SUPREME COURT OF QUEENSLAND

CITATION:	*Johnston & Anor v Hollingsworth & Ors* [2017] QSC 186
PARTIES:	**Harella Caroline Johnston** (Applicant) **Leah Delilah Felsman** (Second Applicant) **v** **Rachael Rebecca Hollingsworth** and **Harel Joseph Herrod** in their capacity as executors and trustees of the estate of **Harel Robert Herrod Deceased** (First Respondents) **Robert Matthew Herrod** (Second Respondent)
FILE NO/S:	S805/1999
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Townsville
DELIVERED ON:	1 September 2017
DELIVERED AT:	Townsville
HEARING DATE:	23 September 2016
JUDGE:	North J
ORDER:	**1. The applicants have leave to amend the originating application in terms as appear in exhibit EAL – 1 to the affidavit of Elizabeth Anne Lorimer filed 30 May 2016.** **2. Unless within 7 days any party files and serves any submissions seeking any further or different order in respect of costs, the order shall be:** **The costs of and incidental to this application be each parties costs in the cause.** **3. Within 14 days the parties are to submit to the Registrar a draft or minute of orders by consent providing for directions for the further conduct of**

the proceedings.

4. **If the parties are unable to agree and comply with Order 3, the matter be listed for review and directions at 9:00am on 28 September 2017**

CATCHWORDS: ESTOPPEL – ESTOPPEL BY JUDGMENT – RES JUDICATA OR CAUSE OF ACTION ESTOPPEL - ISSUE ESTOPPEL – ANSHUN ESTOPPEL

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175
Cordes v Dr Peter Ironside Pty Ltd [2009] QCA 302
Ebber v Isager (1995) 1QdR 150
Herrod & Ors v Johnston & Anor [2012] QCA 360
Johnston & Anor v Herrod & Ors [2012] QSC 99
Port of Melbourne Authority v Anshun Ltd (1981) 147 CLR 589
Singer v Berghouse (1994) 181 CLR 201
Tomlinson v Ramsey Food Processing Pty Ltd (2016) 256 CLR 507

COUNSEL: C Heyworth-Smith QC for the applicants
JA Greggery for the respondents

SOLICITORS: de Groots for the applicants
Connolly Suthers, Lawyers for the respondents

[1] **NORTH J:** The applicants are sisters. By an application filed on 25 October 1999, the applicants sought further and better provision from the estate of their father, Harel Robert Herrod (deceased).[1] The three respondents are brothers and a sister of the applicants. Two are sued in their capacity as executors and trustees of the estate of their deceased father, and the third, Robert Matthew Herrod, is joined as a second respondent. The parties, being the two applicants and the three respondents, are the only surviving dependents of their late father within s41 of the *Succession Act* 1981(Qld).

[2] The applicants seek leave to amend the Originating Application[2] by joining the two respondent executors as the third and fourth respondents and to sue them in their personal capacities. The applicants seek to amend the claims for relief as originally filed in a number of respects but the most significant amendment is the

[1] Originating Application filed 25 October 1999.
[2] Application filed 30 May 2016 and see exhibit "EAL-1" to the affidavit of EA Lorimer filed 30 May 2016.

insertion of a new paragraph two which seeks declaratory and related relief as follows:

"2. Should the claim for further and better provision from the estate fail because the estate has been distributed, then:

(a) A declaration that the distribution within six months of the date of death of Moonoomoo station, more fully described as Lot 5158 on Crown Plan PH 991, County of Albany, Parish of Elsie, Title reference 17665230 (distribution), was made in bread of trust;

(b) A declaration that Harel Joseph Herrod and Robert Matthew Herrod

(i) failed to give notice to the first respondents/executors of the intention to purchase the deceased's share of the partnership within three months of the date of death of the deceased; and

(ii) failed to pay to the estate of the deceased the market value of the deceased's interest in the partnership

(c) A declaration that the second, third and fourth respondents:

(i) are personally liable for the applicants' claim; and

(ii) are estopped from relying on s 44(3) of the Succession Act 1981.

(iii)are liable to account for their rateable share of the applicants' claim.

(d) An order that the second, third and fourth respondents pay to the applicants such amount as this Honourable Court may determine to be further and better provision from the estate together with compound interest thereon, or in the alternative, simple interest."

