DISTRICT COURT OF QUEENSLAND

CITATION:	*Lunapas Pty Ltd & Anor v Murphy* [2019] QDC 111
PARTIES:	**LUNAPAS PTY LTD ACN 104 180 743** (Appellant) **and** **LUCIANO MENNITI** (Second Appellant) **v** **JOHN PAUL MURPHY** (Respondent)
FILE NO:	D 91/18
DIVISION:	Civil
PROCEEDING:	Appeal pursuant to s 45 of *Magistrates Court Act* 1921
ORIGINATING COURT:	Maroochydore Magistrates Court
DELIVERED ON:	27 June 2019
DELIVERED AT:	Maroochydore
HEARING DATE:	26 February 2019
JUDGE:	Long SC DCJ
ORDER:	**1. Appeal dismissed, except that the order made by the Magistrate at Maroochydore on 25 June 2018, awarding to the plaintiff costs in the sum of $3,606.60, including the costs of the application for summary judgment in the sum of $2,200, be varied to be, respectively, $2,430.60 and $1,024.** **2. Reserve the question of costs of the appeal, to be determined on the papers.** **3. Direct that the appellant is to file and serve written submissions within 7 days and the respondent is to file and serve written submissions in response within 14 days.**
CATCHWORDS:	PROCEDURE – QUEENSLAND – ENDING PROCEEDINGS EARLY – SUMMARY JUDGMENT – where Magistrate granted summary judgment in favour of the respondent - where no sworn material from the appellants – whether there was no real prospect of successfully defending all or part of the respondent's claim and no need for a trial

CONTRACT – COMPROMISE OF ACTION – ACCORD AND SATISFACTION – ACCORD AND CONDITIONAL SATISFACTON – ACCORD EXECUTORY - where respondent and appellants entered into a Deed of Agreement whereby the appellants agreed to pay a debt to respondent - where appellants later contended that there was never any debt - whether deed effected an accord and satisfaction so as to prevent the judgment given on the pleaded claim before the Magistrates Court

PROFESSIONS AND TRADES – LAWYERS – REMUNERATION - GENERALLY - where respondent was retained by appellants in a 'direct access' capacity – where respondent averred that he had provided a fee disclosure letter to appellants – where costs had not been assessed - where respondent sued for costs pursuant to s 319(1)(a) *Legal Profession Act* 2017 - whether s 316 of the *LPA* was a bar to recovery of costs

LEGISLATION:

Barristers Conduct Rules 2011, r 24B
Legal Profession Act 2007, ss 308, 310, 316, 319, 322, 327
Magistrates Court Act 1921, ss 45, 47
Uniform Civil Procedure Rules 1999, rr 292, 295

CASES:

Allesch v Maunz (2000) 203 CLR 172
Baxter v Abacelo Pty Ltd (2001) 205 CLR 635
Blue Moon Grill P/L v Yorkey's Knob Boating Club Inc [2006] QCA 253
Dabbs v Seaman (1925) 36 CLR 538
Deputy Commissioner of Taxation v Denlay & Anor [2010] QCA 217
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232
Fox v Percy (2003) 214 CLR 118
House v The King (1936) 55 CLR 499
JJ Richard & Sons Pty Ltd v Precast Concrete [2010] QDC 272
Lupker v Shine Lawyers [2016] 2 Qd R 323
McDermott v Black (1940) 63 CLR 161
McPhee v Zarb & Others [2002] QSC 4
Nissho Iwai (Australia) Ltd v Oskar [1984] WAR 53
Osborn & Anor v McDermott & Anor [1998] 3 VR 1
Queensland Nursing Council v Fletcher [2009] QCA 364
Scaffidi v Perpetual Trustees Victoria Ltd (2011) 42 WAR 59
Scott v English [1947] VLR 445
Webster v Lampard (1993) 177 CLR 598
Willmott & Anor v McLeay & Anor [2013] QCA 84.
Wilson Four Pty Ltd v Sihota [2014] QSC 257

COUNSEL:	K. A. Gothard for the appellants
	A. J. H. Morris QC for the respondent
SOLICITORS:	Jason Nott Solicitors for the appellants
	Rounsefell Lawyers for the respondent

Introduction

[1] This matter is before the court as an appeal in respect of the judgment granted in the Magistrates Court at Maroochydore on 25 June 2018, in terms that:

> "The judgment of the court is that the First and Second Defendants pay to the Plaintiff the amount of $34,452.15 including $2,263.70 interest ($1,945.62 to 30 April 2018 and $318.08 from 1 May 2018 to 25 June 2018) and $3,606.60 for costs ($1,154 costs of the claim, $252.60 filing fee and $2,200 costs of the Application for Summary Judgment)."

[2] As is indicated, that judgment was given by way of summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 ("*UCPR*") and upon the application in that respect, filed by the respondent on 26 April 2018.

[3] Accordingly, the appeal is brought pursuant to s 45 of the *Magistrates Court Act* 1921 ("*MCA*"), because the amount involved is, on any view, more than the "minor civil dispute limit".[1] It is common ground that such an appeal is to be conducted as a rehearing on the record.[2] And it may be noted that the ultimate powers of the court are set out in s 47 of the *MCA*.[3]

[4] The identified record for the purpose of the rehearing is comprised of:

(a) The claim and statement of claim filed by the respondent in the Magistrates Court at Maroochydore on 28 November 2017 and claiming an amount of $48,581.25, alternatively "as a debt representing the balance of professional costs owing to the plaintiff by the defendants" or "as damages for breach of contract", together with interest and costs;

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1 That is, $25,000, which is the "prescribed amount" in schedule 3 of the *Queensland Civil and Administrative Tribunal Act* 2009: see s 45(1)(a) and (5) of the *MCA*.

2 *UCPR* 765(1).

3 Although nothing turns on this or arose in this respect in this matter, it may also be noted that *UCPR* 766 is made applicable by *UCPR* 785 and s 45(1) of the *MCA*.

