

# SUPREME COURT OF QUEENSLAND

CITATION: *Amos v Ian K Fry & Company* [2010] QCA 131

PARTIES: **EDWARD AMOS**  
(respondent to the application/appellant)  
v  
**IAN K FRY & COMPANY**  
(applicant/respondent on the appeal)

FILE NO/S: Appeal No. 86 of 2010  
SC No 11549 of 2009

DIVISION: Court of Appeal

PROCEEDING: Stay Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 1 June 2010

DELIVERED AT: Brisbane

HEARING DATE: 24 May 2010

JUDGE: White JA

ORDER: **1. Mr Edward Amos' Notice of Appeal No. 86 of 2010 be dismissed.**  
**2. Mr Edward Amos pay the respondent's costs of the application and the appeal to be assessed on the standard basis unless, within seven days of the delivery of judgment short written submissions are made seeking some different order. The responding party to file his response within seven days of receipt of those submissions, if any.**

CATCHWORDS: PROCEDURE – COSTS – where order made for trustee/executor to deduct such costs from beneficiary's share of estate as attributable to his conduct in commencing proceedings – where beneficiary refused leave to commence proceedings to seek a costs assessment order – where beneficiary sought leave to appeal from decision – whether beneficiary had standing to seek costs assessment order against trustee's solicitor – meaning of 'third party payer' in the *Legal Profession Act 2007* – whether beneficiary had a legal obligation to pay costs

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – Whether extension of time necessary for stay application by respondent to appeal

*Legal Profession Act 2007 (Qld)*, s 301, s 335, s 339(1)  
*Supreme Court of Queensland Act 1991 (Qld)*, s 43(1)  
*Uniform Civil Procedure Rules 1999 (Qld)*, r 8, r 743A, r 767

*Boyce v McIntyre* [2009] NSWCA 185, cited  
*Deputy Commissioner for Taxation v Moore Bank Pty Ltd*  
 [1987] 1 Qd R 414, cited  
*Equuscorp P/L v Short Punch & Greatorix & Ors* [2001]  
 2 Qd R 580; [\[2000\] QCA 407](#), applied  
*Jackson v Goldsmith* (1950) 81 CLR 446; [1950] HCA 22,  
 cited  
*Littlewood v George Wimpey & Co* [1953] 2 QB 501, cited  
*Raedel & Anor v Jezer Construction Group Pty Ltd* [\[2008\]  
 QCA 368](#), cited  
*Re Early* [1897] 1 IR 6, considered  
*Re Freehill Hollingdale & Page's Bill of Costs* [1998]  
 1 Qd R 616, considered  
*von Risefer & Ors v State of Queensland Department of  
 Natural Resources and Mines; von Risefer & Ors v State of  
 Queensland* [\[2005\] QCA 136](#), cited

COUNSEL: L A Stephens for the applicant/respondent to the appeal  
 D Murphy SC, with N M Cooke, for the respondent to the  
 application/appellant

SOLICITORS: Ian K Fry & Company for the applicant/respondent to the  
 appeal  
 Keller Nall & Brown Solicitors for the respondent to the  
 application/appellant

- [1] Mr Edward Amos has filed a notice of appeal from the order of Ann Lyons J made on 11 December 2009 in which her Honour dismissed Mr Amos' application for leave to commence proceedings to seek a costs assessment order. The respondent, a solicitor, has filed an application seeking orders that the appeal be dismissed or stayed permanently, or alternatively, that it be struck out as vexatious and an abuse of process and as disclosing no prospects of success. In the further alternative, that the appeal be stayed pending Mr Amos' obtaining leave to bring the appeal. The applicant, whom I shall, for convenience, refer to as "the respondent solicitor", also seeks, if necessary, an extension of time within which to bring this application.
- [2] Mr Douglas Murphy SC, who appeared for Mr Amos with Mr NM Cooke, said at the hearing of the application that Mr Amos had offered to stay the appeal pending seeking and obtaining leave to appeal. That offer was declined as the respondent solicitor wished to pursue his principal relief of a permanent stay or strike out.
- [3] In his proceedings below Mr Amos sought an order that the respondent solicitor, who was retained by Mr Edward Amos' brother, Mr Leonard Amos, as trustee and executor of their late father's estate, be ordered to have his bills of costs assessed by a costs assessor. Neither the estate nor the trustee is a party to these proceedings, nor have notices been given.
- [4] Mr Amos sought leave below because he had given undertakings through his counsel on two occasions, before Byrne J on 18 May 2005, and Douglas J on

11 April 2006, not to commence or continue any proceedings against his brother, Mr Leonard Amos, or any agents employed by him, without the leave of the court being first obtained. Those undertakings were given by Mr Edward Amos to Byrne J in the face of an application to have him declared vexatious. This, in turn, was against a history of attempting to frustrate the due administration of his late father's estate, the beneficiaries of which were the two brothers and their sister, Mrs Frances Williams.

