SUPREME COURT OF QUEENSLAND

CITATION:	*LPD Holdings (Aust) Pty Ltd v Russells (A Firm)* [2015] QCA 122
PARTIES:	**LPD HOLDINGS (AUST) PTY LTD** ACN 060 214 511 (appellant) **v** **RUSSELLS (A FIRM)** (respondent)
FILE NO/S:	Appeal No 8254 of 2014 DC No 1716 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – Unreported, 5 August 2014
DELIVERED ON:	26 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2015
JUDGES:	Margaret McMurdo P and Gotterson and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to amend the notice of appeal is refused.** **2. The appeal is dismissed with costs.**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – IN GENERAL – OTHER MATTERS – where the appellant is the former client of the respondent, a law firm – where the respondent brought a claim against the appellant for the recovery of legal costs and disbursements – where the appellant did not file a notice of intention to defend or defence within the required time and default judgment was entered in favour of the respondent – where the appellant applied to the court below for orders that the default judgment be set aside, the whole of the legal costs be assessed, and the respondent deliver to the appellant itemised bills in respect of the costs – where the primary judge held that while the appellant's delay in instituting its application was minimal and no impediment to its success, it had not demonstrated it had a reasonable defence to the respondent's claim – where the primary judge also found that an agreement in September 2013 compromised each parties' positions as to fees payable – where the primary judge dismissed the appellant's application – where the appellant filed a notice of appeal – where the appellant originally contended that the primary

judge erred in failing to give sufficient weight to the appellant's explanation for the delay; in finding that the appellant had no defence to the claim; in taking into account the probable cost of the assessment of the appellant's costs; in finding that the bills were itemised bills; and in finding that the appellant's rights to an assessment of its costs merged in the September 2013 agreement – where the appellant amended its grounds of appeal in its second proposed amended notice of appeal to include the ground: that to the extent the September 2013 agreement precluded a court from ordering that the legal costs be assessed, it is void as against public policy – where at the hearing of the appeal the appellant remained confused as to its proposed grounds of appeal and the orders it was seeking – where counsel for the appellant submitted that it was now only seeking a declaration that the September 2013 agreement did not compromise the appellant's rights to an assessment of its legal costs – where the appellant is seeking to appeal from the judge's reasons, not from the orders made – where the appellant now concedes that it has no grounds to set aside the default judgment and has paid the respondent's costs in full – where the appellant now concedes that its application to the District Court to have all the respondent's costs assessed was misconceived because the costs were $1.4 million, well in excess of the District Court jurisdictional limit – where this Court has the power to make a declaration of the kind sought by the appellant only if it is in the interests of justice – whether the declaration should be granted

Legal Profession Act 2007 (Qld), s 3, s 308, s 331, s 335, s 338, s 344,

Egri v DRG Australia Ltd (1988) 19 NSWLR 600, cited
Westfield Management Limited v AMP Capital Property Nominees Ltd (2012) 247 CLR 129; [2012] HCA 54, cited

COUNSEL:	P Hastie QC for the appellant D Clothier QC for the respondent
SOLICITORS:	McBride Legal for the appellant Russells Lawyers for the respondent

[1] **MARGARET McMURDO P:** The respondent, Russells, is a firm of solicitors. The appellant, LPD Holdings (Aust) Pty Ltd, was their former client in a number of pieces of litigation. Russells brought a claim against LPD in the District Court for the recovery of legal costs and disbursements totalling $172,947.31. LPD did not file a notice of intention to defend or a defence within the required time. Russells obtained default judgment from the registrar on 23 June 2014. It is accepted the default judgment was regularly entered. On 15 July 2014, LPD applied to the District Court for the following orders:

"1. The judgment entered against [LPD] be set aside pursuant to rule 290 of the *Uniform Civil Procedure Rules 1999* (Qld);

2. The whole of the legal costs in relation to [Russells'] files for Supreme Court proceedings 6351 of 2012, Supreme Court proceedings 11108 of

2012 and Court of Appeal proceedings 2750 of 2013 be costs assessed in accordance with the *Legal Profession Act 2007* (Qld) and Chapter 17A Part 4 of the *Uniform Civil Procedure Rules 1999* (Qld);

3. [Russells] deliver itemised bills in respect of the costs charged in invoices 9691, 9964, 10049, 10105, 10268, 13449 and 13634 to [LPD] within 28 days of any orders stating:

   (a) full details of each item of work done;

   (b) the date each item of work was done;

   (c) the basis of the charge for the work;

   (d) the amount charged for carrying out each item of work; and

   (e) the details of the person who carried out the work.

