SUPREME COURT OF QUEENSLAND

CITATION:	*Allen v Ruddy Tomlins & Baxter* [2019] QCA 103
PARTIES:	**KIM MARIE ALLEN** (applicant) **v** **RUDDY TOMLINS & BAXTER** (respondent)
FILE NO/S:	Appeal No 3998 of 2018 DC No 367 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Townsville – Unreported: 21 March 2018 (Durward SC DCJ)
DELIVERED ON:	28 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2018
JUDGES:	Philippides and McMurdo JJA and Henry J
ORDERS:	**1. The application for leave to appeal be granted.** **2. The appeal be allowed.** **3. The order of 21 March 2018 be set aside.** **4. The parties provide written submissions as to costs within 21 days of the date of these orders.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – GENERALLY – where the applicant client and the respondent, a firm of solicitors, entered into a costs agreement in August 2005, which was terminated in August 2007 – where the applicant objected to the respondent's bill of costs and applied for a costs assessment under the *Legal Profession Act* 2007 (Qld) s 335(1) – where the costs assessor filed an "interim decision" in the District Court in March 2009, and subsequently a Costs Assessor's Certificate in July 2017 – where the registrar made orders pursuant to that certificate in 2017 – where the respondent submitted that the *Legal Profession Act* 2007 (Qld) and the *Uniform Civil Procedure Rules* 1999 (Qld) gave rise to an independent "codified regime for the quantification and recovery of legal costs between a law practice and client" that exists outside the ambit of the regime under the LAA, such that it was not time barred from claiming its costs from the applicant –

	whether the respondent was time barred from claiming its costs from the applicant
	Legal Profession Act 2007 (Qld), s 3, s 299, s 316, s 326, s 335, s 337, s 338 *Limitation of Actions Act* 1974 (Qld), s 10 *Uniform Civil Procedure Rules* 1999 (Qld), r 743G, r 743H
	Coshott v Barry [2012] NSWSC 850, considered *Edwards v Bray* [2011] 2 Qd R 310; [2011] QCA 72, considered *Footscray City College v Ruzicka* (2007) 16 VR 498; [2007] VSCA 136, cited *Preston v Nikolaidis* [2017] NSWSC 1527, considered
COUNSEL:	S Hartwell for the applicant R B Dickson for the respondent
SOLICITORS:	Corporate First Lawyers for the applicant CBC Lawyers for the respondent

PHILIPPIDES JA:

The application

[1] The applicant, Kim Allen, brought an application pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) (DCA) for leave to appeal against orders made on 21 March 2018 by Durward DCJ that the respondent, Ruddy Tomlins & Baxter, a firm of solicitors, was not barred by operation of the *Limitation of Actions Act* 1974 (Qld) (LAA) from recovering its legal costs from the applicant. If leave to appeal is granted, the applicant seeks orders that the appeal be allowed, the order of 21 March 2018 be set aside and that the proceedings be stayed.

[2] The applicant's proposed grounds of appeal as they appear in the draft notice of appeal are that the primary judge erred in finding that:

1. the limitation period pursuant to s 10 of the LAA did not apply to the solicitor's retainer and the account rendered to a client for legal services where recovery of assessed costs is sought.

2. the *Legal Profession Act* 2007 (Qld) (LPA) and Ch 17A, Pt 4 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) created a codified regime for the determination of disputes relating to, and the recovery of, legal costs and that the relationship between solicitor and client was no longer a relationship which is based on simple contract.

3. a proceeding is not required under the current discrete regime for assessment and recovery of costs and that s 10 of the LAA did not apply.

[3] The notice of appeal thus raises whether the combined provisions of the LPA and UCPR give rise to an independent "codified regime for the quantification and recovery of legal costs between a law practice and client" that exists outside the ambit of the regime under the LAA.

Factual background

[4] On 19 August 2005, the applicant and the respondent entered into a costs agreement. In August 2007, the applicant terminated the respondent's retainer. On 30

August 2007, the applicant received a letter from the respondent requesting signed acknowledgement that the applicant owed $145,000 to the respondent for fees and costs. In September 2007, the applicant requested that the respondent send an itemised bill. On 20 March 2008, the respondent sent an itemised costs statement in the sum of $145,180 (also enclosing a notice that it ceased to act for the applicant).

[5] On 26 August 2008, the applicant objected to the respondent's bill and, on 26 September 2008, she filed an application for a costs assessment. On 20 October 2008, by consent orders, it was ordered that a costs assessor be appointed to conduct the costs assessment according to the provisions of the UCPR and, by para 10 of those orders, that the costs certificate issued by the costs assessor "be filed in the Court within seven days of the completion of the assessment and upon filing will take effect as an order of the Court". On 26 November 2008, the respondent provided the costs assessor's response to the applicant's objections and purported to submit an amended revised bill in the amount of $139,822.12. On 7 December 2008, the applicant emailed the costs assessor, enclosing the applicant's rebuttal response to the costs assessor's response. The costs assessor subsequently requested further information from the parties. On 9 March 2009, the costs assessor filed an "interim decision" in the District Court.

[6] Thereafter, some eight years later on 21 July 2017, the costs assessor filed a Costs Assessor's Certificate in the amount of $83,031.62. On 12 October 2017, the registrar made orders for costs pursuant to the certificate. On 6 November 2017, the applicant filed an application to set aside the order of 12 October 2017 and for a permanent stay of proceedings. In the alternative, an extension of time was sought in which to seek a review of the costs assessor's decision. On 10 November 2017, the parties signed consent orders setting aside the orders of 12 October 2017.[1]

[7] An application for directions under r 743H of the UCPR was brought before the primary judge. At the hearing of the application, the parties agreed that the primary judge should determine, as a preliminary issue, whether the limitation period in s 10(1)(a) of the LAA applied to preclude the recovery of the assessed costs. His Honour proceeded accordingly.

The decision at first instance

The submissions at first instance

[8] The respective positions of the parties before the primary judge largely reflect the arguments put before this Court. The applicant's submissions centred on the decision in *Edwards v Bray*,[2] where consideration was given to the application of s 10(1)(d) of the LAA to the regime then operative for the assessment of legal costs under the *Queensland Law Society Act* 1952 (QLS Act). The applicant's arguments were summarised succinctly by the primary judge as being that:[3]

> "… the relationship between a solicitor and the client is contractual and the Cost Assessor's Certificate does not create a right to recover professional fees and outlays independent of that contract; that

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1 That consent order was not filed but the parties have proceeded as if it had been and the primary judge referred to the consent order as having been set aside (AB2 at 808). Transcript 1-6.15.

2 [2011] 2 Qd R 310.

3 Reasons at [7].

> s 10(1)(a) of the [LAA] applies (an action founded on simple contract shall not be brought after the expiration of six years from the date on which that cause of action arose) and the cause of action arises when the work is completed or the solicitor's retainer is terminated. Whilst the respondent had applied to the court for an assessment and one was conducted under the [LPA], it is not an 'action' for the purposes of the LAA: it is a mere procedural mechanism for resolution of the quantum and subsequent enforcement of the right to recover legal fees when there are no other issues in dispute. [The applicant] submitted that the Court was not bound to enter judgment in the amount of the Costs Assessor Certificate or at all; and it is the underlying right and title to the debt per se and not the cost assessment process, which is the subject of the limitation period. In this case there has been no acknowledgement of the debt or part payment made by the applicant in respect of the assessed costs."

[9] The primary judge summarised the respondent's argument that the applicant's submissions overlooked the terms of para 10 of the 2008 orders made in accordance with Practice Direction 7 of 2007 and, additionally, that:[4]

> "Under rule 743 UCPR et seq. there is a new regime which fulfils the purposes said to be absent … in *Edwards v Bray*, particularly rule 743H UCPR which provides for the giving of judgment upon a Certificate. [The respondent] also referred to the second reading speech by the Minister on 19 April 2007 for the *Legal Profession Bill 2007* which shows the intention of Parliament to set out a new compact for recovery of costs by a legal practice, including the restriction on the ability of a legal practice to start proceedings for the recovery of legal costs. He said that there is now a new compact is also clear from the relevant Explanatory Notes to the LPA."

