SUPREME COURT OF QUEENSLAND

CITATION:	*Greystone Distributions (Qld & NSW) Pty Ltd & Ors v Rostron Carlyle Solicitors & Ors* [2020] QCA 126
PARTIES:	**GREYSTONE DISTRIBUTIONS (QLD & NSW) PTY LTD** ACN 121 440 908 (first appellant) **KURSHONBROOKE PTY LTD** ACN 122 349 298 (second appellant) **BRADLEY RALPH MAIDMENT** (third appellant) **SUZANNE KAY MAIDMENT** (fourth appellant) **v** **ROSTRON CARLYLE SOLICITORS** ABN 19 135 739 537 (first respondent/not a party to the appeal) **GREGORY STEPHEN ROSTRON** (second respondent/not a party to the appeal) **SHINE LAWYERS PTY LTD** ABN 86 134 702 757 (third respondent/not a party to the appeal) **DAVID MICHAEL TURNER** (fourth respondent)
FILE NO/S:	Appeal No 13561 of 2019 DC No 4607 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2019] QDC 227 (Jarro DCJ)
DELIVERED ON:	9 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2020
JUDGES:	Mullins JA and Boddice and Davis JJ
ORDERS:	**1. Appeal dismissed.** **2. Within seven days the fourth respondent file and serve any material relevant to costs together with written submissions.** **3. Within seven days of service of the fourth respondent's material and submissions, the appellants file and serve any material relevant to costs together with written submissions.**

4. **Within seven days of service of the appellants' material and outline, the fourth respondent file and serve any written submissions in reply.**

5. **The question of costs be determined on the written submissions without further oral hearing.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – PARTIES – GENERALLY – where the appellants appeal against a decision made in the District Court dismissing an application to join the third and the fourth respondents to proceedings – where the fourth respondent opposed their joinder to the proceedings – where the third respondent agreed to abide the order of the court – where the error alleged was that the learned primary judge ignored a substantial risk that any future proceedings brought against the third and fourth respondents might be stayed under the principles explained in *Port of Melbourne Authority v Anshun* – where the dismissal of the application did not affect any substantive rights which the appellants may have against the third and fourth respondents – where the claims arise from separate and distinct circumstances – whether an *Anshun* estoppel arises – whether the refusal to join the third and fourth respondents to the proceedings was a reasonable exercise of the discretion of the primary judge

Civil Liability Act 2003 (Qld), s 30, s 31, s 32B
Uniform Civil Procedure Rules 1999 (Qld), r 69

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39, cited
Allianz Australia Insurance Ltd v Mashaghati [2018] 1 Qd R 429; [2017] QCA 127, cited
Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175; [2009] HCA 27, cited
China First Pty Ltd & Anor v Mount Isa Mines Limited [2018] QCA 350, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Leda Holdings Pty Ltd v Caboolture Shire Council [2007] 1 Qd R 467; [2006] QCA 41, cited
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; [1981] HCA 45, applied
Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors [2019] QCA 160, cited
Tomlinson v Ramsey Food Processing Pty Ltd (2016) 256 CLR 507; [2015] HCA 28, cited
UBS AG v Tyne (2018) 265 CLR 77; [2018] HCA 45, cited

COUNSEL: C Wilson for the appellants
J Green for the fourth respondent

SOLICITORS: Roche Legal for the appellants

DLA Piper for the fourth respondent

[1] **MULLINS JA**: I agree with Davis J.

[2] **BODDICE J:** I agree with Davis J.

[3] **DAVIS J:** The appellants appeal against a decision made in the District Court on 15 November 2019[1] dismissing an application to join the third respondent, Shine Lawyers Pty Ltd ("Shine") and the fourth respondent, Mr David Michael Turner, a barrister, to proceedings ("the Rostron Carlyle proceedings") where the existing defendants are Rostron Carlyle Solicitors ("Rostron Carlyle") and Mr Gregory Stephen Rostron, solicitor and principal of Rostron Carlyle.

