

## Joinder of Claims and Parties

### **Introduction**

- **Section 29** of the *Supreme Court Act 1986* states 'the court must exercise its jurisdiction in any proceeding so as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined and all multiplicity of proceedings concerning any of those matters is avoided'
- In an action all necessary parties, claims, defences, etc. are part of this action

### **Plaintiff's Standing to Sue or Competency to Sue**

- *Locus Standi* – a plaintiff must have a private right to subject matter of proceedings
- Interests must have been impacted
- *Australian Conservation Foundation Inc. v Commonwealth 1980* found that having an interest does not mean a mere intellectual or emotional concern, a person is not interested within the meaning of the rule unless they are likely to gain some advantage if the action succeeds or they will suffer some disadvantage if it fails
- A plaintiff must have the capacity or competence to sue
- Must be stated that party (including corporation) has capacity to sue and be sued

### **Res Judicata (The Thing Has Been Decided)**

- Once a claim has been heard and determined that claim should not be re-litigated – the only rights an aggrieved party has is to appeal
- When proceedings contemplated parties must give careful consideration to claims to be brought, to the parties to be included or joined in litigation
- Public interest must be served in facilitating finality of judgment and thus to prevent inconsistent decisions against the same defendant of the same issue
- Res judicata operates to prevent parties re-litigating claims and re-opening matters already decided by the courts
- There should be finality in litigation and...a party should not be twice vexed in the same matter' – *Johnson v Gore Wood and Co*
- *Res Judicata* reinforced by order **1.14**

### **Cause of Action Estoppel**

- Applies where a court has given judgment in relation to matters that are the subject of litigation, precludes re litigation of a claim made in earlier proceedings made by the same parties in respect of the same subject matter
- Operates as defence of a claim with respect to which judgment has been entered
- Claim has been decided by the court and cannot be re-litigated, parties can't keep re-litigating claims already decided
- A claim that has been decided cannot be re-litigated (public interest)

### **Issue Estoppel**

- Concerned with the redetermination of particular finding or issue made by court in earlier proceedings

- Precludes parties from raising fact or issue already determined by court in previous matter
- Eg. In section 18 claim the court finds the plaintiff did not rely on the representation made by the defendant, court has therefore made finding that there was no reliance, court has made finding of issue, this issue can't be re-litigated
- Eg. Bike into intersection, claimed was 30% to blame, sought relief for fixing his bike. Then sought in Supreme court for personal injury – is court bound by Magistrate?
- Supreme Court not so bound by the decision of the Magistrate – murky however in stance

### **Anshun Principle (Litigation Estoppel)**

- Applies to claims that could have been made in earlier proceedings but weren't, and in subsequent proceedings those claims are sought to be litigated
- Failure to join a claim in a proceeding may preclude to pursuit of such a claim in later proceedings
- **Anshun 1981** – A contract clause was not raised in original proceedings, issue hadn't been raised so other estoppels could not be employed but the identity of the lease so closely connected with issues raised in the first case that it is unreasonable to refrain from raising the issue in the first instance. It was held that the issue should have been raised in the first case
- Principle raised to preserve orderly administration of justice
- Eg. On assignment facts: pleads breach of contract and loses so decides to sue again but on section 18 of consumer law – can't be done
- Differs as not fighting a finding but is rather trying to introduce a cause of action that should have been introduced earlier

### **Res Judicata Applies to Parties**

- Res judicata estoppel applies to parties – if a party should have been included in a previous matter but wasn't, raising that party is prevented in subsequent proceedings

#### **Rippon v Chilciton 2001 [NSWCA] 142**

- Sued for breach of contract and section 18
- Court decided vendor had committed breach of contract and awarded, section 18 dismissed
- Accountants not included in original issue, though court held they should have been – claims held against accountant to be so relevant that it was unreasonable for purchasers not to rely upon them in the initial action

### **Re-Litigation**

- In exceptional circumstances a court may re-open a case – though they must be truly exceptional
- Despite all reasonable efforts made by the parties new facts come to light enabling a new cause of action or defence however the court must be satisfied new evidence is truly new and would almost certainly produce the opposite result

### **Joinder of Parties**

- Plaintiff is to join them – the Anshun principle is a strong incentive to get correct who has a cause of action and whom this is against
- Plaintiffs have carriage of proceedings, they decide who they are going to sue and cause of action, plaintiff's entitled to join different claims against a defendant in the one action
- Two types of joinder; permissive and mandatory

