SUPREME COURT OF QUEENSLAND

CITATION:	*LPD Holdings (Aust) Pty Ltd v Russells* [2017] QSC 45
PARTIES:	**LPD HOLDINGS (AUST) PTY LTD** **ACN 060 214 511** (applicant) **v** **RUSSELLS (A FIRM)** (respondent)
FILE NO/S:	No 2571 of 2015
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2017; Respondent's Supplementary Written Submissions filed 1 March 2017; Applicant's Written Submissions in Reply filed 2 March 2017
JUDGE:	Flanagan J
ORDER:	**Respondent's application filed 7 December 2016 is dismissed. I will hear the parties as to costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT: STAY OR DISMISSAL OF PROCEEDINGS - where the respondent seeks summary judgment pursuant to rule 293 of the *Uniform Civil Procedure Rules* 1999 – where the respondent seeks summary dismissal of the applicant's proceedings pursuant to rule 658 of the *Uniform Civil Procedure Rules* 1999 or the inherent jurisdiction of the Court – where the present proceedings constitute an application under statute for an order for the assessment of legal costs – whether the legal costs payable by the applicant to the respondent give rise to a *res judicata,* having been finally determined in District Court proceedings – whether a costs agreement can compromise the applicant's rights to an assessment of the whole of the legal costs it paid to the respondent – test for summary dismissal on the basis of *res judicata* or issue estoppel – whether the previous proceedings and current proceedings concern the same cause of action and

give rise to a *res judicata* – whether default judgment can found a successful plea of *res judicata*

ESTOPPEL – ESTOPPEL BY JUDGMENT - RES JUDICATA OR CAUSE OF ACTION ESTOPPEL - ANSHUN ESTOPPEL - ISSUE ESTOPPEL – where the applicant seeks summary dismissal - whether a judgment obtained by default gives rise to an Anshun type estoppel

Legal Profession Act 2007 (Qld), s 335(1), s 335(3), s 335(5), s 335(10)
Uniform Civil Procedure Rules 1999 (Qld), r 293, r 658, r 743A, r 743B

Atthow v McElhone [2010] QSC 177, cited
Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl.-Ing Burkhardt GmbH [2001] 1 Qd R 461, cited
Bazos v Doman [2001] NSWCA 347, cited
Blair v Curran (1939) 62 CLR 464, cited
Carl Zeiss Stiftung v Rayner & Keeler Ltd [No 2] [1967] 1 AC 853, cited
Clout & Ors v Klein & Ors [2001] QSC 401, cited
Commonwealth Bank of Australia v White (No 4) [2001] VSC 511, cited
Cordes v Dr Peter Ironside Pty Ltd [2010] 2 Qd R 235, cited
Dey v Victorian Railways Commissioners (1949) 78 CLR 62, cited
Edington v Board of Trustees of the State Public Sector Superannuation Scheme [2012] QSC 211, cited
General Steel Industries Inc. v Commissioner for Railways (N.S.W.) (1964) 112 C.L.R. 125, cited
Higgins v Higgins [2005] 2 Qd R 502, cited
HM Hire Pty Ltd v National Plant and Equipment Pty Ltd [2014] 2 Qd R 44, cited
Jackson v Goldsmith (1950) 81 CLR 446, cited
KC Park Safe SA Pty Ltd v Adelaide Terrace Investments Pty Ltd (Unreported, Federal Court of Australia, Mansfield J, 17 September 1998), cited
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993, cited
Kuligowski v Metrobus (2004) 220 CLR 363; [2004] HCA 34, cited
LPD Holdings (Aust) Pty Ltd v Russells (A Firm) [2015] QCA 122, related
Mango Boulevard Pty Ltd v Spencer & Ors [2008] QCA 274, cited
Mango Boulevard Pty Ltd v Spencer & Ors [2010] QCA 207, cited
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589, considered

Slaveska v State of Victoria & Ors [2015] VSCA 140, cited
Spencer v Commonwealth of Australia (2010) 241 CLR 118, cited
Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507, cited
Westfield Management Limited v AMP Capital Property Nominees Limited (2012) 247 CLR 129; [2012] HCA 54, cited

COUNSEL: P P McQuade QC, with J Green, for the applicant/respondent
P A Hastie QC for the respondent/applicant

SOLICITORS: Russells for the applicant/respondent
McBride Legal for the respondent/applicant

[1] By application filed 7 December 2016, Russells seek summary judgment pursuant to rule 293 of the *Uniform Civil Procedure Rules* 1999 ("UCPR") or alternatively, the dismissal of LPD's proceedings pursuant to rule 658 or the inherent jurisdiction of the Court.