[3] The respondents oppose the application. The respondents submit that the determination of other litigation between the parties creates a *res judicata* with a

consequent merger of the interest or cause of action the subject of the amendment. A second and related submission is that in the circumstances the applicants are estopped under the *Anshun* principle[3] from seeking the relief the subjects of the amendments. Finally they contend that, assuming there is no *res judicata* or estoppel, of the *Anshun* variety, in the circumstances the applicants are in substance seeking to litigate or re-litigate issues that have been the subject of earlier proceedings that as such it is an abuse of process for the applicants to seek an amendment.

[4] In order to understand why the applicants seek the amendment and the basis of the respondents opposition it is helpful to set out the background of the relationship and dealings between the parties and the history of and the outcome of the litigation between them. Following that I will return to and address the issues or contentions raised by the respondents.

[5] This proceeding was commenced in 1999. It had not progressed to trial when on 30 July 2007 the applicants (as plaintiffs) commenced proceedings against the respondents (as defendants) by filing a claim and statement of claim.[4] That 2007 proceeding was tried in 2012.[5] There was an appeal from that judgment resulting in a variation in certain orders and declarations made at first instance.[6] The family history and the factual circumstances being the facts summarised by the learned trial judge at first instance can be quoted from his reasons:[7]

"[1] This proceeding, commenced on 30 July 2007, arises out of events following the death on 14 February 1999 of Harel Robert Herrod. The deceased then lived with his wife Edith on a cattle property called Moonoomoo Station. They had five children, the parties to this proceeding. Of course without affecting undue familiarity, I will in these reasons refer to the children by their first names, daughters Harella and Leah who are the plaintiffs, sons Harel and Robert, the first and second defendants, and daughter Rachael who

[3] *Port of Melbourne Authority v Anshun Ltd* (1981) 147 CLR 589.
[4] S501 of 2007 which issued from a registry in Townsville.
[5] *Johnston & Anor v Herrod & Ors* [2012] QSC 99.
[6] *Herrod & Ors v Johnston & Anor* [2012] QCA 360.
[7] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [1]-[3] and [5]-[10]. This summary was adopted as a statement of facts by the Court of Appeal in *Herrod & Ors v Johnston & Anor* [2012] QCA 360 at [3].

is the third defendant. Their present ages are, respectively, 54 years, 56 years, 51 years, 55 years and 59 years.

[2] The deceased owned a leasehold interest in the property, and ran the cattle business on the land in partnership with Harel and Robert. The property of the partnership comprised the cattle, plant and equipment.

[3] The partnership agreement dated 7 December 1983 provided that the death of a partner would not dissolve the partnership, but that the partnership would in that event continue to be carried on by the surviving partners and the executor of the deceased partner. The surviving partners were in that situation accorded a right to purchase the share of the deceased partner, by giving notice in writing within three months of the death (that is the proper construction of clauses 18 and 19). That date was 14 May 1999. The purchase price would be a net amount agreed upon, or failing agreement, as determined by a stock and station agent

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[5] By his will dated 4 September 1989, the deceased appointed Rachael and Harel as his executors. The deceased's widow Edith was to receive "ready monies and cash investments", motor vehicles, an annuity in the amount of $7,200, and the right to reside in the homestead at Moonoomoo. The deceased's partners, his sons Harel and Robert, were to receive the land (subject to a charge to secure the annuity), including all machinery and equipment, as tenants in common in equal shares. The deceased's daughters, Rachael, Leah and Harella, were to receive the deceased's interest in the partnership together with the rest and residue of the estate, as tenants in common in equal shares.

[6] Harella and Leah claim that shortly after their father's death, their brothers told them that their one-ninth share in the partnership was worth $50,000, and not more than $55,000, based on there being approximately 2,400 head of cattle on Moonoomoo, worth between $200 and $220 per head, and that their

brothers pressed them to enter into agreements surrendering their respective interests for $55,000, in Leah's case not to be payable until she reached 60 years of age. Harella signed a document on 24 March 1999 said to evidence that agreement, although Leah did not. Harella and Leah challenge on various bases the enforceability of any such agreement.

