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Précis Paper

Res Judicata in Insurance Litigation

Phillip Bambagiotti, Barrister and Gina D'Amico, Solicitor discuss *res judicata* in the context of the recent case of *De Armas v Peters* [2015] NSWSC 1050.

Discussion Includes

- How can *res judicata* arise in insurance litigation?
- The lack of knowledge of many insureds as to their obligations to their insurers and the limitations of their rights due to subrogation
- Section 56 of the *Civil Procedure Act 2005* (NSW) – "the just, quick and cheap resolution of the real issues in the proceedings"
- When will leave be granted to appeal interlocutory decisions?
- Is *res judicata* a species of estoppel, or is it something else?

Précis Paper

Res Judicata in Insurance Litigation

1. In this edition of BenchTV, Philip Bambagiotti (Barrister) and Gina D'Amico (Solicitor) present on the NSW Supreme Court's (Wilson J) decision in *De Armas v Peters* [2015] NSWSC 1050 which involved a *res judicata* objection against proceedings commenced by both the defendant-insured and the insurer in the name of the defendant, following a motor vehicle accident. Mr Bambagiotti and Ms D'Amico acted for the unsuccessful plaintiff, Ms de Armas, in the Supreme Court.

Procedural History

2. The dispute arose from a motor vehicle collision on 12 July 2012, causing damage to vehicles insured by the parties.

3. Following the crash, and whilst his own car was off the road for repairs, Peters hired a car for his use. He incurred fees for the hire of the vehicle over and above hire car costs covered by his motor vehicle insurance policy.

4. On 5 September 2012, Peters brought proceedings against de Armas in the Small Claims Division of the Local Court, claiming that the collision and resultant damage to his car was caused by the negligence of de Armas. He sought damages measured by the rental cost of the hire car. De Armas brought a cross-claim against Peters, alleging negligence by Peters and consequent damage to her car.

5. On 15 November 2012, Peters' insurer, the NRMA, had also commenced subrogated proceedings in Peters' name without knowledge of the earlier hire car proceedings. These secondary proceedings relied on the same allegations as those relied upon in the earlier action, although claiming damages for the costs of repair and towing charges.

6. In her defence filed in the second proceedings, de Armas did not plead any abuse of process by Peters. On 13 February 2013, judgment was handed down in the first proceedings, with Peters' claim unsuccessful and de Armas being awarded damages in relation to her cross-claim.

7. On 27 February 2013, de Armas filed a notice of motion seeking orders to dismiss the second set of proceedings as being inconsistent with the orders of the Local Court of 13 February 2013, on the basis of *res judicata*, the operation of s 24 of the *Civil Procedure Act 2005* (NSW) and generally to prevent an abuse of process. On 23 April 2013, Peters filed a notice of motion in the second proceedings seeking that the orders of 13 February 2013 be set aside pursuant

to r 36.15 of the *Uniform Civil Procedure Rules 2005* (NSW) as being entered "irregularly or against good faith."

8. NRMA had argued firstly that there was no *res judicata* because as a subrogating insurer they were of a different economic interest to Peters and secondly they contended that if there was a *res judicata*, then it was arguable that the *res judicata* should not arise or was estopped because De Armas had not informed them about the first proceedings.

9. Magistrate Milledge determined that, as the two proceedings were brought by "two distinctly different entities", Ms de Armas' notice of motion could not be granted. As her Honour had made this finding, she regarded it as unnecessary to consider the motion filed by Mr. Peters regarding an abuse of process under r 36.15. It was dismissed.

10. De Armas appealed from this interlocutory decision on a notice of motion to the Supreme Court. Peters cross-appealed.

The Supreme Court Proceedings

11. A number of interesting issues were enlivened on appeal including *res judicata* and the duties and obligations of parties who are insured. However, ultimately, Wilson J's judgment did not require their resolution because leave to appeal was not granted.

12. De Armas' appeal was brought pursuant to s 40(2)(a) of the *Local Court Act 2007* (NSW). Sections 39 and 40 of the Act relevantly provide:

SECTION 39:

Appeals as of right

(1) A party to proceedings before the Court sitting in its General Division who is dissatisfied with a judgment or order of the Court may appeal to the Supreme Court, but only on a question of law.