(b) The notice of intention to defend and defence filed by the appellants on 5 April 2018;

(c) The respondent's application for summary judgment under r 292 filed 26 April 2018;

(d) The affidavit of the respondent filed on 26 April 2018;

(e) The affidavit of Jason Michael Nott, the solicitor engaged for the appellants, filed 11 June 2018;

(f) The written outline of submissions filed for the appellants on 11 June 2018;

(g) The written outline of submissions filed for the respondent on 11 June 2018;

(h) The transcript of the hearing conducted on 11 June 2018;

(i) The formal judgment given on 25 June 2018 and filed 28 June 2018;[4] and

(j) The written reasons for judgment published by the Magistrate on 25 June 2018.[5]

The circumstances

[5] The following broad summary of the background or factual circumstances, may be adopted from the appellants' written submissions:

> "2. In 2017, the Respondent acted on behalf of the Appellants in New South Wales proceeding 2013/206954 which resulted in the judgment *ACN 116 746 859 (formerly known as Palermo Seafoods Pty Ltd) v Lunapas Pty Ltd (No 2)* [2017] NSWSC 1799.
>
> 3. The Respondent seeks payment of $48,581.25 plus interest and costs for fees he alleges are outstanding.
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> 4. The Second Appellant for the Appellants alleges that the Respondent did not provide him with a costs agreement before undertaking the work and the Second Appellant had understood that the Respondent was acting gratuitously by reason of the Second Appellant's prior generosity towards him.
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> 5. The Respondent commenced the proceeding in November 2017.
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> 6. On 1 February 2018, the parties entered an agreement compromising the proceedings ("the Agreement").

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4 See document 2 – Magistrates Court file in claim 243/17.

5 Document 12.

> 7. Despite the Agreement, on the basis the Appellants were one day late in making a payment, the Respondent sought judgment in this proceeding."

[6] More particularly, it may be noted that:

(a) The statement of claim filed by the respondent alleged that:

(i) In the context of an oral agreement or "retainer" for him to provide the legal services:

> "9. Sometime shortly after 19 February 2017, on a date that the Plaintiff cannot now remember, the Plaintiff hand-delivered a costs disclosure letter dated 19 February 2017 to the First Defendant on his and the Second Defendant's behalf ("**the Palermo Disclosure**"). A copy of the Palermo Disclosure is attached to this pleading and marked "A".
>
> 10. The Palermo Disclosure complied in all respects with the requirements of the *Legal Profession Act 2007*."

(ii) The respondent then performed the retainer and consequently delivered bills in respect of his professional fees for doing so:

- On 24 August 2017, in the amount of $13,062.50; and
- On 8 September 2017 in the amount of $52,644.95;

(iii) After allowing for payments made on four specified occasions between 18 August and 27 September 2017 (in the total amount of $12,000) and some calculation errors, the amount claimed as remaining unpaid was $48,581.25.

(b) The defence filed by the appellants, included contentions:

(i) Taking issue with any retainer, on the basis of an agreement that the respondent "would appear for the [appellants] … "as a friend" and required no more than his outlays to be met";

(ii) Denying any delivery of the costs disclosure letter at about the date it bears (19 February 2017) and alleging a rejected attempt of the respondent to do so, in or about September 2017 and asserting that:

> "8. As to paragraph ten (10) of the statement of claim the [appellants] deny that the Palermo disclosure complied in all respects with the requirements of the Legal Profession Act 2007 in that the costs disclosure letter was not delivered until after the Palermo matter had concluded and was contrary to the agreement between the parties as pleaded at paragraph two (2) hereof.";

(iii) That there was the performance of work in respect of "a significant amount of issues that were extraneous and unnecessary for the preparation for the Palermo matter" and which resulted in the matter going for four rather than the scheduled one hearing day;

(iv) Admitting the delivery of the bills by the respondent, after the conclusion of "the appeal and the Palermo matter"; and

(v) That the respondent's outlays were met and that loans were also made to the respondent in the amounts of $7,500, for his professional indemnity insurance and practicing certificate, and $5,000 for an airfare to London;

And may be noted to have also included an unparticularised counterclaim for damages for contract and/or negligence, upon simply asserting repetition and reliance on the earlier paragraphs of the defence.

Decision under appeal

[7] As was noted by the Magistrate in his reasons, in *Willmott & Anor v McLeay & Anor*,[6] it was noted that ultimately pursuant to *UCPR* 292, the decision of a court is in the exercise of discretion. However, it is necessary to note that *UCPR* 292(2) makes the exercise of such discretion to give judgment for a plaintiff, conditional upon the court being satisfied that:

> "(a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
> (b) there is no need for a trial of the claim or the part of the claim."

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6 [2013] QCA 84.

[8] In this context, a point which is correctly taken for the appellants is that whilst the reasons given by the Magistrate do set out these conditions attaching to *UCPR* 292(2) and also a statement of relevant principle drawn from *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at [17], the express finding extended only so far as the conclusion: "I am of the view the defendants have no prospects of success at trial".

[9] The essential reasoning of the Magistrate to such conclusion and the summary judgment which he consequently awarded, involved notation that:

(a) generally on an application for summary judgment, the evidence is given on affidavit and as was noted by the High Court in *Webster v Lampard* (1993) 177 CLR 598 at 604, a court approaches the matter on the basis that the affidavits (or evidence) of a respondent will be accepted at trial, provided it is not inherently incredible;

(b) here there was no affidavit sworn by or for either appellant but rather an affidavit sworn by their solicitor, stating his instructions in support of their filed defence, as is permitted by *UCPR* 295(2); and

(c) that such an approach had been criticised in *McPhee v Zarb & Ors*.[7]

[10] Although, it was then incorrectly noted that such criticism had led to a conclusion that the respondent in *McPhee v Zarb & Ors* was found to have "no reasonable prospects of defending the claim". In that case the criticism was directed at what had been noted as to an allegation of an oral agreement as to the payment of an additional $10,000.[8] And although Wilson J did conclude,[9] "I would not regard her as having any real prospect of defending the claim on the basis that the vendor did not tender all moneys due under the mortgage because he omitted the $10,000.00", for other reasons, she concluded,[10] that the application for summary judgment against the mortgagee should be dismissed.

[11] Here, the Magistrate's conclusion as to lack of prospects at trial, followed upon the single factual finding:

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7 [2002] QSC 4.
8 Ibid at [30].
9 Ibid at [33].
10 Ibid at [41].

> "The defendants entered in to the Deed of Settlement – he signed the document. At this point the defendants acknowledged the payment of the money was outstanding and owing".

