MAGISTRATES COURT OF QUEENSLAND

CITATION:	*Sterling Law Pty Ltd t/as Sterling Law v Murdock* [2020]
PARTIES:	**Sterling Law Pty Ltd** **ABN 64 165 643 881** **t/as Sterling Law** (Plaintiff) v **Joanne Murdock** (Defendant)
FILE NO/S:	M68 of 2019
DIVISION:	Civil
PROCEEDING:	Claim
ORIGINATING COURT:	Brisbane
DELIVERED ON:	3 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	6 December 2019 (Further material filed 16 April 2020)
MAGISTRATE:	Magistrate Hay
ORDER:	**1. The defendant's applications are dismissed.** **2. Within 21 days of delivery of these reasons the parties are to file and serve written submissions on the issue of costs and as to the appropriate calculation of interest, if not agreed, together with draft orders.**
COUNSEL:	P. G. Jeffrey for the Plaintiff/Respondent
SOLICITORS:	Sterling Law for the Plaintiff/Respondent Rose Litigation for the Defendant/Applicant

[1] The defendant applies for an assessment of legal costs, being the same costs that constitute the plaintiff's claim for monies owing.[1] This is the second time the defendant

[1] Tax invoice dated 12 December 2018. Application filed 14 November 2019.

has made such an application in these proceedings. The defendant also seeks a stay of the summary judgment entered against her on 15 April 2019 to enable the defendant to make instalment payments on that judgment.[2]

[2] The plaintiff resists the defendant's applications on the grounds of *res judicata,* estoppel and abuse of process. The plaintiff contends that the existing judgments of both this court and the District Court exercising its appellant jurisdiction, would be rendered nugatory.[3]

Background

[3] On 15 July 2019 the plaintiff successfully applied for summary judgment against the defendant. That same day the defendant unsuccessfully cross applied for an assessment of the legal costs. The defendant appealed, unsuccessfully, to the District Court. In dismissing the appeal, his Honour Judge Porter observed:

"The position before the learned Magistrate and before this Court on appeal remained as described by Morrison JA in Robertson v Boe Williams Lawyers [2013] QCA 252 at [29] that 'the material did not indicate any proper grounds upon which the costs or the liability to pay them was disputed.' A fortiori given the terms of the Notice to Admit Facts"[4]

[4] The defendant, having failed to respond to a notice to admit facts in these proceedings, remains deemed to have admitted to the quantum of the legal fees claimed in these proceedings. The defendant did not seek to set aside those deemed admissions either during the summary judgment application, her appeal to the District Court,[5] or in the applications presently before this court.

The Law

[5] The application to stay is brought under r. 800 of the *Uniform Civil Procedure Rules* 1999 *(Qld).* The defendant applies on the basis that she wishes to repay the debt by way of instalments due to her financial circumstances. She bears the onus of establishing why a stay, on those grounds, should be granted. Rule 800(1) was considered by the Court of Appeal in *Virgtel Ltd & Anor v Zabusky & Ors (No 2).*[6] President McMurdo (with whom Mullins and Philippides JJ agreed) stated:

"The costs orders the subject of this appeal are final orders. It follows that, ordinarily, the Virgtel companies are entitled to the 'fruits of their victory' by enforcing those final costs orders before the conclusion of the action, unless the appellants show 'special or exceptional circumstances' warranting a stay: Alexander v Cambridge Credit Corp Ltd; Croney v Nand. The onus is on the appellants to demonstrate why the court should grant

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[2] Defendant's submissions (including material to be read as set out therein) and Defendant's supplementary submissions both filed by leave 6 December 2019, together with oral submissions made 6 December 2019.
[3] Plaintiff's outline of argument (including material to be read as set out therein) filed by leave on 6 December 2019, together with oral submissions made 6 December 2019 and a further Affidavit of L.C. Bertrand filed 16 April 2020.
[4] *Murdock v Sterling Law (Qld) Pty Ltd* [2019] QDC 226 at [74].
[5] *Murdock v Sterling Law (Qld) Pty Ltd* supra at [27] and [65] – [66].
[6] [2009] QCA 349

the stay and deny the Virgtel companies the benefit of the orders in their favour." [footnotes removed]

[6] As stated by Applegarth J in *Lee v Abedian & Ors*:[7]

"The ultimate issue is whether it is appropriate to grant a stay in the particular circumstances of this case, taking into account the need to do justice between the parties by balancing their competing rights and interests. An applicant for a stay does not need to show special or exceptional circumstances. Nevertheless, the onus is upon the applicant to demonstrate that it is appropriate for a stay to be granted. In general, courts should not be disposed to delay the enforcement of their orders, and a successful party in litigation is entitled to the fruits of a judgment."

[7] Accordingly, a court considering an application to stay a judgment on the grounds of financial hardship that would impede that party's ability to prosecute its own legal rights must:

1. assess the applicant's true financial position; and
2. balance the competing legal interests of one party's right to the fruits of the judgment as against the applicant's access to justice (including an assessment of the merits of the applicant's legal rights: in this case the defendant's application to have the legal costs assessed). [8]

[8] The law on applications for assessment of legal professional costs has been comprehensively set out in the related decision of his Honour Judge Porter QC in *Murdock v Sterling Law (Qld) Pty Ltd.*[9] I do not propose to restate it here other than to observe that I agree with his Honour's analysis of it and application to the facts of this matter.

