On appeal

IN THE LOCAL COURT
DOWNING CENTRE

MAGISTRATE MILLEDGE

WEDNESDAY 16 APRIL 2014

2012/356246 - GIFFORD PETERS v CARMON DE ARMAS

EXTRACT OF MAGISTRATE'S DECISION

Mr Gordon for the Plaintiff
Mr Oliver for the Defendant

HER HONOUR: This is the matter of Gifford Peters and Carmon de Armas, a matter where the insurer, through Mr Peters, is claiming against Mr de Armas for damages arising from a collision that occurred between the vehicles driven by both Mrs Peters and Ms de Armas on 1 July 2012. There has been earlier proceedings where Mrs Peters sought to recover costs for hire car services from Ms de Armas and pleadings were prepared. I recall at the first proceedings pleadings were prepared where the same cause of action was pleaded in those pleadings as sought to be relied on with regards to the second proceedings and of course it is understood that the pleadings are what is relied on with regards to the facts of the matter and of course the pleadings would set out the facts that the plaintiff would rely on as the facts of the matter to establish the claim.

I now have to determine a notice of motion with regards to the second proceedings. Gifford Peters is now seeking damages against Carmon de Armas for substantial damages that were occasioned to his motor vehicle as a result of that collision. He was not the driver of the car at the time. His wife was the driver of the car at the time and the Court has been told that she was pretty much the custodian of that vehicle and relied on the vehicle for her own purposes and that would appear to be the reason as to why she brought the first action against de Armas for the recovery of hire car fees. I made the inquiry and was told that in the original insurance policy that those hire car fees would have been part of the claim if the matter was to proceed as one claim for damages to the vehicle and also other incidentals as a result of the collision and the alleged negligence of Ms de Armas.

The issue that the Court has to determine is whether the cause of action that is now merged in law as a result of the judgment in the first proceedings and that that cause of action no longer exists and appears that if you sue once you sue for all reasons and the defendant in these proceedings, these second proceedings, raise the issue of res judicata saying that there was a judgment. the matter was determined on the particulars of the first pleading. The issues that were raised in the first proceedings, the pleadings are the same as the pleadings that are relied on in the second proceedings and that s 24 of the

Civil Procedure Act that deals with split actions should be considered as a prohibition to the NRMA now, through Mr Peters, seeking to recover any further damages. Section 24 says the effect of splitting the cause of action says

> "If a person splits any cause of action against another person so as to commence proceedings or to make a cross claim for part only of the amount for which proceedings may be commenced on that cause and judgment is given or entered or a final order is made on the proceedings of cross claim and 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."

That is what the defendant in these proceedings relies on.

Now there are two issues that the Court has to consider by way of notice of motion. The first is the issue of res judicata which has been raised by the defendant in these proceedings and the defendant relies, as I said, on s 24 of the **Civil Procedure Act** and says that it is an abuse of process to bring these second proceedings and that the Court should strike them out which, in accordance with s 24, would mean that judgment should be entered on behalf of the defendant.

The plaintiff, on the other hand, says res judicata is not an issue and that the NRMA, who is now suing in the name of Mr Peters, and looking at the subrogated rights of the insured and the insurer now seeks to recover damages that it has to meet in dealing with the claim for the insured, Mr Peters, and that whilst, on the face of it, it appears that they are the same people that are involved in the suit that whilst it could be seen as the same person there is a very different capacity.

The res judicata - I must say that I found some aspects of this matter quite troubling in looking at the issues of res judicata. I thought the Authorities were fairly light on but I was greatly assisted by the very good submissions of Mr Emmett and Mr Oliver with regards to all of the matters that I had to consider in coming to my determination. I had to consider whether there was Mr Peters - whether it was the same person suing the same person, relying on the same cause of action and if that was to be my finding then of course s 24 would need to be considered and the matter would be seen as an abuse of process and that there would be judgment for the defendant.