[4] Mr Turner resisted the application in the District Court while Shine did not. Shine made no submissions but agreed to abide the order of the court. It took a similar stance on the appeal, so it was Mr Turner who defended the primary judge's decision.

Background

[5] The third and fourth appellants (Mr and Mrs Maidment) had commercial dealings with Mr David Paul Oberhofer and Mrs Teresa Louise Oberhofer and two companies controlled by them, namely Monet Designs Pty Ltd ("Monet") and Greystone Vacuums USA Inc ("Greystone USA"). The Oberhofer parties run a business manufacturing and selling vacuum cleaners specifically designed for use in the equine industry. Monet is a company incorporated in Australia. Greystone USA is a company incorporated in the United States of America.

[6] Mr and Mrs Maidment, allegedly in reliance upon various representations made by Mr and Mrs Oberhofer, wished to acquire rights to sell the vacuum cleaners in Australia and to acquire a shareholding in Greystone USA.

[7] Two companies, the first appellant, Greystone Distributions (Qld & NSW) Pty Ltd ("Greystone Distributions") and the second appellant, Kurshonbrooke Pty Ltd ("Kurshonbrooke"), are controlled by Mr and Mrs Maidment and were to be the vehicles through which Mr and Mrs Maidment were to deal in the vacuum cleaners.

[8] The Maidment parties allege that various written and oral agreements were reached in 2006 and 2007 as a result of misleading representations made by Mr and Mrs Oberhofer. The oral agreements were made by Mr Oberhofer and Mr Maidment. There are now doubts as to whether rights which were acquired through those dealings vested in Kurshonbrooke or Greystone Distributors.

[9] The relationship between the Maidment parties and the Oberhofer parties soured and Mr and Mrs Maidment decided to commence proceedings. They retained Rostron Carlyle to act on their behalf. Mr Rostron handled the case. Rostron Carlyle briefed Mr Edward Goodwin of counsel to draw and settle a statement of claim.

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1 *Greystone Distributions (Qld & NSW) Pty Ltd as Trustee for BR & SK Maidment Trust & Ors v Rostron Carlyle Solicitors & Anor* [2019] QDC 227.

[10] A claim was then served, supported by a statement of claim drawn and settled by Mr Goodwin ("the Oberhofer proceedings"). The plaintiffs were Mr Maidment, Mrs Maidment and Kurshonbrooke. Greystone Distributions was not a plaintiff. The defendants were Mr Oberhofer, Mrs Oberhofer, Monet and Greystone USA.

[11] The Oberhofer proceedings were resolved. The Maidment parties contend that the proceedings were settled on terms unfavourable to them because the loss which was sought to be compensated had primarily been suffered by Greystone Distributions and the proceedings were thereby defective because that company was not a plaintiff.

[12] Being of the view that the Oberhofer proceedings were improperly constituted and that the fault was with their lawyers, Mr and Mrs Maidment then retained Shine to act for them and their two companies against Rostron Carlyle. Shine briefed Mr Turner to settle the pleadings against Rostron Carlyle.

[13] The Rostron Carlyle proceedings were then commenced. The claim names Mr and Mrs Maidment and their two companies as plaintiffs, with Rostron Carlyle as first defendant and Mr Rostron as second defendant. The claim was served and is supported by a statement of claim settled by Mr Turner. In due course, Rostron Carlyle and Mr Rostron filed a defence[2] and the Maidment parties filed a reply.

[14] On 24 September 2019, the application the subject of this appeal was filed. In it, the plaintiff sought to join three further defendants to the Rostron Carlyle proceedings: Mr Goodwin, Shine, and Mr Turner. In support of the application, an amended statement of claim, which pleaded a case against the proposed new defendants, was produced.