The primary judge's findings

[10] His Honour accepted the respondent's contention and held[5] that "the LPA and Ch 17A Pt 4 of the UCPR establish a discrete regime for the assessment of legal costs and for their recovery". His Honour found that, while Practice Direction 7 of 2007 was an interim measure, its significance was more than that, in that it reflected the "intent of the *Legal Profession Bill* 2007 (as it then was) with respect to assessment and recovery of legal costs". Consequently, his Honour held:[6]

> "In other words, I do not consider *Edwards v Bray* remains authoritative with respect to a matter such as is being litigated in this case. The dispute falls to be determined under the codified regime and not otherwise. The simple application of the LAA to the relationship between a solicitor and a client is no longer applicable to the relationship which now is proscribed, for example, by the necessity for full disclosure of costs and an enforceable Costs Agreement between solicitor and client. It is no longer a relationship which is based on simple contract. Further, under what I have referred to as

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4 Reasons at [8].
5 Reasons at [21].
6 Reasons at [22].

> the codified regime that is now applicable, a legal firm does not have to commence a 'proceeding' to recover costs."

[11] In reasoning to that conclusion, his Honour placed reliance[7] on the second reading speech of the *Legal Profession Bill* 2007, where the Minister was said to have stated that "*The new Act provides for procedures for recovery of costs*"[8] and that the LPA included "*provisions as to how costs are recoverable*" as well as how costs were to be assessed. His Honour observed[9] that the assessment of costs, as regulated by Practice Direction 7 of 2007, was intended to facilitate the assessment of such costs in the interim before the provisions of the LPA came into force and included directions as to the determination of costs by a costs assessor, the filing by the costs assessor of a certificate as to assessed costs and the entry of judgment in accordance with that certificate.

[12] His Honour also referred[10] to the purpose of the LPA as stated in s 3 of the LPA and to various provisions of the LPA, in particular, s 337 and s 338, which regulated applications for a costs assessment. His Honour noted the respondent's submission that, in this case, it was the client who applied for the costs assessment and that the respondent had not commenced a proceeding in court. His Honour also noted[11] that the procedure for the assessment of costs provided for by the LPA was contained in Ch 17 of the UCPR, which permitted directions to be made (under r 743G UCPR) in relation to an application for a costs assessment which extended beyond the quantum of costs. His Honour also remarked[12] that the court's power was "greater than that of the costs assessor under the old regime and the court may give judgment" (see also UCPR, r 743H).

Leave to appeal

[13] Relying on the principles set out in *Pickering v McArthur*,[13] the applicant submitted that this was an appropriate case for the exercise of the discretion to grant leave, in that an appeal was necessary to correct a substantial injustice to the applicant and there was a reasonable argument that there was an error to be corrected. The applicant submitted that the grounds of appeal raised issues of general importance concerning the application of the LAA to claims for unpaid legal costs by a law practice from its client, and whether *Edwards* was no longer authoritative in light of the scheme for costs assessment and recovery created by Pt 3.4 of the LPA and Ch 17A, Pt 4 of the UCPR. The applicant submitted that, if the contended error of the primary judge was not corrected, the applicant would suffer a "substantial injustice", namely judgment pursuant to r 743H(4) in the amount of the costs assessors certificate, $83,031.62.[14] The applicant pointed to the respondent's failure between 11 March 2009 and October 2017 to advance matters or protect its position.

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7 Reasons at [16].

8 The quoted remarks are somewhat inaccurate, although it is correct that the Minister observed that some important elements in the new costs provisions included "how costs are recoverable" and "a costs assessment process under the rules of court".

9 Reasons at [16].

10 Reasons at [15], [17].

11 Reasons at [18]-[19].

12 Reasons at [18].

13 [2005] QCA 294 at [3].

14 AB1 109 at [21].

[14] The respondent opposed the granting of leave to appeal, arguing that the issue of the interaction of s 10 of the LAA and Pt 3.4 of the LPA and Ch 17A of the UCPR were unusual in the present case. Nearly nine years had elapsed between the orders of 2008 and the certificate. Further, the present case was not a suitable one for ventilation of the issue because of para 10 of the 2008 orders. The respondent submitted that, by reason thereof, it was unnecessary for the respondent to commence recovery proceedings against the applicant. The plain meaning of para 10 was that, upon its filing in the District Court, a judgment would issue for the amount in the certificate. The consent orders stood to be obeyed and both parties were obliged to comply with them.

[15] In my view, the matters raised by the applicant concerning the interaction of the LPA and the LAA are of general importance warranting the granting of leave and ones where the applicant's complaint of error is reasonably arguable and would result in a substantial injustice if not corrected.

Legislative provisions

The QLS Act and Edwards v Bray

[16] Before turning to the provisions of the LPA, it is convenient to outline the scheme for assessment of legal costs under the earlier and since repealed QLS Act which was considered in *Edwards v Bray*.[15]

[17] The QLS Act required a "client agreement" to be entered into which, by s 48A of the QLS Act, could be enforced "in the same way as another contract". The bringing of a legal proceeding in a court to recover payment of fees or costs was regulated by Pt 4B Div 3 of the QLS Act. As a prerequisite to the bringing of a legal proceeding to recover fees or costs, a practitioner or firm was required to give an account relevantly itemised to a client (s 48J(1)). Except with the leave of the court, such a proceeding could not be commenced before the expiry of one month after the account was given or where there was yet to be a conclusion to an assessment of the account applied for by the client (s 48J(2)).

[18] The QLS Act also provided for a costs assessment regime, which conferred an entitlement on a client to bring an application for an assessment of an account given under a client agreement (Pt 2A Div 6A). A client who sought such an assessment could apply to the clerk of the Solicitors Complaints Tribunal, who appointed a costs assessor to deliver an assessment to the parties (s 6ZA). A client doing so was taken to dispute quantum only and could not subsequently challenge the validity or enforceability of the contract (s 6ZB). An assessor's costs assessment was binding where no application had been made to a court within one month after assessment to determine the reasonableness of the costs charged, and a binding costs agreement was enforceable as a debt for the assessed amount and not subsequently challengeable (s 6ZE).[16]

[19] In *Edwards*, the Court[17] was required to consider whether, by virtue of the provisions of the QLS Act, there was more than one source of a solicitor's entitlement to payment. The argument advanced by the applicant law firm was that

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15 [2011] 2 Qd R 310.

16 However, the Court could extend time to make an application and retained a discretion to make any order considered appropriate including that the costs assessment was not binding: s 6ZF(2).

17 [2011] 2 Qd R 310 at [32] per Margaret Wilson AJA (the other members of the Court agreeing).

a statutory debt arose by virtue of s 6ZE of the QLS Act, which was sourced in statute and for which the limitation period was that in s 10(1)(d) of the LAA, such that there was an alternative cause of action to that arising in contract. The Court held[18] that the relationship between solicitor and client was contractual, which upon termination of the retainer, gave rise to a cause of action for moneys owing pursuant to contract. While s 10(1)(d) of the LAA applied where the claimant had a ***right of recovery*** sourced in a statute and a cause of action (that is, a factual situation which would support his or her right to judgment) had arisen,[19] s 6ZE(2) of the QLS Act was not a source of the applicant's right of recovery.[20] Rather, the Court held:[21]

> "It merely provided an appropriate procedural mechanism for the enforcement of the right to recover the fees or costs (a right that had been conferred by contract and that had arisen on the termination of the retainer) in circumstances where the only issue was quantum and that was now resolved in a way that was binding on the parties."

