage. The plaintiff points out that the pleadings on the claim to recover the cost of repairs differs from the pleading on the claim for loss of use and each claim involves proof of different matters. The plaintiff relies on the English Court of Appeal decision of *Brunsdon v Humphrey (1884) 14 QBD 141* where the majority of the Court held that where the negligent act of the defendant results in both property damage and personal injury, a plaintiff may recover damages in an action in respect of the property damage, and still recover damages in a second action relating to the personal injury.
- 10 This decision has been accepted as the common law position in Australia in *Jackson v Goldsmith (250) 81 CLR 446* per Fullagar J at 467.
- 11 Finally, the plaintiff submits that defendant should not be entitled to rely upon section 24 of the Civil Procedure Act 2005 in circumstances where the defendant consented to a settlement of the first proceedings with the knowledge of a separate pending claim for the cost of repairs. The plaintiff sent a letter of demand to the defendants subrogated insurer AAMI on 3 June 2011 seeking to recover property damages. The plaintiff states that the defendant settled the earlier proceedings with the knowledge that it may bar the recovery of further damages by the plaintiff.
- 12 The plaintiff states that the conduct of the defendant amounted to an "ambush approach" to litigation in the same manner criticised in the decision of *in the matter of Fratelli's Fresh Pasta Pty Ltd [2011] NSWSC 576*. In that case White J was critical of the conduct of a legal advisors acting for the defendant in consenting to an adjournment of proceedings beyond a statutory time limit and with the knowledge that the plaintiff acted under a misapprehension as to the existence of the time limit. The court expressed the view that the "ambush approach" to litigation is discredited and that legal advisors have a duty to co-operate in seeing that issues be resolved as quickly and as cheaply as it properly can be, consistent with its being resolved justly.

- 13 The defendant submits that the provisions of section 24 of the Act reflect the common law principles of res judicata and anshun estoppel. The cause of action in these proceedings is the same as that raised in the earlier proceedings as it relies on the same wrong complained of and requires substantially the same evidentiary matters to be proven by the plaintiff. The defendant submits that it therefore entitled to a judgment in accordance with the provision. Furthermore the defendant submits that the decision in of *Brunsdan v Humphrey* can be distinguished on the basis that it created an exception to the once-and-for-all-rule that applies only to circumstances involving claims giving rise to both personal injuries and property damage.
- 14 In relation to the claim that the defendant was obliged to inform the plaintiff of the potential impediment to bringing a second claim the defendant states it did nothing to create that misapprehension on the part of the plaintiff and that, in any event, the defendant was under no obligation to inform the plaintiff of the potential impediment to a case that had not been commenced.

Analysis

- 15 It is clear that if the defendant can satisfy the Court that section 24(1) applies to the claim brought by the plaintiff that the defendant is entitled to a judgment in his favour. Section 24(1) is in mandatory terms. There is no suggestion that the exception referred to in section 24(2) has any relevance to the claim.
- 16 The plaintiff submits that the Court should take a purposive approach the construction of section 24 of the Act. The plaintiff submits that the underlying purpose of the section is limited to prohibiting parties from dividing a cause of action to come within the jurisdictional limit of an inferior court. As that is not the case in the present instance, the section should not apply.

- 17 A number of authorities from the mid nineteenth century relating to the splitting of a cause of action support the plaintiff's contention that the underlying intention of the provision was to prevent a plaintiff from bringing several claims on a cause of action for the purpose of coming within the monetary jurisdiction of the court (see for example; *Grimbly v Aykroyd* [1847] EngR 444, (1847) 1 Exch 479).
- 18 It is clear that section 24 has its origins in preserving the monetary jurisdiction limits of inferior courts. The predecessors of section 24 appeared in the earliest versions of statutes creating inferior courts within NSW. Section 12 of the District Court Act 1858 (NSW) provided:
- "It shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts but any plaintiff having a cause of action for more than the amount for which a plaint might be entered under this Act may abandon the excess (which abandonment shall be stated upon the plaint) and thereupon the plaintiff shall on proving his case recover to an amount not exceeding two hundred pounds and the judgment of the Court upon such plaint shall be in full discharge of all demands of the Court upon such cause of action".*
- 19 Similar provisions have been enacted on the creation of inferior courts in a number of common law jurisdictions. In the United Kingdom section 63 of the County Courts Act 1846 (UK) provided *"it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said courts."* The Victorian legislature created county courts in 16 Vict No 11 (1852). That enactment contained a similar prohibition on dividing a cause of action for the purpose of making two or more suits within one or more county courts. Those provisions have been re-enacted in subsequent legislation.
- 20 While the provision is common within the legislative regimes establishing inferior courts it has not generally been extended to superior courts.