I was also greatly assisted by Mr Oliver's submissions with regards to the issue of bad faith, **Uniform Civil Procedure Rules** 36.1(5) where it speaks of setting aside judgments if the judgment has arisen as a result of, and I will just use the terminology "bad faith" and it is said by the plaintiff that if I do consider that res judicata is applicable here then I should consider the issues under 36.1(5) and set aside the earlier judgment because it was made in bad faith and the plaintiff relies on a number of dealings that it had with the defendant's representatives during the course of the second proceedings being marshalled and put before the Court, directions hearings and other inquiries the NRMA

made through the defendant's insurer that there was no notice given that at the time that they were dealing with each other in relation to the second proceedings the first proceedings were en foot and being dealt with and in fact it was not until the morning of the directions hearing that the NRMA received a fax to say that the first proceedings had been settled in the defendant's favour.

The NRMA says that it has a right to claim against Ms de Armas, that the NRMA should be seen as an entity in its own right, that whilst it is suing in the name of Gifford Peters, who is the insurer (as said), that it is much like a person suing an Estate in their own name or suing as an executor. The person remains the same but the disposition of the person is very different and that that is how the Court should view this matter, that it is in the interests of justice that the NRMA be given an opportunity of being heard with regards to the claim against Ms de Armas and her insurer, which is AAMI and Mr Peter's insurers is NRMA.

The first proceedings were brought under the name of Mrs Peters and there seems to be no issue with that, with regards to the pleadings, the issues raised in the notice of motion that it was accepted that at the time before the matter was finalised that the plaintiff's name was changed to Mr Gifford Peters and it was settled under the name of Mr Gifford Peters.

The NRMA says that they had a right to participate in the first proceedings, that they were an interested party, that it would have been known to the defendant and the defendant's representatives that they were interested in the first proceedings because they were dealing for the defendant in relation to the second proceedings. So it was known from an early stage that they were in fact an interested party to this action.

Now looking at the chronology, on 12 July 2012 there was the collision between the two vehicles. On 6 September the same year Mrs Peters' claims for hiring costs and at that stage the NRMA had no involvement. On 3 October 2012 there was a conversation between AAMI and NRMA and at that stage the representative AAMI made no mention of the first proceedings. On 15 November 2012 the plaintiff, through the NRMA, commenced the second proceedings. On 17 November 2012 the defendant seeks better particulars from the plaintiff and, again, in that inquiry there was no reference to the first proceedings. On 16 December 2012 the defendant filed a defence in the second proceedings and at that stage the plaintiff says that it did not rely on any pleading of an abuse of process. On 23 January 2013 the defendant's solicitor and the plaintiff's solicitor attended a directions hearing. On 19 February 2013 the matter was set down for hearing and again there was no notice that the first proceedings were en foot. Now the first proceeding, the hearing was on 13 February 2012. There was still no notice. On 13 February Mrs Peters was removed from the plaintiff's position and Mr Peters was installed and of course on that occasion there was judgment for the defendant in relation to that matter.

Now it is true that in subsequent proceedings that the defendant has pleaded s 24 of the **Civil Procedure Act** which deals with the splitting of the cause of

action and it says that it put the NRMA, or it put Mr Peters on notice at that stage that they were going to be relying on res judicata as being the doctrine that should apply here because these were issues that were already ventilated and determined in earlier proceedings.

Whilst I appreciate Mr Oliver's submissions with regards to whether the judgment was made in bad faith - and I must say having read his submissions on that point I agree with him. I think the preliminary issue here is whether the doctrine of res judicata does apply to the second proceedings. I accept what the plaintiff says with regards to looking at Mr Peters and the NRMA, looking at them distinctly as two different entities with regards to bringing a claim. The NRMA does so in Mr Peters' name because Mr Peters is the insured and they are the insurer. At all times the insurer had a right to be heard in the first proceedings. I accept what Mr Oliver says with regards to they should have been put on notice. The original lawyers used by Mr Peters should have been alive to the fact that it was more than simply the hiring charges that were meant to be recovered with regards to this cause of action, that there were other issues that needed to be addressed but whether by way of ignorance or for some other reason they did not turn their mind to that and therefore did not seek to alert the NRMA that they were seeking to recover the hire costs. I do not know the reason for that but it certainly was not done. I am absolutely satisfied that the NRMA were very much in the dark about what was happening with regards to the first proceedings.

Mr Oliver also says in his submissions that pleading s 24 of the **Civil Procedure Act** should have alerted the plaintiff to the fact that there was this issue about splitting cases but at that stage it was too late, that the first proceedings were well and truly underway and determined and that the NRMA were shut out from dealing in the first proceedings.