[20] In reaching that conclusion, the Court observed that:[22]

> "The provisions of Part 2A division 6A of the *QLS Act* were intended to provide a procedure for the resolution of quantum that was alternative to and less formal and expensive than Court proceedings. This is apparent from the scheme of the provisions: it was only the client who might ask for a costs assessment under Part 2A division 6A; the client might do so only where he or she disputed only quantum; and there was the safety net of review of the assessment by the Court on the application of either the client or the solicitor. That this was the legislative purpose is confirmed by reference to the Parliamentary Debates when the provisions were introduced. In short, these provisions were not intended to provide an alternative source of the solicitor's entitlement to fees or costs; nor were they intended to alter or provide an alternative limitation period applicable to the solicitor's claim."

[21] The relevant limitation period that was held to apply was one of six years from the accrual of the cause of action pursuant to s 10(1)(a) of the LAA.[23] The Court noted that, where there was a concern that the limitation period was about to expire, a solicitor's position could be protected by obtaining the court's leave to start a proceeding pursuant to s 48J(2) of the QLS Act.[24]

Relevant legislation

Provisions of the LPA

[22] The LPA commenced on 1 July 2007.[25] Its purpose as stated in s 3 of the LPA is broadly "to provide for the regulation of legal practice in this jurisdiction in the

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18 [2011] 2 Qd R 310 at [20]. The cause of action accrued when the work was completed (rather than on the expiration of the one month period in s 48J of the QLS Act at [23].

19 [2011] 2 Qd R 310 at [43].

20 [2011] 2 Qd R 310 at [44].

21 [2011] 2 Qd R 310 at [44].

22 [2011] 2 Qd R 310 at [42] (footnotes omitted).

23 Reasons at [23].

24 Reasons at [24].

25 *Proclamation – Legal Profession Act* 2007 *(commencing certain provisions)*, Subordinate legislation number 151 of 2007.

interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally" and "to facilitate the regulation of legal practice on a national basis".

[23] Chapter 3 regulates the conduct of a legal practice, setting out "the requirements for law practices for disclosure to clients regarding legal costs, the making and setting aside of costs agreements in relation to legal services, the billing of costs for legal services and the assessment of legal costs" (s 216(2)(c)). Part 3.4 of Ch 3 established a new costs disclosure and assessment regime. Its main purposes are identified by s 299 as being:

(a) to provide for law practices to make disclosures to clients regarding legal costs;

(b) to regulate the making of costs agreements relating to legal services;

(c) to regulate the billing of costs for legal services;

(d) to provide a mechanism for the assessment of legal costs and the setting aside of particular costs agreements;

(e) to provide for the maximum payment of costs in speculative personal injury claims.

[24] The obligation to make costs disclosures imposed by Div 3 of Pt 3.4 is an important feature of the regime set up by Pt 3.4. The failure to make the costs disclosures required by Div 3 has specified consequences in that the client need not pay the legal costs, nor may the law practice maintain proceedings against the client for recovery of legal costs until the costs have been assessed under Div 7 (s 316(1), s 316(2)). On an assessment of costs, a reduction proportionate to the seriousness of the failure may be made (s 316(4)). Further, a failure to make disclosure as required entitles the client to apply for the costs agreement to be set aside (s 316(3)).

[25] Division 4 of Pt 3.4 deals with the basis on which costs are recoverable, whether pursuant to a relevant costs agreement, or alternatively an applicable scale of costs or, if neither of those apply, a fair and reasonable value (s 319). Division 5 of Pt 3.4 deals with cost agreements, including the setting aside of such agreements. A costs agreement may be enforced in the same way as any other contract (s 326).

[26] Division 6 concerns billing and provides that legal costs cannot be recovered by the commencement of legal proceedings unless a bill has been delivered and 30 days have elapsed (s 329(1)).

[27] Division 7, entitled "Costs assessment", makes provision for an application for a costs assessment to be brought by a client (s 335) or by the law practice that has given a bill of costs to a client (s 337). In each case, the costs application is required to be made in the way provided for under the UCPR (s 335(10), s 337(5)). The consequences of the making of a costs application are specified in s 338 as follows:

> "(a) a person liable for the legal costs concerned can not be required to pay money into court on account of the legal costs; and

(b) subject to the leave of the court, *the law practice must not start any proceedings to recover the legal costs until the costs assessment has been completed*." (emphasis added)

Practice Direction 7 of 2007

[28] At the commencement of the LPA, there was no system in place under the UCPR for the assessment of solicitor and client costs. Practice Direction 7 of 2007, which applied from July 2007, provided that consequent upon the LPA, "a regime will be established for the assessment of solicitor and client costs by accredited assessors" and that the practice direction was intended to, and facilitated the assessment of, costs in the interim.

[29] It stated that by r 743A of the UCPR,[26] being a transitional provision, where an application was made to the court for a costs assessment under the LPA, the court may give directions appropriate for the carrying out of the assessment and, by practice direction, guidance may be given as to those appropriate directions. The practice direction provided that directions may deal with, *inter alia*, the determination by the costs assessor of the costs assessment, the filing of a certificate as to the determination and the entry of judgment in accordance with that certificate.

[30] The practice direction ceased to apply from December 2007[27] when a new Pt 4 of Ch 17A was inserted into the UCPR.

Pt 4 of Ch 17A of the UCPR

[31] Part 4 of Ch 17A, entitled "Assessment of costs under the Legal Profession Act",[28] relevantly inserted new rules 743 to 743I. A costs assessment application may be made to a relevant court (r 743A). However, where a law practice has started a proceeding in a court to recover costs, the assessment application must be made in those court proceedings and directions may be made in respect of the assessment application (s 743B).

[32] A procedure for appointment of a costs assessor is provided (r 743F). Provision is also made for directions to be given in relation to an application for assessment (r 743G(1)). At the directions hearing, the relevant court may also consider whether it is appropriate for any question to be tried before costs are assessed, such as whether a person claimed to be liable is liable to pay costs and whether the costs agreement is void (r 743G(2)).

[33] A costs assessor is obliged to file an assessment within 14 days of the assessment being completed and a copy must be given to each of the parties (r 737(2)). Once a certificate of assessment is filed in a relevant court, an application for directions may be made to the court (r 743H). Upon a certificate being filed, the court or any party may have the application relisted before the court (r 743H(2)). The court may give directions in relation to any issue in dispute between the parties or may decide

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26 A transitional provision inserted into the UCPR by the *Uniform Civil Procedure Amendment Rule (No 2)* 2007.

27 Practice Direction No 4 of 2008.

28 *Uniform Civil Procedure Amendment Rule (No 4)* 2007, s 2 and s 10. The assessment procedure for costs, other than costs to which the LPA applies, is dealt with in Pt 3 of Ch 17A of the UCPR and also includes provision, upon the bringing of an application for cost to be assessed, for the referral of issues to the court, and the entering of judgment by the registrar on the basis of the assessor's certificate.

the issue (r 743H(3)). If there are no issues in dispute, the court may give the judgment it considers appropriate, having regard to the certificate (r 743H(4)). The court may also delay giving judgment, or stay the enforcement of a judgment given, pending a review by the court of the costs assessor's decision (r 743H(5)).

Provisions of the LAA

[34] Section 10 of the LAA states

> "**Actions of contract and tort and certain other actions**
>
> (1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action arose—
>
> (a) subject to section 10AA, an action founded on simple contract or quasi-contract or on tort where the damages claimed by the plaintiff do not consist of or include damages in respect of personal injury to any person;…"

[35] By s 5 of the LAA, "action" includes any proceeding in a court of law. By s 42 of the LAA provision is made as to set-off or counterclaim. For the purposes of the LAA, a claim by way of set-off or counterclaim is deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

The appeal

Do the LPA and Ch 17A of the UCPR create an independent codified regime for the recovery of a law practice's costs to which the LAA does not apply?