Clearly, the absence of monetary jurisdictional limits makes such a provision unnecessary in superior courts. Furthermore, in circumstances where a plaintiff splits a cause of action in a superior court the court may rely on its inherent powers to regulate proceedings to protect against a potential abuse of process or to either stay or strike out proceedings based on a plea of *res judicata*. In the mid nineteenth century when district courts, county courts and other inferior courts were created by the legislature it was necessary to source powers to deal with a potential abuse of process within the statute.

21 As a principle of statutory interpretation, there is a presumption that a legislature intends to attach the same meaning to a provision when it is used in subsequent statutes (see *Lennon v Gibson and Howes Ltd [1919] AC 709* at 711-712). However, that presumption is weakened in the present case as the provisions of section 24 of the Civil Procedure Act 2005 materially differ from the earlier provisions. Section 24 does not contain the limitation existing in earlier provisions that require evidence of the purpose of splitting a cause of action. Furthermore, whereas earlier provisions precluded the commencement of multiple proceedings based on the same cause of action and was therefore operative before any judgment was given, section 24 provides a mechanism that only applies where a judgment is given in respect to one action.

22 Having regard to these changes Court is of the view that section 24 of the Civil Procedure Act cannot be considered in a restrictive manner suggested by the plaintiff. Section 24 is in broader terms than the earlier enactments. By removing reference to the purpose of splitting an action the prohibition is now in general terms. It still protects against a plaintiff splitting a cause of action for the purpose of bringing a matter within a monetary jurisdiction of an inferior court, however, it now may have application whenever a plaintiff splits a cause of action and obtains a judgment in one of the proceedings. The current provision more closely mirrors the common law principle of *res judicata*.

23 The second issue that the court must consider is whether the plaintiff in bringing proceedings against the defendant for damages for loss of use of a motor vehicle in relation and then separate proceedings in relation to damages for repairs to the vehicle divided his cause of action.

24 The term "cause of action" has been defined in a number of ways. In *Port of Melbourne Authority v Anshun Pty Ltd* [1981]JCA 45; (1981) 147 CLR 589 Brennan J at [15-17] stated:

"There is an imprecision in the meaning of the term cause of action, which is sometimes used to mean the facts which support a right to judgment (see per Williams J in Carter v Egg and Egg Pulp Marketing Board (Vict) [1942]HCA 30; (1942) 66 CLR 55, at 600,601); sometimes to mean a right which has been infringed (see Serrao v Noel (1885) LR 15 QBD 549) and sometimes to mean the substance of an action as distinct from its form (see Krishna Behari Roy v Brojeswari Chowdraneee (1875) LR 2 Ind App 283). Imprecision in the meaning of cause of action tends to uncertainty in defining the ambit of the rule that a judgment bars subsequent proceedings between the same parties on the same cause of action. The foundation of the rule, whether it be termed res judicata, or cause of action estoppel or judgment recovered, is the merging of the cause of action in the judgment. In reference to res judicata, Dixon J said in Blair v Curran [1939] HCA 23; (1939) 62 CLR 464 at p532: "the very right or cause of action claimed or put in suit has... passed into judgment, so it is merged and has no longer an independent existence..."

25 If a cause of action is taken to mean a right, then a party would not be precluded from relying on the same act or omission in subsequent proceedings where the act or omission gives rise to more than one legal right.

26 In *Brunsdon v Humphrey* the majority of the court held that it was open for a plaintiff to recover damages separate proceedings for property damage and personal injuries. Brett MR considered cause of action in the context

of a legal right and held that property damage and personal injury gave rise from to two distinct causes of action.

- 27 This approach to defining a cause of action does not assist the plaintiff. Both proceedings commenced by the plaintiff can be categorised as claims based in negligence or trespass to property. The same right was relied upon to recover different damages in each case.
- 28 The alternative approach to defining a cause of action is by reference to the set of facts that, if established, give rise to a right to relief. Given that pleadings require parties to state the facts upon which they rely, courts have more recently preferred this approach to identifying the cause of action.
- 29 In *Brunsdan v Humphrey* Brett MR had regard to this issue by considering "*whether the same sort of evidence would prove the plaintiff's case in the two actions*". Brett MR formed the view that the evidentiary matter in relation to proof of personal injury was distinct from the evidence necessary to support damage to property.
- 30 In *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543 Clarke JA considered the question as to whether damages arising from the same construction contract could give rise to separate causes of action. He said (at 559);

"What I think is necessary is an examination of the factual circumstances relied upon to establish the right to relief in each case in order to determine whether there is a sufficient identity between them to found the conclusion that the same cause of action was in question in both cases."

- 31 Clarke JA concluded (at 561-562):

"In simple terms the issues raised in the second proceedings were not litigated in the first. The relief claimed in each was different and

depended on the resolution of essentially different factual issues arising out of different alleged acts and omissions on the part of Westgarths, so that it cannot be said that in substance Macquarie was endeavouring again to litigate the same cause of action" (emphasis added).