[2] LPD's proceedings are for an order for the assessment of all legal costs invoiced by Russells to LPD for legal services provided from May 2010 to May 2014.

[3] LPD's proceedings were commenced by application brought pursuant to the *Legal Profession Act* 2007 (Qld) and chapter 17A, part 4 of the UCPR. Section 335(1) of the *Legal Profession Act* provides that a client may apply for an assessment of the whole or any part of legal costs.

[4] Rule 293(1) of the UCPR, which deals with summary judgment for a defendant, provides that a defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff. LPD's proceedings were commenced by application rather than claim and statement of claim. Whilst directions were made for the filing and serving of Points of Claim and Points of Defence, Russells has not filed a notice of intention to defend. Rule 293 therefore does not apply.

[5] The alternative basis for the relief sought is rule 658 which provides:

> "(1) The court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.
>
> (2) The court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document."

[6] Russells submits that the proceedings ought to be summarily dismissed or alternatively, permanently stayed pursuant to rule 658 or pursuant to the Court's inherent jurisdiction, as:

(a) the costs payable by LPD to Russells are *res judicata,* or subject to issue estoppel, having been finally determined in previous proceedings by a judgment of the District Court; and

(b) further or in the alternative, it was unreasonable (in an *Anshun* sense)[1] for LPD not to have pursued any right to an assessment of costs in those earlier proceedings and neither the *Legal Profession Act* nor the UCPR, entitles LPD to now seek such an assessment.

[7] LPD submits that the previous District Court proceedings do not give rise to the application of either *res judicata,* issue estoppel or *Anshun* estoppel justifying the entry of judgment pursuant to rule 658 or the Court's inherent jurisdiction.

Background

[8] By an agreement in writing dated 27 May 2010 ("the May 2010 Retainer") LPD engaged Russells to provide the following legal services:

> "Advice to the Client in relation to recent conduct of the board of Macarthur Minerals Limited, the conduct of any dispute in regard to that conduct, and advice and assistance concerning the Client's investment in Macarthur Minerals in general.
>
> Such other services which are, in the Firm's opinion, reasonably necessary for that purpose or which are, in the Firm's opinion, incidental thereto."

[9] Pursuant to the May 2010 Retainer Russells acted for LPD in Supreme Court proceedings 6351 of 2012 and 11108 of 2012.

[10] On 2 September 2013 LPD and Russells entered into an agreement varying the May 2010 Retainer ("the September 2013 Agreement").

[11] Prior to the September 2013 Agreement Russells had given and LPD had paid numerous tax invoices for legal services provided pursuant to the May 2010 Retainer. The first invoice, no. 9691, was sent on 8 July 2010.

[12] On 28 March 2014 Russells wrote to LPD giving notice of its intention to cease to act.

District Court Proceedings

[13] On 9 May 2014 Russells filed a claim and statement of claim in the District Court, being proceedings BD1716/14. The claim sought the payment of the sum of $172,947.31 together with interest, pursuant to section 58 of the *Civil Proceedings Act* 2011. Paragraph 3 of the statement of claim referred to the May 2010 Retainer and paragraph 5 referred to the September 2013 Agreement. The material terms of the

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[1] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

September 2013 Agreement were pleaded in paragraph 6. These material terms included:

(a) the agreement was a written variation of the May 2010 Retainer;

(b) LPD acknowledged its indebtedness to Russells for $180,348.96 being sums due pursuant to the May 2010 Retainer since 5 June 2013;

(c) LPD agreed to make payments of $17,500 to Russells on dates from 1 July 2013 to 1 December 2013;

(d) if Russells' usual fees for any month were less than $17,500 Russells would credit the balance to the current debts, and if they were greater, Russells would accept the sum of $17,500;

(e) LPD would pay future barristers' fees in advance;

(f) Russells would make no charge for any professional fees for any work involved in the amendment of the statement of claim in certain Supreme Court proceedings, following the judgment of McMurdo J delivered 28 August 2013.

[14] Paragraph 7 of the statement of claim pleaded that pursuant to the May 2010 Retainer, as varied by the September 2013 Agreement, Russells rendered further services to LPD, more particularly set out in five invoices respectively dated 23 August 2013, 6 November 2013 (two invoices), 6 December 2013 and 28 March 2014.

[15] Paragraph 9 of the statement of claim pleaded that since the September 2013 Agreement LPD had paid certain sums but that an amount of $172,947.31 remained payable by LPD to Russells.