And it may be noted that the effect of this finding is also pressed by the respondent in this appeal.

The appeal

[12] It is convenient to first note that the submissions for the respondent contend that this appeal is brought in respect of an exercise of discretion and that accordingly:

(a) "[t]o succeed in an appeal from a discretionary decision, the appellant must show actual error in the making of that decision: *House v. The King*. The appeal court cannot start by applying the principles of *Fox v. Percy* which, for present purposes, can properly be regarded as applicable to non-discretionary decisions, or to discretionary decisions which are found to be infected with error. In cases of the latter kind, having identified a relevant error, the court will apply the *Fox v. Percy* principles to overcome the error; but they are not the starting point";[11]

(b) "…the first principle governing this appeal is that the onus rests on the Appellants to establish that the Learned Magistrate's discretion miscarried in the sense set out in *House v. The King*…";[12]

(c) "[i]t therefore follows, as the second principle governing this appeal, that in the hearing of an appeal from a discretionary decision, the principles enunciated in *Fox v. Percy* are to be applied only if the Appellants establish that the primary decision was infected with an error of the type discussed in *House v. The King*."[13]

[13] More specifically, the following submissions were made (with the emphasis retained as in the submissions):

(a) "The ordinary characteristics of an appeal by way of rehearing are well established. It is necessary for the appeal court to make up its own mind on the basis of the findings of primary fact made at the previous hearing, unless those findings are set aside in accordance

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11 Respondent's written outline of submissions at [3].

12 Ibid at [6], with particular reference to the well-known passage to be found at (1936) 55 CLR 499 at 504-5.

13 Ibid at [9].

with the established principles: *Fox v. Percy*, (2003) 214 CLR 118 at [22] to [29] **but it is necessary for the appellant to show that the decision under appeal was wrong**: *Allesch v. Maunz*, (2000) 203 CLR 172 at 180-1. Where the appeal is from the exercise of discretion, **that involves showing that there was an error of principle in the exercise of the discretion, or that the discretion miscarried, in that the result was manifestly inappropriate**: *House v. The King*, (1936) 55 CLR 499 at 504-5; *Queensland Nursing Council v. Fletcher*, [2009] QCA 364 at [97]";[14] and

(b) "When considering them one must bear in mind that the appeals are brought against orders made by the primary judge pursuant to the power found in *UCPR* 800. That rule provides that a court may, on the application of a person required to pay money under an order, stay the enforcement of all or part of the order and make such order as the judge considers appropriate. The power therefore confers a wide discretion upon a judge. **The appeals are therefore to be assessed by reference to the principles laid down in *House v The King*, (1936) 55 CLR 499. Before an appellate court can interfere the primary judge must have acted on some wrong principle of law or on some mistaken view of the facts, whether by taking an irrelevant factor into account or ignoring a relevant one; or the existence of error may be inferred from the exercise of discretion which is in the circumstances unjust or unreasonable**."[15]

[14] Whilst it is correct to note that the ultimate conclusion of a court granting summary judgment pursuant to *UCPR* 292, is an exercise of discretion, that however depends upon the determination, in the first instance, of the conditions for any such exercise of discretion.[16] Here,[17] the question is whether the Magistrate correctly found the necessary statutory pre-conditions for any such exercise of discretion. Accordingly and whether approached under the rubric noted in *House v The King* or the broader rubric in *Fox v Percy*, it is necessary, if this court is to intervene to exercise any

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14 Per. McGill DCJ in *JJ Richard & Sons Pty Ltd v Precast Concrete Pty Ltd* [2010] QDC 272 at [8].

15 Per. Ann Lyons J in *Deputy Commissioner of Taxation v Denlay & Anor* [2010] QCA 217 at [38].

16 Cf *Willmot & Anor v McLeay & Anor* [2013] QCA 84, where Holmes J, at [17], described the proper construction of the rule as involving "a residual discretion".

17 Like the position in *Willmott*, ibid at [17].

power available to it, that error be identified in the decision of the Magistrate, such as to warrant such intervention.

[15] The notice of appeal contains grounds set out in contention of such error, in twenty separate paragraphs. It may be noted that all of the contentions are directed at the Magistrate's findings in relation to the necessary pre-conditions but that there is some considerable repetition of at least similar, if not essentially the same, points. In the written submissions, the appellants conclude by summarising the grounds into four essential contentions:

> "a. the Respondent had compromised the proceeding;
> b. the application sought judgment based on a deed of settlement of which the Respondent was in breach and which had not been claimed in the pleadings;
> c. in any event, the Respondent was not entitled to judgment in the proceeding or pursuant to the Agreement by reason of his failure to comply with the requirements of the *Legal Profession Act 2007* (Qld);
> d. there is a need for a trial of this matter to hear the oral evidence of the parties and to determine the effect of the issues raised by the Appellants."

Compromise

[16] By reference to the discussion of principles relating to a contract of compromise, by Jackson J in *Wilson Four Pty Ltd v Sihota,*[18] the contention for the appellants is that the Deed is an agreement in the nature of accord and satisfaction and therefore the respondent was precluded from obtaining judgment in this proceeding. Specific reference is also made to the following statement of principle:[19]

> "Where there is an accord and satisfaction, the agreement for compromise may be enforced, because ex hypothesi the previous cause of action has gone; it has been 'satisfied' by making of the new agreement constituted by abandonment of the earlier cause of action in return for the promise of other benefit."[20]

[17] As noted by Jackson J in *Wilson Four Pty Ltd*,[21]

> "There is also a significant body of case law as to whether a consent order can be set aside. In the circumstances of this case, in my view,

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18 [2014] QSC 257 at [36]-[39].
19 Appellants' written outline of argument at [26].
20 Phillips JA in *Osborn & Anor v McDermott & Anor* [1998] 3 VR 1 at 8, cited with approval in *Baxter v Abacelo Pty Ltd* (2001) 205 CLR 635 by Gummow and Hayne JJ.
21 At [36] and as drawn from the reasons of Dixon J in *McDermott v Black* (1940) 63 CLR 161 at 183-185.