32 The plaintiff submits that the different evidentiary issues to establish a claim for loss of use as opposed to a claim for cost of repairs gives rise to a distinct cause of action as referred to by Brett MR in *Brunsdan*. The Court does not accept that submission. It is clear from what Clarke JA referred to in *Macquarie Bank* that the existence of different acts or omissions that give rise to the claim of relief will be critical in determining whether a new cause of action arises. In these proceedings the plaintiff relies entirely on the same act and omissions on the part of the defendant as those of the earlier proceedings.

33 The plaintiff's claim for loss of use of his motor vehicle and a claim for cost of repairs should be more appropriately characterised as a separate heads of damages arising from the same cause of action. In *Djordjevic v Australian Iron & Steel Ltd (1964) 82WN (Pt1)(NSW) 218* at 220 Hardie J said:

"The law is well settled that, when a person is injured as a result of negligence or other wrongful act of another person, then he has one indivisible claim for damages. He cannot apportion or split it into sections, either in terms or limbs or periods of times or otherwise; he can only recover once and for all for physical injury and impairment to his bodily and mental health".

34 The once and for all rule has been applied in a number of other cases; *Pammet v Pawelski (1949) 79 CLR 406*; *Paff v Speed (1961) 105 CLR 549, 559*; *Todorovic v Waller (1981) 150 CLR 402*.

- 35 The Court is satisfied that the plaintiff in commencing separate proceedings for loss of use and cost of repairs arising from a single collision, split his cause of action.
- 36 In determining whether the requirements of section 24(1) of the Act are otherwise met, the plaintiff obtained a judgment by consent on the earlier proceedings on 17 August 2011. A judgment entered by the Registrar by consent is a final and conclusive judgment of the Court (see section 38 Local Court Act 2007). It is a judgment as referred to in section 24 of the Act.
- 37 The fact that the proceedings were brought ostensibly by the plaintiff's subrogated insurer in relation to the cost of repairs and by the car hire company in relation to loss of use does not alter the operation of section 24 of the Act. Both proceedings were brought in the name of the same plaintiff. "*Lloyds Maritime and Commercial Law Quarterly*" [1996] LMCLQ indicates that the principles prohibiting splitting a cause of action applies equally to insurers acting under subrogation. It states at page 366":
- "It sometimes happens that an insurer pays its insured in respect of a loss independently of the insurer, the insured then sues a third party for his uninsured losses only. If the insured recovers judgment against the third party, or accepts payment into court with the result that further pursuit of the action is stayed, the insurer will not be permitted to bring a second action in the insured's name against the third party with a view to recouping its payments, as this would constitute an abuse of process."*
- 38 The Court is satisfied that section 24 of the Civil Procedure Act applies to the present claim.
- 39 The final question that the Court must consider is the obligation of legal practitioners to ensure determination of real issues and avoid ambush as referred to in the matter of Fratelli's Fresh Pasta Pty Ltd. In particular the Court is asked to consider whether there is any basis not to direct a

judgment in favour of the defendant by reason of the conduct of the legal advisors of the defendant consenting to the earlier judgment with the knowledge of the existence of the claim to be brought by the insurer.

- 40 The Court is satisfied that there is no basis upon which to impose a duty upon the defendant to inform the plaintiff of the possible impediment to recovery of further damages in subsequent proceedings. The duty upon legal practitioners is contained in Part 6 of the Civil Procedure Act 2005 to facilitate the court's overriding objective to achieve the just, quick and cheap resolution of the issues in dispute. When the plaintiff initiated the first proceedings it was not open to the defendant to raise a plea based on *res judicata* or section 24 of the Act. The first opportunity for the defendant to do so was upon the plaintiff commencing the second proceedings having obtained judgment on the first and it did so.
- 41 The obligations on legal practitioners contained in Part 6 of the Civil Procedure Act 2005 relate to proceedings that have commenced. The plaintiff determined the scope of the original proceedings when settling the pleadings and the relief claimed. The defendant was obliged only to respond to the claim as framed. Part 6 of the Civil Procedure Act does not create obligations of legal practitioners to inform the opposing party of matters beyond the scope of proceedings. The plaintiff was legally represented and it was reasonable for the defendant to assume that the plaintiff would be cognisant of issues associated with splitting a cause of action. There was no obligation upon the legal advisor for the defendant to inform the plaintiff of any potential bar relating to any possible prospective litigation.
- 42 Even if there was such a duty, and that duty was breached, the Court notes that this would only give rise to a question as to how the Court should exercise its discretion as to costs rather than disentitling the defendant to a judgement under section 24 of the Act.

43 The Court will direct judgment in favour of the defendant in accordance with the section 24 of the Civil Procedure Act 2005 and allow costs in favour of the defendant.

Assessor Olischlager

Local Court