SUPREME COURT OF QUEENSLAND

CITATION:	*Hollingsworth & Ors v Johnston & Anor* [2018] QCA 351
PARTIES:	**RACHAEL REBECCA HOLLINGSWORTH** **HAREL JOSEPH HERROD** (first appellants) **ROBERT MATTHEW HERROD** (second appellant) **v** **HARELLA CAROLINE JOHNSTON** **LEAH DELILAH FELSMAN** (respondents)
FILE NO/S:	Appeal No 9586 of 2017 SC No 805 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville – [2017] QSC 186 (North J)
DELIVERED ON:	14 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2018
JUDGES:	Gotterson and Philippides JJA and Douglas J
ORDERS:	**The appeal is dismissed with costs.**
CATCHWORDS:	ESTOPPEL – ESTOPPEL BY JUDGMENT – RES JUDICATA OR CAUSE OF ACTION ESTOPPEL – GENERALLY – where the respondents commenced a family provision application in 1999 – where the respondents commenced a different action against executors of the same estate – where judgment was entered in those later proceedings – where the respondents sought to amend their originating application in the family provision application – where the amendment sought to make the executors of the estate personally liable – whether leave to amend ought to have been granted – whether the amendment was *res judicata* ESTOPPEL – ESTOPPEL BY JUDGMENT – ANSHUN ESTOPPEL – GENERALLY – whether leave to amend ought to have been granted – whether the respondents were

estopped from making the amendment

LIMITATION OF ACTIONS – GENERAL MATTERS – AMENDMENT OF ORIGINATING PROCESSES AND PLEADINGS OUTSIDE LIMITATION PERIOD – AMENDMENTS INTRODUCING NEW CAUSE OF ACTION OR PARTICULARISING CAUSE OF ACTION – where the respondent alleged that the amendment was made outside the limitation period – whether the limitation period issue ought to be considered at an interlocutory stage

SUCCESSION – FAMILY PROVISION – PROPERTY WHICH MAY BE SUBJECT TO ORDER – OTHER MATTERS – where the respondents argued that the estate had been fully distributed – where the respondents argued that relief in the family provision application was therefore impossible – whether the impossibility of relief ought to be considered at an interlocutory stage

Succession Act 1981 (Qld), s 52

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39, cited
Conquer v Boot [1928] 2 KB 336, referred to
Ebber v Isager [1995] 1 Qd R 150, referred to
Hawkins v Clayton (1988) 164 CLR 539; [1988] HCA 15, cited
Herrod v Johnston [2013] 2 Qd R 102; [2012] QCA 360, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
In the estate of Gough (1973) 5 SASR 559, cited
Johnston v Herrod [2012] QSC 98, cited
Johnston v Hollingsworth [2017] QSC 186, approved
King v Lintrose Nominees Pty Ltd (2001) 4 VR 619; [2001] VSCA 140, distinguished
Linprint Pty Ltd v Hexham Textiles Pty Ltd (1991) 23 NSWLR 508, distinguished
Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd (1996) 40 NSWLR 543, applied
New Brunswick Railway Company v British and French Trust Corporation Limited [1939] AC 1, cited
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; [1981] HCA 45, applied
Republic of India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) [1993] AC 410, cited
Sahin v National Australia Bank Ltd [2012] VSCA 317, distinguished
Timbercorp Finance Pty Ltd (in liq) v Collins (2016) 259 CLR 212; [2016] HCA 44, cited
Trawl Industries of Australia Pty Limited (In liq) v Effem Foods Pty Ltd (1992) 36 FCR 406; [1992] FCA 272, cited

Wardley Australia Ltd v Western Australia (1992) 175 CLR 514; [1992] HCA 55, applied
Willoughby v Clayton Utz (No 2) (2009) 40 WAR 98; [2009] WASCA 29, applied

COUNSEL: D B Fraser QC for the appellants
C C Heyworth-Smith QC, with N J Derrington, for the respondents

SOLICITORS: Connolly Suthers Lawyers for the appellants
de Groots Wills and Estate Lawyers for the respondents

[1] **GOTTERSON JA:** I agree with the orders proposed by Douglas J and with the reasons given by his Honour.