[15] Against Mr Goodwin, the amended statement of claim pleaded that he was negligent or in breach of his retainer by settling a statement of claim in the Oberhofer proceedings which did not join Greystone Distributions as a plaintiff. The case pleaded against Shine and Mr Turner was that they should have joined Mr Goodwin to the Rostron Carlyle proceedings, but that the claim is now statute-barred so their rights against Mr Goodwin were lost. There is obvious conflict between pleading a claim against Mr Goodwin, but then pleading positively against Shine and Mr Turner that the case against Mr Goodwin is statute-barred.

[16] The application came before Judge Jarro in the District Court on 27 September 2019. Mr Goodwin resisted joinder on the basis that any claim against him was statute-barred. As already observed, Shine took a neutral stance and Mr Turner resisted the application. The learned primary judge heard argument and reserved his decision.

[17] While judgment was reserved, the Maidment parties had the matter listed for further argument on 30 September 2019 whereupon they sought to rely upon a second amended statement of claim which pleaded causes of action against Mr Goodwin which were said not to be statute-barred. His Honour declined to allow the Maidment parties to rely upon the second iteration of the amended pleading.

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2 Although the pleading is titled "Defence of the first defendant", it is clearly a defence filed on behalf of both defendants.

[18] Still while judgment on the application remained reserved, the primary judge was advised that the Maidment parties and Mr Goodwin had agreed that, as against Mr Goodwin, the application would be dismissed with no order as to costs.

[19] That development left the primary judge in a quandary. The claims against Shine and Mr Turner were based on the failure to join Mr Goodwin. The claim against Mr Goodwin having now gone, the basis upon which to join Shine and Mr Turner was unclear. His Honour caused his associate to raise that issue with the parties by email and that provoked a third version of the amended pleading. That version deleted reference to Mr Goodwin as a party but maintained, as against Shine and Mr Turner, the allegations which had been made against Mr Goodwin. Therefore, the claims against Shine and Mr Turner remained founded upon the loss of the claim against Mr Goodwin.

Determination of the application by the learned primary judge

[20] The application was based upon r 69 of the *Uniform Civil Procedure Rules* 1999 (UCPR). That rule provides, relevantly:

> "**69 Including, substituting or removing party**
>
> (1) The court may at any stage of a proceeding order that—
>
> (a) a person who has been improperly or unnecessarily included as a party, or who has ceased to be an appropriate or necessary party, be removed from the proceeding; or
>
> (b) any of the following persons be included as a party—
>
> (i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding;
>
> (ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding. …"

[21] Before the District Court, both r 69(1)(b)(i) and r 69(1)(b)(ii) were relied upon. His Honour refused joinder on either ground.

[22] On appeal, the appellants submitted that his Honour should have joined the further parties under r 69(1)(b)(ii) but did not argue error in his Honour refusing to order joinder under r 69(1)(b)(i). Most of his Honour's reasons for judgment are devoted to a consideration of r 69(1)(b)(i), although much of what his Honour said about r 69(1)(b)(i) was relied upon in dismissing the application based on r 69(1)(b)(ii).

[23] In refusing to order joinder under r 69(1)(b)(i), his Honour:

(a) identified the alleged causes of action against Rostron Carlye and Mr Rostron;

(b) identified the alleged causes of action against Mr Goodwin, Shine and Mr Turner;

(c) correctly directed himself to the appropriate principles explained in *China First Pty Ltd & Anor v Mount Isa Mines Limited*;[3] and

(d) held that neither the presence of Shine nor Mr Turner was necessary for the court to decide the Rostron Carlyle proceedings as presently constituted.

[24] As already observed, no challenge is made to those findings.