[16] On 23 June 2014 the Registrar gave judgment in default of pleadings in the amount of $184,059.35 including $11,112.04 interest.

[17] On 15 July 2014 LPD filed an application to set aside the default judgment and for Russells' costs to be assessed. Paragraph 2 of the application sought an order that the whole of the legal costs in relation to LPD's files for Supreme Court proceedings 6351 of 2012 and 11108 of 2012 and Court of Appeal proceeding 2750 of 2013 be costs assessed in accordance with the *Legal Profession Act* and chapter 17A part 4 of the UCPR. By paragraph 3 of the application LPD sought an order that Russells deliver up itemised bills in respect of the costs charged in certain invoices dated 8 July 2010, 5 November 2010, 7 December 2010, 21 January 2011, 9 March 2011 and 23 November 2012.

[18] In the course of the hearing before Botting DCJ to set aside default judgment, counsel for LPD clarified that LPD was not asserting that the legal fees billed were excessive, rather LPD asserted its legal right to have the costs assessed.

[19] Botting DCJ refused the application to set aside default judgment. There was no issue that the judgment had been regularly entered. His Honour was of the view that any delay in seeking to have the judgment set aside was minimal. As to whether there was an arguable defence to Russells' claim, his Honour noted as follows:

> "The case is, in one sense, curious, because this is not, in fact, a case where it is said that there is a defence to the action. Rather, it is submitted that the applicant client wishes to take advantage of the statutory provisions which enable it to seek a delivery of an itemised bill of costs in respect of the services provided in the past."

[20] His Honour noted that LPD was unable to identify any claims for legal costs which were either baseless or excessive. Botting DCJ continued:

> "I think the client's position is made the more difficult because of, as I perceive it, an agreement entered into in September of 2013 in which each party compromised, as I perceive it, their respective positions in respect of the fees payable and to be paid. As I say, that document appears to me to be an agreement by the parties by which their various rights essentially merge into the new rights created by the agreement of September 2013.
>
> In the circumstances, I am not persuaded that there is a triable issue such as would warrant my setting aside the judgment by default. I think I may have already mentioned that there is, in fact, not a draft defence that has been put before me. But, in the circumstances, that, perhaps, does not carry as much weight as it would in other cases. If I had come to a different conclusion, then I would have set aside the judgment, only on the basis that there be some condition imposed. It is not necessary to think through exactly what it would be, but – which would do something, anyway, to secure the plaintiff's costs of the assessment. But, as I say, at the end of the day, I am not satisfied that this is a proper case for me to exercise the discretion in favour of the applicant and set aside the default judgment. The order should be, I suppose, application dismissed and costs to be assessed."[2]

Botting DCJ ordered that the application be dismissed. LPD not only sought to set aside the default judgment but also the relief referred to in [17] above.

Court of Appeal Decision

[21] LPD appealed the order of Botting DCJ, refusing the application to set aside default judgment. Margaret McMurdo P (with whom Gotterson and Philippides JJA agreed) wrote the primary judgment. Her Honour noted that LPD in its amended written submissions in reply sought an amendment of the notice of appeal seeking "a declaration that the (September 2013) 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*

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[2] Transcript of judgment, 5 August 2014, 3, lines 28-46.

question the conduct of the respondent in the performance of its retainer'".[3] Her Honour identified LPD's contentions as follows:

> "LPD contends that it paid a total of about $1.4m in fees to Russells.[4] Its last bill was dated 28 March 2014 so that its application for an assessment of costs was well within time.[5] 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.
>
> 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 which informed LPD of its right 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.
>
> 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.*[6]"[7]

[22] The Court of Appeal refused the application for leave to amend the notice of appeal and dismissed the appeal with costs. In dismissing the appeal Margaret McMurdo P observed:

> "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.
>
> 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 $1.4 m, 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.
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> 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

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3 *LPD Holdings (Aust) Pty Ltd v Russells (A Firm)* [2015] QCA 122 per Margaret McMurdo P at [10].

4 I note that in paragraph 18 of the Points of Defence the respondent denies that the applicant has paid a total of $1,442,766.81 in respect of legal costs. The respondent does not dispute that an amount in excess of $1.4m was paid by the applicant but the amounts paid totalled $788,673.44 for the respondent's fees (ex GST), $516,416.61 in disbursements (including Counsel's fees, ex GST) and $129,687.36 GST.

5 *Legal Profession Act,* section 335(5).

6 (2012) 247 CLR 129, 143 [46] and [50]; [2012] HCA 54.