### **Permissive Joinder**

- Governed by **9.2**
- **9.2.a** states that plaintiffs and defendants may join in the same proceedings where **(i)** if separate proceedings involve common questions of law or fact and **(ii)** all the rights to relief claimed by parties are in respect of or arise out of the same transaction or series of transaction the plaintiff has a right to sue the defendant – plaintiff may learn others have same rights then they may join together
- **Payne v Young 1980** – first limb of common question of law satisfied but found the cause of actions arose out of different transactions
- There is a narrow interpretation of **9.2.a**
- **9.2.b** allows for parties to join together with leave of the court
- Where parties cannot join together under 9.2.a then they may ask court for leave to join

### **Bishop v Ridgeland Securities 1990**

- Court decided the parties could join
- Allowed joinder even though claims were different from each other (different contracts thus 9.2.a.ii not satisfied) though Federal Court allowed joinder
- Court held that 9.2.b was created to allow joinder not coming under 9.2.a
- Leave granted for joinder in separate claims against the same defendants, though the transactions were separate
- Court held under circumstances the joinder would be more convenient than 114 claims (public interest, case management)
- Leave granted in this case as evidence was extremely similar between the plaintiffs

- Discretion to allow joinder is unconfined, not appropriate to define circumstances as must depend on particular case
- Court must take whatever course is most conducive to just resolution between the parties
- Leave ought not be granted unless court affirmatively satisfied that joinder is unlikely to result in unfairness to any party; eg. If evidence between each plaintiff is discrete, and overbear what is common between the parties

### **Mandatory Joinder**

- A mandatory joinder is when parties must join together
- Governed by **9.3**
- **9.3.1** – where a plaintiff claims any relief to which any other person is entitled jointly with the plaintiff **(a)** all persons so entitled shall be parties to the proceedings and **(b)** any person who does not consent to being joined as a plaintiff shall be made a defendant
- Eg. If the plaintiffs are joint contractors those plaintiffs must join together
- An action is not properly instituted unless joint contractors are joined in one proceeding, the court may stay proceedings or defendant may raise defence
- **9.3.2** – where the plaintiff claims relief against a defendant who is liable jointly with some other person and also liable severally, that other person need not be made a defendant to the proceeding.
- **9.3.3** – where persons are liable jointly, but not severally, under a contract, and the plaintiff in respect of that contract claims against some but not all of those persons, the Court may stay the proceeding until the other persons so liable are added as defendants
- **9.3.4** – the Court may make an order under paragraph (1) before or after the non-joinder

### **Joinder of Claims**

- **9.1** allows for the joinder of claims
- **9.1** – a plaintiff may join any number of claims against a defendant **(a)** whether the plaintiff makes the claims in the same or in different capacities and **(b)** whether the claims are made against the defendant in the same or in different capacities

### **Counter Claim**

- Governed by **Order 10**
- Employed by defendant when has claim against the plaintiff, or another defendant as well (common in car collisions)
- A defendant may counter claim (not a defence) and has independent procedural existence – thus if the original claim by plaintiff is dropped the counter claim may continue
- **10.02** applies rule **9.1** to this situation allowing cases to be heard together
- Counter claim facilitates joint trial of two or more claims; counterclaims must set out material facts, cause of actions, etc.
- Will trigger a round of pleadings, where a counter claim filed the plaintiff must file a defence

### **Set Off 13.14**

- Pure defence to plaintiff's claims – where remedy sought by plaintiff is monetary, the defendant has a monetary claim against plaintiff the set off allows defendant to rely upon monetary claim as a defence to a whole or part of a plaintiff's claim
- Set off differs from counter claim as if plaintiff drops their claims the set off lapses

### **Third Party Procedure**

- Governed by **Order 11**
- Allows defendant to issue a third party notice to a non-party to the proceeding the object of which is to ensure third party bound by judgment of the court
- Used when the defendant is being sued and the defendant believes a third party is liable for damages to the plaintiff
- **Order 9.6** permits a joinder when proceedings have already begun and the plaintiff wants to add or substitute defendant – this is an addition of parties
- Court has power to make an order adding party or order a party cease to be a party or order a defendant be substituted for another
- An exception to this is **9.11.3.a** that states if the limitation period has expired as against a party ordered to be added or substituted then there is not point allowing the addition or substitution
- Any addition or substitution of a party takes effect from the date the court makes the order
- If the limitation period has expired before the order is made then the court won't make the order