> the first question is whether the alleged contract of compromise, which the consent order embodies or evidences, operates as an accord and satisfaction or an accord executory. The distinction between the two was drawn in the now classical passage from Dixon J's reasons for judgment in *McDermott v Black*:
>
> > "The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given the accord remains executory and cannot bar the claim. The distinction between an accord executory and an accord and satisfaction remains as valid and as important as ever. An accord executory neither extinguishes the old cause of action nor affords a new one…
> >
> > …of accord and satisfaction there are two cases, one where the making of the agreement itself is what is stipulated for, and the other, where it is the doing of the things promised by the agreement. The distinction depends on what exactly is agreed to be taken in place of the existing cause of action or claim. An executory promise or series of promises given in consideration of the abandonment of the claim may be accepted in substitution or satisfaction of the existing liability. Or, on the other hand, promises may be given by the party liable that he will satisfy the claim by doing an act, making over a thing or paying an ascertained sum of money and the other party may agree to accept, not the promise, but the act, thing or money in satisfaction of his claim. If the agreement is to accept the promise in satisfaction, the discharge of the liability is immediate; if the performance, then there is no discharge unless and until the promise is performed."" (citations omitted)

[18] Upon this appeal, the position for the appellants is that having regard to the compromise constituted by the Deed, the respondent was left only with a prospective action for breach of that agreement and accordingly was not entitled to the summary judgment that had been obtained upon the cause of action set out in the statement of claim and which had been so compromised. It is also correctly pointed out that the respondent had not obtained any leave to amend his claim. There are then further contentions as to purported difficulties in the effective

contention that the judgment below was obtained upon the respondent's reliance upon that prospective cause of action.[22]

[19] For the respondent in the proceedings below and again in this Court, it was contended that the appellants' approach was upon a misunderstanding that the respondent had proceeded upon the Deed, when it was not pleaded in the statement of claim. And it is further contended that the respondent had merely relied upon the Deed as evidencing relevant "admissions" of the appellants.[23] And it is also pointed out that the Magistrate expressly noted the execution of the Deed only as acknowledgement that "the payment of the money was outstanding and owing".[24] It was the respondent's position that the summary judgment had been appropriately sought and given upon the existing cause of action that was before the Magistrates Court.[25]

[20] It is therefore necessary to consider the nature of the Deed and in doing so, to focus on what the parties have agreed, rather than simply upon the categorisation of an agreement as either an accord and satisfaction or an accord executory.[26] And as noted by Jackson J in *Wilson Four Pty Ltd*,[27] such an approach allows for further distinction between those categories, as discussed in *Scaffidi v Perpetual Trustees Victoria Ltd*.[28] In *Scaffidi*, the court noted the recognition of a third alternative categorisation referred to as accord and conditional satisfaction. It was noted,[29] that such categorisation may be traced to the observations of Fullagar J in *Scott v English*,[30] with the reasoning summarised in the following terms by Phillips JA in *Osborn v McDermott*:[31]

> "[H]is Honour contemplated a case in which the accord amounted to an immediately enforceable agreement (which suggests that there was accord and satisfaction), but that the "satisfaction" (the discharge of existing obligations) was itself only conditional, suspending the original cause of action, but not extinguishing it,

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22 In particular, that the agreement had not been terminated but rather that the respondent had accepted the late performance of the appellants and was in breach in the agreement himself: see appellants' written submissions at [32]-[36].
23 Respondent's written outline of submissions at [13].
24 Reasons at third last paragraph.
25 See respondent's written outline of submissions at [12]-[16].
26 Per Keane JA, *Blue Moon Grill P/L v Yorkey's Knob Boating Club Inc* [2006] QCA 253 at [20].
27 [2014] QSC 257 at [37].
28 (2011) 42 WAR 59 at [26]-[33].
29 Ibid at [29]-[31].
30 [1947] VLR 445 at 453.
31 [1998] 3 VR 1 at 10.

> unless and until performance by the defendant according to the tenor of the agreement."

And it may be further noted that Phillips JA proceeded to describe the three categories of compromise, as follows:

> "Thus, there are three possibilities, not two. First, there is the mere accord executory which, on the authorities, does not constitute a contract and which is altogether unenforceable, giving rise to no new rights and obligations pending performance and under which, when there is performance (but only when there is performance), the plaintiff's existing cause of action is discharged. Secondly, at the other end of the scale is the accord and satisfaction, under which there is an immediate and enforceable agreement once the compromise is agreed upon, the parties agreeing that the plaintiff takes in satisfaction of his existing claim against the defendant the new promise by the defendant in substitution for any existing obligation. Somewhere between the two, there is the accord and conditional satisfaction, which exists where the compromise amounts to an existing and enforceable agreement between the parties for performance according to its tenor but which does not operate to discharge any existing cause of action unless and until there has been performance.
>
> Where there is a mere accord executory, no suit can be maintained upon the compromise unless and until there has been performance, and then suit is ordinarily unnecessary. Upon default in performance, the plaintiff's existing cause of action continues unaffected. With accord and satisfaction, either party may sue upon the compromise, but only on the compromise and for nothing else: the original cause of action has gone. Where there is accord and conditional satisfaction, the plaintiff is bound to await performance and accept it if tendered, but if there be no performance, then the plaintiff may proceed according to general principles called into play when any agreement is repudiated: the plaintiff may either treat the agreement (the accord) as at an end and proceed on his original cause of action; or he may, at his option, sue on the compromise agreement, in place of the original cause of action."[32]

Also in *Nissho Iwai (Australia) Ltd v Oskar*,[33] Brinsden J described such a situation, as follows:

> "I am of the opinion that [the compromise] was no mere accord executory but a contract intended to create new antecedent obligations, but effected no absolute discharge of the cause of action but only if the defendant performed his promise. The defendant in this case failed to perform his promise and so that left the plaintiff in the position that it could sue on the new contract or rescind the new contract and proceed on the original cause of action."

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32 Ibid at 10-11.

33 [1984] WAR 53 at 58.

[21] Here, the terms of the Deed lend themselves to such a description. It is only necessary to note clauses 2 through 6.

