

AUSTRALIA / JUDGMENT

Ge v King

[2025] NSWSC 1215**COURT**

Supreme Court

DECIDED

16 October 2025

BEFORE

Harrison AsJ

CASE / FILE NUMBER

2024/00467367

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Supreme Court

New South Wales

Medium Neutral Citation: Ge v King [2025] NSWSC 1215**Hearing dates:** 21 August 2025**Date of orders:** 16 October 2025**Decision date:** 16 October 2025**Jurisdiction:** Common Law**Before:** Harrison AsJ

Decision: (1) Leave is granted to the appellants to file an amended summons to include proposed appeal ground 10.
(2) Leave to amend the grounds of appeal to include appeal ground 11 is refused.
(3) Costs are reserved.

Catchwords: CIVIL PROCEDURE — originating process — amendment — where leave sought to amend the summons to include additional grounds not raised at first instance

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 56, 57, 58, 64
Residential Tenancies Act 2010 (NSW), s 52
Workers Compensation Act 1987 (NSW), ss 140, 145, 155
Workplace Injury Management and Workers Compensation Act 1998 (NSW) ss 4, Sch 1, s 2

Cases Cited:	Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175 Banque Commerciale S.A., En Liquidation v. Akhil Holdings Ltd (1990) 169 CLR 279 at 284 Cappello v Hammond & Simonds NSW Pty Ltd [2021] NSWCA 57 Connecticut Fire Insurance Co v Kavanagh (1892) AC 473 Coulton v Holcombe (1986) 162 CLR 1 Crampton v R [2000] HCA 60 Geelong Building Society (in liq) v Encel [1996] 1 VR 594 Heath v Goodwin (1986) 8 NSWLR 478 Holcombe v Coulton (1988) 17 NSWLR 71 Suttor v Gundowda Pty Ltd (1950) 81 CLR 418 University of Wollongong v Metwally (No 2) [1985] HCA 28 Whisprun Pty Ltd v Dixon [2003] HCA 48 Sutherland v. Thomson (1906) AC. 51
Texts Cited:	Ritchies Uniform Civil Procedure (NSW), [s 64.10]
Category:	Procedural rulings
Parties:	Guoqing Ge (First Appellant) Shaoying Chen (Second Appellant) Natalie King (Respondent)
Representation:	
Counsel:	A Wilson (First and Second Appellants) T Davy (Respondent)
Solicitors:	Hunt & Hunt Lawyers (First and Second Appellants) Bay Legal (Respondent)
File Number(s):	2024/00467367
Publication restriction:	Nil

JUDGMENT

This judgment involves an application by the plaintiffs seeking leave to amend the summons to appeal.

The first appellant is Guoqing Ge. The second appellant is Shaoying Chen. They are husband and wife. They are represented by A Wilson of counsel. The respondent is Natalie King. She is represented by T Davy of counsel.

Without intending any disrespect and for convenience of understanding, I shall refer to the parties by name. Ge and Chen (Ge and Chen) were the defendants in the Local Court and appellants in this Court; likewise, King was the plaintiff in the Local Court and respondent in this Court.

Ge and Chen relied upon the affidavit of their solicitor, Joey Tass, dated 2 May 2025. King relied on the affidavit of her solicitor, Timothy Mitchell, dated 4 June 2025.

Notice of motion dated 2 May 2025

On 2 May 2025, Ge and Chen filed a notice of motion requesting that this Court grant leave to amend their summons to include two further grounds, one that was not raised at the hearing in the Local Court. Ge and Chen seek leave to amend the summons to appeal to include the grounds of appeal at pars 10 and 11. They are:

“10. The Magistrate erred in law in assessing damages in circumstances where the damages were caused by the failure of the Defendant to maintain a policy of workers compensation insurance in that:

- (a) the failure to maintain such insurance was an illegal act, and the damages that were awarded were for losses sustained by the Defendant for that illegal act;
- (b) the damages awarded were too remote from any breach of contract to sound in damages; and
- (c) the cause of the loss claimed was the failure to maintain insurance and not any breach of the lease (Workers’ compensation)

[This ground of appeal was not raised in the pleadings or during the hearing in the Local Court.]