[25] Having identified the cases against the various defendants and proposed defendants, his Honour refused joinder under r 69(1)(b)(ii). His Honour:

(a) correctly directed himself to the appropriate principles explained in *Leda Holdings Pty Ltd v Caboolture Shire Council*;[4]

(b) held that unnecessary delay and expense would be incurred by joining Mr Turner as:

> "Mr Turner would be required:
>
> (a) to plead to the proposed pleading in circumstances where the majority of the allegations made concern Rostron Carlyle; and
>
> (b) to participate in a trial as to the conduct of the proceedings in which Mr Turner was not responsible (namely the Oberhofer proceedings)."[5]

(c) held further:

> "All in all, I am of the view that the joinder serves no useful purpose. It is, what I consider to be, an attempt to join two separate trials and it is not desirable that both be resolved within the current litigated proceeding. For those reasons, the application to join Mr Turner should be dismissed.";[6] and

(d) held that Shine should not be joined despite their passive stance to the application as the allegations against Shine are similar to the allegations against Mr Turner. His Honour considered that the discretionary features favouring a refusal to join Mr Turner also resulted in a refusal to join Shine.

[26] It seems common ground, both at first instance and on appeal, that the dismissal of the application did not affect any substantive rights which the appellants may have against Shine and Mr Turner.

The appellants' case on appeal

[27] The appellants' case on appeal is fundamentally different to that presented at first instance. Before the District Court, the failure alleged against Shine and Mr Turner was not joining Mr Goodwin and thereby allowing the claim against him to become statute-barred. On appeal, the complaint was:

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3 [2018] QCA 350.
4 [2007] 1 Qd R 467.
5 At [19].
6 At [22].

> "The third respondent (Shine Lawyers) and their counsel, the fourth respondent (Mr Turner) represented the Maidment interests in the action against Rostron Carlyle. The Maidment interests allege that Shine Lawyers and Mr Turner allowed good arguable claims against Rostron Carlyle to become limitation barred."[7]

And:

> "As a result of deficiencies in the way that Shine Lawyers and Mr Turner pleaded the Maidment interests' claim against Rostron Carlyle in the District Court action, and as a result of the expiry of the relevant limitation periods applicable to available claims against Rostron Caryle, the Maidment interests lost valuable opportunities to pursue good claims against Rostron Carlyle for damages for the loss a valuable opportunity to pursue good claims against the Oberhofer interests in the Oberhofer action."[8]

[28] The focus of the appellants' case on appeal is an alleged loss of causes of action against Rostron Carlyle, not Mr Goodwin. It is difficult for the appellants to criticise an exercise of discretion not to allow joinder of a claim based on a loss of a cause of action against Mr Goodwin when that claim is not maintained on appeal.

[29] Nowhere in the material is there any articulation of the "good arguable claims" against Rostron Carlyle which are not already pleaded in the Rostron Carlyle proceedings and are now said to be lost.

[30] Much of the argument advanced both in writing and orally on behalf of the appellants sought to provide reasons and arguments as to why the learned primary judge ought to have ordered joinder. It is not enough for the appellants to establish on appeal that there are reasons, or even good reasons, for Shine and Mr Turner to be joined in the Rostron Carlyle proceedings. As the appeal is against an exercise of discretion by the learned primary judge, an error of the kind identified in *House v The King*[9] must be established.

[31] Not only was his Honour's judgment one in exercise of discretion, but it was a species of judicial discretion with which courts of appeal are loath to interfere. In *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc*,[10] an appeal from an order releasing a party from an undertaking given in support of an interlocutory injunction, Gibbs CJ, Aickin, Wilson JJ and Brennan J (as his Honour then was)[11] said this of appeals against procedural orders:

> "Nor is there any serious dispute between the parties that appellate courts exercise particular caution in reviewing decisions pertaining to practice and procedure. Counsel for Brown urged that specific cumulative bars operate to guide appellate courts in the discharge of that task. Not only must there be error of principle, but the decision appealed from must work a substantial injustice to one of the parties. The opposing view is that such criteria are to be expressed disjunctively. Cases can be cited in support of both views: for example, on the one hand, *Niemann v Electronic Industries Ltd*; on

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7 Appellants' written outline, paragraph 3.
8 Appellants' written outline, paragraph 14.
9 (1936) 55 CLR 499 at 505.
10 (1981) 148 CLR 170.
11 With whom Murphy J was in substantial agreement: see 179-180.