> "**2. PAYMENT OF MONEY**
>
> **2.1 Time**
> Time is of the essence in respect of all payments of money that any of the Menniti Parties are obliged to pay under this Agreement.
>
> **2.2 Payment of the Palermo Debt**
> (a) At the Agreement Date, the balance of the Palermo Debt is $38,833.85.
> (b) The Menniti Parties must pay $10,000.00 to Mr Murphy, on or before midnight on 20 February 2018 by either of the methods stipulated in Clause 2.3.
> (c) Mr Murphy will act for the Menniti Parties on a speculative basis in the Ray White Matter and the Rent Proceeding and be paid his professional fees accordingly.
> (d) To that end, the Menniti Parties will enter into, and execute, speculative costs agreements with Mr Murphy in respect of those matters.
> (e) At the conclusion of the Ray White Matter, Mr Murphy and the Menniti Parties will negotiate in good faith to reach a binding agreement as to the payment of the balance of the Palermo Debt, which will be $28,833.85 at that time, provided the Menniti Parties comply with this agreement.
> (f) Pending compliance with sub-Clauses (a) to (e), Mr Murphy will not progress the Palermo Litigation.
> (g) For the avoidance of doubt, payment of the balance of $28,833.85, or any part of it, is not dependent upon the result in either or both of the Ray White Matter or the Rent Proceeding.
>
> **2.3 Payment Method**
> All money paid to Mr Murphy under this Agreement must be paid by either:
> (a) electronic funds transfer to:
> (i) Mr Murphy's Bank of Queensland Account BSB 124-079 Account 22-11-2533; or
> (ii) any other account that Mr Murphy may nominate in writing; or
> (b) delivery of a bank cheque to Mr Murphy by hand or certified post.
>
> **3. RELEASE BY MR MURPHY**
> The effect of this clause 3 is that on completion of the due and punctual performance and observance of the terms of this Agreement by the Menniti Parties, Mr Murphy releases them on and from the Agreement Date from all Claims in relation to the Palermo Debt

which Mr Murphy may have, or be entitled to bring, or would but for this Agreement be entitled to have had, or been entitled to bring, against the them (sic), at law or in equity, or under the provisions of any statute, in relation to or arising out of the subject matter of this Agreement, except as set out in this Agreement.

4. RELEASE BY THE MENNITI PARTIES

Subject to clause 3 of this Agreement, and the due and punctual performance and observance of the terms of this Agreement by Mr Murphy, the Menniti Parties release Mr Murphy on and from the Agreement Date from all claims which they may have or be entitled to bring or would but for this Agreement be entitled to have had or been entitled to bring against Mr Murphy, at law or in equity, or under the provisions of any statute, in relation to or arising out of the subject matter of this Agreement, except as set out in this Agreement.

5. CONSENT TO JUDGMENT

The Menniti Parties irrevocably consent to judgment in a Court of competent jurisdiction in the amount of the unpaid balance of the Palermo Debt which is not paid, or not promptly paid, or if the Menniti Parties fail to comply with sub-Clause 2.2(e), plus Mr Murphy's costs of obtaining judgment at his then ordinary hourly charging rate, plus Interest since he delivered his bills in the Palermo Matter.

6. PLEADING AS A BAR

Subject to the other provisions of this Agreement, any Party who is not in breach of this Agreement, on and from the Agreement Date, may plead the terms of this Agreement as a bar to any Claim brought by the other Party arising out of or in connection with the subject matter of this Agreement, except for breach of a provision of this Agreement.

To avoid doubt, the Recitals to this Agreement must be construed as terms of this Agreement and must be given full effect as admissions or contractual conditions, as the case requires."

[22] The terms of clauses 5 and 6 in particular, would not allow for this agreement to be regarded as in the nature of a mere accord executory but and on the other hand, the terms of clauses 3 and 4, being dependent on the due and punctual performance and observance of the terms of "the agreement" and with the effective reservation (in clause 2.2(f)), of the respondent's ability to progress the "Palermo Litigation" (defined in the recitals as the proceedings commenced by the respondent "in the Magistrates Court at Maroochydore to recover the Palermo Debt"), it is also not amenable to being categorised in the nature of an accord and satisfaction or an

agreement effecting any absolute discharge of the pending cause of action in the Magistrates Court.

[23] As noted, by clause 2.1, time was made the essence of the obligations for payment by the appellants under the Deed. Moreover and by clause 10.1, variation or consent to any departure from a provision of the Deed was required to be in writing. Accordingly, and upon the failure of the appellants to perform their promise to pay the $10,000 on or before midnight on 20 February 2018, the respondent was entitled to pursue the pending cause of action. Clearly the appellants had not performed their promise and in that sense, were in breach of the Deed and therefore not able to rely upon clause 6 of the Deed as any prospective bar to that claim.

[24] Moreover, it was the respondent who sought to rely on the Deed before the Magistrate and, as must be observed as underlying some apparent sense of confusion on the part of the appellants as to the basis of that reliance, the respondent expressly placed the following reliance on the Deed:

> "(e) If payment was not made on time, the Defendants consented to judgment for the unpaid balance of the Debt plus interest since the delivery of my bills plus my costs of obtaining judgment at my ordinary hourly rate;
> (f) I am entitled to, and do, plead the terms of the Deed as a bar to any claim by the Defendants arising out of the subject matter of the Deed, including the counter-claim."[34]

A particular consequence of that reliance and to which it will be necessary to return, is the reflection in the orders of the Magistrate, of an award of costs upon the basis stipulated in clause 5 of the Deed.

[25] Although and in submissions to this Court, the appellants faintly sought to allude to the prospect of equitable relief, it is correctly noted for the respondent that the purported factual basis of any such reliance is not objectively made out. In his affidavit, Mr Nott avers to having been informed by Mr Menniti, as follows:

> "6. Mr Menneti informed me, and I believe:
> ….
> o. Mr Murphy took Mr Menneti to page four (4) of the Deed of Settlement and pointed to paragraph 2.2(b) where it said that the ten thousand dollars ($10,000.00) had to be paid by 15 February 2018.
> p. Mr Menneti said to Mr Murphy that he would need until the end of the month to pay.

