Khoury & Anor v Murdoch & Anor [2005] NTSC 70

PARTIES:	KHOURY, DIEB PETER and BENJAMIN & KHOURY PTY LTD ACN 104 057 043 v MURDOCH, JUNG-SOOK and MURDOCH, GERALD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	116 of 2005 (20522355)
DELIVERED:	4 November 2005
HEARING DATES:	28 October 2005
JUDGMENT OF:	RILEY J

CATCHWORDS:

ESTOPPEL – FORMER ADJUDICATION

Res judicata – cause of action estoppel – first proceeding directed at the maintenance of a caveat – second proceeding directed at a specific allegation of fraud – application of *Anshun* principle – whether it was unreasonable not to have

raised issue of fraud in first proceeding – cause of action in the second proceeding was not directly relevant to the right of plaintiffs to maintain caveat – factual merits of the second proceeding have not been addressed – not a case for application of *Anshun* principle.

Land Title Act (NT) s 188
Law of Property Act (NT) s 208

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 489 at 597 and 602, considered.
Jackson v Goldsmith (1950) 81 CLR 446 at 466, cited.
Blair v Curran (1939) 62 CLR 464 at 532, cited.
Jeans v Bruce [2004] NSWSC 539 at [304], cited.
Chamberlain v Deputy Commissioner of Taxation (1987-88) 164 CLR 502 at 507, applied.
Cromwell v County of Sac (1876) 94 US 351 at 356; (1876) 24 L Ed 195 at 199, applied.
Gibbs and Anor v Kinna (1992) 2 VR 19 at 28 and 29, applied.
Tanning Research Laboratories Inc v O'Brien (1989-1990) 169 CLR 332 at 346, applied.
University of Wollongong & Ors v Metwally (No 2) (1985) 59 ALJR 481 at 483, cited.
Effem Foods Pty Ltd v Trawl Industries of Australia Ltd (In Liq) & Ors (1993) 115 ALR 377 at 404, applied.
Imhoff v IBM Australia Ltd [2001] NTSC 23, cited.

Handley JA, "A Closer Look at *Henderson v Henderson*" (2002) LQR 397 at 405.

REPRESENTATION:

Counsel:

Plaintiffs:	P.M. Barr QC
First defendant:	J. Kelly

Solicitors:

Plaintiffs:	Paul Maher
First defendant:	Pipers Barristers & Solicitors

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Khoury & Anor v Murdoch & Anor [2005] NTSC 70
No 116 of 2005 (20522355)

BETWEEN:

KHOURY, Dieb Peter
First Plaintiff

and

BENJAMIN & KHOURY PTY LTD
ACN 104 057 043
Second Plaintiff

AND:

MURDOCH, Jung-Sook
First Defendant

and

MURDOCH, Gerald
Second Defendant

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 4 November 2005)

[1] In this matter I am concerned with two sets of proceedings, being D.P. Khoury and Benjamin & Khoury Pty Ltd v Jung-Sook Murdoch and Adelaide Bank Limited (proceeding number 78 of 2005 – "the first

proceeding") and D.P. Khoury and Benjamin & Khoury Pty Ltd v Jung-Sook Murdoch and Gerald Murdoch (proceeding number 116 of 2005 – "the second proceeding").

[2] In the first proceeding the plaintiffs pleaded that Gerald Murdoch entered into a solicitor's costs agreement to the ultimate benefit of each of the plaintiffs. The agreement included the granting of an equitable charge over any property owned by Mr Murdoch then or in the future to secure fees and expenses related to court proceedings being conducted in New South Wales. It was then pleaded that Mr Murdoch and his wife, the first defendant, became the registered owners of a property in Larrakeyah in the Northern Territory. The plaintiffs separately lodged lapsing caveats over that property at different times. The first proceeding was commenced to support a lapsing caveat and the statement of claim must be considered in that light. The plaintiffs claimed to have become the holders of an equitable charge over Mr Murdoch's interest in the real property situated at Larrakeyah. It was pleaded that Mr Murdoch and Mrs Murdoch transferred the property to Mrs Murdoch and the child of the relationship, Geraldine Murdoch. Thereafter the property was further transferred into the sole name of Mrs Murdoch.