> the other hand, *De Mestre v A D Hunter Pty Ltd*. For ourselves, we believe it to be unnecessary and indeed unwise to lay down rigid and exhaustive criteria. The circumstances of different cases are infinitely various. We would merely repeat, with approval, the oft-cited statement of Sir Frederick Jordan in *In re the Will of F B Gilbert (dec)*:
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> > '... I am of opinion that, ... there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal.'
>
> See also, *Brambles Holdings Ltd v Trade Practices Commission*; *Dougherty v Chandler*. It is safe to say that the question of injustice flowing from the order appealed from will generally be a relevant and necessary consideration."[12]

[32] That judgment was delivered by the High Court well before the introduction of modern rules of practice which incorporate rules such as r 5 of the UCPR, and years before *Aon Risk Services Australia Limited v Australian National University*[13] emphasised the significance of case management orders.[14] These developments strengthen the courts' reluctance to interfere with case management decisions.

[33] It will be rare that an appellate court will interfere in the exercise of discretion in case management where, as here, no substantive right is affected by the decision.

[34] Faced with these issues, Mr Wilson, who appeared for the appellants, identified the alleged error as the learned primary judge ignoring a substantial risk that any future proceedings brought against Shine and Mr Turner might be stayed under the principles explained in *Port of Melbourne Authority v Anshun*.[15] He accepted in argument that unless there was such a risk, the appeal could not succeed.

[35] *Anshun* was raised as a consideration at first instance.[16] His Honour made passing reference to the argument but did not expressly deal with the point in his reasons.[17]

Mr Turner's case on appeal

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12 At 177 (footnotes omitted).
13 (2009) 239 CLR 175.
14 See also *UBS AG v Tyne* (2018) 265 CLR 77 at 96 and 125-6. Case management discretions should be exercised so as to ensure that a trial is fair; see *Allianz Australia Insurance Ltd v Mashaghati* [2018] 1 Qd R 429 at 442 and *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd* [2019] QCA 160 at [30]-[31].
15 (1981) 147 CLR 589.
16 At [9].
17 See footnote 3.

[36] Mr Turner submitted that in determining that it was not "desirable, just and convenient"[18] to join Shine and Mr Turner to the Rostron Carlyle proceedings, no error of the kind described in *House* had been committed by his Honour.

[37] In submitting that, for various reasons, the principles in *Port of Melbourne Authority v Anshun* had no application, Mr Turner submitted:

> "33. Even if the principles addressed in *Anshun* do have application, the High Court has confirmed that whether such an estoppel arises depends upon an assessment of whether it was 'reasonable' for a party not to bring claims which are the subject of later proceedings in earlier proceedings.
>
> 34. It would not, of course, be reasonable to expect the Appellants to have proceeded against the Third and Fourth Respondents in the face of those parties' successful defence of an application for joinder. The Appellants correctly concede this point. It does not provide a basis upon which to set the decision of the Primary Judge aside."[19]

Impact of the *Anshun* principles

[38] *Port of Melbourne Authority v Anshun* concerned a claim for damages for personal injuries arising from an accident involving a crane. The crane was being used by Anshun Pty Ltd ("Anshun") and was hired from the Port of Melbourne Authority ("the Authority"). Both Anshun and the Authority were sued by the plaintiff who then claimed contribution from each other pursuant to provisions in the *Wrongs Act* 1958 (Vic). Judgment was entered against both the defendants. Contribution was assessed at 90 per cent to the Authority and 10 per cent to Anshun. The Authority then sued Anshun claiming total indemnity pursuant to contractual covenants in the agreement whereby the crane was hired by it to Anshun. Anshun obtained an order staying the Authority's proceedings.