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34 Affidavit of JP Murphy, affirmed 16/4/18, at [7(e)]-[7(f)].

q. Mr Murphy said that they had to put something in the document so "how about we split the difference and put in the 20?'"
r. Mr Menneti said "what if I am a day late?"
s. Mr Murphy replied that "a day or so late won't matter".
t. Mr Menneti otherwise took Mr Murphy at his word and simply signed the Deed of Settlement [and] did not otherwise read it.
u. Mr Rossiter was the witness to Mr Menneti's signature as well as the witness [to] Mr Murphy's.
v. On the 20th of February 2018, Mr Menneti telephoned Mr Murphy because he knew he was not going to be able to make the payment of the ten thousand dollars ($10,000.00) by 20 February 2018. Mr Menneti told Mr Murphy that he had cash flow problems, he was doing the best he could to find the ten thousand dollars ($10,000.00) and that he probably wouldn't be able to pay ten thousand dollars ($10,000.00) by the 20th and needed more time. Mr Menneti said he may be a day or so late.
w. Mr Murphy responded "If you are a day or so late it won't matter. I'll let you off the hook this time".
x. As it was Mr Menneti was able to pay the first five thousand dollars ($5,000.00) on 20 February 2018 and telephoned Mr Murphy to let him know that it had been paid. He thanked Mr Menneti for the payment.
y. On 21 February 2018, Mr Menneti phoned Mr Murphy to let him know that he had paid the second five thousand dollars ($5,000.00). Mr Murphy thanked him again and Me (sic) Menneti said to Mr Murphy "Let's get on with the Ray White matter and the rent matter" to which Mr Murphy said "will do". Page [44] of "**JMN – 1**" is a true and correct copy of Mr Menneti's phone record for the period 27 January 2017 to 26 February 2018. Mr Menneti phoned Mr Murphy on his mobile number 0413004132 at:
    i. 21 February 2018 at 10:30am;
    ii. 21 February 2018 at 10:32am; and
    iii. 21 February 2018 at 10:34am.

7. Mr Menneti has advised me, and I believe, if he had any idea or indication from Mr Murphy that Mr Murphy was not going to stick to his word and was going to try and sue him for what he calls the "Palermo Debt" he would have borrowed the ten thousand dollars ($10,000.00) from a third party rather than wait for his cash flow to enable him to pay it. In the event, Mr Murphy, by his words, gave Mr Mennetii comfort that it was in order for Mr Menneti to be a day or so late for payment of the ten thousand dollars ($10,000.00)." (errors as in original)

As is pointed out, there are some objective difficulties. The evidence demonstrates payments of amounts of $5000 on 21 and 22 February 2018.[35] And the telephone

35 Ibid at [8(b)] and JPM-2.

records relied upon for the appellants,[36] demonstrate relevant call records for 21 February but not for 20 February 2018. As is contended for the respondent, whether the issue may be waiver,[37] or equitable estoppel,[38] the essential difficulty is in identification of any sufficiently relevant conduct of the respondent that has occurred prior to the time for performance of the appellants' promise and such as to prospectively be a foundation for any such relief.

[26] Further and as also correctly contended for the respondent, there is no inconsistency in the treatment of the payments made on 21 and 22 February 2018, as being made in partial discharge of the debt the subject of the proceeding before the Magistrates Court and not made in performance of the Deed, because of payment outside the terms of that deed.

Reliance upon the Deed

[27] There appears to have been some confusion as to the respondent's reliance upon the Deed in obtaining judgment in the Magistrates Court and no determination by the Magistrate as to this issue.

[28] Upon this appeal and particularly in response to the appellants' contentions that the respondent had wrongly obtained judgment upon an unclaimed and unpleaded cause of action, as arising under the Deed,[39] the respondent contends that there is misconception as to the reliance placed upon the Deed before the Magistrate. As is noted by the respondent, the Magistrate did have regard to the Deed.[40] And it is contended that the respondent did not sue upon the Deed but rather sought judgment upon the cause of action as pleaded in the statement of claim.[41] The contentions for the respondent then proceed to note:

(a) the "partial" nature of the "compromise of the litigation", rather than replacement of it;
(b) the consent of the appellants pursuant to clause 5 of the Deed, in the event of breach of it, to judgment upon the stated terms as to costs; and
(c) the following recitals in the Deed:[42]

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36 Affidavit of JM Nott, sworn 8/6/18, at JMN-1, p 44.
37 Cf: *Foran v Wight* (1998) 168 CLR 385.
38 Cf: *Waltons Stores (Interstate) Ltd v Maher* (1998) 164 CLR 387.
39 Cf: *Equititrust Limited v Gamp Developments Pty Ltd & Ors (No 2)* [2009] QSC 168 at [9]-[10] and *Tropical Hire Pty Ltd (in liquidation) v Simpson* [2014] QDC 250 at [12].
40 Magistrate's reasons at pages 2 & 4.
41 Respondent's written outline of submissions, at [13].
42 Ibid at [14].

> "
> …
>
> D. The Menniti Parties admit that the amount stipulated in Recital F ("**the Palermo Debt**") is owing and immediately payable to Mr Murphy.
>
> …
>
> F. Mr Menniti and Lunapas did not pay Mr Murphy in full in respect of the Palermo Matter. The outstanding debt is $38,833.85 (including filing fees) - $22,000 of a total of $60,833.85 having been paid."

[29] It is then submitted:[43]

> "15. Given the terms of the Deed, and apart from any other consideration, judgment was correctly entered to that extent, and the Respondents (sic) cannot succeed in the appeal.
>
> 16. In light of the terms of the Deed, and applying *Dabbs v. Seaman*, no error is shown in the Learned Magistrate's treatment of the Deed, nor can any error be shown."

[30] There is also an earlier reference to *Dabbs v Seaman*[44] to support a contention that the respondent relied upon the Deed "as establishing certain facts which the appellants are estopped or precluded from contradicting."[45] However what must be noted is that the judgment relied upon proceeds to make clear that the claimed estoppel is recognised as follows:

> "In *Horton v. Westminster Improvement Commissioners Martin* B. states it thus: "The meaning of estoppel is this – that the parties agree, for the purpose of a particular transaction, to state certain facts as true; and that, so far as regards *that transaction*, there shall be no question about them." Lord *Blackburn* himself so held in *Burkinshaw v. Nicolls*. Lord *Mansfield* in *Goodtitle d. Edwards v. Bailey* said: "No man shall be allowed to dispute his own solemn deed." But a question may always arise whether there has been adopted, for the purposes of an instrument and as its conventional basis, any given state of facts. That must be determined upon its construction." (citations omitted)[46]

[31] Further, what is neither apparent nor made clear is as to how this is entirely consistent with the other contentions as to the effect of the compromise and the recognisable election for the respondent to proceed upon the previously claimed and pleaded cause of action.