7 *LPD Holdings (Aust) Pty Ltd v Russells (A Firm)* [2015] QCA 122 per Margaret McMurdo P at [13]-[15].

> the primary judge was right to dismiss this part of LPD's application and properly dismissed the whole application with costs.
>
> 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."[8]

Application for Costs Assessment

[23] The application referred to by the President in the above quoted passage is the application for costs assessment filed 12 March 2015. By this application LPD seeks an assessment of all of the costs invoiced by Russells to LPD for legal services over a period of four years from May 2010 to May 2014.

[24] Pursuant to directions made 4 May 2016, Points of Claim and Points of Defence have been filed and served. The directions made 4 May 2016 were made in circumstances where LPD had previously filed (on 13 April 2016) an application for a preliminary question to be determined in respect of the effect of the September 2013 Agreement. The 4 May 2016 directions also provided for security for costs, the filing of affidavits and the hearing of the whole of the application for a costs assessment on the civil list.

[25] The Points of Claim in paragraphs 3, 4 and 5 plead the May 2010 Retainer. Paragraphs 20 and 21 plead the September 2013 Agreement. Paragraph 22 pleads, by reference to date, invoice number and amount (inclusive of GST) the memoranda of fees and disbursements (and credited fees) rendered as tax invoices by Russells. The period covered is from 8 July 2010 to 6 December 2013. Paragraphs 24 to 30 plead the default judgment proceedings in the District Court and the subsequent appeal, as well as the fact that the default judgment amount has been paid. Paragraphs 31 to 35 plead the basis for the assessment of costs. By paragraph 35 LPD disputes, and requires an assessment of, the whole of the costs paid to Russells. Paragraph 35 pleads the grounds for objection. The grounds, as particularised, relate to the reasonableness of the work undertaken by Russells, the reasonableness of the work carried out by Russells and the reasonableness of the costs charged.

[26] Relevantly in paragraph 1(d) of the Points of Defence Russells pleads that:

> "(d) … pursuant to the District Court Judgment:
>
> (i) any rights the applicant had:

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[8] *LPD Holdings (Aust) Pty Ltd v Russells (A Firm)* [2015] QCA 122, per Margaret McMurdo P at [22]-[25].

A to challenge that any amounts paid to the Respondent under the Retainer or September Agreement were not in fact due and payable; or

B to seek an assessment of any amounts paid to the Respondent under the Retainer or September Agreement pursuant to the *Legal Profession Act,* 2007

merged with the District Court Judgment;

(ii) the appropriate remedy for challenging the District Court Judgment was to appeal that judgment;

(iii) an appeal to the Court of Appeal in respect to the District Court Judgment was dismissed by that court on 26 June, 2015; and

(iv) in the premises of sub-paragraphs (i) to (iii) herein the Applicant is no longer entitled to challenge or to seek an assessment of legal costs paid pursuant to the Retainer or September Agreement."

[27] LPD in paragraph 1 of its Points of Reply (which were not directed) addresses paragraph 1(d) of the Points of Defence as follows:

"(o) the statement of claim upon which the District Court default judgment was granted was based upon the September agreement;

(p) any rights the respondent had under the September agreement merged with the District Court default judgment;

(q) the District Court judgment was granted in default of the filing of a notice of intention to defend;

(r) the right or entitlement of the applicant to an assessment of costs:

(i) is not a right or entitlement based upon the September agreement;

(ii) was not a matter which was necessary to decide or which was actually decided by the granting of the default judgment;

(s) the statutory right or entitlement of a client to an assessment of costs is not an identical issue to a debt claim for the costs such as to found an estoppel by record or an issue estoppel or result in a merger of that right with a District Court default judgment;

(t) the District Court judgment did and does not prevent the applicant challenging or seeking an assessment under statute of the legal cost paid to the respondent."

[28] LPD does not seek the declaratory relief foreshadowed in the Court of Appeal in its Points of Claim. In the course of hearing the present application it became apparent that LPD wishes to assert, as part of the application for an assessment of costs, that the September 2013 Agreement did not affect its right to apply for an assessment of its legal

costs. I therefore gave LPD leave to file amended Points of Claim and for both parties to file supplementary submissions.