[7] Harella and Leah have not received any distribution from the estate. Indeed, the proceeds of insurance policies which should have been treated as residue, in which they were therefore entitled to share, were paid out to the widow Edith in May and June 1999. On 11 May 1999, the executors paid Edith the sum of $13,316, in respect of AXA National Mutual policy 655,935/5, and on 9 June 1999, they paid her $10,173.66, the proceeds of Colonial/Prudential policy number 1094277. Those amounts total $23,489.66 which should be taken into account in calculating the value of the residue in which the plaintiffs were entitled to share.

[8] Harella and Leah commenced a family provision application on 25 October 1999 (number 805/1999), which was within the statutorily prescribed limitation period. That proceeding has been stayed pending the completion of the instant proceeding. The executors, Harel and Rachael, claim that the estate has been distributed.

[9] Harel and Robert transferred the deceased's share in the partnership to themselves as from 18 October 1999, and thereafter carried on the partnership business in their own names, as sole partners, under the name Moonoomoo Cattle Company. Notice was not given for the purchase of the deceased's share within three months of the death of the deceased (although Harel and Robert claim to have given notice to the executors on 17 July 1999). As I have said, properly construed, cl 18 and cl 19 of the partnership agreement required notice in writing within three months of death. The deceased's executors did not get in any sum reflecting the market value of the deceased's interest in the partnership.

[10] On 30 June 2002, Harel and Robert dissolved their new partnership. The year before, they had purchased the neighbouring property Carmichael. On 11 October 2002, Harel transferred his one-half interest in Moonoomoo to Robert for $722,500, and Robert transferred his interest in Carmichael to Harel for $557,500. They split the herd between them. On 5 November 2004, Robert sold Moonoomoo to a third party for $2,710,000."

[6] One of the facts recited above requires a clarification if for no other reason that it became a matter of some controversy leading up to and at the hearing before me. The learned trial judge understood that the 1999 family provisions proceedings had been stayed pending the completion of the 2007 proceedings. The solicitor for the respondents (who commenced to act for them subsequent to the trial but before the appeal) swore an affidavit[8] that a search of the courts files relating to the proceedings and the record of the correspondence between the solicitors for the parties could locate neither a stay order nor an agreement to stay the 1999 proceedings. However, a further search of the courts records reveal that both matters had come before the court for directions for orders and review on 20 April 2010. A transcript of the hearing that day[9] is now available. It reveals that the learned judge who conducted the review expressed a firm view that it was preferable for the 2007 proceedings to be heard and determined in advance of the 1999 family provisions proceedings. While it is accurate that strictly speaking no stay order was made by the court nor did the parties in correspondence expressly agree that the 1999 proceedings be stayed, it seems that there was a measure of acquiescence by the parties in that course for thereafter the parties appear to have proceeded, if not persuaded by his Honour, at least in conformity with the intimation given by the court.

[7] In order to better understand and identify the issues of fact and law litigated and determined by the judgments following the trial and subsequent appeal it is helpful to quote from the reasons of the trial judge and the Court of Appeal. Early

[8] Affidavit PJ Radford filed 20 June 2016.
[9] See "PJR 3" to the affidavit of PJ Radford filed 22 September 2016.

in his reasons the trial judge recorded the claims made by the plaintiffs and the position of the defendants:[10]

"Plaintiffs' claims

[11] The plaintiffs claim equitable compensation, or at their election, an account, with any election to be exercised following the delivery of judgment.

[12] The claim is premised on findings that the defendants acted in breach of trust, and breach of fiduciary duty, by engaging in self-dealing and conflicted transactions; engaging in those transactions in order to benefit themselves to the detriment of the plaintiffs; misleading the plaintiffs by failing to account properly to them, as trustees or fiduciaries; receiving trust property in breach of trust; and profiting from that property.

[13] By way of equitable compensation, the plaintiffs claim the value of the interest in the estate lost to them, together with compound interest, reflecting the circumstance that they would have used those monies in ways which would have improved their financial positions.

[14] The plaintiffs alternatively claim damages at common law for devastavit, misrepresentation and deceit.

[15] The issues which arise on the plaintiffs' approach may be summarized broadly as follows:

1. Did the executors and trustees fail properly to administer the estate and breach their duties as trustees?

[10] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [11]-[18].

2. Did Robert and Harel, with Rachael's concurrence, misrepresent to the plaintiffs the value of the deceased's interest in the partnership as at the date of death?

3. Did Harella and Leah enter into agreements to surrender their interests in the estate? If so, were they then in a situation of "special disadvantage"? If so, did Robert and Harel take advantage of that disability and act unconscionably?