(2) A party to proceedings before the Court sitting in its Small Claims Division who is dissatisfied with a judgment or order of the Court may appeal to the District Court, but only on the ground of lack of jurisdiction or denial of procedural fairness.

SECTION 40:

Appeals requiring leave

(1) A party to proceedings before the Court sitting in its General Division who is dissatisfied with a judgment or order of the Court on a ground that involves a question of mixed law and fact may appeal to the Supreme Court but only by leave of the Supreme Court.

(2) A party to proceedings before the Court sitting in its General Division who is dissatisfied with any of the following judgments or orders of the Court may appeal to the Supreme Court, but only by leave of the Supreme Court:

(a) an interlocutory judgment or order,

(b) a judgment or order made with the consent of the parties,

(c) an order as to costs.

13. In *Be Financial Pty Ltd v Das* [2012] NSWCA 164, Basten JA (with whom Tobias AJA agreed) set out at [32]–[36] the principles to be considered in deciding whether leave to appeal should be granted from an interlocutory decision of the Local Court. The crucial aspect of that decision was that it clarified the requirement that it is necessary to demonstrate more than just that the trial judge got something wrong – there has to be some element of principle or a question of general public importance to justify allowing leave to appeal from such a decision:

> The principles governing cases such as these have recently been restated in *Zelden v Sewell; Henamast Pty Ltd v Sewell* [2011] NSWCA 56. As Campbell JA noted (with the agreement of Young JA) at [22]:
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> It is of some importance to reiterate the principles that were stated in *Carolan v AMF Bowling Pty Ltd* [1995] NSWCA 69, where Sheller JA said that an applicant for leave must demonstrate something more than that the trial judge was arguably wrong in the conclusion arrived at. Cole JA relied on a principle that where small claims are involved, it is important that there be early finality in determination of litigation, otherwise the costs that will be involved are likely to swamp the money sum involved in the dispute.
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> In *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 Campbell JA, with the agreement of Young and Meagher JJA, expanded on his summary of *Carolan*, noting that Kirby P had recognised "that ordinarily it was appropriate to grant leave to appeal only concerning matters that involve issues of principle, questions of general public importance or an injustice which is reasonably clear, in the sense of going beyond [what is] merely arguable: at [46].
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> …
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> In *Coulter v R* [1988] HCA 3 ; 164 CLR 350, dealing with a challenge to a refusal of the South Australian Full Court to grant leave to appeal in a criminal matter, the majority noted that a leave requirement was a preliminary procedure "recognised by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention": at 356 (Mason CJ, Wilson and

Brennan JJ). That statement is clearly applicable to civil, as well as criminal, appellate jurisdiction.

As the High Court has noted, an application for leave is not a proceeding in the ordinary course of litigation but a preliminary procedure: *Collins v R* [1975] HCA 60; 133 CLR 120 at 122; *Coulter* at 356. On the other hand, there is no reason to doubt that s 58 of the *Civil Procedure Act 2005* (NSW), requiring a court to act in accordance with "the dictates of justice" when making an order or direction "for the management of proceedings", applies in respect of a leave application. One of the factors to be taken into account pursuant to s 58 is "the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction": s 58(2)(b)(vi). That provision, like s 56, identifying the overriding purpose of the *Civil Procedure Act* as being to facilitate the just, quick and cheap resolution of the real issues in the dispute, recognises that questions of injustice are relative. Similarly, the requirement that this Court not order a new trial unless it appears that "some substantial wrong or miscarriage" has been occasioned, also reflects a principle of parsimony in requiring that the parties be put to the expense of a second trial: UCPR, r 51.53.

14. De Armas submitted that leave should be granted because the issue of subrogation was an important one, of significance generally and particularly to insurance companies. Peters contended that, as the capacities in which the insurer and insured in the present matter sued were different, *res judicata* did not operate to bar Peters' action in the Local Court.