[29] By these amendments to the Points of Claim LPD now alleges that properly construed, the September 2013 Agreement did not compromise LPD's rights to an assessment of costs charged by Russells. Further, or in the alternative, LPD alleges that if the September 2013 Agreement properly construed did compromise its rights to an assessment of its costs insofar as the agreement purported to compromise these rights, the September 2013 Agreement is void. The primary basis for this allegation is that the agreement would be inconsistent with the public policy underlying the *Legal Profession Act*. As foreshadowed in the Court of Appeal proceedings LPD now seeks the following declaratory relief:

(a) a declaration that the September 2013 Agreement did not compromise LPD's rights to an assessment of the whole of the legal costs it paid to Russells;

(b) in the alternative, if it be found that the September 2013 Agreement did compromise LPD's rights to an assessment of its costs, to the extent that it purports to compromise those rights, a declaration that the agreement is void.

The Test for Summary Dismissal

[30] In *Higgins v Higgins*[9] White J considered the scope of rule 658:

> "… the court may at any stage of a proceeding (which includes a process started by an application, r. 8) make any order, including a judgment, that the nature of the case requires, r. 658. Furthermore, there is nothing in the *UCPR* to displace the inherent jurisdiction of the court which includes the power to dispose of the proceeding summarily, *General Steel Industries Inc. v Commissioner for Railways (N.S.W.)* (1964) 112 C.L.R. 125."

[31] Applegarth J in *Atthow v McElhone*[10] referred to *Higgins v Higgins* as authority for the proposition that the court may intervene summarily in its inherent jurisdiction or pursuant to rule 658 of the UCPR.

[32] By the present application Russells seek summary dismissal of LPD's proceedings either pursuant to rule 658 or within the inherent jurisdiction of the Court. In such circumstances, as observed by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)*[11] there is a need for exceptional caution in exercising the power whether it be inherent or under statutory rules. A case must be very clear to justify the summary intervention of the court to prevent LPD submitting its case for determination.[12] These principles apply where the basis for summary

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9 [2005] 2 Qd R 502 at [15].
10 [2010] QSC 177 at [19].
11 (1964) 112 CLR 125 at 129.
12 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 per Dixon J at 91.

determination is *res judicata,* issue estoppel or estoppel of the kind described in *Anshun*.[13]

[33] In *Slaveska v State of Victoria & Ors*[14] the Victorian Court of Appeal (Warren CJ, Tate JA and Ginnane AJA) stated:

> "A finding that an Anshun estoppel operates to prevent a person from bringing a proceeding or particular claims is a serious step: it removes a litigant's right to have the merits of a claim adjudicated. For this reason, the authorities establish that an *Anshun* estoppel finding should only be reached in the clearest of cases and after 'a scrupulous examination of all the circumstances'."

[34] In *Edington v Board of Trustees of the State Public Sector Superannuation Scheme*[15] Mullins J dismissed an application under rule 16 seeking orders to strike out, set aside, or permanently stay the proceeding. As to the principles to be applied on such applications her Honour said, in summary:

(a) the approach to determining whether the proceedings should be brought to an end summarily should be no less stringent than that provided under rule 293;

(b) authoritative statements about exercising caution in terminating a proceeding summarily remain applicable;

(c) "the comments in the judgments in *Spencer* about the exercise of caution in dismissing an action summarily were intended to apply generally in respect of the procedure of summary judgment".

[35] Her Honour's reference to *Spencer* is to the decision of the High Court in *Spencer v Commonwealth of Australia*[16] where it was stated:

> "The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action or on the basis that the action is frivolous or vexatious or an abuse of process."

***Res judicata* and issue estoppel**

[36] In *Blair v Curran*[17] Dixon J explained the distinction between *res judicata* and issue estoppel as being:

> "That in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of

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13 *Commonwealth Bank of Australia v White (No 4)* [2001] VSC 511 (21 December 2001) per Warren J at [46].
14 [2015] VSCA 140 at [199].
15 [2012] QSC 211 at [53]-[54].
16 (2010) 241 CLR 118 at 131, [24] per French CJ and Gummow J.
17 (1939) 62 CLR 464 at 532.

> some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order."

[37] The doctrine of *res judicata* therefore applies where a right or cause of action put in suit passes into judgment. The consequence is that the right or cause of action "merges" with the judgment and no longer continues to have any independent existence. Fullagar J in *Jackson v Goldsmith*[18] described *res judicata* as follows:

> "The rule as to *res judicata* can be stated sufficiently for present purposes by saying that, where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action."

There can be no *res judicata* unless the cause of action in the earlier proceedings is the same as the cause of action now being advanced. Issue estoppel, on the other hand, prevents a "state of law or fact" which has been determined in previous proceedings from being re-agitated in later proceedings.

[38] In *Kuligowski v Metrobus*[19] the High Court quoted with approval the requirements for the application of the doctrine of issue estoppel as identified by Lord Guest in *Carl Zeiss Stiftung v Rayner & Keeler Ltd [No 2]*:[20]

> "(1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

[39] In the present case there is no dispute about the satisfaction of requirement 3 in the application of issue estoppel.