As I said, when I started, the issue of res judicata was a difficult one for me to come to terms with when looking at the Authorities and of course perhaps the very best that the plaintiff could do in the circumstances was to give a textbook definition about suing the same person in different capacities and saying that it is recognised that the insured and the insurer would fit into that category.

There is a number of affidavits and viva voce evidence taken during the course of dealing with this latter matter. Desiree Patesky was the assistant team manager at the recovery centre of the NRMA Insurance and she speaks of the insurance policy and the collision that activated that policy on 12 July 2012. She said the statement of claim and the proceedings commenced on 15 November that same year. She said there was no reference in Ms Ostimeer's note that separate proceedings had already been filed. There was the affidavit of Mark Board in the statement of claim of 6 September 2012. The defence was filed and it was dated 2 October 2012 and the statement of cross claim , 3 October 2012 and of course the name, Charlotte Peters, as the cross defendant. The cross claimant successfully sued in the Small Claims on 13 February 2013. She says the NRMA received a phone call from Charlotte Peters on 15 February 2013. She said that was the first notice that NRMA knew of separate proceedings and the plaintiff was unsuccessful in the Small

Claims Division. She said the original defence does not refer to separate proceedings and the amended defence filed on 5 March was the first time it referred to separate proceedings. Charlotte Peters was of course asserting negligence by the defendant and that there was to be a witness in the NRMA case of Bonny Ting that didn't give evidence in the first proceedings but is now available to give evidence in the second proceedings. She said the NRMA paid Cass Smash Repairs, Combined Towing and Hertz Australia Pty Limited. She said on 13 July 2012 AAMI contacted the NRMA and confirmed that the insured details had come - sorry, I just cannot understand my note there - that there was another phone call on 13 July. Anna Tomakos gave evidence that she was a paralegal and solicitor for the plaintiff and again, on 19 November, she was instructed by the NRMA to commence proceedings against Carmon de Armas on behalf of the insured, Gifford Peters, On 14 November she said notice a file note is dated 3 October. On 15 November 2012 attempted to find out the details of the car hire and that same day filed the statement of claim for $11,153.65. On 1 December it was served on the defendant. On 17 December there was a letter received requesting proof of the claim. This is to do with the particulars and again no mention of the first proceedings. On 16 December the original defendant - there was no mention of the concurrent proceedings. On 23 January spoke to Ashley, not advised of separate proceedings for hire car. That they were acting for the defendant in those proceedings. Then of course she also speaks of the directions hearing on 19 February. Also heard from Gavin Paul ..(not transcribable).. I will not go into any further details of the evidence that they gave because mostly what that would support would be the second part of the plaintiff's submission with regards to striking out the first judgment as it has been given in bad faith because the Court was never put on notice that the NRMA was initiating second proceedings to recover more significant damages.

I am satisfied that the NRMA have suffered a loss as a result of paying out on the insurance policy and the NRMA has a right to claim that money back. Mr Oliver, in his submission, says that there are other ways that if this matter is struck out with regards to the doctrine of res judicata that there are other ways that the NRMA can recover any loss and it sets out how that could be done.

I believe the NRMA has a right in the first instance to bring a claim against the defendant in the second proceedings, Carmon de Armas, in its own right looking at the interests of the insured and the interests of the insurer. It is true that the insured brought about a first proceeding and that was naïve and also in terms of how the NRMA would deal with the insured. That was a very negligent thing for the insured to do, to blindly go ahead and launch proceedings for a discrete aspect of the damages that were being sought against Ms de Armas.

I accept the submissions of the plaintiff that res judicata is not an issue here whilst it could be seen as a line fall. I am satisfied that the NRMA in an effort to recover from Ms de Armas has a right to sue in the name of Mr Peters, the insured, and for that reason I am satisfied that it is not an abuse of process. That it is a matter that can be heard and determined on the facts.

So that is as far as I need to go with regards to that issue because if I was to have found that res judicata was in fact a prohibition to the suit I would then need to turn my mind to 36.1(5) and I have been told by the plaintiff that in dealing with the matter where the NRMA can be heard in relation to this claim that the first judgment remains intact and that is not interfered with and that whilst it appears to be a hearing de novo I am satisfied that it is a matter where the NRMA has standing and for that reason I DO NOT FIND THAT IT IS AN ABUSE OF PROCESS.

EXTRACT CONCLUDED