[39] After finding that the Authority's claim was not *res judicata* as the contractual claim had not been determined, and no issue estoppel arose as the second action raised different issues to the first, the High Court upheld the stay. In so doing, neither the plurality[20] nor Murphy J based the stay upon proof that the second action was brought in abuse of process. The plurality held:

> "In these cases in applying the *Henderson v Henderson* principle to a plaintiff said to be estopped from bringing a new action by reason of the dismissal of an earlier action, Somervell LJ and Lord Wilberforce insisted that the issue in question was so clearly part of the subject matter of the initial litigation and so clearly could have been raised that it would be an abuse of process to allow a new proceeding. Even then the abuse of process test is not one of great utility. And its utility is no more evident when it is applied to a plaintiff's new proceeding which is said to be estopped because the plaintiff omitted to plead a defence in an earlier action.

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18 Rule 69(b)(ii).

19 Fourth respondent's amended written outline of argument, paragraphs 33 and 34.

20 Gibbs CJ, Mason, Aickin, Brennan JJ.

> In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it."[21]

[40] In *Tomlinson v Ramsey Food Processing Pty Ltd*,[22] the High Court observed the distinction between the principles underpinning *res judicata*, remedies available upon proof of an abuse of process, and various species of estoppel which can arise once a final judgment has been delivered. Those species of estoppel were described in these terms:

> "Three forms of estoppel have now been recognised by the common law of Australia as having the potential to result from the rendering of a final judgment in an adversarial proceeding. The first is sometimes referred to as 'cause of action estoppel'. Estoppel in that form operates to preclude assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceeding and which was determined by the judgment. It is largely redundant where the final judgment was rendered in the exercise of judicial power, and where res judicata in the strict sense therefore applies to result in the merger of the right or obligation in the judgment. The second form of estoppel is almost always now referred to as 'issue estoppel'. Estoppel in that form operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a 'judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies'. The third form of estoppel is now most often referred to as '*Anshun* estoppel', although it is still sometimes referred to as the 'extended principle' in *Henderson v Henderson*. That third form of estoppel is an extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding. The extended form has been treated in Australia as a 'true estoppel' and not as a form of res judicata in the strict sense. Considerations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument."[23]

[41] An *Anshun* estoppel is a discretionary remedy and one consideration is whether the splitting of causes of action is likely to contribute to conflicting judgments.[24]

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21 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602.
22 (2015) 256 CLR 507.
23 At 517.
24 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 603.

[42] Mr Wilson of counsel for the appellants contended that if Shine and Mr Turner are not joined to the Rostron Carlyle proceedings then in any subsequent proceedings brought against them, they might successfully argue:

(a) they should have been joined to the Rostron Carlyle proceedings; and

(b) the continuation of the second proceedings might lead to a judgment inconsistent with that given in the Rostron Carlyle proceedings.

[43] That submission ought to be rejected.

[44] An *Anshun* estoppel will only arise upon a finding that it was unreasonable for a party to a second proceeding to fail to join all claims in its first proceeding. Any complaint of unreasonableness must be made and established by the party who would seek to raise the estoppel, here Shine and Mr Turner.

[45] Mr Turner, both at first instance and on appeal, has actively opposed the appellants' attempts to join him and Shine to the Rostron Carlyle proceedings. Shine, while taking a neutral stance, have been content to take the benefit of Mr Turner's opposition to their joinder.

[46] In these circumstances, neither Mr Turner nor Shine could assert in later proceedings that it was unreasonable for the appellants not to have joined them in the Rostron Carlyle proceedings.