[9] If the defendant's application for a costs assessment is granted, upon the assessment being completed, the costs assessor will file a certificate and the registrar must make an order in accordance with that certificate. This order will take effect as a judgment in these proceedings.[10]

[10] *Res judicata* arises when a right or cause of action 'merges' with a judgment and no longer has any independent existence.[11]

[11] Issue estoppel arises when:

1. The same question has been decided;
2. The judicial decision said to create the estoppel is final;
3. The parties (or their privies) to the judicial decision are the same as those to the proceedings in which the issue estoppel is said to arise.[12]

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[7] [2017] QSC 22 at [4]
[8] *O'Connor & Ors v CWC Investors Pty Ltd & Ors (No 2)* [2019] QSC 138
[9] [2019] QDC 226.
[10] Rule 740 of the *Uniform Civil Procedure Rules* 1999 *(Qld)*
[11] *Jackson v Goldsmith* (1950) 81 CLR 446 at 466. See also *LPD Holdings (Aust) Pty Ltd v Russells* [2017] QSC 45 at [37].
[12] *Kugligowski v Metrobus* (2004) 220 CLR 363 at 373, [21]. See also *LPD Holdings (Aust) Pty Ltd v Russells* [2017] QSC 45 at [38].

[12] *Anshun* estoppel precludes the assertion of a claim, or raising an issue or fact or law, if that claim or issue is *"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 have been raised in that proceeding."*[13]

Consideration

[13] As noted above, if the defendant's application for a costs assessment is granted, upon the assessment being completed, the costs assessor will file a certificate and the registrar must make an order in accordance with that certificate. This order will take effect as a judgment in these proceedings.[14] This will necessarily mean that there will be two, potentially conflicting, judgments in the same proceedings.

[14] I find that the doctrine of *Res judicata* should be applied. This is the second time the defendant has applied for the same legal costs to be assessed. The legal costs are the subject matter of these proceedings as a whole. The first application for a costs assessment was dismissed, and that dismissal was upheld on appeal after the appellant court's detailed consideration of the merits of that first application.[15]

[15] In *LPD Holdings (Aust) Pty Ltd v Russells*[16] very similar issues were considered. However the key distinguishing features in *LPD Holdings* were that:

1. The law firm had obtained its judgment by default;
2. The client had commenced their application for costs assessment in separate proceedings by way of originating application;
3. The client's application for costs assessment pertained to both costs that were the subject of the default judgment, as well as other costs liabilities as between the client and the law firm.

[16] The fact that the judgment had been obtained by way of default in *LPD Holdings* was a key determinant in Justice Flanagan's conclusion that neither issue estoppel nor *res judicata* arose in that case. [17]

[17] His Honour found:

> *"... 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.*
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> *"Nor am I satisfied for the purposes of summarily dismissing the application for costs assessment that the issues now raised... were determined on their merits in the District Court proceedings."* [18]

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[13] *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [22]. See also *LPD Holdings (Aust) Pty Ltd v Russells* [2017] QSC 45 at [53].
[14] Rule 740 of the *Uniform Civil Procedure Rules* 1999 *(Qld)*
[15] *Murdock v Sterling Law (Qld) Pty Ltd* supra.
[16] Unreported, Flanagan J, [2017] QSC 45.
[17] supra at [45] – [50].
[18] supra at [49] – [50].

[18] In rejecting the *Anshun* estoppel argument, Justice Flanagan observed that in applying to set aside the default judgment, the District Court had not considered all the merits of the client's application for an assessment of all the costs paid to the law firm. Rather his Honour observed that the District Court had not been persuaded that there was a triable issue that would warrant setting aside the default judgment.[19] Further his Honour observed that it was not clear whether an *Anshun* estoppel can arise if there has been no examination of the merits of the claim in the earlier action:[20]

> *"As observed by Appelgarth J in* HM Hire[21] *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 taken account of all the facts of the case.' [22] In my view, it is not appropriate to summarily dismiss the present proceedings in circumstances where the questions of unreasonableness of LPD's conduct are required to be determined... 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."*[23]

[19] *LPD Holdings* can be distinguished from the present proceedings:

1. In the present proceedings the court at first instance considered the merits of any defence raised on the summary judgment application and a cross application for assessment, and on appeal the District Court undertook a full assessment of the merits of any defence available and, relevantly, the likelihood of the defendant success on an assessment of those costs.[24]
2. In LPD Holdings, the *Anshun* estoppel could only have been a bar to those costs that had been the subject of the default judgment, not the further costs liabilities incurred. In the present proceedings the *Anshun* estoppel bars the entire subject matter of these proceedings.

Conclusion

[20] Noting the scope of the decision given on appeal,[25] applying the doctrine of *Res judicata*, the principles espoused in *LPD Holdings* and having regard to the effect of r. 740 of the *Uniform Civil Procedure Rules* 1999 *(Qld)*, I find that the defendant's application for assessment of the legal costs is barred pursuant to the doctrine of *Res judicata* and she is issue estopped from making such an application.

[21] I further find that, in view of the findings already made by Judge Porter QC in *Murdock v Sterling Law (Qld) Pty Ltd*[26] and my conclusion that the applicant is precluded from seeking an assessment of the legal costs, the application for a stay of the judgment entered against her on 15 July 2019 must also fail. Accordingly there is no need for

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[19] supra at [56].
[20] supra at [57]. See also *Clout & Ors v Klein & Ors* [2001] QSC 401at [44].
[21] *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd* [2014] 2 QDAC R 44.
[22] *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd* [2014] 2 QDAC R 44 at [12].
[23] *LPD Holdings* supra at [58].
[24] supra at [70] – [83].
[25] *Murdock v Sterling Law (Qld) Pty Ltd* [2019] QDC 226.
[26] supra.

consideration of the defendant's financial position, because even if impecunious there is no legal claim that will subverted by the refusal of this application.

ORDERS

[22] The defendant's applications for an assessment of costs and stay respectively are dismissed.

[23] I direct that within 21 days of the publication of these reasons the parties are to file and serve written submissions on the issue of costs and as to the appropriate calculation of interest, if not agreed, together with draft orders.