[3] The focus of the first proceeding was whether or not there was a caveatable interest as claimed by the plaintiffs. Without pleading more the plaintiffs sought a declaration that they separately held equitable charges over half of

the land situated at Larrakeyah and that their interest took priority over the mortgage registered in favour of Adelaide Bank Limited.

[4] In those proceedings the first defendant, Mrs Murdoch, applied to strike out the plaintiffs' claim as not disclosing a cause of action. The matter was considered by the Master of the Supreme Court who struck out the claim. The Master noted that the statement of claim failed to deal with the provisions of s 188 of the Land Title Act which provide that, subject to exceptions, a registered proprietor of an interest in land holds that interest subject to registered interests but free from all other interests. He observed that the plaintiffs had not pleaded any material facts that would bring them within any of the exceptions provided for in s 188 and, of particular interest for present purposes, had not alleged fraud. He ruled that the plaintiffs had not pleaded a viable cause of action and made an order striking out the statement of claim.

[5] The matter came back before the Master on an application by the plaintiffs that they be allowed to file an amended statement of claim. The plaintiffs indicated through counsel that they wished to plead fraud as an exception to s 188 of the Land Title Act. On the basis of the information then available the Master concluded that the plaintiffs "have been unable to articulate a satisfactory argument to support a claim to defeat the indefeasibility provisions of the Land Title Act" and declined to allow an opportunity to amend the statement of claim. He therefore entered summary judgment in favour of the defendants on 15 September 2005. A notice of appeal against

that decision was not lodged but, in recent times, an application for leave to appeal out of time has been filed and served.

[6] The second proceeding was commenced on 15 September 2005 and had a different focus. The plaintiffs were again Mr D.P. Khoury and Benjamin & Khoury Pty Ltd. Mrs Murdoch was named as the first defendant and Mr Murdoch became the second defendant. Adelaide Bank Limited was not named as a party to the proceeding.

[7] The statement of claim on this occasion relied upon a similar history to that pleaded in the first proceeding, however the identified cause of action is different. It is pleaded that the alienation of the real property was not made in good faith and was made with intent to defraud the plaintiffs. The particulars of intent to defraud are pleaded as follows:

> "The intent is to be inferred from the fact that the inevitable result and/or necessary consequence of the transfers was to put the land beyond the reach of the plaintiffs in execution of any future judgment and/or to defeat the claim(s) of the plaintiffs, alternatively of the second plaintiff, as chargee(s) of Mr Murdoch's interest in the land."

[8] It is then pleaded that the transfers are voidable pursuant to s 208(1) of the Law of Property Act. That section provides that an alienation of property made with intent to defraud creditors is voidable at the instance of any person prejudiced by the alienation of the property. In this regard the second proceeding differed from the first in that it was not directed towards supporting a claimed caveatable interest and there is within it no attempt to

attack the title of Mrs Murdoch in the property by seeking to bring the plaintiffs within the fraud exception to the indefeasibility of title provisions of the Land Title Act. Rather, the plaintiffs seek to attack the transaction which led to the alienation of the interest of Mr Murdoch in the property.

[9] In her application to this Court Mrs Murdoch, as the first defendant to the second proceeding, seeks to obtain judgment against the plaintiffs. In so doing she submits that the second proceeding is subject to the doctrine of res judicata or, if not, she seeks a declaration that the plaintiffs are estopped from presenting a claim in this proceeding which, although not actually raised in the first action, was so relevant to the subject matter of the first proceeding that it would have been unreasonable not to rely upon it in that proceeding: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. Finally the first defendant seeks a stay of the second proceeding as constituting an abuse of process. Those matters come before me as preliminary issues in the second proceeding.

Cause of action estoppel

[10] The first defendant submitted that the cause of action pleaded by the plaintiffs against the first defendant in the second proceeding is the same as that which was litigated in the first proceeding. It is submitted that where an action has been brought and judgment has been entered in an earlier action no other proceeding can thereafter be maintained on the same cause

of action: *Jackson v Goldsmith* (1950) 81 CLR 446 at 466, approved in *Port of Melbourne Authority v Anshun Pty Ltd* (supra at 597).

[11] As was noted by Dixon J in *Blair v Curran* (1939) 62 CLR 464 at 532, res judicata applies where "the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence". The prior cause of action must be identical to the subsequent cause of action: *Jeans v Bruce* [2004] NSWSC 539 at [304]. Gibbs CJ, Mason and Aickin JJ observed in *Port of Melbourne Authority v Anshun Pty Ltd* (supra at 597) that:

> "The rule as to res judicata comes into operation whenever a party attempts in a second proceeding to litigate a cause of action which has merged into judgment in a prior proceeding."