Submissions

[36] The applicant argued that, given that an entitlement to fees arose on termination of the retainer in August 2007, the respondent's cause of action was founded on contract and barred by s 10(1)(a) of the LAA, the six year time limitation period having expired.

[37] The applicant argued that the primary judge erred in accepting the respondent's proposition that, under the new Ch 17A Pt 4, a new regime was established that fulfilled the purposes said to be absent in *Edwards*, particularly r 743H which provides for the giving of judgment on a certificate. The applicant submitted that the primary judge erred in his construction of the LPA by placing undue weight on the comments by the Minister in the second reading speech that an important element of the *Legal Profession Bill* 2007 included how costs were "recoverable". In the applicant's submission, this was too broad and vague to be of any real assistance to the interpretation of the relevant provisions. In addition, the words "recovery" and "recoverable" in the second reading speech did not suggest an intention that the regime for recovery of legal costs would stand outside the operation of the LAA.

[38] The respondent contended that the primary judge was correct in contrasting the regime applicable under the QLS Act, where the assessment scheme only determined disputes as to quantum and was not an alternative source of a solicitor's entitlement to costs, from that which applied under the LPA. In that regard, the

second reading speech was relevant to informing the purpose of the bill introducing the LPA (s 14B(3)(f) and s 14B(3)(g) of the *Acts Interpretation Act* 1954 (Qld)).

[39] The applicant also submitted that it was not evident from the primary judge's reasons how the stated primary purpose in s 3 of the LPA was applied to the ultimate conclusion reached by the primary judge and that, additionally, his Honour failed to refer to s 299 which prescribes the main purposes of Pt 3.4, which is entitled "Costs disclosure and assessment". The applicant submitted that the stated purposes of the LPA, and specifically Pt 3.4, speak of regulation and assessment *not* the recovery of legal costs and that the decision of the primary judge as to the interpretation of the LPA did not sit well with the stated purpose of the LPA, being the regulation of the profession and protection of the consumer.

[40] Further, as to the relevance of Practice Direction 7 of 2007 to the interpretation of Ch 3, Pt 3.4 of the LPA and Ch 17A of the UCPR, it was said that the practice direction is too broad to support a conclusion that it, together with the LPA, was intended to create a code for the recovery of legal costs as between a law practice and client. In any event, it was well accepted that delegated legislation should not be taken into account for the purposes of interpretation of the Act itself,[29] and an interim practice direction can be treated no higher.

[41] The applicant submitted that the LPA and UCPR should be construed so to avoid "patently unintended or absurd results"[30] and that the conclusion reached by the primary judge that an independent codified regime for a law practice's costs existed under the LPA and UCPR would lead to an absurd result that could not have been intended. This followed from the fact that no time limit was imposed by the LPA on applications by a law practice for assessment of its costs under s 337(1), save for that imposed by s 337(4). The primary judge's approach would create a situation where a law practice was not subject at law to the same limitations, in respect of enforcing its right to recover fees and costs as any other commercial entity, but rather could, by virtue of an application for costs assessment under s 337(1) of the LPA made at *any time*, have its costs assessed and seek judgment pursuant to r 743H(4) of the UCPR. The applicant submitted that it is unlikely that Parliament would have intended such a result and that the primary judge's interpretation of the LPA was inconsistent with the purpose of regulating the profession and protecting the consumer, who would be left unprotected.

[42] The respondent on the other hand argued that the decision of the primary judge did not produce an unintended or absurd result. It was submitted that the power of the relevant court to give judgment pursuant to r 743 of the UCPR, having regard to the costs assessor's certificate, avoided multiple proceedings, and that such a power did not exist under the QLS Act. That accorded with the stated purpose of the LPA in that it was "in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally".

[43] In support of its reliance on *Edwards*, the applicant submitted that the conclusion reached in that case accorded with the approach of the Supreme Court of New South Wales in *Coshott v Barry*[31] and *Preston v Nikolaidis*[32] in respect of a similar scheme

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29 *Mine Subsidence Board v Wambo Coal Pty Ltd* [2007] NSWCA 137 at [41] per Tobias JA.
30 *Footscray City College v Ruzicka* (2007) 16 VR 498 at [16] per Chernov JA.
31 [2012] NSWSC 850.
32 [2017] NSWSC 1527.

for costs assessment in the *Legal Profession Act* 1987 (NSW). The respondent argued that *Coshott* ought to be distinguished as it concerned New South Wales legislation that differed from the LPA. Similarly, *Preston* was said not to be of assistance as it concerned New South Wales legislation that was repealed in 1992.

Consideration

[44] The starting point in the construction of the provisions of the LPA is a consideration of the LPA's legislative purpose. An interpretation which will best achieve the legislative purpose of the LPA is to be preferred to any other.[33] There is nothing in the purposes stated in s 3 or in s 299 of the LPA which support an interpretation of Ch 3 Pt 3.4 of the LPA as being directed to the establishment of a separate statutory cause of action for the recovery of costs. Chapter 3, Pt 3.4 of the LPA is not expressed to provide alone, or in combination with the provisions of the UCPR, a code for the recovery of costs outside the application of the LAA. Nor do the provisions of the LPA expressly indicate that the broadening of the costs assessment procedure to allow a legal practitioner also to bring a costs assessment application was intended to provide an alternative cause of action to that founded in contract.

[45] I am not persuaded that ambiguity arises as to the legislative intention of the LPA such that regard should be had to extrinsic evidence. While it is the case, as the primary judge observed, that a law firm is no longer confined to applying to the court to commence a proceeding to recover costs, and may itself initiate the costs assessment procedure under Div 7 of Pt 4, the procedure set up under the LPA remains premised on the underlying contractual relationship resulting from a costs agreement. Indeed, the LPA states as much by recognising, in s 326, that subject to the provisions of the LPA, a costs agreement may be enforced in the same way as any other agreement.

[46] In my view, the primary judge erred in his interpretation of the introduction of an entitlement of a law firm to bring a costs assessment application that may result in a certificate and ultimately a judgment. The costs application scheme introduced by the LPA remains of an administrative nature. The costs assessment provisions of the LPA and the UCPR do no more than provide a procedural mechanism for the resolution of quantum and then enforcement of the right to recover legal fees, where there are no other issues in dispute. Where such issues arise directions may be made on the relisting of the application.

[47] The conclusion in *Edwards* remains relevant. While there are two avenues to judgment, one being by bringing a proceeding for moneys owing pursuant to the terminated retainer, and the other being by an assessment application, the underlying cause of action is contractual. It follows that an application to the court for assessment under the LPA is not an "action" for the purposes of the LAA. It is not surprising therefore that no period of limitation is provided as to the bringing of such an application. The failure to specify any time period in the LPA or the UCPR does not oust the operation of the LAA. Nor does this result in any injustice to the respondent. As observed in *Edwards*, the respondent could have protected its position by seeking leave to commence proceedings prior to the limitation period expiring pursuant to s 328 of the LPA.

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33 *Acts Interpretation Act* 1954 (Qld), s 14A.

[48] The continuing relevance of the findings made in *Edwards* accords with the approach adopted in *Coshott* and *Preston* in construing the similar NSW legislative scheme for costs assessment. That scheme, which confers an entitlement on a legal practitioner to bring a costs assessment application, has been interpreted as only providing an administrative mechanism for quantifying legal costs and as an aspect of the regulation of the legal profession, rather than as conferring a right independent of contract to the recovery of legal costs by a law practice from its client, or immunising the recovery of legal fees and costs from the operation of the limitation acts.

