Local Court
New South Wales

Citation:	Round v Mace [2012] NSWLC
Hearing Date(s):	6 September 2012
Decision Date:	25 September 2012
Jurisdiction:	Local Court – Small Claims Division
Before:	Assessor Olischlager
Decision:	1. Application for stay of proceedings/dismissal of claim dismissed. 2. Verdict and judgment in favour of the plaintiff in the sum of $6,685.97 together with court costs and service fees of $122 and professional costs of $1168. Judgment to be paid within 28 days.
Catchwords:	Anshun Estoppel, Abuse of Process, Splitting a Cause of Action
Legislation Cited:	Civil Procedure Act 2005
Cases Cited:	Johnson v Gore Wood & Co [2002] 2 AC1 Port of Melbourne Authority v Anshun Pty Ltd [1981] HCA 45 Henderson v Henderson (1843) 3 Hare 100 Habib v Radio 2UE Sydney Pty Ltd [2009] NSWCA 231 R&J Lyons Family Settlement Pty Ltd v 155 Macquarie Street Pty Ltd [2008] NSWSC 232 Walton v Gardiner [1993] HCA 7; 177CLR 378 Abbey Panel and Sheet Metal Co v Barson Products [1948] 1KB 49 Hungerfords v Walker (1989) 171 CLR 125
Category:	Civil

Parties:	Andrew Round (Plaintiff) Lee Mace (Defendant)
Legal Representation:	Mr Livingston for the plaintiff Mr Oliver for the defendant
File number(s):	2011/00348125
Place of Hearing:	Downing Centre Sydney
Publication Restriction:	Nil

JUDGMENT

1 This is a claim brought by the plaintiff for general damages arising from the loss of use of his motor vehicle that was damaged in a collision on 29 June 2011 as a consequence of the negligence of the defendant.

2 The defendant raises a preliminary issue as to whether the plaintiff is precluded from bringing these proceedings by reason of earlier proceedings (referred to as the first proceedings) that were commenced in the name of the plaintiff based on the same cause of action.

3 The defendant submits that these proceedings are an abuse of process by reason of the settlement or compromise of the first proceedings and relies on the principles of Anshun estoppel.

4 While questions of abuse of process would normally be raised by notice of motion pursuant to UCPR 13.4 or UCPR 14.28 the defendant has elected to raise the issue by way of the defence filed. As these are proceedings being heard and determined within the Small Claims Division of the Local Court the informal processes of the Court allow this issue to be determined in conjunction with the substantive issues.

Summary of Litigation

5 The facts surrounding the history of litigation are largely not in dispute. On 19 September 2011 the solicitors acting on behalf of the plaintiff's subrogated insurer filed a statement of claim in the Local Court against Mr Mace claiming "loss and damage in the sum of $26,947.04" arising from the collision on 29 June 2011. The particulars of the pleading for damages were "cost of repairs $26,947.04".

6 On 21 September 2011 a licensed commercial agent, Compass Claims, wrote to the plaintiff's subrogated insurer stating that it was instructed to recover the plaintiff's loss being the cost of hire of a replacement vehicle while the plaintiff's vehicle was being repaired. Compass Claims proposed that the subrogated insurer join its claim for repairs with the plaintiff's claim for loss of use.

7 On 26 September 2011 the solicitors acting on behalf of the plaintiff's subrogated insurer made an alternative offer that would enable the loss of use claim to be incorporated into the proceedings commenced by the subrogated insurer.

8 On 4 October 2011 the solicitors for the subrogated insurer received payment from the defendant and informed Compass Claims that it would file a notice of discontinuance in the first proceedings. On 5 October 2011 a notice of discontinuance was filed in the first proceedings by which the plaintiff discontinued the whole of the proceedings.

9 The defendant subsequently filed an "Acknowledgement of Liquidated Claim" in the first proceedings and the registrar recorded a judgment, however, that judgment was set aside, and in my view rightly so, as being irregular.