11. The Magistrate erred in law in failing to give reasons, or adequate reasons, in determining the damages awarded to the Defendant (Adequate reasons).”

King opposes the application for leave on the basis that the amendments involve a matter that was not raised at first instance, being, that King was obliged to maintain a policy of workers compensation insurance.

There is no dispute that proposed appeal point 10 was not argued at first instance.

Ge and Chen’s submissions in this Court

Ge and Chen submitted that the amendments to the summons are sought for a proper purpose, are proper in substance and form, do not cause prejudice and are consistent with the dictates of justice.

Counsel for Ge and Chen contend that there is no evidence that could have been given in the Court below that could have possibly prevented the relevant appeal points from succeeding. There is no dispute that King had an obligation to maintain a workers’ compensation insurance policy and failed to do so.

Background

The factual background is not in dispute. In October 2021, King engaged Yuping Chen as a nanny (Ms Chen). The engagement of Ms Chen was facilitated through an agency, Meiqi Housekeeping Services (the agency). Ge and Chen are the registered proprietors of the property known as XXX March Street, Bellevue Hill NSW 2023 (the premises). King occupied the premises from 10 January 2022 pursuant to a Residential Tenancy Agreement with Ge and Chen.

On or about 13 January 2022, an electronic roller blind fell from its fixture and landed on the finger of Ms Chen (who incidentally has the same surname as the second appellant), causing an injury (injury). It is common ground that at the time of the injury, King did not maintain a workers' compensation insurance policy in relation to Ms Chen. The agency refused to pay the expenses of Ms Chen on the basis that the injury was a workers' compensation matter. Insurance and Care NSW (iCare) processed a workers' compensation claim on behalf of the nanny and sought to recover the costs of that claim from King.

On 20 October 2022, iCare and King entered into a deed (the deed). Under the deed, King paid \$40,000 to iCare. King engaged Bellrock Advisory, an insurance consultant, to deal with the claim by iCare. The cost of those services was \$8,000.

In the Local Court proceedings, King succeeded in claiming damages for:

the monies paid to iCare in the sum of \$40,000; and

costs associated with the workers' compensation claim.

King was represented by T Davey of Counsel and Ge and Chen were self-represented, by Ge, in the Local Court.

The judgment of the Local Court is the subject of this appeal.

The Workers Compensation Act 1987 (NSW)

The facts that formed the basis of King's case in the Local Court reflect the obligations imposed on King under workers' compensation legislation. As an employer or a deemed employer, King was required to maintain a policy of workers' compensation insurance in respect of Ms Chen.

Section 155 of the Workers Compensation Act 1987 (NSW) (WC Act) relevantly reads:

155 Compulsory insurance for employers

- (1) An employer (other than a self-insurer) shall obtain from a licensed insurer, and maintain in force, a policy of insurance that complies with this Division for the full amount of the employer's liability under this Act in respect of all workers employed by the employer and for an unlimited amount in respect of the employer's liability independently of this Act (but not including a liability for compensation in the nature of workers compensation arising under any Act or other law of another State, a Territory or the Commonwealth or a liability arising under the law of another country) for any injury to any such worker.

Maximum penalty—500 penalty units or imprisonment for 6 months, or both.

This is not limited to relationships of employment at common law: *Hollis v Vabu* (2001) 207 CLR 21.

Section 4 of the Workplace Injury Management and Workers Compensation Act 1998 (NSW) (WIMWC Act) relevantly reads:

worker means a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing). However, it does not include...

Schedule 1, s 2 of the WIMWC Act has effect in respect of deemed employment and relevantly states:

2 Other contractors

- (1) Where a contract—
 - (a) to perform any work exceeding \$10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name), or

...

is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor.

The admissions contained within the statement of claim and affidavits of King in the Local Court indicate that Ms Chen was a worker for whom King had an obligation to maintain a workers' compensation insurance policy.