[49] In *Coshott*, the Court was required to consider the application of the *Limitation Act* 1969 (NSW) (NSW Act) to claims for unpaid legal costs by solicitors against clients brought pursuant to the scheme operating under the *Legal Profession Act* 1987 (NSW). After the termination of the solicitors' retainers, the law firm did not commence legal proceedings but applied under the scheme for an assessment of their costs.[34] Upon determination of the application for assessment by a costs assessor,[35] a certificate of determination was issued.[36] In respect of two of the matters, the certificates were filed and thereby took effect as judgments of the Court as contemplated by the NSW legislation.[37] In reviewing the reforms effected by the NSW legislation, her Honour observed that the reforms "were intended to provide a 'faster, easier and cheaper system of review of bills of costs', largely removing caps on the quantum of legal costs that could be charged whilst introducing new measures for the protection of clients, including providing stricter disclosure obligations and the costs assessment system".[38]

[50] It was common ground that the solicitor's right to recover fees gave rise to a cause of action founded on contract. It was also common ground that, on any analysis, the certificates taking effect as judgments were filed outside the six year limitation period applicable to a cause of action founded in contract. The law firm contended that no limitation period applied.

[51] The law firm argued that it was still open to it to commence legal proceedings but that, in any event, the effect of the NSW legislation was to provide solicitors with a choice of bringing legal proceedings or, alternatively, seeking an assessment resulting in the filing of a certificate and an enforceable judgment. In making that submission, it was argued that since the costs assessment regime introduced by the *Legal Profession Act* 1987 (NSW) imposed no time limit on a law practice bringing an application for assessment and made no provision for the NSW Act to be raised as a defence or plea in bar to the registration of an assessment certificate as a judgment, it must have been intended to provide a new procedure for recovery of costs which would *not* be subject to the NSW Act, so that it sat outside the reach of the latter Act.[39]

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34 *Legal Profession Act* 1987 (NSW), s 201.

35 Such person being designated a "Manager, Costs Assessment" being an administrative office under s 3 of the *Legal Profession Act* 1987 (NSW).

36 *Legal Profession Act* 1987 (NSW), s 208J(1).

37 *Legal Profession Act* 1987 (NSW), s 208J(3).

38 [2012] NSWSC 850 at [16].

39 [2012] NSWSC 850 at [30]-[32].

[52] In rejecting that argument, McCallum J observed[40] that it was "difficult to articulate a coherent analysis of the operation of the costs assessment system without giving some oxygen to that argument" and that s 68A of the NSW Act presupposed a procedure for the determination of whether the underlying cause of action had been extinguished. Yet, her Honour remarked that the deeming effect of the filing of the certificate under the costs assessment scheme meant that there was no practical opportunity to invoke such a procedure.[41] Her Honour held, however, that the conclusion that the recovery of legal costs by means of the costs assessment system attracts no statutory time bar is even more problematic, stating:[42]

> "In my view, the defendants' submissions in the present case misconceive the juridical foundation of the costs assessment system. A solicitor's entitlement to lodge an application for a costs assessment is not a source of right or title in itself. It is an aspect of the regulation of the legal profession under the *Legal Profession Act* 1987. The Act creates an administrative mechanism for quantifying legal costs in a variety of circumstances, some of which raise no limitation issue (such as costs ordered by a court). To the extent that it provides for the assessment of costs payable under contract, I do not think it alters the fundamental nature of the right and title to those costs."

[53] Her Honour held that,[43] subject to s 208J(3), the making of an application for a costs assessment did not immunise the right and title of a solicitor to bring a claim in contract for unpaid legal fees from the application of the NSW Act. As support for that view, her Honour referred to *Coburn v Colledge*.[44]

[54] Her Honour rejected an alternative submission that, if costs assessments are subject to the NSW Act, it was sufficient compliance that the application for assessment was lodged within six years of the cause of action accruing, stating:[45]

> "The short answer to that contention is that it is the underlying right and title to the debt, and not the cost assessment process, which is subject to the *Limitation Act*. Mr Turner acknowledged that a costs assessment is a non-curial proceeding. I am not satisfied that the lodging of an application for a costs assessment amounts to bringing an action on a cause of action within the meaning of the *Limitation Act*."

[55] In *Preston*, Slattery J endorsed the reasoning and conclusion in *Coshott* in respect of the NSW legislation as amended. In particular, his Honour adopted[46] McCallum J's analysis that a costs assessment under the NSW legislation was an administrative process, not an application to the Court.

[56] On the basis of the reasoning in these decisions also, the applicant submitted that the LAA applies and therefore the respondent's action for the recovery of legal

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40 [2012] NSWSC 850 at [33], [49].
41 As mentioned below, r 743H(3) of the UCPR provides for a legal issue to be determined.
42 [2012] NSWSC 850 at [41].
43 [2012] NSWSC 850 at [43].
44 [1897] 1 QB 702 at 705-706.
45 [2012] NSWSC 850 at [52].
46 [2017] NSWSC 1527 at [29].

costs and fees, which is founded on contract, is barred by the operation of s 10(1)(a) of the LAA as the action has been brought after the expiration of six years from the date on which the cause of action arose. The cost assessor's certificate did not create a right to recover professional fees and outlays that arose independent of that contract.

[57] It is clear that any proceeding in a court of law is expressly encompassed by the term "action" for the purposes of the LAA, and such a proceeding may include a court process commenced by an application. However, for the purposes of s 10(1)(a), an action (court proceeding) is one arising from a cause of action in contract. Such an action seeking a remedy based in contract cannot be brought after the six year time limitation.

[58] However, the costs assessment process available to the solicitor and the client under the UCPR which is initiated by the costs application is one for the quantification of the costs claimed by the solicitor under a costs agreement; that is, the debt arising from the contract. The recovery of the debt is a separate matter. The assessment concerns the quantification of the debt claimed by the solicitor under a costs agreement. (Where a solicitor brings a costs recovery proceeding, then by virtue of r 743B UCPR, any application for a costs assessment must be made in that proceeding, and at a directions hearing for the costs application under r 743G, directions can also be made as to the conduct of the proceeding).

[59] At a directions hearing conducted under r 743G, the court may make an order for an assessor to assess the costs the subject of the application, where quantum is the sole dispute. If the court considers it is appropriate that a question be determined before assessment, it can order that the application, being the broadened application, be heard by the court. After and upon a certificate of assessment being filed, the application for the assessment of costs may be relisted by the court or any party under r 743H. At that relisting, the court may give the judgment it considers appropriate having regard to the certificate, where there is *no issue in dispute*.

[60] Where a client brings a costs application under the UCPR, the client is using an administrative procedure for the determination of a dispute as to the quantum of a debt, and not seeking relief as to the vindication of the rights concerning the validity of the costs agreement or the contractual debt. The application by the client does not therefore constitute an action founded on contract; nor can it constitute a proceeding by the solicitor, the "person" referred to in s 10 of the LAA, for the purpose of that Act. The fact that, where appropriate, the administrative process can be made the vehicle for the determination of issues such as the contractual entitlement of the solicitor, or the validity of the contract founding a claim, does not lead to the client's application for assessment itself constituting an action for the purposes of the LAA. Indeed, r 743H(3) of the UCPR provides a practical opportunity to determine whether the underlying cause of action has been extinguished by the relisting procedure under r 743H.

[61] A costs application will result in the making of a costs assessment order where the sole dispute is as to quantum. Likewise, the court may give judgment after the filing of the certificate by the assessor, provided there is no remaining issue in dispute. Where there are such issues, the court may make directions or decide such issues. The matter then before the court is not an application for the assessment of costs but for the determination of the issue in question.

[62] It is difficult to see why the time period for the recovery of costs (as a contractual debt) should differ depending on whether the client challenges the quantum of costs or whether the solicitor brings a recovery proceeding (or costs assessment application). If an application for a costs assessment brought by the client sufficed as an "action" under the LAA, and one under which the solicitor could claim costs, the practical effect would be to remove a client's entitlement to raise a time limitation to the *solicitor's* claim once an application for costs assessment has been made by the *client*. That consequence does not promote the purpose of s 3 of the LPA to regulate legal practice in Queensland in the interests of the administration of justice and "for the protection of consumers".