10 On 1 November 2011 Compass Claims commenced these second proceedings on behalf of the plaintiff seeking damages of $6,685.97 for damages arising from the collision on 29 Jun 2011 being the cost of hiring an alternate/substitute motor vehicle.

11 There is no dispute that these second proceedings involve the same parties and the same cause of action the subject of the first proceedings.

Submissions by the Parties

12 The plaintiff submits that no *Anshun* estoppel arises because there was no judgment entered in the first proceedings. Furthermore the plaintiff submits that there was nothing unreasonable in the conduct of the plaintiff discontinuing the first proceedings upon receipt of payment and commencing the second proceedings.

13 Although the first proceedings were discontinued following payment of the claim that payment did not give rise to accord and satisfaction as there is no evidence of payment being made pursuant to an agreement between the parties.

14 The plaintiff submits that the discontinuance of the first proceedings does not prevent the commencement of fresh proceedings. Uniform Civil Procedure Rule 12.3(1) provides;
"A discontinuance of proceedings with respect to a plaintiff's claim for relief does not prevent the plaintiff from claiming the same relief in fresh proceedings".

15 The plaintiff submits that these proceedings are not an abuse of process. The proceedings are not a re-litigation of the first proceedings as the first proceedings were not determined.

16 The plaintiff states that it could not be said that the plaintiff acted unreasonably in not including the vehicle hire claim in the first proceedings

that were on foot a mere 17 days. The defendant's subrogated insurer was aware of the existence of the hire car claim and that it attempted to out-manoeuvre the plaintiff by paying an amount to the plaintiff's subrogated insurer and filing an acknowledgment to the claim in an effort to deny the car hire claim.

17 The defendant submits that *Anshun* principle applies in circumstances where proceedings have been compromised without being judicially determined. The defendant submits that the payment made by the defendant in response to the first proceedings represented a compromise of the cause of action. The plaintiff acted unreasonably in failing to litigate in respect to the whole of the claim of damages in the first proceedings.

18 The defendant submits that the plaintiff was cognizant of the implication of failing to bring proceedings for the whole of the claim. The defendant refers to correspondence by Compass Claims to the plaintiff's subrogated insurer dated 21 September 2011 that offered to join their claim and noted:

"it is an established principle of law that all claims for damages arising out of the same accident need to be brought together. In the event that a claim is settled or a determination issued, a plaintiff, in whatever guise may well be prohibited from filing proceedings a second time for further damages."

19 The defendant states that the plaintiff's cause of action is indivisible and that consequently, it is an abuse of process to bring the second proceedings on the same cause of action in circumstances where the first proceedings were compromised and the damages claimed in the second proceedings should have been raised in the first proceedings.

20 The defendant relies on the decision of the House of Lords in *Johnson v Gore Wood & Co [2002] 2 AC1.* In that case Lord Bingham rejected (at 32H-33A) a submission that the rule in *Henderson v Henderson* did not

apply to proceedings that *"had culminated in a compromise and not a judgment"*. His Lordship held that:

"[a]n important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first, often, indeed, that outcome would make a second action the more harassing."

21 Lord Goff, Lord Cooke and Lord Hutton agreed with Lord Bingham on this question. Lord Millett (at 59C) agreed that the principle in Henderson v Henderson:
"is capable of applying even where the first action concluded in a settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when the unsuspected part remained outstanding."

Anshun Estoppel

22 The principle of Anshun estoppel arises where it is unreasonable to permit the continuation of proceedings by reason of earlier proceedings. Unreasonableness may be evident through the re-litigation of the same issues giving rise to the possibility of conflicting judgments and vexing a defendant with the same cause of action twice or otherwise where the second proceedings are so closely related that they should have been brought as part of the earlier proceedings.

23 In *Port of Melbourne Authority v Anshun Pty Ltd [1981] HCA 45* Gibbs CJ, Mason and Aickin JJ approved the principle stated by Sir James Wigram VC in *Henderson v Henderson (1843) 3 Hare 100* at 115;
"...where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the

same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought froward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject to litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

24 Their Honours identified the test for estoppel in the following terms at [602 – 603]:

"...there will be no estoppel unless it appears that the matter relied upon... in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to have relied on it. Generally speaking, it would be unreasonable not to so plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding.