[40] As to *res judicata* Russells submits that the right or cause of action put in suit by Russells in the District Court proceedings was a right to payment of $172,947.31 pursuant to the May 2010 Retainer and the September 2013 Agreement (together called the "retainer"). According to Russells the quantum of the District Court judgment was determined by reference to various amounts paid and credited between the parties during the course of that retainer, and represented the final amount payable under the retainer. Once judgment had been delivered in those proceedings, any "rights" to payment pursuant to the retainer "merged" into the judgment and ceased to have any independent existence.

[41] Russells submits that the phrase "legal costs" is not defined for the purposes of Division 7 of the *Legal Profession Act,* which upon its ordinary construction must mean amounts

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18 (1950) 81 CLR 446 at 466.
19 (2004) 220 CLR 363 at 373, [21]; [2004] HCA 34.
20 [1967] 1 AC 853 at 935.

that a person is, or may, be liable to pay to a law practice for the provision of legal services. According to Russells, upon judgment being given in the District Court proceedings there were no longer any "legal costs" payable between LPD and Russells. The retainer is no longer in force and the final amount payable under it has been determined by the District Court proceedings. Accordingly, there are no "legal costs" for which LPD may seek an assessment.

[42] As to issue estoppel, Russells submits that the amount payable under the retainer by LPD to Russells was a "fact" determined in the District Court proceedings. Accordingly, even if LPD was otherwise entitled to apply for an order for an assessment of its costs, LPD is nevertheless estopped from asserting that any amount other than the amount determined by the District Court (namely $172,947.31) was payable to Russells pursuant to the retainer.

[43] Russells further submits that the fact the District Court proceedings were disposed of by way of default judgment does not prevent the doctrines of *res judicata* or issue estoppel from operating.[21]

[44] LPD submits that there cannot be any *res judicata* or issue estoppel based on the default judgment as this was for a debt. The facts upon which the judgment was based was the September 2013 Agreement. Therefore, according to LPD, no issue as to an assessment of costs arose.

[45] The present case is in my view, not one that would permit summary dismissal of the application for costs assessment, either on the basis of *res judicata* or issue estoppel. The difficulty is that it is not at all clear what the default judgment determined. It at least determined that LPD was required to pay a debt of $172,947.31 to Russells. In the statement of claim this debt was calculated by reference to the September 2013 Agreement where LPD acknowledged its indebtedness to Russells for $180,348.96. It is not clear how this amount was arrived at. The statement of claim in paragraph 6(b) refers to the fact that the $180,348.96 excludes invoice no. B15552 dated 23 August 2013. The September 2013 Agreement[22] simply records in relation to the amount of $180,348.96:

> "We confirm that our liability for fees and disbursements in respect of accounts rendered as at 18 June (2013) was, after our payments of $135,000 and $40,000 on 3 July, 2013."

The table which follows includes the amount of $180,348.96.

[46] In a letter dated 6 February 2017 from Russells to LPD's solicitors[23] Russells asserted that the default judgment determined as a bare minimum the amount owing by LPD under the May 2010 Retainer, as varied by the September 2013 Agreement. The letter continues:

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[21] *Clout & Ors v Klein & Ors* [2001] QSC 401 at [39]-[40] per Holmes J (as the Chief Justice then was).
[22] Affidavit of Amanda Jane Skoien filed 8 February 2017, page 22 of exhibits.
[23] Affidavit of Amanda Jane Skoien filed 8 February 2017, page 45 of exhibits.

> "In seeking an assessment of our costs, your client is challenging the entitlement of our firm to be paid the amount determined by the judgment in the District Court Proceedings."[24]

[47] The application for costs assessment relates to the entire period from May 2010 to May 2014. It is not clear why an acknowledgment by LPD that it is liable for fees and disbursements in respect of accounts rendered as at 18 June 2013 in the amount of $180,348.96 constitutes a form of compromise in respect of all previous invoices that have been paid. Paragraph 18 of the Points of Defence for example, pleads that LPD paid fees (ex GST) to Russells of $158,047.89 in 2010, $184,499.19 in 2011 and $207,384.52 in 2012, all well before the September 2013 Agreement.

[48] To the extent the Points of Defence plead that the September 2013 Agreement is an accord,[25] this is properly a matter to be determined on the hearing of the application for an order for an assessment of costs.