[2] **PHILIPPIDES JA:** For the reasons given by Douglas J, I agree that the appeal should be dismissed with costs.

[3] **DOUGLAS J:** This is an appeal against a decision granting leave to amend an originating application seeking further and better provision from the estate of the respondents' father. The main issue in the appeal is whether the respondents' success in another action from which they received an award of equitable compensation from the appellants precludes them from also seeking further and better provision from that estate.

[4] The other action, which was resolved by earlier decisions by de Jersey CJ as varied by this court,[1] resulted in a declaration that an agreement entered into by each respondent to forego her interest in the estate of their deceased father or a cattle partnership for payment of a sum of money was unenforceable and was set aside for breach of the fiduciary duties owed to the respondents by the appellants. There was also a declaration that each respondent was entitled at their election to an account of profits or an award of equitable compensation. They elected to receive equitable compensation. I shall refer to that decision as the "adjudicated proceeding".

[5] The appellants say that the estate is now fully administered which explains the nature of the amendments sought to the originating application which seek to establish personal liability in the appellants for distributing assets of the estate allegedly in breach of trust. The learned primary judge decided that there was no estoppel precluding the respondents from pursuing the statutory remedy available under s 52 of the *Succession Act* 1981 against the personal representatives of the deceased for failure to perform their duties and permitted the originating application to be amended.

Background

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1 *Johnston v Herrod* [2012] QSC 98 and *Herrod v Johnston* [2013] 2 Qd R 102.

[6] The appeal relates to the administration of the estate of Robert Harel Herrod ("the deceased") who died on 14 February 1999. The parties to this appeal are his children. While he was alive, the deceased held a leasehold interest in a cattle property called Moonoomoo Station on which he ran a cattle business in partnership with his two sons, Robert Herrod and Harel Herrod, two of the appellants. The property of the partnership consisted of cattle, plant and equipment.

[7] By his will dated 4 September 1989, the deceased appointed Harel Herrod and Rachael Hollingsworth, one of his daughters, as executors. Under the will, Robert Herrod and Harel Herrod were to receive the land, including machinery and equipment not owned by the partnership as tenants in common while Rachael Hollingsworth, Harella Johnston and Leah Felsman were to receive the deceased's interests in the partnership together with the rest and residue of the estate as tenants in common in equal shares. Harella Johnston and Leah Felsman are the respondents in this matter.

[8] On 25 October 1999, the respondents filed an originating application seeking further and better provision from the estate of the deceased pursuant to s 41 of the *Succession Act*. I shall refer to that application as "the FPA". On 30 July 2007, the respondents also filed the claim which led to the adjudicated proceeding. An amended statement of claim was filed on 25 May 2009 in that proceeding.[2]

[9] On 20 April 2010, the parties attended a hearing to resolve whether the FPA and the adjudicated proceeding should be heard together.[3] Cullinane J indicated that he was not going to order the matters to be heard together.[4] His Honour also expressed the view that the adjudicated proceeding should be resolved before the FPA but did not stay the FPA. Nor did the parties expressly agree that the FPA should be stayed but the adjudicated proceeding continued to trial as if the FPA had been stayed.[5]

[10] On 18 December 2012, the Court of Appeal delivered judgment in the adjudicated proceeding resolving the matter in favour of the respondents with an adjustment in respect of the amount of equitable compensation awarded by de Jersey CJ on 22 May 2012 from $433,709.67 down to $273,851.

[11] The trial decision by de Jersey CJ focussed principally on whether the appellants had misrepresented to the respondents the value of their share in the partnership bequeathed to them. His Honour found that there had been such misrepresentations and that the respondents had been overborne by the appellants who pressured them to enter into agreements to be paid significantly less for their shares in the partnership than they were worth.[6]

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2 AB455.

3 AB1-8.

4 AB7 ll 34-35.

5 AB504 at [8] and AB570 at [6].

6 *Johnston v Herrod* [2012] QSC 98 at [95], [101]; AB516-517.