4. Did Robert and Harel as partners, and Robert and Rachael as trustees, breach duties owed to the plaintiffs, for example by placing themselves in situations of conflict, deriving personal profit, acting in bad faith etc?

5. Did Robert and Rachael, as trustees, breach their duty to administer the estate according to law?

The defendants' position

[16] The defendants contend that the plaintiffs are bound by the agreements into which they entered, and that those agreements are not vitiated or rendered unenforceable by any misrepresentation, undue influence or unconscionability.

[17] The defendants contend that the agreements amounted to no more than a convenient way of administering the estate: they did not involve self-dealing on the part of Robert and Harel.

[18] In any event, the defendants assert, the plaintiffs are estopped from denying the enforceability of the agreements because of their own conduct vis-à-vis the other parties."

What followed was an extensive review of the evidence relating to the assets of the partnership, including the cattle owned by the partnership, and an assessment of the value of the partnership as at the date of death. Following that, his Honour

assessed the value of the entitlements of the daughters in the estate under the will which included not only the proportionate interest in the value of the partnership bequeathed to each daughter by the will but in addition the value of their respective interest in the residue of the estate.[11]

[8] The learned trial judge then turned to an extensive consideration of the issues raised by the "defendant's position". He considered whether the agreements relied upon by the defendants, both oral and written, were made and whether they were binding upon one or any one of the plaintiffs.[12] Next he considered whether the plaintiffs were in a position of special disadvantage and whether the conduct of any of the defendants in pressuring the plaintiffs to enter the agreements was unconscionable.[13] His Honour then considered whether the agreements were induced by a misrepresentation and whether the plaintiffs were estopped from denying the enforceability of the agreements.[14] Then his Honour turned to the consideration of the claims made by the plaintiffs of breach of duty by the defendants and the plaintiffs' claims for equitable relief.[15] By way of introduction to that examination his Honour said:[16]

> [110] Harel and Rachael owed the plaintiffs fiduciary duties in their capacity as executors of the estate. As partners with the deceased as at the time of his death, Harel and Robert owed the estate, and their sisters as beneficiaries with interests in the partnership share owned by the estate, the fiduciary duty which is owed by partners.

[9] His Honour's subsequent consideration of the claims against each defendant of breach of duty was confined to the respective defendants' dealing with the deceased's interest in the partnership which, as an asset of the estate, had been bequeathed under the will to each of the daughters. Harel's conduct was considered in the context that he was both an executor of the estate and a partner.

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[11] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [19]-[63].
[12] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [69]-[90].
[13] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [91]-[95].
[14] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [96]-[108].
[15] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [109] ff.
[16] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [110].

In both capacities he owed fiduciary duties to the plaintiffs.[17] Rachael owed a duty as an executor and Robert as a partner.[18] Having considered that each defendant had breached his or her fiduciary duty, his Honour turned to the question of relief[19] including declaratory relief, at the election of the plaintiffs, for either an account of profits or equitable compensation and interest. In the context of the issue before me the declarations made by his Honour are instructive:[20]

"1. a declaration that the agreement entered into by each plaintiff to forego her interest in the estate of her deceased father or the Moonoomoo cattle partnership, in return for payment of a sum of money, on or about 18 February 1999, is unenforceable and is set aside;

2. a declaration that each of the defendants has breached his or her fiduciary duty owed to each plaintiff, whether as executor of the deceased estate or as partner in the Moonoomoo cattle partnership;

3. a declaration that each plaintiff is entitled, at that plaintiff's election:

   (a) to an account of the profits which have accrued to the respective defendants by reason of their breach of duty; or

   (b) to equitable compensation, assessed in the amount of $433,709.67 for the payment of which the defendants are jointly and severally liable, to the intent that the aggregate amount receivable by each plaintiff does not exceed $433,709.67."

Both applicants elected to receive equitable compensation.[21] But before discussing the significance of the trial and the reasons for judgment, brief mention should be made of the appeal from the trial judgment.

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[17] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [111]-[115].
[18] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [116]&[117].
[19] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [118] ff.
[20] *Johnston & Anor v Herrod & Ors* [2012] QSC 98 at [130].
[21] See the affidavit of the applicant's solicitor sworn 4 May 2012 (and exhibits) being EX "PJR-3" to the affidavit of P.J. Radford filed 20 June 2016.