In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings eg expense, importance of a particular issue, motives extraneous to the actual litigation, to mention but a few."

25 A finding of unreasonableness should not be lightly made. As pointed out by the plaintiff in submissions McColl JA (with whom Giles and Campbell JJA agreed) in *Habib v Radio 2UE Sydney Pty Ltd [2009] NSWCA 231* stated at [85]:

"In considering whether an Anshun estoppel has been established it is necessary to bear in mind that "shut[ting] out a claim ... a party wishes to pursue, without determination of its intrinsic merit, on the ground that it ought to have been raised in earlier litigation ... is a serious step, [and] a

power not to be exercised except 'after a scrupulous examination of all the circumstances'": Ling v Commonwealth [1996] FCA 1646; (1996) 68 FCR 180 (at 182) per Wilcox J, approved in Bazos (at [45]) per Stein JA (Priestley and Beazley JJA agreeing); see also Brisbane City Council v Attorney-General (Qld) [1979] AC 411 (at 425) per Lord Wilberforce."

26 Similar comments regarding the test of unreasonableness were made by Bryson AJ in *R&J Lyons Family Settlement Pty Ltd v 155 Macquarie Street Pty Ltd [2008] NSWSC 232*:

"In my opinion a finding that it was unreasonable not to bring a claim in some earlier litigation is not a finding to be made lightly. In this context unreasonableness is a severe test, to be distinguished from a test of inconvenience, even severe inconvenience. Consideration starts at the point that there is free access to courts and that it is not compulsory to bring forward all claims on related subjects at the same time. This is well illustrated by the outcome in Cromwell v County of Sac [1876] USSC 62; (1876) 94 US 351 cited in Anshun at 599."

Abuse of Process

27 The second legal issue raised by the defendant is whether the second proceedings amount to an abuse of process. The Court has an inherent power to control its procedures to prevent an abuse of its processes. The Court may either permanently stay proceedings pursuant to section 67 of the Civil Procedure Act or dismiss the proceedings generally. The decision to either stay or dismiss proceedings based on abuse of the court's process is a discretionary relief.

28 Abuse of process operates more broadly than Anshun estoppel. In *Walton v Gardiner [1993] HCA 7; 177CLR 378 at 393*, Mason CJ, Deane and Dawson JJ stated:

"...proceedings before a court should be stayed as an abuse of process if, notwithstanding the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the

reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings."

29 When exercising its discretion to grant relief against an abuse of process the Court must have regard to both public interests and the private interests of the parties. Lord Bingham in *Johnson v Gore Wood & Co* at 31 referred to this interest based approach to when assessing an alleged abuse of process:

"But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same, that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse to may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

Analysis

30 The defendant bears the burden of establishing the elements that give rise to Anshun estoppel or an abuse of process. Having regard to the conduct of the parties with respect to both the first proceedings and these current proceedings the Court is satisfied that there is no basis to either stay or dismiss the proceedings by reason of either Anshun estoppel or abuse of process.

31 The defendant has failed to demonstrate that the conduct of the plaintiff was either unreasonable or that it caused oppression to the defendant.

32 The separation of the claim for damages from the claim for cost of repairs is a consequence of the plaintiff suffering both an insured loss and uninsured loss as a result of the collision caused by the defendant. While this in itself is not sufficient justification for the taking of separate proceedings, it is relevant to considering the reasonableness of the conduct of the plaintiff. The commencement of two separate proceedings was a direct result of the plaintiff's interests being separately represented. The subrogated insurer for the plaintiff and Compassclaims were communicating with the intention of bringing a single claim. The commencement of two proceedings was a result of the practical difficulties associated with co-ordinating associated claims and the intervention of the defendant making payment in response to the initial claim. It was not motivated by any improper purpose or desire to cause inconvenience or oppression upon the defendant.