[12] As part of his decision his Honour also addressed whether Harel Herrod and Rachael Hollingsworth had breached their fiduciary duties as executors of the estate in these relevant terms:

> "[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.
>
> *Harel*
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> [111] In paras 8 and 9 of these reasons for judgment, I set out the circumstances in which the share in the partnership was lost to the estate.
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> [112] In summary, Harel and Robert purported to acquire the interest in the estate of the partnership by notice of 17 July 1999, operative from 18 October 1999. As previously observed, the notice required by the partnership agreement had to be given within three months of the death of the deceased partner. As already previously noted,[7] Robert and Harel affected to assume the deceased estate's interest, for no payment of consideration, running their new partnership until the year 2002 when Robert acquired Moonoomoo in its entirety, and Harel took over Carmichael on which he continues to live.
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> …
>
> *Rachael*
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> [116] Rachael failed in many respects to discharge her duty as executor.
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> …
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> (b) Rachael at the least acquiesced in her brothers' taking over the estate's interests in the partnership, without the notice required under the partnership agreement, without the executors' commissioning a valuation, and without the payment of any consideration.
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> … (citations inserted)"

[13] His Honour's decision did not address the issue whether there had been a breach of duty or trust by the appellants in distributing Moonoomoo Station within six months of the date of death of the deceased in breach of trust.

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7 *Johnston v Herrod* [2012] QSC 98 at [8]-[9]; AB503-504.

[14] The Court of Appeal agreed with de Jersey CJ's view of the effects of the notice required by the partnership agreement.[8] Otherwise the changes to his Honour's orders addressed the amount of the equitable compensation to be ordered.

[15] On 27 May 2016, the respondents sought leave to further amend the originating application in the FPA to insert claims that would entitle them to relief in the event that the estate had been distributed.[9] The amendments that were inserted by the learned primary judge's order included:

> "2. Should the claim for further and better provision from the estate fail because the estate has been distributed, then:
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> (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 breach of trust;
>
> (b) A declaration that Harel Joseph Herrod and Robert Matthew Herrod
>
> (i) failed to give notice to the first respondents/executors of their 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:
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> (i) are personally liable for the applicants' claim; and
>
> (ii) are estopped from relying on s44(3) of the *Succession Act* 1981.
>
> (iii) are liable to account for their rateable share of the applicants' claim.
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> (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."

[16] A further amendment to cl 3 sought costs against the appellants personally.

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8 *Herrod v Johnston* [2013] 2 Qd R 102, 111-112 at [11]-[17].

9 AB447-449.

[17] As the relief sought in paras 2(c) and 2(d) in particular was said to rely on s 52 of the *Succession Act* it will be useful to set out its terms:

> "**52 The duties of personal representatives**
>
> (1) The personal representative of a deceased person shall be under a duty to—
>
> (a) collect and get in the real and personal estate of the deceased and administer it according to law; and
>
> (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court; and
>
> (c) when required to do so by the court, deliver up the grant of probate or letters of administration to the court; and
>
> (d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be; and
>
> (e) pay interest upon any general legacy—
>
> (i) from the first anniversary of the death of the testator until payment of the legacy; or
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> (ii) in the case of a legacy that is, pursuant to a provision of the will, payable at a future date—from that date until payment of the legacy;
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> at the rate of 8% per annum or at such other rate as the court may either generally or in a specific case determine, unless any contrary intention respecting the payment of the interest appears by the will.
>
> (1A) Nothing in subsection (1) abrogates any rule or practice deriving from the principle of the executor's year or any rule or practice under which a beneficiary is entitled to receive interest upon any legacy from the date of the testator's death.
>
> (2) If the personal representative neglects to perform his or her duties as aforesaid the court may, upon the application of any person aggrieved by such neglect, make such order as it thinks fit including an order for damages and an order requiring the personal representative to pay interest on such sums of money as have been in the personal representative's hands and the costs of the application."