[49] Russells' submission that the present proceedings should be summarily dismissed because of *res judicata* and issue estoppel is not merely limited to the amount of the District Court judgment debt and the tax invoices that are referrable to the amounts relevant to calculating the judgment debt. What is sought is the summary dismissal of the whole of LPD's proceedings which seek an order for an assessment of costs which goes well beyond the amount of the judgment debt. In terms of *res judicata* I do not accept that the present proceedings and the District Court proceedings concern the same cause of action. A cause of action is "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court" or may be described as "the fact or combination of facts which gives rise to a right to sue".[26] There is not, in my view, a sufficient identity between the underlying facts supporting the debt in the District Court proceedings with what is sought in the present proceedings. The proceedings for which summary dismissal is sought concerns an application for costs assessment. As is evident from the application itself, the assessment of costs is sought pursuant to the *Legal Profession Act* and rule 743A of the UCPR. Section 335(1) of the *Legal Profession Act* provides that a client may apply for an assessment of the whole or any part of legal costs. Section 335(3) provides that the costs application may be made even if the legal costs have been wholly or partly paid. An application under section 335 must be made in the way provided under the UCPR: section 335(10). The "causes of action" in the present proceedings and the District Court proceedings are *prima facie* different. The District Court proceedings may be described as an action for a debt. The present proceedings constitute an application, relying on a statutory provision, for an order for the assessment of legal costs.

[50] Nor am I satisfied for the purposes of summarily dismissing the application for costs assessment that the issues now raised in the declaratory relief sought in the Amended Points of Claim were determined on the merits in the District Court proceedings. In *Mango Boulevard Pty Ltd v Spencer & Ors*[27] Muir JA and Fraser JA both accepted that

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[24] Affidavit of Amanda Jane Skoien filed 8 February 2017, page 46 of exhibits.
[25] Points of Defence, paragraphs 1(a)-(c).
[26] *Cordes v Dr Peter Ironside Pty Ltd* [2010] 2 Qd R 235 per Holmes and Chesterman JJA at [48].
[27] [2010] QCA 207.

a default judgment may give rise to a *res judicata* or issue estoppel.[28] Fraser JA made specific reference to a judgment in default of pleadings, distinguishing such judgments from ones that do not involve any actual determination on the merits:

> "Such judgments should be distinguished from default judgments which have been treated as giving rise to a *res judicata* or an issue estoppel, such as a judgment based upon default of pleading (which may be explained on the ground that the party in default has or should be taken to have admitted the allegations) and a consent judgment based upon a compromise (where the parties should be held to their compromise)." (citations omitted)

[51] In *Clout & Ors v Klein & Ors*[29] Holmes J (as the Chief Justice then was) stated that it was clear that there is no universal rule that a default judgment will found a successful plea of *res judicata.* Both Holmes J in *Clout,* Muir JA in the first case of *Mango Boulevard*[30] and Fraser JA in the subsequent case involving *Mango Boulevard*[31] quoted with approval a statement by the Privy Council in *Kok Hoong v Leong Cheong Kweng Mines Ltd*:[32]

> "default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essentials of what they must necessarily have decided and, to use the words of Lord Maugham L.C., they can estop only for what they must 'necessarily and with complete precision' have been thereby determined."[33]

[52] Even if one accepts that each of the material facts pleaded in the statement of claim in the District Court proceedings are deemed to have been admitted by LPD, no part of those proceedings have determined whether LPD may seek an order for an assessment of costs. Nor did those proceedings decide on the merits or otherwise the proper construction of the September 2013 Agreement and whether it excluded the statutory right of LPD to seek a costs assessment order. The debt claimed in the statement of claim was calculated at least in part by reference to the acknowledgment of LPD in the September 2013 Agreement that it was liable for fees and disbursements in respect of accounts rendered as at 18 June 2013 in the amount of $180,348.96. The deemed admission in respect to the September 2013 Agreement does not determine whether LPD is otherwise entitled to have the costs, which it paid in 2010, 2011 and 2012 for example, assessed. Whilst Botting DCJ in his ex tempore reasons referred to the September 2013 Agreement and the application to have all of the costs assessed, neither of these issues were determined on the merits. When his Honour's reasons are read as a whole, these two aspects constitute matters taken into consideration by Botting DCJ in the exercise of his discretion to refuse to set aside judgment in default. It remains the fact that the claim as pleaded in the statement of claim was for a debt of $172,947.31.

***Anshun* estoppel**

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28 Muir JA at [55] and Fraser JA at [116].
29 [2001] QSC 401 at [26].
30 [2008] QCA 274 at [56].
31 [2010] QCA 207 at [124].
32 [1964] AC 993 at 1012.
33 *Clout & Ors v Klein & Ors* [2001] QSC 401 at [28].