15. Wilson J reflected on the following factors in deciding to reject the application for leave:

- At [27], "The quantum of damages relevant to the Local Court action was very low. The cost of these proceedings is likely to have already overtaken the sum originally in dispute, or at least come close to it." Further at [60], "Bearing in mind the overriding purpose of the *Civil Procedure Act* 2005 (at s.56) to achieve the just (and quick and cheap) resolution of the real issues in the proceedings, I am not persuaded that the conclusion reached by her Honour was not open to her in all of the circumstances."
- At [28], "The question of leave to appeal involves examination of the merits of the arguments advanced in support of the appeal and cross-appeal, and attention to whether any injustice has been occasioned to either party such that the intervention of this Court is required." Further at [33], "Her Honour plainly gave significant weight to what she regarded as the injustice worked against the NRMA by the "negligence" of Mr. and Mrs. Peters in failing to inform the insurer that legal action had been launched against Ms. de Armas, compounded as it was by the inexplicable failure of AAMI to refer to the first proceedings during its dealings with the NRMA." Finally at [55], "The NRMA, a party with a legitimate interest in the determination of the issue of negligence

relevant to the 2012 collision, did not initiate the (very limited) claim filed by Mr. Peters, and had no say in the pleadings or in the manner in which the litigation was conducted and the issues raised by it for determination. Its complete ignorance of the suit arose, certainly by the default of Mr. Peters but also, in her Honour's view, by the almost studied failure of the plaintiff's representatives to refer to it in dealings with the NRMA. Her Honour was clearly of the view that, should the de Armas motion succeed, an injustice would be occasioned to the NRMA, and the real issues between the parties would not have been litigated."

- At [49], "The issue of capacity is to be determined by reference to substance not form." Further at [49], "the first set of proceedings were brought by Mr. Peters in his personal capacity seeking damages for personal loss relevant to the use of a hire car, whilst the second set of proceedings were brought by Mr. Peters in name only, in respect of the rights subrogated to the NRMA under the policy of insurance." Finally at [55], "Whilst the cause of action may have been the same, the redress sought was very different and, accordingly, it was open to her Honour to consider that the matters litigated and the interests determined were also different."
- At [64], "Nor am I of the opinion that this is an issue with the wider importance that the plaintiff argues for, such that leave should be granted. Whilst issues relevant to the rights of insurance companies and notions of subrogation generally may be of interest beyond the parties to these proceedings, a decision of a magistrate in the Local Court can have no binding effect on the Local Court more generally, and nor can a decision of a single justice of this Court have the great significance that Ms. de Armas contends it will."

Implications

16. Ultimately, the decision in *De Armas* is not a decision about *res judicata*. Rather, it is a decision that clarifies what is required in seeking leave to appeal from an interlocutory decision of the Local Court. Her Honour's ruling leaves it open to the parties to have heard and determined the real issues in the proceedings, and prevents one litigant from taking advantage of the actions of another to shut out from the proceedings an entity with a legitimate interest in the proceedings.

17. The judgment will certainly have implications for the way in which similar actions will be run in the Local Court. Had de Armas brought a motion to strike out or permanently stay the second proceedings before the first proceedings had been determined on the basis of an abuse of process, it is possible that with that notification what ultimately played out might have been different. Were such a strike out application to have been successful, Peters and the insurer would likely have come to an arrangement as to how to proceed against de Armas together.

18. Finally, the decision also highlights the complicated issues that can arise in the Local Court, particularly in relation to the right of subrogation, the extent of guidance and assistance a party is obliged to provide their opponent under the *Civil Procedure Act*, and the procedural question of *res judicata* objections.

BIOGRAPHY

Philip Bambagiotti

Barrister at Tenth Floor St James Hall Chambers, Sydney.

Philip Bambagiotti was admitted as a Lawyer in 1992 before being called to the NSW Bar in 1997. He is a leading authority on the law relating to building disputes and is an author of *Building Disputes and the Home Building Act 1989* (NSW) (2012). He is also a member of a number of international organisations including the Union Internationale des Avocats, the Italian and French Chambers of Commerce & Industry, and the French Australian Lawyers Society.

Gina D'Amico

Gina was admitted as a Lawyer in 2011. She is an Associate in the Insurance Team at Mills Oakley in Sydney.

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Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_31-07-2015_insurance_banking_construction_government.pdf

Judgment Link

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Cases

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Legislation

Civil Procedure Act 2005 (NSW)
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