[63] Where the costs assessment application is brought by the client and the solicitor has a concern that the time limitation will expire before costs are assessed, although the solicitor cannot usually bring a recovery proceeding before the costs assessment is completed, it can seek leave to do so under s 338.

[64] I am not persuaded that s 42 LAA provides assistance to the respondent in the present case. There is an important distinction between an original action in which a claimant is vindicating rights, as contemplated by s 42, and one in which an applicant uses an administrative procedure to ascertain quantum.

[65] Therefore, as I have stated, an application for costs assessment pursuant to s 335(1) of the LPA is not an "action" for the purposes of the LAA.

[66] In the present case, the respondents brought no action within the period prescribed by the LAA, which remained applicable. The applicant raised the issue of the respondent's entitlement to recover costs after the filing of the assessor's certificate in accordance with r 743H of the UCPR. The primary judge erred in finding that the respondent was not statute barred from recovering costs under the costs agreement.

[67] A final matter is the respondent's contention that the effect of para 10 of the 2008 orders rendered it unnecessary for the respondent to commence recovery proceedings against the applicant. That argument is misconceived. The order in para 10 of the 2008 orders of the District Court is a nullity in that it was beyond power to order that the certificate take effect as an order. Being an order of an inferior court, it is not necessary for this court to order that it be set aside.

Estoppel

[68] The applicant submitted that the respondent is estopped from relying on para 10 of the consent orders as the District Court, without notice to the parties and presumably relying on para 10 of the orders, entered "judgment" in the amount of the cost assessor's certificate. On 6 November 2017, the applicant applied to set aside that "judgment" and on 10 November 2017, the parties signed a consent order for the registrar to set aside the consent orders. Given that the order was a nullity, as was that of 2008, nothing further need be said about the estoppel submission.

Orders

[69] I would order that:

1. The application for leave to appeal be granted.

2. The appeal be allowed.

3. The order of 21 March 2018 be set aside.

4. The parties provide written submissions as to costs within 21 days of the date of these orders.

[70] **McMURDO JA:** I regret that I am unable to agree with the judgment of Philippides JA. In my opinion there is no impediment, from the *Limitation of Actions Act* 1974 (Qld) ("the LAA"), to the recovery of the respondent's assessed costs from the applicant under the regime prescribed by Chapter 17A Part 4 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the UCPR"). In essence, this is because a judgment could be given to the respondent in the proceeding which the applicant has brought under that regime, without the respondent having to commence its own proceeding.

[71] I agree that the respondent's right (or cause) of action is one founded upon a contract and that there is no distinct right of action to recover legal costs which is created by the *Legal Profession Act* 2007 (Qld) ("the LPA"). Rather, what the LPA creates is a new remedy to recover legal costs.

[72] I agree also that the respondent's right of action is of a kind within s 10(1)(a) of the LAA.

[73] Importantly, a provision such as s 10 does not affect the right of action, but instead acts as a procedural bar to a remedy. In the *Commonwealth v Mewett*,[47] Gummow and Kirby JJ said:

> "[A] statutory bar, at least in the case of a statute of limitations in the traditional form, does not go to the jurisdiction of the court to entertain the claim but to the remedy available and hence to the defences which may be pleaded. The cause of action has not been extinguished. Absent an appropriate plea, the matter of the statutory bar does not arise for the consideration of the court. This is so at least where the limitation period is not annexed by statute to a right which it creates so as to be of the essence of that right."
>
> (Footnotes omitted.)

In *WorkCover Queensland v Amaca Pty Ltd*,[48] the High Court applied that passage to the LAA. The Court there said that such a limitation provision "acts as a bar, when pleaded, to any remedy the plaintiff may seek when bringing an action for damages pursuant to that liability."[49]

[74] In that respect, the relevant statute in New South Wales is different. Section 63 of the *Limitation Act* 1969 (NSW) provides that, on the expiration of a limitation period fixed by or under that act for a cause of action to recover any debt, damages or other money, the right and title of the person formerly having the cause of action to the debt, damages or other money is, as against the person against whom the cause of action formerly lay and as against the person's successors, extinguished. Because of that difference, the reasoning in the New South Wales cases, upon

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47 [1997] HCA 29; (1997) 191 CLR 471 at 534-535.

48 [2010] HCA 34; (2010) 241 CLR 420 at 433 [30]; see also *Australian Iron & Steel Ltd v Hoogland* [1962] HCA 13; (1962) 108 CLR 471 at 488 (Windeyer J); *Commonwealth v Verwayen* [1990] HCA 39; (1990) 170 CLR 394 at 497 (McHugh J); *McKain v RW Miller & Co (South Australia) Pty Ltd* [1991] HCA 56; (1992) 174 CLR 1 at 43–44 (Brennan, Dawson, Toohey and McHugh JJ).

49 [2010] HCA 34; (2010) 241 CLR 420 at 433 [31].

which the applicant relies, such as *Coshott v Barry & Anor*,[50] is of limited relevance to the present case.

[75] The LAA affects the availability of a remedy by prescribing the period in which a proceeding, in which that remedy will be sought, is to be commenced. Section 10 provides that an "action" shall not be brought, on a cause of action of this kind, after the expiration of six years from the date on which the cause of action arose. The word "action" is defined to include "any proceeding in a court of law."[51]

[76] The way in which a proceeding may be commenced is prescribed by the UCPR. Rule 8 of the UCPR provides that a proceeding starts when an originating process, being either a claim (under Ch 2 Pt 3) or an originating application (under Ch 2 Pt 4), *is issued by a court*. An originating application and an application within a proceeding (under Ch 2 Pt 5) are different things. By r 12, a court may allow a proceeding to be started by an oral application, but only when urgent relief is sought and upon an undertaking to file an application.

[77] An application by a law practice for an assessment of the legal costs within its bill, made under s 337 of the LPA, is a proceeding in a court of law and is thereby an action under s 10 of the LAA. The process of an assessment of costs, if ordered in an application under this regime, may itself be an administrative exercise. But a court's disposition of an application, under the relevant provisions of the LPA and the UCPR, is an exercise of judicial power and the application is a proceeding in a court of law.

[78] However, in this case, the law practice, that is to say the respondent, has not brought the proceeding. The proceeding was brought by the applicant when she filed her application for a costs assessment pursuant to s 335(1) of the LPA. It is in that proceeding that the respondent says that it should be given judgment for its costs as assessed.

The LPA

[79] By s 335(1) of the LPA, a client may apply for an assessment of the whole or any part of legal costs. By s 335(2), a third party payer[52] may also apply for an assessment of the legal costs which are payable by it. By s 335(5), a costs application by a client or a third party payer must be made within a period of 12 months after the bill was given, a request for payment was made, or when the costs were paid if there was no bill or request.[53] By s 335(10), a costs application under s 335(1) or (2) must be made in the way provided for under the UCPR.

[80] Section 337 provides that a law practice that has given a bill under Division 6 of the LPA may apply for an assessment of the whole or any part of the legal costs to which the bill relates. By s 337(4), a costs application may not be made under that section unless 30 days have passed from when the bill was given, a request for payment was made, or the costs were paid, if there was neither a bill nor a request for payment or a costs application was made by another person relating to those

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50 [2012] NSWSC 850.

51 By s 5 of the LAA.

52 As defined in s 301 of the LPA.

53 This is no argument here that the client's application was brought outside that time period; in any case, it would only be a procedural bar which the respondent has not raised.

costs. Section 337(5) provides that an application by a law practice under this section shall be made in the way provided for under the UCPR.

[81] It is to be noted that s 337(4), unlike s 335(5), does not prescribe a time by which such an application must be made. In other words it does not impose anything in the nature of a limitation period.