4. [Russells] pay the costs of [LPD] of the application; and

5. Such further or other orders as the court sees fit."

[2] In brief, ex-tempore reasons, the primary judge accepted that LPD's delay in instituting its application was minimal and was no impediment to its success. The real question was whether it had an arguable defence to Russells' action. This case was curious because LPD did not submit it had a defence to the action and no draft defence was before the court. LPD submitted that it wanted to take advantage of the statutory provisions enabling it to seek delivery of an itemised bill of costs in respect of Russells' past services. LPD conceded that this would involve a very considerable further cost which ultimately one party would have to bear. The various bills to which the judge was taken in argument contained a reasonable amount of information as to their basis. LPD had not identified any of Russells' claims which were baseless or excessive. LPD's position was more difficult because in an agreement in September 2013 each party compromised their positions as to fees payable and to be paid. The parties' various rights essentially merged into new rights created by that agreement. His Honour was unpersuaded that there was a triable issue warranting the setting aside of the default judgment. The judge dismissed LPD's application and ordered it to pay Russells' costs to be assessed.

[3] LPD filed a notice of appeal against those orders on the grounds that the judge erred in failing to give sufficient weight to LPD's explanation for failing to file a defence; in finding that LPD had no defence to the claim; in taking into account the probable cost of an assessment of LPD's costs; in finding that the bills were itemised bills; and in finding that LPD's rights to an assessment of its costs merged in the September 2013 agreement. It sought an order setting aside the whole of the judgment below and an order setting aside the judgment entered by default together with an order in its favour for the costs of the appeal and the application below.

[4] LPD filed its written submissions on 30 September 2014. Russells filed its responsive written submissions on 28 October 2014. LPD filed its initial written submissions in reply on 7 November 2014 in which LPD agreed that in this appeal it "principally challenges the primary judge's finding as to the effect of the 2013 agreement" and that it was appropriate that it amend the notice of appeal to reflect LPD's contentions.

[5] LPD stated:

> "If it is intended to suggest that Russells do not contend that the [September 2013] agreement operates in a way that prevents the costs being assessed it is correct and the submission is welcome; and the appeal can be shortly disposed of. In any event, LPD is content with an order that clarifies that the 2 September 2013 agreement does not compromise its rights to apply for an order that there be an assessment of legal costs paid by LPD…to Russells or the exercise of any other rights respecting the conduct of the litigation by Russells.[1]"

[6] LPD's lawyers wrote to Russells later on 7 November stating that:

> "our client's chief concern was and is to preserve its entitlement to have its legal costs assessed. Please confirm that you do not contend and would not argue that the judgment by His Honour precluded another court making an order for the assessment of your costs.
>
> If that is your client's position we will take instructions with a view to having the appeal dismissed by consent with our client paying your costs in relation to the appeal to date."

[7] On 12 November 2014, Russells responded:

> "As is apparent from paragraph 25 of our submissions, the conclusions and orders reached by His Honour...preclude another court from making an order for assessment of your client's costs.
>
> Once default judgment was entered against your client on 23 June, 2014, the costs of which your client sought assessment became a judgment debt. It then became your client's task, at its application…to satisfy the Court that it had a defence to [Russells'] claim. It failed to do so. Further, we rely on the effect of the September, 2013 Agreement and the judgment made by the primary Judge in respect of the Agreement.
>
> With respect, the potential for an order for assessment by the primary Judge or another Court is not a relevant factor in the Appeal."

[8] On 12 December 2014, LPD filed an application to amend its notice of appeal together with a supporting affidavit from its solicitor, Ms Sophia Scott. Ms Scott deposed that counsel below had prepared the notice of appeal but LPD had instructed a different counsel to prepare the outline of argument in the appeal. LPD filed submissions in support of its application on 6 February 2015 together with amended written submissions in the appeal. These submissions stated that LPD had paid Russells the judgment sum below and "does not by this appeal seek to have that payment reversed and is content to await the decision of an assessor."[2]

[9] Russells filed its amended written submissions on 9 February 2015 and further amended written submissions on 20 February 2015. LPD filed its amended written submissions in reply on 27 February 2015 together with a further affidavit of Ms Scott attaching another proposed amended notice of appeal.

[10] In its amended written submissions in reply, the paragraph set out in [5] of these reasons, was struck through and LPD raised new contentions not raised in the primary

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1 LPD's initial written submissions in reply [5] and [6].