Where no such policy is in effect, an injured worker may pursue a claim against iCare as the nominal insurer. Section 140 of the WC Act relevantly reads:

140 Persons eligible to make claims

- (1) A claim under this Division may be made against the Nominal Insurer by any person who considers he or she has a claim against an employer for compensation under this Act or work injury damages in respect of an injury to a worker, if—
 - (a) the employer is uninsured, or
- ...
- (2) An employer is considered to be uninsured if the employer—

- (a) had not obtained, or was not maintaining in force, a policy of insurance for the full amount of the employer's liability under this Act in respect of the injured worker at the relevant time, or

...

- (3) If a payment is made by the Nominal Insurer in respect of a claim under this Division and the employer is subsequently identified, the Nominal Insurer may recover the amount paid from the employer or the employer's insurer in the manner provided by this Division.

The pleadings and evidence of King in the Local Court indicate that Ms Chen made a claim against iCare as the nominal insurer, pursuant to this provision.

In such circumstances, the nominal insurer can recover the costs of the claim from the employer. Section 145 of the WC Act relevantly reads:

145 Employer or insurer to reimburse Insurance Fund

- (1) The Nominal Insurer may serve on a person who, in the opinion of the Nominal Insurer, was —
 - (a) in respect of an injured worker to or in respect of whom a payment has been made by the Nominal Insurer in respect of a claim under this Division, an employer at the relevant time, or
 - (b) an insurer under this Act of such an employer,

a notice requiring that person, within a period specified in the notice, to reimburse the Insurance Fund an amount (not being an amount exceeding the amount of the payment made) specified in the notice.

...

- (3) A person on whom a notice has been served under subsection (1) in respect of an injured worker may, within the period specified in the notice, apply to the Commission for a determination as to the person's liability in respect of the payment concerned.
- (4) The Commission may hear any such application and may—
 - (a) make such determination in relation to the application, and
 - (b) make such awards or orders as to the payment of compensation under this Act to or in respect of the injured worker concerned,

as the Commission thinks fit.

...

- (6) The Nominal Insurer may recover an amount specified in a notice served under subsection (1) (being a notice in respect of which an application has not been made under subsection (3)) from the person to whom the notice was given as a debt in a court of competent jurisdiction.

...

The pleadings and evidence of King in the Local Court indicate that iCare, as the nominal insurer, claimed against King as Ms Chen's employer pursuant to this provision, and that the claim was settled by way of the deed.

Ge and Chen concede that the proposed ground 10 was not raised below, but King maintains that the question of quantum was not in issue below and no challenge was made to the evidence of King in respect of damages.

The pleading framework in the Local Court

The starting point is the pleading framework.

The statement of claim filed 24 November 2023 alleged:

"PLEADINGS AND PARTICULARS

1 At all material times the Defendants were the registered proprietors of the property known as XXX March Street, Bellevue Hill NSW 2023 (the 'Premises').

2 The Plaintiff entered into a Residential Tenancy Agreement under the Residential Tenancies Regulation 2019 (NSW) with the Defendants on 9 December 2021 (the 'Lease'), for a period of 13 months starting on 10 January 2022.

3 On or about 10 January 2022, the Plaintiff moved into the Premises.

4 It was a term and condition of the Lease entered between the Plaintiff and Defendants that the Defendants would ensure the premises are fit to live in.

Particular: Clause 19.1

5 It was a term and condition of the Lease entered between the Plaintiff and Defendants that the Defendants would comply with all statutory obligations related to the health or safety of the residential premises.

Particular: Clause 19.6

6 It is a general obligation under section 52 of the Residential Tenancies Act 2010 to ensure the residential premises are reasonably clean and fit to live in.

7 On or about 13 January 2022, an electric roller blind being a fixture on the Premises detached from the Premises falling and causing an injury to the finger of Yuping Chen an employed nanny working for the Plaintiff (the ‘nanny’).

8 The Plaintiff alleges that the Defendants have breached the terms of the Residential Tenancies Agreement by failing to provide a premises that are reasonably fit to live in.”

On 7 December 2023, Ge filed the defence. It seems that he filed it on behalf of Chen and himself. The defence pleaded:

“PLEADINGS AND PARTICULARS

1 We did not have knowledge of any defects of the electric roller blinds nor could we have reasonably been expected to identify the defects. The electric roller blinds at XXX March Street Bellevue Hill were newly installed by No Bull Blinds in 08/2021.

