

Res Judicata or how a final injunction in the Equity division can bar recovery of damages

by K.R. Handley QC

It is generally well known that damages for a cause of action must be assessed once and for all, and that after damages have been assessed a second action cannot be brought to recover further damages. See *Conquer v Boots* [1928] 2 KB 336.

It is also generally known that issues of fact or law determined in prior proceedings cannot be relitigated between the same parties or their privies in later proceedings. See *Blair v Curran* 62 CLR 464 at 532 per Dixon J.

However members of the Bar may not be generally familiar with a further principle of the law of estoppel by judgment which is illustrated by the decision of the High Court in *Port of Melbourne Authority v Anshun Pty Ltd (No. 2)* (1981) 147 CLR 589.

In that case the Authority hired one of its cranes to a hirer. A third party injured by the operation of the crane sued the Authority and the hirer.

Cross notices were given for contribution between the defendants, and the Authority was adjudged 90 per cent responsible. In a second action it sought to enforce an indemnity in the contract of hiring.

The High Court held that the Authority was estopped from enforcing the indemnity because the claim to do so could and should have been raised in the earlier proceedings.

Recently Clarke J had to consider whether estoppel by judgment applied to bar proceedings for damages in the Common Law Division for breach of contract where earlier proceedings in the Equity division to restrain the breach had been concluded by a consent judgment for a final injunction and costs.

No claim for damages had been raised in the Equity Summons. Clark J held that a second action claiming damages for the same breach could not be maintained

because damages could have been claimed and recovered in the Equity proceedings.

He applied *Port of Melbourne Authority v Anshun* (above), and an earlier decision in *Serrao v Noel* (1885) 15 QBD 549 (CA) which was based on similar facts.

There proceedings had been taken in the Chancery Division to restrain dealings in certain securities and for their delivery up to the plaintiff. A final order was made by consent for the securities to be delivered up and for payment of costs.

Subsequently the plaintiff sued in the Queens Bench Division to recover damages for the wrongful detention of the securities. No claim for damages had been raised or pleaded in the Chancery proceedings, but the Court of Appeal held that the second action could not be maintained as it was brought on the same cause of action.

In this case and in the case before Clarke J the plaintiffs had succeeded in the earlier equity proceedings, and had obtained final consent orders which in terms did not release the defendants from claims for damages. Moreover in neither case had damages been claimed in the prior proceedings.

It is apparent that care must be exercised in obtaining final injunctions by consent or by decision (especially in urgent cases) lest the plaintiff's rights to damages be inadvertently lost.

Another area where the principles of *Anshun's* case should be borne in mind is by parties in Supreme Court proceedings who contemplate determining the action and then invoking the jurisdiction of the Federal Court under the Trade Practices Act. Care should be taken, when the Supreme Court proceedings are resolved that the litigant's right to raise associated non-federal issues in the Federal Court is preserved.

Obituary: Lord Diplock

Lord Diplock died on 14 October aged 78. He had just finished sitting on the Judicial Committee of the Privy Council as a member of the Boards hearing two Australian cases, *Lloyd v. David Syme & Co Limited* and *Austin v. Mirror Newspapers*. Rumour has it that his Lordship was writing the judgment in the former case on October 13, the day before he was admitted to hospital.

On October 16 Lord Scarman paid tribute to Lord Diplock in the House of Lords.

He said the House's sense of loss was individually and collectively very deep and would endure.

By Lord Diplock's death the nation lost one of the finest legal brains of all time in the history of common law. He was a truly great appeal judge: original, creative, and of old established legal shibboleths, devastatingly destructive.

Yet he was a very traditional common-law judge. He believed in developing the law by judicial decision and he adopted a sturdily independent, but also a very co-operative approach to the statute law.

He was a champion of the purposive approach in interpreting Acts of Parliament, seeking out their legislative purpose, and wherever possible, giving effect to that purpose in his interpretation of their provisions.

For many years he and Lord Wilberforce were the Castor and Pollux of the legal firmament guiding the law through the troublesome areas of social and economic change which merged into the law through the channel of legislation.

While it was not the time to assess Lord Diplock's specific contributions to the development of the common law, Lord Scarman said, they were many, particularly in the field of commercial law, arbitration law, and administrative law. In those fields some of his decisions would remain important landmarks for a very long time.