[10] The unsuccessful defendants appealed and although they enjoyed 'an appreciable measure of success' most of their arguments were unsuccessful.[22] They succeeded in having brought into account as debts of the partnership a debt of $62,000[23] and a second debt totalling $66,217.[24] The consequence was that after bringing into account the debts the value of the deceased's interest in the partnership was reduced by $128,217. The defendants also succeeded in having the interest rate at which compensatory damage for loss of use of the money was calculated reduced from 8% to 5%.[25] Thus the reduction in the value of the deceased's interest in the partnership by bringing into account the debts identified and the subsequent recalculation of the damage or loss suffered by the plaintiffs for the loss of use of their value of their respective interest in their father's share of the partnership asset had the effect of reducing the amount recoverable, at their election, for equitable compensation. In all other respects the findings and reasons of the trial judge were upheld.

[11] Exhibited to an affidavit of the solicitor for the respondents are copies of the pleadings in what he described the adjudicated proceedings.[26] The statement of claim claims the following relief:[27]

"AND The Plaintiffs claim the following relief:

1. Such orders as may be necessary for the administration of the estate of **HAREL ROBERT HERROD** ("the Deceased");

2. A declaration that the First and Second Defendants received the Deceased's share of the Partnership known as The Moonoomoo Cattle Company ("the partnership") and hold the same and/or the profits derived thereby (or their traceable proceeds):

   (a) on constructive trust to give effect to the rights of the Plaintiffs;

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[22] See *Herrod & Ors v Johnston & Anor* [2012] QCA 360 at [135].
[23] *Herrod & Ors v Johnston & Anor* [2012] QCA 360 at [104].
[24] *Herrod & Ors v Johnston & Anor* [2012] QCA 360 at [111].
[25] *Herrod & Ors v Johnston & Anor* [2012] QCA 360 at [55], [133].
[26] See exhibit "PJR 1" to the affidavit of PJ Radford filed 28 June 2016.
[27] Exhibit "PJR 1 (e)" to the affidavit of PJ Radford filed 28 June 2016.

(b) subject to a lien in favour of the Plaintiffs;

3. A declaration that the First and Second Defendants are liable to account as constructive trustees for benefits derived in breach of trust and/or breach of fiduciary duty;

4. All necessary accounts and inquiries to be taken and made, including an account of profits and all necessary directions (including for the taking of accounts on the footing of wilful default and at the Plaintiffs' election for an award of interest in lieu of profits) and an inquiry to determine:

(a) what are (or were) the assets of the estate,

(b) what distributions and/or payments have been made to the Defendants or third parties out of the assets of the estate,

(c) what profits have been derived by the Defendants,

(d) what has become of those profits or of those distributions / payments,

(e) for what costs (if any) have the Defendants sought to reimburse themselves from the assets of the estate;

(f) what costs have been incurred by the Plaintiffs in the commencement and prosecution of this claim and proceedings no 805/99 against the Defendants, which were necessitated by the wrongful actions of the Defendants;

5. Order for payment of such sums as may be found to be due;

6. Further or, where appropriate at the election of the Plaintiffs, equitable compensation in the amount of ~~$563,044.85~~ $593,879.34 for the First Plaintiff and ~~$343,183.85~~ $370,018.34 for the Second Plaintiff and/or such other amount as is appropriate following the aforesaid inquiries and/or

such amount by way of interest as this Honourable Court so determines in its equitable jurisdiction;

7. Damages for *devastavit* (against the Defendants) including exemplary and/or aggravated damages (against the First and Second Defendants), in the total sum of ~~$563,044.85~~ $693,879.34 for the First Plaintiff and ~~$343,183.85~~ $470,018.34 for the Second Plaintiff and/or such other amount as is appropriate following the aforesaid inquiries;

7A. Rescission and delivery up for destruction of "Deed" dated 24 March 1999 and "Notice to Trustees" of the same date;

7B. Alternatively (at the Plaintiff's election) damages for deceit, including exemplary and/or aggravated damages (against the First and Second Defendants) in the total sum of $693,879.34 for the First Plaintiff and $470,018.34 for the Second Plaintiff and/or such other amount as is appropriate following the aforesaid inquiries;