[53] In *Tomlinson v Ramsey Food Processing Pty Ltd*[34] French CJ, Bell, Gageler and Keane JJ described *Anshun* estoppel in the following terms:

> "The third form of estoppel is an extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding." (citations omitted)

[54] Applegarth J in *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd*[35] stated:

> "In assessing unreasonableness in the context of *Anshun* estoppel, an issue may arise as to whether the matter sought to be litigated in the later proceeding was relevant to the subject matter of the first proceeding. This is cast sometimes in terms of whether the new claim "'properly belonged to the subject of litigation" in the earlier proceeding. In addressing that matter, the relevant evidence is not restricted to the pleadings in both proceedings and the reasons for judgment in the earlier matter.
>
> In some circumstances, a matter may be so relevant to the subject matter of the first proceeding that it can be said to have been unreasonable not to rely upon it in the first proceeding. Even where such a close association is not established, and even where there will not be inconsistent judgments in the sense earlier discussed, a consideration of all of the relevant facts may result in a conclusion that it was unreasonable for the party not to have litigated the matter in the first proceeding." (citations omitted)

[55] Russells submits that the combined effect of sections 335(1) and 335(10) of the *Legal Profession Act* and rule 743B of the UCPR means that, as the District Court proceedings have been finally determined, it is no longer open for LPD to seek an assessment of its costs. Further in any event, even if there was some basis upon which such an assessment may be ordered, any such application should have been made in the District Court proceedings. Russells further submits that the fact that the *Legal Profession Act* and the UCPR require any application for an assessment of costs to be made in a proceeding for the recovery of legal costs is a strong indicator that it was unreasonable for LPD not to have done so.

[56] I do not accept Russells' submissions. LPD in seeking to have judgment in default set aside applied for an assessment of all the costs it had paid to Russells. Botting DCJ did not decide this application on its merits. Rather, his Honour was not persuaded that there was a triable issue such as would warrant setting aside the judgment by default. The fact that any costs assessment would be an expensive exercise was only one of a number of matters taken into consideration by Botting DCJ in the exercise of his discretion not to set aside judgment in default.

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34 (2015) 256 CLR 507 at [22].
35 [2014] 2 Qd R 44 at 51-52, [19] and [20].

[57] Whilst there is authority to support a *res judicata* or issue estoppel arising in respect of a judgment in default of pleading, the situation is not as clear in respect of an *Anshun* estoppel. In *Clout* Holmes J said:

> "There is some doubt as to whether *Anshun* estoppel has any application where there has been no examination of the merits of the claim in the earlier action.[36] It has been noted that 'attempts to apply *Anshun* to bar claims not previously adjudicated upon have had little success.'[37] At the least, it is clear that great care must be exercised in considering whether an *Anshun* estoppel ought to be applied."[38]

[58] As observed by Applegarth J in *HM Hire* the *Anshun* doctrine is not based on proof of abuse of process. *Anshun* creates a test of unreasonableness, and requires proof that it was unreasonable not to have brought forward the claim in the earlier proceedings. A determination of the question of unreasonableness may involve a broad merits-based judgment which takes account of the "public and private interest involved and also takes account of all the facts of the case".[39] In my view, it is not appropriate to summarily dismiss the present proceedings in circumstances where questions of unreasonableness of LPD's conduct are required to be determined. The effect of the combined provisions of sections 335(1) and (10) of the *Legal Profession Act* and rule 743B of the UPCR are but one of a number of matters that may be considered in any application of *Anshun* estoppel. Other considerations as to the test of unreasonableness may include LPD seeking an order for an assessment of all costs in its application to have judgment in default set aside, and LPD seeking declaratory relief before the Court of Appeal. Further, the operation of *Anshun* estoppel in the present proceedings may ultimately be limited to only bar an assessment of the tax invoices which underpin the District Court judgment sum.

Disposition

[59] Russells' application is dismissed. I will hear the parties as to costs.

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[36] *Bazos v Doman* [2001] NSWCA 347; *KC Park Safe SA Pty Ltd v Adelaide Terrace Investments Pty Ltd* (Unreported, Federal Court of Australia, Mansfield J, 17 September 1998).

[37] *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl.-ing Burkhardt GmbH* [2001] 1 Qd R 461 at 468.

[38] *Clout & Ors v Klein & Ors* [2001] QSC 401 at [44].

[39] *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd* [2014] 2 Qd R 44 at [12].