[82] Sections 340 and 341 prescribe what a costs assessor must do and the criteria which the assessor must consider. Section 340 provides:

> "Assessment of complying costs agreements
>
> (1) A costs assessor for a costs application must assess any disputed costs that are subject to a costs agreement by reference to the provisions of the costs agreement if—
>
> (a) a relevant provision of the costs agreement specifies the amount, or a rate or other means for calculating the amount, of the costs; and
>
> (b) the agreement has not been set aside under section 328;
>
> unless the costs assessor is satisfied that—
>
> (c) the costs agreement does not comply in a material respect with any disclosure requirements of division 3; or
>
> (d) division 5 precludes the law practice concerned from recovering the amount of the costs; or
>
> (e) the parties otherwise agree.
>
> (2) The costs assessor is not required to initiate an examination of the matters mentioned in subsection (1)(c) and (d) ."

Section 341(1) provides:

> "Criteria for assessment
>
> (1) In conducting a costs assessment, the costs assessor must consider—
>
> (a) whether or not it was reasonable to carry out the work to which the legal costs relate; and
>
> (b) whether or not the work was carried out in a reasonable way; and
>
> (c) the fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that *section 340* applies to any disputed costs."

The UCPR

[83] Rule 678(2)(c) of the UCPR provides that Chapter 17A Part 4 of that act applies to costs payable or to be assessed under the LPA.

[84] Rule 743A (within Part 4) provides, by sub-rule (1), that a person applying for a costs assessment must apply to the "relevant court".[54] By r 743A(2), an application for a costs assessment must be in a certain form and accompanied by an affidavit containing the matters prescribed by sub-rules (3), (4) and (5). In particular, by r 743A(5), the affidavit must state whether the applicant disputes (or requires assessment of) all or what part of the costs and, if the applicant disputes all or part of the costs, the grounds on which the applicant disputes the amount of the costs or the applicant's liability to pay them.

[85] In the present case, the applicant applied to the District Court, by an application filed in the Townsville Registry, on 26 September 2008. Her application was given a date for a directions hearing on 20 October 2008. The application was accompanied by an affidavit which set out the grounds for her disputing the amount of the costs, the effect of which was that she conceded an amount of $75,000 of the $145,180 then sought by the respondent.

[86] Rule 743E provides that if the parties agree, the costs assessment will be carried out by a particular assessor pursuant to a consent order, in which case any directions hearing date previously allocated for the application will be vacated by the registrar. Rule 743F provides that if the parties do not agree that the assessment will be carried out by a particular assessor, a party may either apply to the registrar for the appointment of an assessor, or apply to the court for directions.

[87] Rule 743G provides for a directions hearing in an application. Rule 743G(2) provides that at a directions hearing, the court may consider matters such as whether the application for a costs assessment has been properly filed and served, whether it is appropriate to refer the application to mediation and whether it is appropriate for any question to be tried before the costs are assessed. Rule 743G(2)(d) gives examples of a question to be tried before the costs are assessed, as follows:

> "(i) whether a person claimed to be liable to pay costs is liable to pay those costs; and
>
> (ii) whether any costs agreement relied on by the lawyer concerned is void; and
>
> (iii) whether the lawyer concerned was negligent; and
>
> (iv) whether the lawyer concerned was in breach of the contract of retainer; and
>
> (v) whether the lawyer concerned acted without the instructions of, or contrary to the instructions of, the client …"

[88] Rule 743G(3) provides that at a directions hearing, the court may, if the grounds of dispute relate only to the amount of costs, order that a particular costs assessor be appointed to carry out the assessment or, if otherwise, it may order that the application be heard by the court.

[89] In the present case, the grounds of dispute appear to have related only to the quantum of costs. At the directions hearing,[55] a judge appointed an assessor to

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54 A term defined by r 743 to mean the court having the lowest monetary limit to its jurisdiction in a personal action that is not less than the costs claimed.

55 Held on 20 October 2008.

assess the whole of the costs payable pursuant to the client agreement between the parties. The judge made directions for the provision to the assessor of relevant material and written submissions. Her Honour ordered the costs assessment be completed by a certain date, and that it be conducted according to the provisions of the UCPR. The judge further ordered as follows:

> "10. The costs certificate issued by the costs assessor to be filed in the Court within seven days of the completion of the assessment and upon filing will take effect as an order of the Court."

[90] There was debate in this Court as to the effect or otherwise of the second part of that last order, the applicant contending that it was a nullity because it was beyond the power of the District Court to delegate its power to the costs assessor. Assuming that to be correct, the defect would not have affected the other orders which were then made.

[91] Rule 743H provides for another directions hearing, once a certificate of assessment is filed in court. In the present case, a certificate was filed on 21 July 2017, assessing the costs at $83,031.67. That assessment was received by the applicant on 17 August 2017.

[92] Rule 743H should be set out in full:

> "Application to court for directions after certificate of assessment filed
>
> (1) This rule applies if a certificate of assessment is filed in the relevant court.
>
> (2) The court or any party may, on notice to all parties who participated in the assessment, have the application relisted before the court.
>
> (3) In relation to any issue in dispute between the parties, the court may give directions or decide the issue.
>
> (4) If there are no issues in dispute, the court may give the judgment it considers appropriate having regard to the certificate.
>
> (5) The court may delay giving a judgment, or stay the enforcement of a judgment given, pending a review by the court of a decision of the costs assessor."

[93] It can be seen that a hearing under r 743H may occur by the initiative of the court or any party. If by then there is any issue in dispute between the parties, the court may give directions or decide the issue. If there is no issue in dispute, the court may "give the judgment it considers appropriate having regard to the certificate." The court may review a decision of the costs assessor, and delay giving a judgment, or stay the enforcement of a judgment given, pending that review. Where, at a hearing under r 743H, the law practice seeks a judgment, the law practice does not thereby commence a proceeding; rather, it makes an application within a proceeding.

[94] If the court decides, under r 743H, any remaining issue, the court could then give the judgment it considers appropriate. I do not understand it to be suggested that, if the court has to and does decide an issue, it would have no power to give a judgment in favour of the law practice, if that is appropriate having regard to the certificate and the outcome of the court's decision. The evident purpose of the regime provided by the LPA and this part of the UCPR is to provide for the final disposition of a dispute of a relevant kind. The jurisdiction conferred on a court by this regime qualifies,[56] but does not exclude, the exercise of a court's more general jurisdiction to determine a claim by a lawyer for legal costs.

[95] Consequently, under this regime, a law practice may be given a judgment without having to bring a proceeding, because it may be given a judgment in a proceeding brought by the client under s 335 of the LPA.

The effect of the LAA

[96] As I have said, s 10 of the LAA affects the availability of a remedy by prescribing the period in which a proceeding, in which that remedy will be sought, is to be commenced. Section 10 assumes that the proceeding will be one which is brought by the party seeking the remedy in question. It would appear that s 10 is not engaged in a case such as this one, where the remedy is sought by the party against whom the proceeding was commenced. On that view, s 10 would not affect the respondent's recovery of the assessed costs within the proceeding in the District Court.

[97] As noted earlier,[57] s 337 of the LPA prescribes no limitation period. I would accept that s 10 of the LAA does so, for an application under s 337 (ie. where the application for an assessment is made by the law practice). But that is not this case.

[98] An alternative view is that, although the remedy is not sought by the party who commenced the proceeding, s 10 provides a bar to the remedy unless the proceeding in which it is sought was commenced within the limitation period. In other words, an alternative view is that a law practice could be given a judgment in a proceeding brought under this regime by the client, only where the proceeding was commenced within six years of the accrual of the lawyer's right of action. But on that view, s 10 would provide no bar to the remedy in this case, because the proceeding here was commenced within the limitation period.