8. Alternatively (at the Plaintiffs' election) judgment for monies had and received for the profits obtained by reason of the deceit, breach of trust and/or fiduciary duty and/or *devastavit* by the First and Second Defendants (against the First and Second Defendants), to be quantified following the aforesaid inquiries;

9. The appointment of a receiver or administrator;

10. Such injunctive relief as may be necessary;

11. An order removing the First and Third Defendants as executors and/or trustees of the estate of the Deceased;

12. Such orders as may be necessary under ss 6 and 52(1)(b) and (2) of the Succession Act 1981, ss 8 and 109 of the *Trusts Act* 1973 and s 228 of the *Property Law Act* 1974;

13. Interest under statute (against all or any of the Defendants as is appropriate);

14. Such further or other relief (including judicial sale) and directions as may be just;

15. Costs on an indemnity basis or such other basis as this Honourable Court considers appropriate."

A comparison of the pleadings as they stood at the time of the trial of the 2007 adjudicated proceedings with the reasons of the trial judge where he set out his understanding of the issues and causes of action for determination confirms his Honour's summary[28] is accurate. For example in his reasons his Honour[29] referred to some common law claims advanced by the applicants in the alternative that were unnecessary for him to consider in light of his findings.[30] These claims were advanced in the amended statement of claim.

[12] The focus of the 2007 proceedings was the interest the applicants took in the estate of their deceased father under his will which concerned, in large measure, the share each took of interest their father had in the partnership. The complaints made by the applicants in the 2007 proceedings concerned the respondents' dealings in respect of those assets of the partnership which in turn were part of their father's interest in the partnership.

[13] There are no pleadings in this proceeding. The initiating document is an originating application and affidavits have been filed. As originally filed the applicants claimed further and better provision from the estate of their father presumably under Part 4 of the *Succession Act* 1981. In terms of the originating proceedings as filed the issues therefore would, in broad terms involve the familiar two stage process which concerns the following issues:[31]

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[28] Quoted at para [7] above.
[29] Quoted at para [14].
[30] At [122].
[31] See for example *Singer v Berghouse* (1994) 181 CLR 201 at [208].

- Has adequate provision been made for the applicants under the will of their father?

- If not, what provision ought to have been made?

  In turn the second of those questions might involve a consideration of third question.

- Against whose interest or what estate assets should the burden fall of providing better provision?

The foregoing is not an attempt at a precise statement of all of the issues that might arise in the proceedings as originally framed. It should not be overlooked that the assets potentially available against which recourse might be had in order to make adequate provision for the applicants, assuming affirmative answers to the other questions, include the interest the deceased had in the real property asset and improvements that he left to Harel and Robert. Another asset potentially available is Rachael's interest she took in her father's share of the partnership.

[14] The issues that might arise for determination under the originating application if amended are different from those raised by the originating application as originally filed. As an alternative to the claim for further and better provision the amended claims are predicated on the premises that the claim for better provision from the estate might fail because the estate has been distributed.[32] The focus of recovery shifts to the actions of each of the named respondents who are alleged to have been responsible for placing the assets that would otherwise have been available for which further and better provision might have been made beyond the power of the first two respondents in their capacity as trustees and executors of the estate of their late father. But the extent of recovery from the respondents is limited to such amount (including interest) that might be required to provide further and better provision.[33] Thus while the enquiry changes the assets the

[32] See para [2] above; see also *Frey v Frey* [2009] QSC 43.
[33] See para [2] above and para 2(d) of the relief claimed.

subject of that enquiry remain the same as those under the application as originally framed.

[15] With these observations in mind I turn to a consideration of the contention raised by the respondents that the amendments to the claim creates a *res judicata.* This will also involve mention of the similar but not identical concept of issue estoppel.[34]

[16] The content of and distinction between these two doctrines was authoritatively considered by the High Court in *Port of Melbourne Authority v Anshun Proprietary Limited:*[35]

> "The distinction between res judicata (in England called "cause of action estoppel") and issue estoppel was expressed by Dixon J. in *Blair v. Curran* in these terms: "in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order."
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> The distinction was restated by Fullagar J. in his dissenting judgment in *Jackson v. Goldsmith*. His Honour expressed the rule as to res judicata by saying: "where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action. This rule is not, to my mind, correctly classified under the heading of estoppel at all. It is a broad rule of public policy based on the principles expressed in the maxims '*interest reipublicae ut sit finis litium*' and '*nemo debet bis vexari pro eadem causa*.'" His Honour went on to discuss issue estoppel, citing the comment of Dixon J. in *Blair v. Curran*: "A judicial determination directly involving an issue of fact or of law disposes once for

[34] See for example *Tomlinson v Ramsey Food Processing Pty Ltd* (2016) 256 CLR 507 at [19]–[23].
[35] (1981) 147 CLR 589, 597.

all of the issue, so that it cannot afterwards be raised between the same parties or their privies."