This formulation was applied by Deane, Toohey and Gaudron JJ in *Chamberlain v Deputy Commissioner of Taxation* (1987-88) 164 CLR 502 at 507.

[12] In the present case it cannot be said that the cause of action pleaded in the second proceeding relates to "the very right or cause of action" claimed in the first proceeding. Indeed the finding of the Master was that there was no viable cause of action pleaded in the first proceeding and it was on that basis that he struck out the statement of claim.

[13] Reference to the statement of claim in the first proceeding reveals no attempt to plead fraud. When the statement of claim was struck out the

plaintiffs sought to file a fresh statement of claim alleging fraud in order to avoid the effect of the indefeasibility provisions in s 188 of the Land Title Act but were refused the opportunity to do so. The summary judgment that was subsequently entered was in relation to a proceeding in which fraud had not been raised and where no viable cause of action had been identified.

[14] The second proceeding makes a specific allegation of fraud. Further, it acknowledges the indefeasibility of the title held by the first defendant but seeks relief by way of a declaration that the transfer of the land away from Mr Murdoch was a voidable transfer pursuant to the terms of s 208(1) of the Law of Property Act.

[15] This is not a case where the doctrine of res judicata has application. The cause of action sought to be litigated in the second proceeding has not merged into judgment in the first proceeding.

***Anshun* and abuse of process**

[16] The first defendant also relies upon the majority judgment in *Anshun*. She submits that, in the circumstances of this case, the claim now sought to be pursued in the second proceeding is "so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it" in those proceedings: *Port of Melbourne Authority v Anshun Pty Ltd* (supra at 602).

[17] The application of the *Anshun* principle is discretionary and largely turns on matters of fact. As was noted by Gibbs CJ, Mason and Aickin JJ when discussing the estoppel in the context of a defence (at 602):

> "Generally speaking, it would be unreasonable not to 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 the particular issue, motives extraneous to the actual litigation, to mention but a few."

It is not enough to show that a matter could have been raised in an earlier proceeding in order to render the raising of it in a later proceeding as abusive. Determining whether the principle has application will involve a consideration of all of the surrounding circumstances to determine whether it was "unreasonable" not to have raised the issue. In *Anshun* the majority (at 603) made reference to "illustrations" given in *Cromwell v County of Sac* (1876) 94 US 351 at 356, (1876) 24 L Ed 195 at 199 as to why a party may justifiably refrain from litigating an issue in earlier proceedings. The following observations appeared in that case (at 356):

> "Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

See also *Gibbs and Anor v Kinna* (1999) 2 VR 19 at 28 per Kenny JA.

[18] In *Tanning Research Laboratories Inc v O'Brien* (1989-1990) 169 CLR 332 Brennan and Dawson JJ said (at 346):

> "A plaintiff who has an unadjudicated cause of action which can be enforced only in fresh proceedings … cannot be precluded from taking fresh proceedings merely because he could have and, if you will, should have counterclaimed on the cause of action … We do not read the majority judgment in … *Anshun* … as holding the contrary, except in a case where the relief claimed in the second proceeding is inconsistent with the judgment in the first."

[19] In the present case it is necessary to consider the *Anshun* principle and the issue of abuse of process in light of all of the surrounding circumstances.

[20] In the second proceeding the plaintiffs rely upon a cause of action based on s 208(1) of the Law of Property Act and seek a declaration that the alienation of Mr Murdoch's previously held interest in the land be declared void at the instance of the plaintiffs. The ground relied upon is that such alienation had been made to defraud creditors. That claim was not pleaded in the first proceeding. The plaintiffs frankly acknowledged that at the time of the first proceeding they were not aware of the availability of the remedy and say they did not become aware of it until there was a change of legal representation shortly before the second proceeding was commenced. In the first proceeding the plaintiffs did not refrain from claiming a remedy against Mrs Murdoch and Mr Murdoch under s 208 of the Law of Property Act for tactical reasons but, rather, failed to do so through ignorance.