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43 Ibid at [15]-[16].
44 (1925) 36 CLR 538 at 549.
45 Respondent's written outline of submissions at [13].
46 *Dabbs v Seaman* (1925) 36 CLR 538 at 549.

[32] It is, however, submitted that the reliance upon clause 5 of the Deed, as was successful in that the judgment included the respondent's costs of the application for summary judgment as calculated in accordance with that clause, is vindicated upon the basis that, in the context of terms of clause 2.2(f), the reference to "judgment" in clause 5 "could only mean judgment in the subject litigation".[47] That submission is not to be accepted. The terms of clause 5, considered in the context of the remainder of the Deed, are not amenable to such a construction. Not only is there reference to "judgment in a Court of competent jurisdiction" rather than in the "Palermo Litigation"[48], the effect of the clause is in securing the prospect of summary judgment and the effective recovery of a form of indemnity costs, in the event of breach of the Deed by the appellants. Moreover, such reliance upon this clause is essentially in conflict with the contentions otherwise and necessarily made, that the respondent effectively elected to pursue an existing and unmerged cause of action rather than any cause of action arising from the Deed.

[33] It must be concluded that not only was this point,[49] not expressly dealt with by the Magistrate but he has, at least, been led into error in awarding the costs of the application for summary judgment in accordance with the prescription in clause 5 of the Deed. Neither, as must be recognised, was there any express determination of the appellants submission that the Deed placed before the Magistrate by the respondent, effected an accord and satisfaction which precluded the relief sought on the cause of action before the Court.

The Retainer and the *Legal Profession Act* 2007

[34] Before further consideration of the effect of these conclusions, it is necessary to consider the contentions of the appellants as to issues arising in respect of the relationship between the parties, as regulated by the *Legal Profession Act* 2007 ("*LPA*"). Here the respondent's claim is for recovery of legal costs pursuant to the terms of what he claimed to be his retainer in that regard, from his clients and for whom he acted as a barrister in what is often referred to as a "Direct Access" capacity and without engagement of him by an instructing solicitor. Although there is reference made to the absence of evidence of compliance with the respondent's

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47 Respondent's written outline of submissions at [14(b)].

48 Defined in Recital E to be "proceedings in the Magistrates Court at Maroochydore to recover the Palermo Debt".

49 As it was adverted to in the appellants written outline of submissions to the Magistrate, at [27].

obligation pursuant to rule 24B of the *Barristers Conduct Rules* (to which I will return), as was clarified in the oral argument on the hearing of the appeal, the critical issues which arise here are in respect of the application of part 3.4 of chapter 3 of the *LPA*.

[35] In that respect it may be noted that the respondent's position is within the definition of the term "law practice" in the *LPA*.[50] In the context of the requirements set out in s 308 for disclosure to a client in respect of costs to be charged by a legal practitioner, the appellants placed particular emphasis upon the following provisions:

> "**s 316 Effect of failure to disclose**
>
> (1) If a law practice does not disclose to a client or an associated third party payer anything required by this division to be disclosed, the client or associated third party payer, as the case may be, need not pay the legal costs unless they have been assessed under division 7.
>
> Note— Under section 341, the costs of an assessment in these circumstances are generally payable by the law practice.
>
> …..
>
> **s 327 Particular costs agreements are void**
>
> (1) A costs agreement that contravenes, or is entered into in contravention of, any provision of this division is void.
> (2) Subject to this section and division 7, legal costs under a void costs agreement are recoverable as set out in section 319(1)(b) or (c)."

[36] However, it is necessary to understand that the purported triable issue raised here does not go to any contended deficiency as to any costs disclosure that was relevantly made, or to any particular lack of compliance of the costs agreement relied upon by the respondent, but rather to there being no such agreement nor any relevant disclosure, as required by s 310(1), in that there was no disclosure "made in writing before, or as soon as practicable after, the law practice [was] retained in the matter".

[37] In any event, the respondent points to s 319(1), which provides:

> "(1) Subject to division 2, legal costs are recoverable—
>
> (a) under a costs agreement made under division 5 or the corresponding provisions of a corresponding law; or

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50 See schedule 2 of the *LPA*; definition of "law practice" at (b)(i).

> (b) if paragraph (a) does not apply—under the applicable scale of costs; or
> (c) if neither paragraph (a) nor (b) applies—according to the fair and reasonable value of the legal services provided.
>
> *Note for paragraph (c)* — See section 341(2) for the criteria that are to be applied on a costs assessment to decide whether legal costs are fair and reasonable."[51]

And relies upon the notation in *Lupker v Shine Lawyers,*[52] that ultimately the respondent would be entitled to recovery on a quantum meruit. However, it must be noted that the further contention that any such claim was likely to be equal or be very close to the debt to which the judgment relates,[53] overlooks the potential effect of s 316 and the absence of assessment of the costs, as a bar to any such recovery.

[38] However and upon the factual premise that the respondent sued pursuant to s 319(1)(a) of the *LPA*, there was no such bar. And it was that factual premise that was at the epicentre of the contentions in respect of the application for summary judgment. Further and notwithstanding that in the defence filed by the appellants, there are some broad and undetailed assertions of a kind which may be amenable to costs assessment,[54] it is notable that there is no suggestion that the appellants have sought to exercise any right to have an assessment of the legal costs,[55] or that this should have been considered by the Magistrate.[56]

[39] In these circumstances, the essential issue in the summary judgment application and which was determined adversely to the appellants, effectively determined that the respondent was entitled to recover his costs pursuant to s 319(a) and therefore, that s 316(1) was not engaged.