2 We do not know how the electric roller blinds detached and how the nanny cut her finger on the blinds.

3 We did not think there was anything defective in the blinds. No Bull Blinds said “blinds falling down is very rare. Potentially these blinds fell as the doors/windows were open when they were rolled down. Or they were catching on some of the tenants belongings, which prevented them from rolling straight.”

Neither party referred to the tenant’s obligation to obtain a workers’ compensation policy in relation to Ms Chen.

The hearing in the Local Court, Waverley

On 7 and 18 November 2020, the hearing took place before Magistrate Nash (the Magistrate). On 18 November 2024 the Magistrate delivered an ex tempore judgment. King relied on two affidavits dated 22 March 2024 and 19 July 2024. She was represented by T Davy. At the hearing, Ge represented himself and Chen. Ge cross-examined King.

Ge also relied upon an affidavit dated 18 April 2024 that essentially stated that he had no knowledge of the latent defect of the blind. He deposed that on 10 January 2022, before the tenant moved in, he operated all the blinds a number of times. On the same day, the real estate agent sent King the entry condition report. No issues were identified as being in an unsatisfactory condition in the house. A copy of the entry condition report was attached to Ge’s affidavit. On the morning of 13 January 2022, he was notified by King that the electrical blinds in the lounge room had “fell off” and her nanny’s finger was injured.

Chen relied upon her affidavit dated 18 April 2024. Her affidavit is in similar terms to that of Ge. Ge was cross-examined and gave evidence as follows:

“A. Evidence about the nanny’s bedroom the blinds I was sent a message, sent the photos and notified about the blind in the nanny’s bedroom so and I don’t know exactly caused how the nanny operated the blinds and how it get stuck.

Q. Yes

A. I wasn’t there, so I was not aware any about the cause there and my immediate action is to ask the blind company to send a technician to inspect again all the blinds. And about the children’s bedroom’s blinds I can’t remember I was notified about that, I have any knowledge about that and I don’t know if the agent was also notified about that but after her report the blind the nanny the blind company already inspect and I also instructed them to change the electric blinds into curtains, normal curtains.

Q. Yes.

A. Yes.

Q. Okay.

A. Overall I have empathy towards the tenant because the incident happened and the workers compensation claims from the nanny and so the tenant had stayed longer than the fixed term, I think extend another five or six months I think, yeah, and there are some you know – because the tenant occupied the common area and we tried to ask them to move their car into park in their own garage and nannies cause some, you know, problem with another tenant in the--” (T40 [25]-[48])

At T7 [23]-[26], counsel for King stated the following:

“[T]here’s evidence of the workers compensation claim and its resolution so this isn’t the only evidence of the injury. It is the only evidence from The nanny in absentia of the injury other than photographic evidence and the fact that she made a workers compensation claim and was compensated.”

At T11 [26]-[27], counsel for King further stated:

“There wasn’t any workers compensation insurance and so the money was paid by my client directly, the compensation to the injured person.”

The ex tempore decision of the Magistrate dated 18 November 2024

On 18 November 2024, the Magistrate made findings as follows:

“In cross-examination, Ms King was asked about whether she had previously operated the blinds in the living room or shown the nanny how to use them. She said she had seen the nanny operating the blinds and they were working fine. She agreed that she did not see the blinds fall in the living room. In re-examination, she confirmed she saw the blinds in the nanny’s bedroom fall as she was in the room at the time. (T7 [47]-[53])

...

On a proper construction of the contract, whether the premises were fit for habitation, is to be determined at the time of the incident giving rise to the damage. I am comfortably satisfied, and at least on balance, that the premises in which the electric blinds were installed but which have detached from the wall mounts or brackets are not, for contractual purposes, fit for habitation, given the immense safety risk to individuals within the premises arising from that circumstance. (T10 [45]-[50])

...

Further, for all these reasons, I find it necessarily follows that the premises were not in a reasonable state of repair, having regarded the age or rent payable for and respective life of the premises. In this respect, I find it difficult to accept any circumstance where a premises could be said to be in a reasonable state of repair and yet supply electronic blinds which inexplicably detach from their wall mounts or bracket and thus fall to the ground. Properly construed, I do not consider that the absence or lack of notice to or knowledge held by the defendants about the defects in the installation of the electric blinds alters their contractual obligation to provide premises in a reasonable state of repair and fit for habitation.