[18] The amended statement of claim in the adjudicated proceeding included claims said by the appellants to be the same or substantially the same as those set out in the further amended originating application. It is in that context that the appellants argue that the causes of action underlying the orders sought in the amendment are *res judicata* or, alternatively, subject to an estoppel of the type discussed in *Port of Melbourne Authority v Anshun Pty Ltd*[10] or are statute barred or are claims where it is impossible for the respondents to obtain relief because the estate has been fully distributed. I shall discuss each of those appeal grounds in that order.

Res judicata

Para 2(a) of the amendments to the originating application

[19] The appellants' notice of appeal asserts that para 2(a) of the amendments to the originating application ("the amendments") was pleaded in paras 4, 6(b)(2), 7(a), 14, 16, 17, 19, 20(e), 21, 26(x), 26(xi), 26(xiii) and 27 of the amended statement of claim in the adjudicated proceedings and in paras 1-6, 7B, 8, 12 and 13 of the relief claimed.

[20] For present purposes, the most relevant pleadings in the amended statement of claim are the allegations in para 20(e) that, (presumably) Harel Herrod and Rachael Hollingsworth distributed Moonoomoo Station to Harel and Robert Herrod within six months of 14 February 1999, again, presumably in reliance on para 19, in breach of trust. There are also the allegations in para 26(xiii) that the respondents had not received their just entitlements under the will and have suffered loss and damage particularised in these terms:

> "(xiii) Fourthly, alternatively, if the Defendants are correct (which is not admitted) in their argument that the Court has no power to make a Family Provision order in proceeding No. 805/99 because of distributions already made by the First and Third Defendants, the Plaintiffs have lost the benefit of the relief which, but for the distributions, would have been granted under the provisions of Part 4 of the *Succession Act* 1981, or the Plaintiffs have lost the chance of obtaining such relief. The Plaintiffs say that the said benefit or chance should be valued at $550,000.00 each."

[21] Neither of those issues were litigated nor the subject of any consideration by de Jersey CJ. As I have already pointed out his Honour said explicitly that the FPA had been stayed pending the completion of the adjudicated proceeding.[11]

Para 2(b)(i) of the amendments to the originating application

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10 (1981) 147 CLR 589.

11 *Johnston v Herrod* [2012] QSC 98 at [8]; AB504.

[22] The appellants' notice of appeal also asserts that para 2(b)(i) of the amendments was pleaded in paragraphs 2, 3, 5, 6(b), 7(b), 10 and 11 of the amended statement of claim and paragraph 2 of the relief claimed. The declaration sought in para 2(b)(i) is closest to the allegation in para 10 of the amended statement of claim that "at no time within three calendar months of the death of the Deceased did the First and Second Defendants give notice in writing to the Trustees of any desire to purchase the Deceased's interest in the Partnership."

[23] As I have pointed out above that issue was decided in favour of the respondents by de Jersey CJ and upheld by the Court of Appeal. I do not understand that the respondents in these proceedings seek to challenge that aspect of the adjudicated proceeding.

Para 2(b)(ii) of the amendments to the originating application

[24] The declaration sought in para 2(b)(ii) of the amendments was said to be reflected in paras 2, 3, 5, 6(b), 7(b), 9-11, 13-19, 20(a), 20(b), 20(d) and 26 of the amended statement of claim and paras 1-5, 7B, 8, 12 and 13 of the relief claimed. Again, the most relevant of those allegations appear to be those in para 18(c) that Harel Herrod and Robert Herrod "acquired or purported to acquire the Deceased's interest in the Partnership without paying any or any adequate sum to reflect its fair market value" and, in para 20(b)(i) that they failed to get in any or any adequate sum to reflect the fair market value of the deceased's interest in the partnership.

[25] Again those assertions are consistent with de Jersey CJ's findings. Nor do I understand that the respondents intend to do anything other than support them in these proceedings.

Discussion

[26] The appellants' argument was that the learned primary judge applied the wrong test in considering whether a *res judicata* operated to preclude the further litigation of these causes of action. His Honour's statement of the test, however, was that expressed in *Port of Melbourne Authority v Anshun Pty Ltd* as follows:[12]

> "The distinction between res judicata (in England called 'cause of action estoppel') and issue estoppel was expressed by Dixon J. in *Blair v Curran*[13] 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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12 (1981) 147 CLR 589, 597.