2 LPD's written outline of submissions [9].

court including the seeking of "a declaration that the agreement does not compromise [LPD's] rights to an assessment of its legal costs, and hence [LPD] does not pursue that part of paragraph 2B of the draft amended notice of appeal attached to the reply dated 7 November 2014 which sought a declaration that the agreement did not compromise *'any other rights to question the conduct of the respondent in the performance of its retainer."*"

[11] The grounds stated in its second proposed amended notice of appeal, exhibit "SCS-5" to Ms Scott's affidavit of 27 February 2015, were that the primary judge erred in finding that LPD had no defence to the claim and that there was no basis to set aside the judgment; in taking into account the probable cost of an assessment of LPD's costs; in finding that LPD's rights to an assessment of its costs merged in the September 2013 agreement; and that to the extent that the September 2013 agreement precluded a court from ordering that the costs paid by LPD to Russells be assessed, it is void as against public policy. It sought orders that the whole of the judgment below be set aside; alternatively the dismissal of the application for an assessment of costs be set aside; an order that there be an assessment of costs paid by LPD to Russells; alternatively a declaration that the September 2013 agreement does not compromise LPD's rights to an assessment of the legal costs it paid to Russells; alternatively that the application be remitted to the District Court to be dealt with in accordance with the reasons of this Court; and that Russells pay LPD's costs of the appeal and the application below.

[12] At the hearing of this appeal LPD remained confused as to its proposed grounds of appeal and the orders it was seeking. Counsel for LPD stated that all LPD wanted was the declaration.[3] It was no longer seeking a specific order to set aside the dismissal of the application for an assessment of costs and nor was it seeking an order that there be an assessment of costs. It was no longer seeking an itemisation of the seven bills of costs. At the conclusion of its initial oral submissions, LPD's counsel stated that LPD was seeking orders that the appeal be allowed, the whole of the judgment below be set aside and that this Court declare that the September 2013 agreement did not compromise LPD's rights to an assessment of its legal costs, together with costs.[4] At the conclusion of its submissions in reply, LPD's counsel asked for this Court; "to decide that the decision made that the September agreement precludes [LPD] seeking an assessment of costs is wrong. And the way to do that is to allow the appeal and to set aside the dismissal of that part of the application that relates to it."[5]

LPD's contentions

[13] LPD contends that it paid a total of about $1.4m in fees to Russells. Its last bill was dated 28 March 2014 so that its application for an assessment of costs was well within time.[6] The litigation was complex but the size of the bill in comparison to the stage of litigation reached was extraordinary and in itself justified an order for a costs assessment.

[14] There was no basis for the judge to conclude that LPD's rights as to costs were compromised in the September 2013 agreement. The agreement did nothing more than compromise the due date for the payment of the then outstanding accounts and establish a regime for payments for work done over the following six months. It did not contain any form of release from claims and it did not have the effect of releasing Russells from having its costs assessed. It did not vary the original agreement retainer

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3 T1-3 – 1-5.
4 T1-25.
5 T1-47 lines 15 – 17.
6 *Legal Profession Act* s 335(5).

which informed LPD of its rights to an assessment. It was nonsense to suggest that the agreement precluded past and future costs from being assessed under the statutory regime which governs legal costs.

[15] Alternatively, if the September 2013 agreement amounted to a compromise of LPD's rights to an assessment of costs, LPD argued it was void as against public policy. It would amount to an unlawful attempt to oust the jurisdiction of the court to order an assessment of legal costs and was therefore void: *Westfield Management Limited v AMP Capital Property Nominees Limited*.[7]

[16] The purposes of the *Legal Profession Act*[8] include to regulate legal practice 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. The Act confers upon clients a right to a costs assessment.[9] Legal practitioners are required to inform clients of that right in the event of a dispute as to legal costs.[10] An application for an assessment of costs can be made even if the costs have been wholly or partly paid.[11] If a costs application is made, ordinarily the law practice must not start any proceedings to recover legal costs until the costs assessment has been completed.[12] Only a sophisticated client as defined in the Act (and it is common ground that LPD is not a sophisticated client in that sense) may contract out of Division 7 of Part 3.4 of the Act which deals with costs assessments.[13] The scheme of the Act makes clear that if the September 2013 agreement is construed as Russells contends, it should be declared void and unenforceable as against public policy.

[17] LPD no longer sought to set aside the default judgment which it had paid. LPD also accepted that its application for a costs assessment below was wrongly brought as the total amount of costs to be assessed (about $1.4m) exceeded the jurisdictional limit of the District Court.[14] LPD has now brought an application for an assessment of Russells' costs in the Supreme Court. This application has been adjourned pending the determination of this appeal. Russells made clear in their outlines of argument and correspondence that they intended to rely on the primary judge's statement in his reasons that the parties in the September 2013 agreement compromised their positions as to fees payable and to be paid and their various rights essentially merged into new rights created by that agreement. This Court should therefore give leave to amend the notice of appeal and grant LPD a declaration that the September 2013 agreement does not compromise either its rights to an assessment of the legal costs it paid to Russells, or any other rights to question Russells' conduct in the performance of its retainer. In the absence of such a declaration, Russells could argue at the hearing of the application for a costs assessment that an issue estoppel had been created by the primary judge's comments in his reasons: *Egri v DRG Australia Ltd*.[15]