I find this is irrelevant to whether there has been a breach of contract. There is no express or necessarily implied condition in the contract that the landlord's prior notice of a defect, such as the present one, must be proved to establish a breach. This is logical because by reference to the lease agreement, read with the legislatively incorporated contractual provisions to which I have referred, it is the landlord and the landlord alone who makes the various promises and guarantees to the tenant. A landlord can of course and, with respect, prudently would, take out landlord's insurance to cover incidents such as the present one. (T11 [25]-[40])

...

There was no dispute, as was clear from the defendants' pleading, about the quantum of damages claimed in the event that I found in favour of the plaintiff, nor that the claimed damages were reasonably foreseeable. For the reasons I have given, but for the incident causing damage to the nanny, Ms Chen's finger, the medical costs would not have been incurred. For the reasons I have given, those costs are a direct and foreseeable consequence of the breach of contract which I have found to be proved on the balance of probabilities. No submission about this was made to the contrary in the event that I found the plaintiff had proved the alleged breach of contract. This observation also extends to the \$8,000 insurance consultants fees that the plaintiff incurred. No submission was made challenging the defendants' liability for this sum in the event that I found a breach of contract had otherwise been proved. (T13 [25]-[37])"

King's submissions in this Court

In opposing the motion, King relies on the affidavit of her solicitor, Timothy Mitchell dated 4 June 2025 (Mitchell affidavit). While his affidavit has been the subject of criticism by counsel for Ge and Chen, I will only refer to the relevant parts of his evidence.

Mitchell deposes in his affidavit at par 7:

"At no time did it come to my attention that the Defendants/Appellants raised the issue of an obligation of my client that she should have had workers compensation insurance in the Local Court proceedings."

At par 9:

"I have subsequently reviewed the transcript of the Local Court proceedings heard on 7 November 2024 and could not identify any moment in those proceedings where the question of a requirement for workers compensation insurance was articulated by the Defendants/Appellants."

At par 10:

"Accordingly, in conference with my client, or in the preparation of her evidence, or supervision of the preparation of her evidence by the solicitor formerly employed by Bay Legal at the time of the Local Court proceedings, Simon Jahshan, I did not turn my mind to (the obligation to maintain a workers compensation insurance policy), or to any evidence which my client might put on or legal argument which would address that question."

At par 16:

"At no stage did I discuss the issue of workers compensation insurance with that barrister."

The absence of such a conversation is of no consequence. Counsel was clearly aware of the workers compensation obligation and the failure to insure."

The law

The Court has the power to require or grant leave to amend the summons as set out in s 64 of the Civil Procedure Act 2005 (NSW) (CPA). That power is expressly limited to necessary amendments and "for the purpose of determining the real questions raised by or otherwise depending on the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings": s 64(2) of the CPA. Section 64 of the Civil Procedure Act 2005 (NSW) (CPA) relevantly provides:

64 Amendment of documents generally

- (1) At any stage of proceedings, the court may order—
 - (a) that any document in the proceedings be amended, or
 - (b) that leave be granted to a party to amend any document in the proceedings.

...

In *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd* [2006] NSWSC 249, the Court said at [11]:

“[11] Applications such as the present are now governed by Civil Procedure Act 2005 (NSW), s 64, which provides that at any stage of proceedings the court may order that leave be granted to a party to amend any document in the proceedings. The section further provides that, subject to s 58, which is concerned with the court acting in accordance with the dictates of justice, all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings. Relevantly, and consistently with the position before the Civil Procedure Act, the power to grant leave to amend may be exercised at any stage of the proceedings, and is to be exercised in such manner as the court considers necessary in the interests of justice, and not to punish a party for its pleadings. The power is subject to the overriding purpose referred to in s 56, and some of the relevant considerations are set out in Civil Procedure Act, ss 57 and 58.”

Ritchie’s Uniform Civil Procedure (NSW) at [s 64.10] states:

“Four propositions have generally been regarded as defining the limits of the general discretion to grant leave to amend. These are:

the application for leave to amend must be made for a proper purpose;

the proposed amendment must be proper as to both substance and form — and not liable to be struck out;

the amendment must not cause undue prejudice to the other party; and

the amendment must be consistent with the "dictates of justice".