13 (1939) 62 CLR 464, 532.

> The distinction was restated by Fullagar J. in his dissenting judgment in *Jackson v. Goldsmith*.[14] 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*:[15] 'A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies.'
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> 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*.[16]
>
> Subject to an examination of the application of the principle in *Henderson v Henderson*,[17] 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."

[27] After discussing the issues his Honour concluded, in terms with which I agree, as follows:[18]

> "[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. 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 with that in the amended statement of claim in the adjudicated proceedings 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*

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14 (1950) 81 CLR 446, 466.

15 (1939) 62 CLR 464, 531.

16 [1967] 1 AC 853, 913, 964 et seq.

17 (1843) 3 Hare 100 [67 ER 313].

18 *Johnston v Hollingsworth* [2017] QSC 186 at [17]; AB 581-582 (footnotes omitted).

> *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 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." (citations omitted)

[28] The appellants accepted that their submissions faced a high hurdle because this was an appeal against the exercise of a discretion involving a matter of procedure.[19] Their main submission was that the respondents had pleaded the same causes of action in the adjudicated proceeding as they sought to advance by the amendments to the FPA. Mr DB Fraser QC for the appellants submitted that his Honour focussed on the nature of the relief obtained in the adjudicated proceeding and submitted that that involved an error of principle as it was the cause of action and facts pleaded rather than the measure of relief in each case which found *res judicata*. In making that submission, he relied upon the decision in *Ebber v Isager*,[20] a case where there had been successive actions for breach of a building contract. That decision relied upon the English decision in *Conquer v Boot*[21] where, again, there were successive actions in respect of breach of the same building contract and the court

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19 *House v The King* (1936) 55 CLR 499, 505 and *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 176.

20 [1995] 1 Qd R 150.

21 [1928] 2 KB 336.

took the view that it was not possible to say that every one of the breaches created a separate cause of action.[22] It is worth noting, however, that Talbot J said that the test whether a previous action creates a bar is not whether damages sought to be recovered are different, but whether the cause of action is the same.[23]

[29] In this case one has to consider at the start the nature of the cause of action lying behind the declaratory relief sought. The relief sought in the adjudicated proceeding related to the unenforceability of an oral agreement that the respondents relinquish their entitlement from the deceased's estate to an interest in the partnership for a lesser sum than they were owed. The unenforceability of the agreement arose from the misrepresentation and unconscionable conduct of the appellants as did the remedy of equitable compensation.

[30] That cause of action has no connection logical or otherwise with the issue whether the deceased made adequate provision for them in his estate. Also the statutory cause of action under s 52 of the *Succession Act* which supports some of the amendments, although it was referred to in the prayer for relief in the adjudicated proceeding,[24] was not necessary to the decision in the adjudicated proceeding and was not directed to the recovery of damages for the inability to recover the amount possibly owing on the FPA application. At best what was in issue on the pleading was the loss of the possible benefit of the FPA, an issue which was not pursued or decided in the adjudicated proceeding.

[31] Mr Fraser submitted that the respondents were seeking to add to the relief in the FPA pursuant to s 41 of the *Succession Act* a further statutory cause of action under s 52 already pleaded in the adjudicated proceeding and were now seeking to obtain more equitable damages "for the same breach and the same statutory cause of action".[25] It seems to me that the answer to that submission is that the claim for further provision does not arise out of the same cause of action and the right to damages and other orders available under s 52(2) in particular does not necessarily arise out of the same breach of duty by the appellants or the same statutory cause of action that has actually been determined in the adjudicated proceeding.

[32] The rights available under s 52(2) were not germane to the equitable compensation awarded in the adjudicated proceeding. Nor was that compensation said to be dependent on any failure by the appellants, for example, to get in the deceased's estate or to distribute it as soon as may be, contrary, for example to s 52(1)(a) or s 52(1)(d). Rather, it was determined to be payable by reference to the appellants' misrepresentation of the value of the partnership property and their unconscionability in inducing the respondents to agree to sell their share of that property for much less than it was worth.