[99] That position is unsurprising and would not be conducive to any injustice. It would accord with the operation of s 42 of the LAA which provides as follows:

> "For the purposes of this Act, a claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded."

Ordinarily, there would be no pleadings in a proceeding under this regime and there are none in this case. Nevertheless, the claim by the respondent here, for a judgment for the costs as assessed, is in the nature of, or is analogous to, a counter-claim, which by s 42 is deemed to be a separate action commenced at the same time as the original action.

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56 See s 338 of the LPA.

57 At [81].

[100] Consequently, I respectfully disagree with the reasoning of the primary judge, who said that s 10 of the LAA does not apply to any proceeding under this regime. But as I have explained, the LAA does not provide a bar to the remedy which is sought by the respondent in this case.

Orders

[101] This application for leave to appeal raises important questions of law, and I would grant leave to appeal. I would order that the appeal be dismissed with costs. The outcome would be that the District Court would resolve the other question which was before it, namely whether there was an error by the assessor.

[102] **HENRY J:** I agree with Philippides and McMurdo JJA that leave to appeal should be granted.

[103] I agree with Philippides JA that the appeal should be allowed. I agree with her Honour's reasons and proposed orders. I wish only to elaborate on some aspects of the reasons why the appeal should be allowed and then deal with a procedural misunderstanding below.

[104] Part 4 of chapter 17A *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*"), "Assessment of costs under the *Legal Profession Act* 2007", provides a procedure by which a party may apply for a costs assessment, a process resulting in the filing of a certificate of assessment by the costs assessor.[58] Part 4 also includes, at r 743H(4), a power for the court, if there are no issues in dispute, to give the judgment it considers appropriate having regard to the certificate. Securing such a judgment is one path by which a party may recover costs, although part 4 does not make it the exclusive path. Indeed r 743B(1) in part 4 contemplates a law practice may recover costs by the traditional path of suing for their recovery.

[105] It is noteworthy part 4 does not contain a provision like r 740, found in part 3. Rule 740 provides that after the filing of the certificate "the registrar of the court must make the appropriate order having regard to the certificate" and that the order "takes effect as a judgment". There is no such automatic result after the filing of the certificate under part 4. More remains to occur if a party is to seek to recover costs under part 4. Firstly, the re-listing of the application has to be initiated, per r 743H(2). Secondly, any issues in dispute may be the subject of directions or decision by the court, per r 743H(3). Thirdly, "if there are no issues in dispute", the court "may" give the judgment "it considers appropriate", per r 743H(4). There is nothing in r 743H to suggest the ultimate decision whether to give judgment should not involve orthodox legal decision-making. It is orthodox that a court should not give judgment unless a party seeks it[59] and unless there is a proper factual and legal foundation for the giving of judgment.[60]

[106] The legal foundation for the seeking and giving of judgment under r 743H is simple contract. This heralds the potential application of s 10(1) *Limitation of Actions Act* 1974 (Qld), which relevantly provides "an action founded on simple contract" "shall not be brought after the expiration of 6 years from the date on which the cause of action arose". The determinative issue in this appeal is whether the seeking of judgment under r 743H comes within the meaning of "an action" in s 10(1)(a).

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58 See rr 743I and 737.

59 See for example the observations of McHugh J in *Coleman v Power* (2004) 220 CLR 1, 44 [79].

60 See for example the observations of Kitto J in *The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374.

[107] The meaning of "action" is defined in s 5(1) *Limitation of Actions Act* as including "any proceeding in a court of law". The learned primary judge concluded s 10 did not apply in this matter because a "proceeding is not required under" part 4's "regime for assessment and recovery of costs". Given that an application for a costs assessment is obviously a proceeding and is a necessary requirement of part 4's "regime", his Honour evidently meant a proceeding is not required for that aspect of part 4 allowing judgment to be given. This interpretation finds some support in the possibility of the giving of judgment being triggered by the relisting of the "application before the court" per r 743H(2). However it is important to appreciate r 743H actually operates at a stage after the application for a costs assessment has been granted.

[108] Rule 743H(2)'s reference to the "application" is in a literal sense a reference to the application to the court for a costs assessment. But by the time r 743H applies, the actual application for a costs assessment will have already resulted in the order sought by the application. The pursuit of further decision making pursuant to r 743H may occur via the relisting of the "application" but the proceeding in which the court makes such decisions is only incidentally connected with the application to the court for a costs assessment because that application will have been granted previously. This tells against the primary judge's conclusion because an incidental proceeding is itself a proceeding.

[109] Rule 8 *UCPR* provides that a "proceeding" starts when an originating process is issued in the form, inter alia, of an application. It follows the reference to an application in the *UCPR* is a reference to a proceeding. The *UCPR* is a statutory instrument deriving from s 85(4) *Supreme Court of Queensland Act* 1991 (Qld). It follows, by virtue of s 37 *Statutory Instruments Act* 1992 (Qld), that the words and expressions used in the *UCPR* have the same meanings as they have in the *Supreme Court of Queensland Act*.

[110] Schedule 5 *Supreme Court of Queensland Act* provides an inclusive definition of proceeding:

> "**proceeding** means a proceeding in a court (whether or not between parties), and includes—
>
> (a) an incidental proceeding in the course of, or in connection with, a proceeding; …"

[111] As earlier explained, the proceeding before the court at which a party can seek judgment per r 743H is incidental to the application to the court for a costs assessment. It meets the description, "an incidental proceeding in the course of, or in connection with, a proceeding". As already explained, an application is a proceeding. It follows that, even though a party's seeking of judgment per r 743H first requires the re-listing of the "application", the bringing of an ensuing hearing at which the party seeks judgment constitutes the bringing of a "proceeding". Section 10(1) *Limitation of Actions Act* precludes the bringing of such a proceeding after the expiration of six years from the date on which that party's cause of action founded on simple contract arose. This has the consequence that any attempt by the respondent to seek judgment through r 743H became time barred long ago.

[112] My final point involves clarification of a procedural misunderstanding below. There were only ever two applications filed. The first application, filed on 26

September 2008, was an application by the applicant (the respondent solicitors' disgruntled former client) for an order for the assessment of costs. The second application, filed 6 November 2017, again by the applicant, sought orders that the order of the Registrar of 12 October 2017 be set aside and that the proceedings "be permanently stayed". It is that application which came on for hearing before the learned District Court Judge.

[113] The filed materials do not show the respondent had, as the applicant's counsel and the primary judge mistakenly thought,[61] initiated the relisting of the matter for a hearing pursuant to r 743H. On the day of the listed hearing of the applicant's application the parties agreed, apparently because of time constraints, that the only component of the applicant's application to be argued that day would be the so-called "limitation point".[62] The "limitation point" as argued was relevant as one of a number of reasons to be advanced as to why there ought be a stay.

[114] I expose this apparent misunderstanding to avoid confusion below regarding the undecided balance of the applicant's stay application. Whether the limitation point fell for determination in the context of an application by the applicant for a stay or in the context of the respondent seeking judgment does not alter the outcome of the appeal. If it were the former, the question would have been whether the respondent would be barred from seeking judgment by s 10(1). If it were the latter, the question would have been whether the respondent was barred from seeking judgment by s 10(1). Either way the determinative issue is the same.

[115] The orders sought in the appeal included an order staying the proceedings below. The conclusion that the seeking of judgment through the mechanism of r 743H would be barred by s 10(1) means there is unlikely to be any residual utility in the continuation of proceedings incidental to the application for costs assessment – certainly the outcome of this appeal means there is none as a pathway to judgment for the respondent. Nonetheless, to cater for the unlikely possibility some direction or order, other than the giving of judgment, might remain to be sought, the prudent course is to leave the final fate of the stay application to the parties and the District Court.

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61 AR 741 [1.1]; AR 759 [4].

62 AR 6 L37.