33 The decision by the plaintiff to discontinue the first proceedings in light of payment being received was not unreasonable. The Court notes that had the plaintiff sought to amend the statement of claim in the first proceedings to incorporate the claim for loss of use instead of discontinuing the first

proceedings then it is unlikely that any issue of Anshun estoppel or abuse of process would have been raised. There is little difference, in terms of the practical impact upon the defendant, between the plaintiff amending the first claim or discontinuing the first claim and recommencing a second claim.

34 The defendant has not demonstrated that the commencement of two proceedings was oppressive. The plaintiff discontinued the first proceedings prior to the defendant filing any document or becoming an active party to the proceedings. The policy consideration that a defendant should not be vexed twice by the same cause of action has no real relevance in the present case.

35 The defendant's subrogated insurer was also on notice of the existence of the loss of use claim through pre litigation letters by Compassclaims in July and September 2011. In those circumstances it cannot be said that the defendant was misled into making a settlement payment under the belief that this settled the plaintiff's entire claim.

36 While the Court accepts that Anshun estoppel may apply in circumstances where there is a compromise of a claim, the Court is not of the view that the payment made by the defendant represented either a compromise or settlement of the claim. The payment was not the product of any agreement between the plaintiff and the defendant. The plaintiff's claim for damages was, by its nature, an unliquidated claim. A claim for unliquidated damages is not made into a liquidated demand merely because the plaintiff names a definite figure (see *Abbey Panel and Sheet Metal Co v Barson Products [1948] 1KB 493* at 498). While UCPR 14.13 permits a plaintiff to claim a specific amount for motor vehicle repairs in proceedings commenced in the District Court and Local Court that pleading concession does not alter the nature of the plaintiff's claim. As the claim is for unliquidated damages it cannot be settled by payment unless quantum is either agreed between the parties or assessed by the Court.

37 Accordingly, the Court dismisses the application by the defendant to either stay or dismiss the proceedings based on Anshun estoppel and abuse of process.

38 The defendant has not filed evidence in response to the substantive matters of the plaintiff's claim. The plaintiff has provided evidence by Mr Round regarding his claim for loss of use of his motor vehicle while it was being repaired. He provides evidence that he was the owner of a 2007 Mercedes that was damaged as a result of a collision caused by the defendant on 29 June 2011. Mr Round arranged for his vehicle to be taken to LSR Autobody Pty Ltd and he made arrangements through Compassclaims to hire a Mercedes E220. The replacement vehicle was hired for 16 days from 5 July 2011 to 21 July 2011 at a cost of $378.18 per day together with a delivery charge of $27.27. There is no evidence provided by the defendant to suggest that the rate of hire charged by the Compass Claims was outside the range of rates available in the hire car market. The plaintiff has also tendered a statement from the manager of the smash repairer responsible for effecting repairs to the plaintiff's vehicle confirming that repairs were commenced on 29 June and completed on 21 July 2011.

39 The Court will enter a verdict and judgment in favour of the plaintiff in the sum of $6,685.97. Although the plaintiff claims interest pursuant to section 100 the Court is not satisfied that interest should be allowed with respect to a claim for general damages for loss of use of a chattel. The award of damages is not based on the actual pecuniary loss suffered by the defendant. Damages represent an amount to compensate the plaintiff for the deprivation of the chattel rather than to compensate the cost of obtaining a replacement vehicle. The award of damages represents the measure of the loss. In my view an allowance of interest in addition to the award for loss of use of a motor vehicle would mean that the plaintiff is effectively compensated twice in relation to this loss. The position is similar to the circumstances referred to in *Hungerfords v Walker (1989)*

171 CLR 125 where the applicant was awarded damages including loss damages for loss of use of money. The Court declined to allow interest as an award for loss of use and interest would result in the applicant being compensated twice.

40 The Court allows court costs of $86.00, service fees of $36.00 and professional costs at the unliquidated scale rate. The Court allows 28 days for payment of the judgment amount.

S Olischlager
Local Court Assessor