Conclusions

[40] Accordingly, the issue before the Magistrate and now before this court is whether or not, on the evidence before the court, the appellants had no real prospect of successfully defending the claim of the respondent and that there was no need for a

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51 It may be noted that despite the evidence that the work performed by the respondent was in respect of and in relation to a proceeding conducted in New South Wales, there is no suggestion of any issue arising under division 2.
52 [2016] 2 Qd R 323, see [40], [44].
53 Respondent's written outline of submissions at [68].
54 See Defence at [9(c)]-[9(d)].
55 See s 335 *LPA* and Chapter 17A, Part 4 of the *UCPR*.
56 See *UCPR* 743B.

trial of the claim, in order to determine the issue as to whether there had been disclosure by the respondent as required by s 308 of the *LPA*, and as he claimed and averred had occurred by provision of his letter bearing the date 19 February 2017.[57]

[41] It is apparent that it necessarily follows that there is an absence of compliance with rule 24B(b) of the *Barristers Conduct Rules,* in that there is no provision for, let alone any written acknowledgement, signed by the client, from whom the respondent proposed accepting instructions directly and who was not a solicitor, that he or she has been informed of the matters set out in rule 24B(b)(a). It is inherent in the materials that such did not occur, which is curious when it may be noted that some attention to the requirements of rule 24B(b)(a) is to be observed in the letter. However and for present purposes, it is necessary to observe that any such failing is not as to disclosure as required by s 308 of the *LPA* and does not attract any consequence that s 316 of the *LPA* is engaged.

[42] Further and as is also inherently the respondent's position, he has no written acknowledgement of any acceptance of the costs agreement upon which he relies to engage s 319(a) of the *LPA*, nor apparently any record or corroboration of it having been given to the first appellant. Rather and as he is entitled to do, having regard to the provisions of s 322 of the *LPA*, he relies upon the concluding indication in that letter:

> "You may accept this offer to enter into a costs agreement relating to my retainer in this matter, either:
>
> 1. expressly, either orally or (preferably) in writing;
> 2. by your conduct in giving me further instructions in relation to this matter, or allowing me to continue carrying out the retainer, without first notifying me that you do not accept these terms."

[43] However, it was in this context of these unsatisfactory aspects of the respondent's position that he averred before the Magistrate that the allegations in the statement of claim were true,[58] including therefore, paragraphs 9 and 10 as set out above.[59] Notwithstanding therefore the entire reliance upon that averment by the respondent and the absence of any evidence of any written acknowledgement, by the appellants, of the costs disclosure and agreement, or in respect of the matters the subject of rule 24B of the *Barristers Conduct Rules*, the only evidence placed before the

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57 Attachment "A" to the statement of claim filed on 28/11/17.
58 Affidavit of JP Murphy, filed 26/4/18, at [3].
59 See [6(a)(i)] above.

Magistrate in contradiction of that evidence, was in the form of the affidavit sworn by the appellants' solicitor in reliance on *UCPR* 295(2), without any explanation as to any reason, let alone necessity, for doing so.

[44] Further, it is useful to note the following chronology of events:

28/11/17	Claim and statement of claim filed by respondent.
1/2/18	Deed of compromise executed.
20/2/18	Failure to pay $10,000.
29/3/18	Solicitor for the appellants telephoned the respondent and is provided with an emailed copy of the Deed of compromise
5/4/19	The notice of intention to defend and defence filed by the appellants
26/4/18	Application for summary judgment filed by the respondent.

[45] In these circumstances, it is not simply a matter where, as he was entitled, the Magistrate was not prepared to give any more than little weight to the affidavit of the appellants' solicitor and the importance of the finding of the Magistrate that at the point of entering the Deed "the defendants acknowledged the payment of the money was outstanding and owing", is self-evident. The acknowledgement or admission of the appellants of the fact and quantum of the debt which was the subject of the proceeding before the court was an evidential fact and stood in complete contrast to and contradiction of the proposed defence to the respondent's pleaded claim.

[46] Whilst it may be noted that the affidavit of the appellants' solicitor contained reference to a detailed account from his client as to the circumstances purporting to support the appellants' defence and as to the circumstances in which he executed the Deed without particular reference to the terms of the Deed, which had been prepared by the respondent and which he was pressured into executing, it was and is not just a case of attribution of limited weight to the absence of sworn material as to those circumstances from the appellants and any other witnesses such as were involved as intermediary between the parties and present at the execution of the Deed. Rather the essential problem lies in the complete inconsistency evidenced by the preparedness of the appellants to deal with the respondent on the basis that they

would acknowledge the debt and pay it off, with the subsequently emerging contention that there was never any such debt arising out of any retainer under which the respondent acted for the appellants. It is also not a matter which assists the appellants' position that the subsequently emerging contention involves the imputation of significant and serious misconduct on the part of the respondent.

[47] In such circumstances, it should not be concluded that any error has been demonstrated in the essential finding of the Magistrate that the appellants had no real prospect of successfully defending the respondent's claim, having regard to the high degree of certainty of outcome that is required,[60] and that it is, in such circumstances, inconsequential that there was no express finding that there was also no need for a trial of the claim or any part of it. That is particularly because once the respondent's position as to the retainer and disclosure by way of the costs letter at the outset, is accepted, there is nothing identified as requiring any trial, nor preventing an exercise of discretion to grant summary judgment. In particular and once it is understood, as a matter of application of principle to the interpretation of the Deed, that it is appropriately regarded as effecting accord and conditional satisfaction of the existing claim, there was no impediment to the necessary implication that the respondent's election was to pursue his existing claim by seeking summary judgement on it.

[48] Accordingly and except in respect of the identified issue as to the basis upon which the costs of the application for summary judgment were awarded, and despite the absence of any express determination as to the nature and effect of the Deed, it is apparent that the Magistrate proceeded appropriately upon the basis that the respondent was entitled to seek the judgment in the proceedings before the Court. And it may be further noted, the Magistrate otherwise only expressly placed reliance on the acknowledgment in the Deed that "the payment of the money was outstanding and owing".

[49] There does however remain the identified issue in terms of the judgment then granted and as to the consequential error as to the basis upon which the costs of the application for summary judgment were awarded. However, it may be noted that s 45(1)(d) of the *MCA* allows for appeal by "any party who is dissatisfied with the judgment or order of a Magistrates Court" and the identified error is amenable to

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60 *Agar v Hyde* (2000) 201 CLR 552.

correction, consistently with the power of the Court recognised in s 47(d) of the *MCA* and/or UCPR 766(1)(b) and (6).

[50] Upon the publication of these reasons, for dismissing this appeal, it will be necessary to further hear the parties as to the order to be made in consequence of that conclusion and these reasons, and as to the costs of the appeal.