

# SUPREME COURT OF QUEENSLAND

CITATION: *MIM General Insurance Ltd v D'Anglers' Paradise P/L*  
[2002] QSC 224

PARTIES: **MIM GENERAL INSURANCE LIMITED**  
(ACN 000 122 850)  
(applicant/defendant)  
v  
**D'ANGLERS' PARADISE PTY LIMITED**  
(ACN 064 264 464)  
(respondent/third plaintiff)

FILE NO: 3825 of 2001

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 15 August 2002

DELIVERED AT: Brisbane

HEARING DATE: 12 August 2002

JUDGE: Wilson J

ORDER: **1. That the third plaintiff's claim against the defendant be dismissed;**  
**2. That the third plaintiff pay the defendant's costs of and incidental to its claim including the costs of this application, to be assessed on the indemnity basis.**

CATCHWORDS: PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – application to dismiss plaintiff's claim as abuse of process – whether the claims had already been litigated in proceedings between the parties in the Federal Court – application of principle of *res judicata*

PROCEDURE – COSTS – where third plaintiff's claim was dismissed as an abuse of process – whether third plaintiff should pay applicant defendant's costs on an indemnity basis or on the standard basis

*Access Finance Corporation Pty Ltd v Golubovic & Anor* (1991) ASC ¶56-089, applied.  
*Fountain Selected Meat (Sales) v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, applied.

COUNSEL: R G Bain QC for the applicant/defendant  
R J Clutterback for the respondent/third plaintiff

SOLICITORS: Deacons for the applicant/defendant  
Allen Allen & Hemsley for the respondent/third plaintiff

- [1] This is an application by the defendant to dismiss the third plaintiff's claim as an abuse of process. The basis of the application is that the claims made by the third plaintiff in this proceeding are the same as those previously made by it in a proceeding in the Federal Court. The applicant submits that the principle of *res judicata* prevents the re-litigation of those issues.
- [2] The respondent's submission is that, because there was no hearing on the merits in the Federal Court, the principle is not applicable.
- [3] The respondent/third plaintiff conducted a retail fishing supplies business on the Sunshine Coast in late April 1995. Its premises and stock in the premises were damaged by spillage of incendiary material which had been placed in the ceiling of the shop by someone. The applicant/defendant was the respondent/third plaintiff's insurer under a policy of business insurance issued in July 1995. The respondent claimed on the insurance in respect of the damage and consequential loss, and the applicant rejected the claim.
- [4] In 1997 the respondent commenced proceedings against the applicant in the Federal Court. Those proceedings came on for trial before Justice Dowsett on 3 April 2002. The respondent sought an adjournment unsuccessfully. The next day it renewed the application for an adjournment, again unsuccessfully. Its counsel then withdrew. The trial proceeded with no evidence being offered by the respondent (the applicant in those proceedings). The claim was dismissed. There was an unsuccessful appeal to the Full Court of the Federal Court.
- [5] I am satisfied that the issues raised by the respondent/third plaintiff in the present proceeding are the same as issues it raised in the Federal Court proceeding. Suffice it to quote from the submissions of counsel for the applicant:-
- “6. On 30 April 2001, D'Anglers (and the Loieros) commenced this action. This action replicates the claims dismissed in the Federal Court. Such differences, even of language, as exist between this action, and that raised by D'Anglers in the Federal Court, are minor and immaterial. It is not necessary to catalogue those minutely. The following are salient.
7. The relevant insurance, the parties to the insurance and 'the incident' – ie. The setting of flammable material in D'Anglers' shop and resultant damage to the shop, fittings, fixtures and stock – was all raised in the Federal Court (Amended Statement of Claim paragraphs 5-12). The specific representations as to the currency of the policy (cf. paragraph 13 of the Statement of Claim in the Supreme Court) from 7 July 1994 to 7 July 1995 (rather than '7-6-94' to '7-6-95') was not advanced in detail in the Federal Court but, nonetheless, was squarely raised by the assertion by sub-paragraph 7(a) of the Amended Statement of Claim in the Federal Court that 'the period of cover was from 7 July 1994 to 7 July 1995'.

8. The taking of possession of D'Anglers' shop, alleged in paragraphs 27-29 of the current Statement of Claim, together with the representations concerning the insurer's response (paragraphs 29 and 31 of that pleading) are rehashes of what was raised in the Federal Court (paragraphs 21-24 of the Amended Statement of Claim).
9. The 'First Cause of Action – Repudiation of Contract' (paragraphs 33-35) and the 'Second Cause of Action – Breach of Contract' (paragraphs 37-41) of the current Statement of Claim similarly is a rehashing of paragraphs 34-37 (quaere paragraphs 37A-37H) of the Amended Statement of Claim in the Federal Court and the 'Third Cause of Action – Breach of Duty of Care' (paragraphs 42-44) is an admixture of the 'Third Cause of Action – Breach of Duty of Care' (paragraphs 45-49) of the Amended Statement of Claim in the Federal Court and some elements of the antecedent 'repudiation' case in that pleading.
10. The 'Fourth Cause of Action – Trespass' (paragraphs 45-47) of the current Statement of Claim is both a further characterisation of the alleged taking of possession D'Anglers' premises said to have been part of the 'Second Cause of Action' and a reprise of the former 'Fifth Cause of Action', expressly raised and abandoned in the Federal Court.
11. The balance of the current Statement of Claim concerns only loss but, to the extent relevant, the heads of damage advertised as having been suffered by D'Anglers' in the current Statement of Claim correspond with, or at least lie within, those embraced in the particulars of loss offered in the Federal Court.

[6] This is not a case of a default judgment having been entered in consequence of some procedural default. Rather the matter proceeded to trial when the present respondent (the applicant in the Federal Court) offered no evidence. Its claim was dismissed on the merits and a final judgment was given. In *Access Finance Corporation Pty Ltd v Golubovic & Anor* (1991) ASC ¶56-089, Gobbo J said at 56,934:-

“In my view the fact that there was little or no material put forward cannot derogate from the decision. In a contested hearing of a claim for negligence by A against B which results in the claim being dismissed by the judge for want of any evidence of negligence, the issue of negligence is still finally decided even if the plaintiff failed to call any or sufficient relevant evidence of negligence.”

[7] It follows that the principle of *res judicata* is applicable. The respondent/third plaintiff's claim should be dismissed as an abuse of process.

- [8] Costs should follow the event. The applicant/defendant's counsel asked that those costs be assessed on the indemnity basis. Orders for the assessment of costs on that basis are properly made only in exceptional circumstances. In *Fountain Selected Meats (Sales) v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 400-401, Woodward J said:-

“I believe that it is appropriate to consider awarding ‘solicitor and client’ or ‘indemnity’ costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion.”

- [9] I consider that the present case is one where the respondent/third plaintiff, properly advised, should have known that it had no chance of success.
- [10] Accordingly, I order –
1. That the third plaintiff's claim against the defendant be dismissed;
  2. That the third plaintiff pay the defendant's costs of and incidental to its claim including the costs of this application, to be assessed on the indemnity basis.