Russells' contentions

[18] Russells contends that LPD's application to amend its grounds of appeal to ask for a declaration should be refused. It did not seek this relief in the District Court. In

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7 [2012] HCA 54; (2012) 247 CLR 129, 143 [46] and [50].
8 *Legal Profession Act* s 3(a).
9 *Legal Profession Act* s 308(1)(i).
10 *Legal Profession Act* s 331(1)(a).
11 *Legal Profession Act* s 335(3).
12 *Legal Profession Act* s 338.
13 *Legal Profession Act* s 344.
14 Appeal Hearing T1-9 line 45 – T1-10 line 2.
15 (1988) 19 NSWLR 600, McHugh JA, 603; Clark JA, 611; and Mahoney JA who agreed with both, 601.

effect, it seeks to appeal from the judge's reasons, not from the orders made. This is not the purpose of an appeal. LPD seeks a declaration to quell a controversy which may never arise. For these reasons the appeal should be dismissed with costs.

[19] If the amendment to the notice of appeal is allowed, the Court should not grant the declaration. LPD was a commercial client of Russells. Between 8 July 2010 and 28 March 2014 Russells issued 50 invoices pursuant to the retainer agreement, most of which were paid without complaint. In October 2012, LPD questioned some costs and raised concerns about how the proceedings had been conducted and the outcomes. LPD retained Mr Peter Rosengren, an experienced independent commercial solicitor, to review Russells' invoices and Russells granted him access to their files and other information as required. The parties then entered into the September 2013 agreement by way of variation to the original retainer. This was not a mere agreement to allow a client with cash flow difficulties some liberty in payment arrangements. It had a broader purpose and effect, compromising the parties' rights as to how much money was owed and how it was to be paid. Counsel for LPD below expressly confirmed that LPD was not asserting any excessive charging; its application was based on its claim of a legal right to an assessment.[16] LPD was now bound by the conduct of its case below.

[20] LPD did not argue below that the September 2013 agreement was void as being against public policy. If the Court entertained the argument on appeal, it should be rejected. There is nothing against public policy or the terms of the *Legal Profession Act* which prohibit a solicitor and client from reaching a genuine compromise in a costs dispute. Costs applications must be made under the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) which provide for the resolution of disputes by alternative dispute resolution. The application to amend the notice of appeal should be refused. The declaration should not be granted. The appeal should be dismissed with costs.

Conclusion

[21] The primary judge considered the case "curious". Like Alice's adventures in Wonderland, this case on appeal became "curiouser and curiouser."[17] As Russells rightly identifies and as counsel for LPD well knows, appeals are from orders, not reasons. The primary judge dismissed LPD's application with costs. Its application is set out in [1] of these reasons.

[22] LPD sought at first instance to set aside the default judgment entered on 23 June 2014. LPD now concedes it has no grounds to set aside that judgment which it has paid in full. The primary judge was right to refuse this part of LPD's application.

[23] LPD sought at first instance to have all Russells' costs assessed in accordance with the *Legal Profession Act* and the *UCPR*. LPD now concedes that this was misconceived as its costs were about $1.4m, well in excess of the District Court jurisdictional limit. For that reason and without considering LPD's arguments as to the construction of the *Legal Profession Act*, the primary judge was right to dismiss this part of LPD's application.

[24] LPD also sought at first instance an order that Russells deliver itemised bills in respect of seven invoices. LPD no longer seeks that order. It follows that the primary judge was right to dismiss this part of LPD's application and properly dismissed the whole application with costs.

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16 T1-8 line 45 – T1-9 line 10.

17 Lewis Carroll, *Alice's Adventures in Wonderland*, Ch 2.

[25] This Court has the power to make a declaration of the kind sought by LPD in its proposed amended notice of appeal. But an appeal court is not a court at first instance and would be reluctant to grant a declaration unless to do so was clearly in the interests of justice. The declaration was not sought at first instance. The appeal itself has become pointless and is misconceived. I am unpersuaded this is an appropriate case for this Court to grant a declaration of the kind sought. LPD has brought an application in the Trial Division of the Supreme Court for a costs assessment of Russells' bills. If LPD wishes to apply for a declaration concerning the September 2013 agreement, the sensible course would be for it to do so in the Trial Division, with the application perhaps returnable at the hearing of LPD's application for the costs assessment.

[26] For these reasons the application for leave to amend the notice of appeal should be refused and the appeal dismissed with costs.

[27] **GOTTERSON JA:** I agree with the orders proposed by McMurdo P and with the reasons given by her Honour.

[28] **PHILIPPIDES JA**: I agree with the reasons of McMurdo P and the orders proposed.