The difference between res judicata (cause of action estoppel) and issue estoppel has been expressed in similar terms in the House of Lords – see *Carl Zeiss Stiftung v. Rayner & Keeler Ltd*.

Subject to an examination of the application of the principle in *Henderson v. Henderson*, it is evident from the discussion which has already taken place that this is not a case of res judicata. The rule as to res judicata comes into operation whenever a party attempts in a second proceeding to litigate a cause of action which has merged into judgment in a prior proceeding. Here the indemnity cause of action was not litigated in the Soterales proceedings. The judgment in that case did not deal with that cause of action, though it evidently proceeded on the assumption that the Authority was not entitled to an indemnity." (Footnotes omitted)

[17] When a plea of *res judicata* falls is to be considered, resort must be limited to the record, being the pleadings and the judgment.[36] But with issue estoppel and other estoppels resort can be had to other materials. A comparison of the prayer for relief in the amended originating application[37] with that in the amended statement of claim in the adjudicated proceedings[38] demonstrates that different causes of action concerning different assets and the respondents' distinct dealings with those different assets are and were an issue. There is no *res judicata*. Much the same conclusion would follow if it had been contended that there is an issue estoppel. In the adjudicated proceedings the property the subject of those proceedings was the property the applicants took under the will in their father's estate and the conduct of the respective respondents in their dealings with it. As I have noted above the issue the subject of the current proceedings involves the primary question whether adequate provision was made for the applicants by their father under his last will and if not against which assets of the estate resort might

[36] *Ebber v Isager* (1995) 1 QdR 150 at 151. See also *Cordes v Dr Peter Ironside Pty Ltd* [2009] QCA 302 at [44].
[37] See para [2] above.
[38] See para [11] above.

be had for the purposes of making provision. Those assets are different from the assets that were the subject of the adjudicated proceedings because they concern the interest taken by Harel and Robert in the land and improvements and potentially the interest that Rachael received in her father's interest in the partnership under the will. The issue sought to be agitated by the amendments is whether the respondents are liable to the applicants in respect of their claim for further and better provision by reason of their dealings with the latter referred to assets. In the adjudicated proceedings no claim or cause of action or state of fact or law was determined that might fall for determination under the current proceedings as amended for the reason that they concern different assets, different conduct and different causes of action or principles of law. The circumstance that the identities or parties are identical and that in broad terms the dispute concerns the estate of the father of the parties and the dealings in respect of estate assets is, in my view, insufficient to constitute an issue estoppel.

[18] The second estoppel contended by the respondents is one based upon the principles approved and established by the High Court in *Port of Melbourne Authority v Anshun Proprietary Limited*:[39]

> 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 L.J. 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.**
>
> **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**

[39] (1981) 147 CLR 589, 602-604.

would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings e.g. expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few. See the illustrations given in *Cromwell v County of Sac*.

It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment. In this respect the discussion in *Brewer v. Brewer* is illuminating.

There it was held that the wife's omission to plead matters which would have constituted a discretionary bar to her husband's suit for dissolution of marriage on the ground of adultery did not estop her from raising those matters in subsequent proceedings for maintenance. Fullagar J., with whom Dixon C.J. agreed, said:

> "In *Hoysted's Case* the Commissioner was *not* merely seeking to raise on the second appeal a point which he might have raised but had omitted to raise on the first appeal. He was seeking to raise a point which could not be decided in his favour consistently with the decision on the first appeal. The point had not been argued on the first appeal, and there was therefore no express decision on the point. But the Commissioner had allowed it to be assumed against him, and the assumption was fundamental to the decision in the sense that, if the assumption had not been made, the decision must have been different. As Somervell L.J. said: -'He was therefore seeking to obtain an order which was on the face of it and in form in *direct conflict* with the order which had been made previously'. The point in question had been '*the groundwork of the decision itself*, though not then directly the point at issue' (per Coleridge J. in *Reg. v. Township of Hartington*)."