[21] The first defendant submits that the plaintiffs should not now be permitted to raise the cause of action pursuant to s 208 of the Law of Property Act "which they (inadvertently) neglected to do last time". It was submitted that the allegations of fact made on the earlier occasion remain the same and the plaintiffs should not be able to raise a new argument which, whether deliberately or by inadvertence, they failed to put during the hearing when they had an opportunity to do so: *University of Wollongong & Ors v Metwally (No 2)* (1985) 59 ALJR 481 at 483. The first defendant says that the proceeding should not be allowed to continue pursuant to the *Anshun* principle or, if that not be available, it should be struck out or stayed as an abuse of process.

[22] The plaintiffs submit that it was not unreasonable not to have raised the matters on the earlier occasion. Those proceedings were directed to a different end, namely the maintenance of a caveat. Whilst acknowledging that the precise cause of action raised in the second proceeding was, at that time, unknown to the plaintiffs it is pointed out that an attempt to raise the issue of fraud in a different context was rejected by the Master. Counsel sought to pursue a case based upon fraud arising out of the timing of the transactions regarding the real estate but was not permitted to do so. The effect of being so excluded was that the factual merits of the case now sought to be presented have not been addressed. There has been no adjudication on the merits. This was not a case where the plaintiffs, for tactical reasons, chose not to present the argument or to raise the cause of

action. Further, the present cause of action was not directly relevant to the right of the plaintiffs to maintain a caveat.

[23] Writing extra-curially Handley JA of the Court of Appeal of New South Wales ("A Closer Look at *Henderson v Henderson"* (2002) 118 LQR 397) expressed the view that whether proceedings failed on their merits on the earlier occasion or for some technical reason is a matter of significance in considering whether an abuse of process exists. He said (at 405):

> "Where the plaintiff failed in the first action the reason for that failure is important when considering whether a second action is abusive. There is a significant difference for this purpose between a dismissal on the merits, and a dismissal on some procedural or technical ground, or because the plaintiff misconceived his remedy (references omitted). This principle was applied in *Barakot Ltd v Epiette Ltd* (1998) 1 BCLC 283 where the Court of Appeal held that a second action to recover £1.24m for money lent was not an abuse where the first only failed because the defendant had not been incorporated at the relevant time."

In the present case the plaintiffs failed on the first occasion through an inability to effectively identify an appropriate cause of action in a pleading. The plaintiffs have not had the opportunity to have considered on their merits the matters they now wish to put.

[24] The available evidence gives rise to very real questions as to why the land was transferred out of the name of Mr Murdoch at the particular time and also as to the explanation provided by Mrs Murdoch for so doing. The circumstances identify a basis for concern that what occurred was done with the intent to defraud the creditors of Mr Murdoch. Without embarking upon

a consideration of the evidence or the competing interpretations of events, from what is presently known there is a serious issue to be tried. To allow the *Anshun* estoppel to prevent the issue being aired would be to risk an injustice occurring. This is not a case where there has been any testing of the material before the court, it is not suggested that the plaintiffs chose a course of conduct and should not be permitted to depart from it. At the time they proceeded with their first action they had limited information and were seeking further information before making the serious allegation of fraud. They were, at that time, pursuing a claim with the narrow focus of seeking to maintain the caveat.

[25] In this case, in the event that proceedings are permitted to continue and to proceed to judgment, there is no risk of there being inconsistent judgments because the decision of the Master was made without reference to the merits of the proceeding and simply concluded that there was no relevant cause of action disclosed in the pleadings before him. Further, the focus of the two sets of proceedings are quite different from each other. Courts have traditionally given a narrow scope to the doctrines of issue estoppel and res judicata because, once estoppel applies, effect must be given to it and "that effect may be to tape the mouth of truth": *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (In Liq) & Ors* (1993) 115 ALR 377 per Burchett J at 404, *Imhoff v IBM Australia Ltd* [2001] NTSC 23. Generally speaking it is undesirable to shut out a potentially meritorious claim. The principle should only be applied in the clearest of cases: *Gibbs*

and Anor v Kinna (supra at 29). In my opinion, and in the particular circumstances of this case, it would be oppressive to permit the successful peremptory strike-out application of the earlier incomplete proceeding to preclude the plaintiffs from pursuing the cause of action now pleaded.

[26] This is not a case for the application of the *Anshun* principle. Further, the submission that to allow the second proceeding to continue is an abuse of process should be rejected.

[27] The application is dismissed.

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