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22 See Sankey LJ at 342-343.

23 *Conquer v Boot* [1928] 2 KB 336, 345.

24 AB481 para 12.

25 Appeal transcript of the oral submissions at T1-29/16-26.

[33] This is not, therefore, a case such as *Sahin v National Australia Bank Ltd*[26] where the plaintiffs were precluded from bringing a further action in deceit after having succeeded in an earlier action for misleading and deceptive conduct. Nor is it like *King v Lintrose Nominees Pty Ltd*[27] where a claim for rescission was followed by a separate claim for equitable compensation arising out of the same transaction which was prevented from proceeding because it was a fresh claim based on the same cause of action.

[34] The respondents argued that they could not have contended for the relief that is now sought in the FPA during the adjudicated proceeding because they had not then been adjudged entitled to further provision from the estate, effectively because the FPA was not to be heard at the same time as the adjudicated proceeding.

[35] The respondents also submitted, in respect of the relief sought in paras 2(a) and 2(b) that it is clear by reference to the reasons for judgment that those claims were not litigated.[28] That is not quite correct in respect of the relief sought in para 2(b) as I have pointed out. Nowhere, however, it was submitted, did de Jersey CJ suggest that a claim arising out of the distribution of Moonoomoo and the remainder of the estate, despite notice of the FPA, was in issue. As a consequence, therefore, this claim has not been determined on the merits nor have the same questions been raised in the adjudicated proceeding as are sought to be raised here.[29]

[36] The relief sought in paras 2(c) and 2(d) was also justified as having a separate juridical basis from an equitable action for breach of fiduciary duty or breach of trust. That relief was said to be based on s 52 of the *Succession Act* and to be a remedial provision providing the court with statutory power that ensures that it does not lose its ability to enforce an executor's duty "to avoid embarrassing the court".[30] Paragraph 2(c)(ii) is also supported as ancillary relief on the basis that the appellants are precluded by an issue estoppel from contending that they may deny liability on the basis of s 44(3) of the *Succession Act*.

[37] The respondents also submitted that the allegations that there was a breach of trust by Harel Herrod and Rachael Hollingsworth with complicity in that breach by Robert Herrod because of the distribution of Moonoomoo were included in the amended statement of claim as a matter of case management, before Cullinane J's determination that the adjudicated proceeding would be heard first. The argument was that, following that determination, the respondents did not advance any case in

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26 [2012] VSCA 317.

27 (2001) 4 VR 619.

28 As to the use of the reasons for judgment see *Willoughby v Clayton Utz (No 2)* (2009) 40 WAR 98, 107-108 at [30].

29 See, again, *Willoughby v Clayton Utz (No 2)* (2009) 40 WAR 98, 104 at [14] where the constituent elements required to set up a *res judicata* are discussed.

30 *In the estate of Gough* (1973) 5 SASR 559, 566.

reliance on those alleged wrongs. We were told that there was no reliance, for example, on material filed in the FPA in the adjudicated proceeding.

[38] In particular the respondents relied on the illuminating discussion by Clarke JA in *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd*[31] both of *res judicata* and *Anshun* estoppel. Some extracts from his Honour's reasons throw light on the issues in this case:[32]