Such an order is also constrained by the dictates of justice as set out in s 58 of the CPA, which expressly requires the court to consider the overriding purpose in ss 56 and 57 and the court may consider, to the extent relevant, the following matters (s 58(2)(b)):

58 Court to follow dictates of justice

...

(2) For the purpose of determining what are the dictates of justice in a particular case, the court —

(a) must have regard to the provisions of sections 56 and 57, and

(b) may have regard to the following matters to the extent to which it considers them relevant—

(i) the degree of difficulty or complexity to which the issues in the proceedings give rise,

(ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,

(iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,

(iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),

- (v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,
- (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
- (vii) such other matters as the court considers relevant in the circumstances of the case.

King submitted that of the abovementioned considerations, the most relevant factors to the present application are (v), (vi) and (vii), although (i) and (ii) may also have some weight.

Raising a new point on appeal

In considering whether to allow any amendment, the Court must determine whether or not an order for costs would be sufficient to cure any prejudice arising to King: *Heath v Goodwin* (1986) 8 NSWLR 478; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175. The capacity of an appellant to argue a point not argued at first instance is tightly circumscribed.

Ge and Chen referred to *Cappello v Hammond & Simonds NSW Pty Ltd* [2021] NSWCA 57 ('Cappello'). In *Cappello*, the Court of Appeal stated at [37]:

"[37] ... A new point cannot be taken on appeal where, had the issue been raised in the court below, evidence could have been given which "by any possibility" could have prevented the point from succeeding: Suttor v Gundowda Pty Ltd (1950) 81 CLR 418 at 438; [1950] HCA 35; Coulton v Holcombe (1986) 162 CLR 1 at 7-8; [1986] HCA 33; Water Board v Moustakas (1988) 180 CLR 491 at 497; [1988] HCA 12. If on the other hand there is a pure question of law, even one which was not even obliquely raised at first instance, there are occasions when it is appropriate to let that be advanced for the first time on appeal..."

King maintains that the question of quantum was not at issue below at all and no challenge was made to the evidence of King in respect of the damages incurred. To the extent that ground 11 is not a mere extension of ground 10, and thus caught by the same considerations, it is contended that it too falls foul of the principles articulated CPA and the relevant considerations.

While it is accepted that the statements of Leeming JA in *Capello* at [37] is a correct statement of the law, in that a new point cannot be taken on appeal if evidence could have been given which could "by any possibility" have prevented the point from succeeding, it is not a statement as to all matters or legal principles which apply in circumstances where a party seeks to amend a summons to include a proposed ground that has not been raised before.

Leeming JA in *Capello* at [37] referred to and followed the well-known principle in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438 ('*Suttor*'), where Latham CJ, Williams and Fullagar JJ said:

“The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards.”

Their Honours in *Suttor* then went on to refer to the decision of the Privy Council in *Connecticut Fire Insurance Co v Kavanagh* (1892) AC 473 at 480 where Lord Watson said:

“When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below.”

In this appeal, prejudice or injustice to King could arise where an opportunity for compromise has been lost. Thus, as Tadgell J in *Geelong Building Society (in liq) v Encel* [1996] 1 VR 594 said at 608-609:

“It is reasonable to suppose that, had the respondent been faced with the point which is now sought to be made against him, he could well have taken a different attitude to the appellant's claim from that which he did. Thus, to allow the amendment now sought would be to put the respondent at risk of incurring a very large extra liability without having an appropriate opportunity to consider avoiding it by way of compromise or other means. That is a disadvantage for which an order for costs of the appeal in the respondent's favour could not compensate him.”

A Court may refuse to allow an amendment to a pleading on appeal where further evidence is required or findings of fact were not made in the Local Court. In *Banque Commerciale S.A., En Liquidation v. Akhil Holdings Ltd* (1990) 169 CLR 279 at 284 (*‘Banque’*), Mason CJ and Gaudron J referred to:

“the rule that, unless all facts have been determined beyond controversy or the question is one of construction or law and it is expedient and in the interests of justice to entertain the point, a party may not take a point for the first time on appeal.”