> This was also the conclusion reached by Williams, Webb and Taylor JJ.
>
> The likelihood that the omission to plead a defence will contribute to the existence of conflicting judgments is obviously an important factor to be taken into account in deciding whether the omission to plead can found an estoppel against the assertion of the same matter as a foundation for a cause of action in a second proceeding. By "conflicting" judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction."
>
> (Footnotes omitted) (Emphasis added)

[19] There is a short answer (which has two parts) to the respondents' contention that the issues in question in the current proceedings are so clearly part of the subject matter of the adjudicated proceedings that they should have been raised and that is was unreasonable not to raise the issues now sought to be litigated. In partial support for these contentions, the respondents drew attention to the circumstance that in the amended statement of claim in the adjudicated proceedings[40] there is by way of anticipation an assertion that the estate may have been distributed.[41] But it should be noted that it was only in a letter dated 7 April 2016 by the solicitors for the respondents to the solicitors for the applicants that it was unambiguously asserted on behalf of the executors and trustees that the estate had been administered.[42] Notwithstanding the answer to the respondents' contention is the circumstance that it was the court which appears to have insisted as long ago at the review on 20 April 2010 that the adjudicated proceedings be heard and before the application for further and better provision from the estate.[43] That circumstance together with the circumstance that the proceedings involve different assets and different causes of action and issues of law and fact is, I consider, a sufficient answer to the respondents' contention.

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[40] TS501/2007, filed 22/5/2009.

[41] See para 26 (xiii).

[42] See exhibit EAL14 to the affidavit of EA Lorimer file19/7/16 @ p.42. The real property was transferred out of the estate on about 24/3/99, less than 1.5 months after death on 14/2/99 and the partnership assets were transferred on 18/10/99 about 8 months after death.

[43] See para [6] above.

[20] In the circumstances the applicants are not estopped nor precluded on any of the basis contended by the respondents from prosecuting the claims sought to be advanced by the amendments they seek to make to the originating application.

[21] The final contention made by the respondents is that the applicants seek to re-litigate the same issues that were litigated in the adjudicated proceedings, and to seek additional recovery is an abuse of process of the court. But this submission overlooks the fact that in the adjudicated proceedings the applicants recovered, by way of equitable compensation, the value of the interest they took unto their father's will together with interest. The value of that interest has been authoritatively determined by the judgment of the Court of Appeal. The recovery the applicants might be entitled to assuming the success in the current proceedings is the difference between the value of that interest in their father's estate and that amount that might be determined as adequate provision. If it be that their father failed to make adequate provision for the applicants then, subject to the findings upon the issues identified above,[44] and also subject to the determination on the issues the subject of the contentious amendments, appropriate orders or judgments might follow. There would be no additional or double recovery in those circumstances. No additional circumstance was identified that suggested that it was not possible to have a fair trial of the issues the subject of the application or that for any other reason because of delay an order should be made refusing the application to amend and to dismiss or stay the proceedings.[45]

[22] In the circumstances, subject to what follows the applicants are entitled to order some terms of their application.

[23] It is obviously desirable that the necessary pre-litigation steps be expedited and completed so that a trial of the claim as amended can take place as early as possible. In the orders that follow I will require the parties to consult and to bring into court minutes of orders and directions for the further conduct of the matter within a relatively short time frame. Failing agreement, the parties are to relist the

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[44] See para [13] above.
[45] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [102]-[103].

matter for further directions. In the orders I propose to make I have provided that the cost of the application be each parties costs in the cause. That, subject to any further submission that might be made, is in my view appropriate and allows for recovery depending upon the ultimate findings.

[24] The orders will therefore be:

1. The applicants have leave to amend the originating application in terms as appear in exhibit "EAL – 1" to the affidavit of Elizabeth Anne Lorimer filed 30 May 2016.

2. Unless within 7 days any party files and serves any submissions seeking any further or different order in respect of costs, the order shall be:

   The costs of and incidental to this application be each parties costs in the cause.

3. Within 14 days the parties are to submit to the Registrar a draft or minute of orders by consent providing for directions for the further conduct of the proceedings.

4. If the parties are unable to agree and comply with Order 3, the matter be listed for review and directions at 9:00am on 28 September 2017.