> "The existence of the two principles sitting, as it were, side by side tells against an expansive view of estoppel by record. That is not to say that the defence should not succeed wherever the identity of cause of action is established. It should. Rather it means that a strict approach should be taken in inquiring whether there is in a given case the necessary identity.
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> …
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> Like Giles J in *Onerati v Phillips Constructions Pty Ltd (In Liq)* (1989) 16 NSWLR 730 at 738-739, I do not think it helpful to adopt a technical approach to the present problem. The doctrine is concerned with substance, not form, and where parties simply plead facts (without necessarily identifying the cause of action) it seems to me that it is far more helpful to focus on the facts which are said in each instance to support the right to relief.
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> …
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> In *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 108 ALR 335, Gummow J (at 347) expressed the opinion that it was necessary to focus on the substance and not the form of the two actions (the third example of Brennan J). His Honour went on to say (at 351) that the same factual matrix had generated the controversy which was given legal form in the two actions. This may be a wider test than the test I favour but I am not presently convinced that there is a significant difference between them. Both require an examination of the facts pleaded (and analysed in the first judgment) and both concentrate on substance. But, as *Port of Melbourne Authority v Anshun Pty Ltd* itself demonstrates (at 597), a claim intimately bound up with the facts the subject of the first action but not relied on in that action may, subject to the Anshun principle, be litigated in a later proceeding. A plea of estoppel by record will be bad, notwithstanding that the second judgment might contradict the earlier one.
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> What I think is necessary is an examination of the factual circumstances relied upon to establish the right to relief in each case

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31 (1996) 40 NSWLR 543, 556-562.

32 (1996) 40 NSWLR 543, 558-561.

> in order to determine whether there is a sufficient identity between them to found the conclusion that the same cause of action was in question in both cases. One matter which may be of importance in contract cases is whether, in substance, both actions are based on breaches of a particular term in a single contract. This factor may be conclusive in some cases while in others it may not be. On the other hand, the defence of estoppel by record may defeat a second action despite the fact that it is based on a breach of a term of the contract not relied on in the first action: eg, *India Steamship*. Again the fact that both claims arise out of the same incident may be most material.
>
> …
>
> In simple terms, the issues raised in the second proceedings were not litigated in the first. The relief claimed in each was different and depended on the resolution of essentially different factual issues arising out of different alleged acts and omissions …"

[39] The respondents also criticised the appellants' argument on the basis that it relied upon the fact that no formal application was made to discontinue the claims premised on the distribution of Moonoomoo, for example by deleting paras 20(e) and 26(xiii) of the amended statement of claim. The submission was that those issues were not litigated in substance and had not actually been determined or distinctly raised and decided.[33]

[40] The appellants' reliance on the decision in *Linprint Pty Ltd v Hexham Textiles Pty Ltd*[34] to assert that the respondents should have discontinued their claim for relief for breach of trust, *devastavit* and breach of fiduciary duty and relief under s 52(2) of the *Succession Act* was distinguished by the respondents' counsel. They pointed out that that was a case dealing with judgment by default where such a judgment would plainly resolve all the pleaded issues necessary for judgment.

[41] It was also said to be inconsistent with *Willoughby v Clayton Utz (No 2)*.[35] That decision was relied on for the proposition that whether a matter was decided on the merits or litigated in contested proceedings had to be determined as a matter of fact and not merely by reference to the pleading. The respondents also submitted that a careful reading of para 21 of the amended statement of claim alleged a *devastavit* in respect of the assets of the deceased's estate falling within cl 3(e) of the will, namely the interests in the partnership, rather than the estate as a whole. Consequently there was no claim for *devastavit* pleaded in the adjudicated proceeding which would

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33 *Trawl Industries of Australia Pty Limited (In liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406, 418; *Republic of India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace)* [1993] AC 410, 415 and *New Brunswick Railway Company v British and French Trust Corporation Limited* [1939] AC 1, 19-20.

34 (1991) 23 NSWLR 508, 524.

35 (2009) 40 WAR 98.

have permitted damages to be recovered to compensate the respondents for the loss of the ability to prosecute the FPA.

[42] Finally, in this respect, it was also pointed out by the respondents that their election to claim equitable compensation rather than an account of profits in respect of their claim in the adjudicated proceeding did not determine the relief sought here as the relevant default in the adjudicated proceeding was the loss of the respondents' share in the partnership and the various breaches of duty associated with it.

[43] Put shortly, therefore, there has been no determination either made finally or on the merits of the issues raised in paras 2(a) and 2(b) of the amendments to the originating application in the context of this claim in the FPA. The declarations sought in paras 2(c)(i) and 2(c)(iii) similarly have not been determined. Nor has the relief sought in para 2(d). The relief sought in para 2(c)(ii) relates to an argument that the appellants themselves are estopped from relying on s 44(3) of the *Succession Act* because of the effect of the adjudicated proceeding. It itself, therefore, cannot be the subject of a *res judicata* determination in this application.