Their Honours in *Banque* continued that some aspects of this rule:

“appear to derive from public policy considerations directed to ensuring the finality of litigation. On the other hand, some aspects of the rule may have their genesis in estoppel by election in the conduct of litigation, although, if so, the relevant consideration is not that the other party is put in a worse position but that he or she may have been so placed. See, for example, [Water Board v Moustakas (1988) 62 ALJR 209] where the refusal to allow the appellant to raise a new case was rested on 'the possibility that the [other party] may, if it had been raised below, have wished to call evidence in response to it'. So far as the rule may derive from public policy, the relevant consideration is that the case sought to be made on appeal is a new or different case from that which emerged at the trial.”

While the above principles are fundamental and address technical issues that constitute the interests of justice, the finality of litigation and the importance of parties being bound to the cases they make at trial should not be overlooked: *Crampton v R* [2000] HCA 60 at [15] per Gleeson CJ and at [157] per Hayne J. This is underscored in the decision of the High Court in *University of Wollongong v Metwally (No 2)* [1985] HCA 28 where the Court said at [7]:

“a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.”

As McHugh JA said in *Holcombe v Coulton* (1988) 17 NSWLR 71 at 76-77:

“To allow a party to raise in an appellate court a matter which was not litigated in the trial court not only undermines the respective functions of the trial and appellate courts and the policy of law but perhaps more importantly it deprives the appellate court of the benefit of the views of the trial court.”

In *Coulton v Holcombe* (1986) 162 CLR 1 at 7:

“It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.”

Finally, in *Whisprun Pty Ltd v Dixon* [2003] HCA 48 Gleeson CJ, McHugh and Gummow JJ observed at [51] that:

“a new trial inevitably inflicts on the parties worry, inconvenience and an interference with their personal and business affairs.”

King’s submissions

Ge and Chen made decisions at first instance about the case they wanted to put before the Court. They elected to pursue a simple case about what they asserted was the effect of ss 52 and 63 of the Residential Tenancies Act 2010 (NSW). They are sophisticated and commercial individuals with a substantial property portfolio. They chose not to obtain formal legal representation, although they were given the opportunity to do so during the procedural development of the proceedings in the Local Court. They could have made any appropriate challenge to the evidence of King and did cross-examine her but did not raise any disputes about the quantum of damages or the entitlement of King to recover based on an obligation to obtain workers’ compensation insurance. The trial judge is entitled to have an opportunity to consider a matter and exercise his discretion, where it called for, before being told that the appeal had been allowed upon a point he had no opportunity of considering: *Sutherland v. Thomson* (1906) AC. 51 at 55.

Resolution

It is my view that at the time of the hearing in the Local Court, Ge and Chen unwisely elected to be self-represented. In their defence, they did not allege that the tenant was obliged to have a workers' compensation policy in place for Ms Chen but rather they focused on the issue of whether they had complied with s 52 of the Residential Tenancies Act to ensure that the residential premises were clean and fit to live in as the electric roller blinds, being a fixture on the premise, fell and caused injury to Ms Chen who was employed by King.

It is my view that the new issue raised in point 10 of the amended summons does raise a pure question of law. While King has raised s 155 of the WC Act and cl 2A of Sch 1 of the WIMWC Act, as matters for consideration, in my view, the proposed ground raises a question of pure law. In the interests of justice, Ge and Chen should be granted leave to file an amended notice of appeal to include the proposed appeal ground 10.

The proposed appeal ground 11 is whether the Magistrate gave any reasons or adequate reasons. This proposed appeal ground is a generic one and should have been raised in the notice of appeal filed on 16 December 2024. The Magistrate did give extensive reasoning as to the issues raised before him. In any event, it is my view that proposed appeal ground 11 has no merit leave to amend the grounds of appeal to include proposed ground 11 is refused.

Costs

Costs are discretionary. Costs are reserved.

Orders

The Court orders that:

Leave is granted to the appellants to file an amended summons to include proposed appeal ground 10.

Leave to amend the grounds of appeal to include appeal ground 11 is refused.

Costs are reserved.

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