[47] Further, the claims against Shine and Mr Turner are distinct from those against Rostron Carlyle and Mr Rostron. It is not suggested that the four parties are joint or concurrent tortfeasors[25] and are not "concurrent wrongdoers" for the purposes of the *Civil Liability Act* 2003.[26] It is not suggested that they are all parties to the same contractual covenants. The claims against Rostron Carlyle and Mr Rostron allege a failure to join a plaintiff (Greystone) in the Oberhofer proceedings. The only identified claim against Shine and Mr Turner is that they failed to join a party (Mr Goodwin) to the Rostron Carlyle proceedings. The claims against Rostron Carlyle and Mr Rostron are not closely connected to the claims against Shine and Mr Turner.

[48] In their defence to the Rostron Carlyle proceedings, the existing defendants plead that if the appellants prove a claim against them, then Mr Goodwin is a "concurrent wrongdoer"[27] and so judgment should only be given against them for a sum reflecting the proportion of the total loss and damage attributable to their (as opposed to Mr Goodwin's) responsibility for the loss.

[49] There is a possibility that the failure to join Mr Turner and Shine to the Rostron Carlyle proceedings could lead to inconsistent judgments in this way:

1. In the Rostron Carlyle proceedings a court could find that Mr Goodwin contributed to the appellants' loss of rights against the Oberhofer parties.

2. The court would then apportion part of that loss as attributable to Mr Goodwin's negligence and give judgment against the current defendants for the balance.

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25 Both common law joint tortfeasors who commit the same tort by vicarious liability, breach of a joint duty, or by inflicting damage by concerted action, or concurrent tortfeasors who by separate torts contribute to the same loss (*The Koursk* [1924] P 140).

26 Sections 30 and 31.

27 Section 31.

4. A court hearing a subsequent claim against Shine and Mr Turner would have to assess, on evidence then produced by the appellants, the extent of Mr Goodwin's contribution to the appellants' loss of rights against the Oberhofer parties.[28]

5. The assessment of Mr Goodwin's contribution by the court which heard the Rostron Carlyle proceedings may be different to the assessment of the court which hears the claim against Shine and Mr Turner.

[50] The fact that Rostron Carlyle and Mr Rostron, the current defendants, claimed that Mr Goodwin was arguably a concurrent wrongdoer, was identified by the learned primary judge. His Honour noted that in their pleading in reply the appellants denied that Mr Goodwin was a concurrent wrongdoer. The appellants pleaded:

> "11. The Plaintiffs deny the allegations in paragraph 86 of the Defence and believe the allegations to be untrue because the matters there pleaded do not give rise to the conclusion of law that that Mr Goodwin is a concurrent wrongdoer for the purposes of section 30 of the CLA."

[51] Given that the claims arise from separate and distinct circumstances and given the opposition by Mr Turner, and indirectly by Shine, to their joinder to the Rostron Carlyle proceedings, no *Anshun* estoppel arises. The fact that there is a possibility of inconsistent judgments does not undermine his Honour's conclusion that there is little overlap between the issues arising in the claim against the current defendants and the issues that may arise in a claim against Shine and Mr Turner. The refusal to join Shine and Mr Turner to the Rostron Carlyle proceedings was a reasonable exercise of the discretion reposed upon the primary judge by r 69.

[52] No error has been demonstrated in the exercise of discretion by the learned primary judge and I would dismiss the appeal.

[53] In argument, Mr Green of counsel who appeared for Mr Turner, said that if the appeal was dismissed, special costs orders may be sought and he wished to have an opportunity to make further submissions.

[54] I would make directions for the exchange of material and submissions on costs and for the costs to be determined without further oral hearing.

Orders

[55] I would order:

1. Appeal dismissed.

2. Within seven days the fourth respondent file and serve any material relevant to costs together with written submissions.

3. Within seven days of service of the fourth respondent's material and submissions, the appellants file and serve any material relevant to costs together with written submissions.

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[28] Section 32B of the *Civil Liability Act* 2003 expressly permits the bringing of separate proceedings against different concurrent wrongdoers.

4. Within seven days of service of the appellants' material and outline, the fourth respondent file and serve any written submissions in reply.

5. The question of costs be determined on the written submissions without further oral hearing.