[44] This is not a case where the adjudicated proceeding, having passed into judgment, has determined the quite separate application as between the respondents and their father's executors on behalf of his estate claiming that he failed to make proper provision for them in his will and against the appellants as executors and in their personal capacities for relief pursuant to s 52 of the *Succession Act* in respect of that aspect of the administration of the estate. It is not a case of the appellants being vexed twice in respect of the same dispute.

***Anshun* estoppel**

[45] For similar reasons it should follow that no estoppel has been established pursuant to the principle discussed in *Port of Melbourne Authority v Anshun Pty Ltd*.[36] It was not unreasonable of the respondents to fail to prosecute their claim for further provision under the FPA having regard to the intimation by Cullinane J that he would not order them to be heard together. As was submitted for the respondents, the proceeding now advanced does not rely upon the allegations of misrepresentation or unconscionable conduct ventilated in the adjudicated proceeding. It deals with the consequences of different breaches in relation to the distribution of the estate generally and of Moonoomoo in particular, causing a loss to the estate if the FPA succeeds. As the learned trial judge observed, the recovery the applicants might be entitled to, assuming their success in the current proceedings, is the difference between the value of their interest in their father's estate and that amount that might be determined as adequate provision.[37]

Are the claims statute-barred?

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[36] (1981) 147 CLR 589, 602-603; see also *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212, 236-237 at [55]-[58].

[37] *Johnston v Hollingsworth* [2017] QSC 186 at [21]; AB585.

[46] The limitation defence was raised for the first time on appeal. It is not usual to resolve such issues at the interlocutory stage except in the clearest of cases.[38] The respondents' mounted several arguments why the appeal on this ground should fail.

[47] First it was submitted for the respondents that the gist of the cause of action arising under s 52 of the *Succession Act* is damage which will arise when the respondents first suffer loss.[39] That loss is contingent on the exercise of the court's discretion and the estate's liability to pay arises only at the time the court makes an order. That contingency has not yet been fulfilled, loss has not arisen, therefore the limitation period has not been commenced.

[48] The ground of appeal was also criticised on the basis that there is presently no evidence about the nature of the distribution of Moonoomoo and whether it raises the possibility that Harel Herrod converted it to his own use opening the possibility of a cause of action based on conversion by a trustee of trust property to his or her own use where there was no limitation period for an action by a beneficiary.[40]

[49] It was also submitted that this cause of action arises out of substantially the same facts as the already existing amended originating application for the purpose of r 376(4) of the *Uniform Civil Procedure Rules* 1999. The additional fact needed to make good the claims for relief in paras 2(a), 2(c)(i), 2(c)(iii) and 2(d) of the amendments is said to be the allegation that Moonoomoo was distributed within six months of the testator's death. It was submitted that it would be difficult to see what policy underlying the *Limitation of Actions Act* would be infringed by treating that additional fact as arising out of generally the same story.[41]

[50] For those reasons it is not appropriate to decide at this stage whether any limitation defence arises.

Impossibility of relief

[51] The appellants also argued that because the estate has been fully distributed no relief can be granted to the respondents even if their FPA is successful. The respondents submit, however, that they have not conceded that the estate has been fully distributed and argue that it is far from clear whether the cattle herd had been distributed. That too is an issue which should await the hearing of the FPA and the determination of whether relief is available against the respondents that they are personally liable for the appellants' claim.

Order

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38 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 533.

39 *Hawkins v Clayton* (1988) 164 CLR 539, 587.

40 See s 27(2) and s 28 of the *Limitation of Actions Act* 1974.

41 See *Draney v Barry* [2002] 1 Qd R 145, 164 at [57] and *Paul v Westpac Banking Corporation* [2017] 2 Qd R 96 at [15].

[52] The appeal should be dismissed with costs.