- [5] Her Honour Justice Lyons found that the hearing before her was virtually identical to the hearing before Fryberg J on 18 December 2008 between Mr Edward Amos and Mr Leonard Amos as executor/trustee of the estate, and held that the issue had been resolved. More significantly, her Honour held that Mr Edward Amos was not a third party payer as defined in s 301 of the *Legal Profession Act 2007* because he had no legal obligation to pay the costs and therefore was not entitled to an order that the costs be assessed. Mr Edward Amos contests those conclusions in his grounds of appeal. Although the first order in his notice of appeal is that "Leave be granted", he has not, in a separate application and prior to initiating an appeal, sought leave to bring the appeal. The impetus for having the costs assessed is, in the first place, order no. 10 of the orders made by Byrne J on 18 May 2005, and mirrored in those of Douglas J, namely,

"It is directed that LEONARD RALPH AMOS as sole executor and sole trustee of the estate or his agent Ian Kennedy Fry for the sale of the estate property at 58 Melville Tce, Wynnum, may deduct such costs from the Respondent's [Edward Amos] share of the estate or his share of the proceeds of sale and pay the same to Ian Kennedy Fry as the solicitor for the Applicant."

together with the letter from the respondent solicitor to Mr Edward Amos' solicitors dated 15 December 2008 setting out the calculations of the amount attributed to Mr Edward Amos' conduct adding to the costs of administering the estate. Those calculations resulted in a nil distribution to Mr Edward Amos and a distribution of \$157,610.82 to each of Mr Leonard Amos and Mrs Frances Williams. The costs incurred by reason of the conduct of Mr Edward Amos were said to be approximately \$270,000.

- [6] To consider the application to strike out the appeal or to stay it permanently it is necessary to summarise the considerable history of the administration of this estate albeit in summary form. Not all material relating to the many applications in related proceedings was read on this application but much can be gleaned from summaries in affidavits and from court orders.

### **Relevant chronology**

- [7] Charles Amos died on 23 February 1999. By his will he appointed his sons Edward and Leonard to be the trustees and executors of his estate. He bequeathed his residuary estate to his three children, Edward, Leonard and Frances equally. The estate comprised some \$52,000 in bank accounts and a house property at Wynnum which, eventually, was sold for approximately \$650,000.
- [8] On 19 April 1999 probate was granted to the named executors. They were not in agreement about the disposition of the Wynnum property. Mr Edward Amos made a claim to an interest in the house of a resulting/constructive trust kind. He sought

to have Mr Leonard Amos removed as executor. Both alleged each owed money to the estate. Mr Leonard Amos sought directions<sup>1</sup> in March 2000 in respect of the administration of the estate.

- [9] Mr Edward Amos, in the meantime, transferred the Wynnum property to himself absolutely on 17 February 2000. In response, Mr Leonard Amos lodged a caveat and commenced proceedings<sup>2</sup> seeking a declaration that Mr Edward Amos held the property on trust for the estate and other orders. Mr Edward Amos counterclaimed for compensation for the occupation of the Wynnum property by his brother and other relief. Just before the commencement of the trial, the beneficiaries settled matters by the execution of a Deed of Settlement dated 15 September 2004, the full terms of which are attached to these reasons. The parties to the Deed agreed that it was in full and final settlement of all claims arising in relation to the administration of the estate and any claims the estate might have against any of the beneficiaries, the executors and trustees. Mr Ian Fry, the respondent solicitor, was irrevocably appointed as the executors' agent to sell the Wynnum property. The proceeds of sale were to be deposited in Mr Fry's trust account to be distributed, as set out in the Deed, and, after those costs and expenses, to be distributed one-third to each of Frances Williams, Leonard Amos and to Mr Edward Amos' solicitor's trust account.
- [10] Mr Leonard Amos commenced proceedings by application filed on 8 November 2004<sup>3</sup> for orders to enforce the Deed against Mr Edward Amos. That application was to be heard on 22 November 2004. However, on 18 November 2004 Mr Edward Amos commenced (but did not serve) proceedings<sup>4</sup> to set aside the Deed on various grounds including that the Deed was for an illegal purpose as Mr Ian Fry was not the holder of a real estate agent's licence; and that it failed for uncertainty because it supposed that the property would be purchased.
- [11] On the hearing of Mr Leonard Amos' application to enforce the Deed, Atkinson J ordered Mr Edward Amos to sign all necessary documents to give effect to cl 2 of the Deed within seven days, failing which the registrar of the court was directed to sign on his behalf. Her Honour declared that on the true construction of the Deed the respondent solicitor was entitled to engage town planners to obtain a demolition consent for the Wynnum property and that Mr Edward Amos was ordered to sign all necessary documents to obtain that consent. Mr Edward Amos was ordered to pay the costs of that application.
- [12] Mr Edward Amos appealed that decision<sup>5</sup> and applied for a stay of the orders of Atkinson J pending the outcome of the appeal. On 17 December 2004 the President refused the application for stay and ordered Mr Edward Amos to pay the costs.<sup>6</sup>
- [13] Thereafter it seems that Mr Edward Amos took possession of the Wynnum property, changed the locks, installed a tenant, caused "difficulties" with the town planner with the demolition consent application and other conduct which, so far as the correspondence and affidavits reveal, was contrary to the terms of the Deed.

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<sup>1</sup> Originating application no. 1885 of 2000.

<sup>2</sup> No. S4763 of 2000.

<sup>3</sup> In proceedings no. S4763 of 2000.

<sup>4</sup> No. S10061 of 2004.

<sup>5</sup> Appeal No. 10686 of 2004.

<sup>6</sup> [2004] QCA 490.

It emerged that Mr Edward Amos allegedly had failed to reveal a liability for land tax over the Wynnum property. He had cancelled the estate insurance over the property and insured the property in his own name.

- [14] On 14 April 2005 a consent dismissal of the appeal was filed together with an order that Mr Edward Amos pay the costs.
- [15] Mr Leonard Amos sought to have Mr Edward Amos' proceedings commenced on 18 November 2004 to set aside the Deed struck out. He also, by originating application,<sup>7</sup> sought the removal of Mr Edward Amos as an executor and trustee of the estate. Mr Edward Amos allegedly avoided personal service of the originating application and an application for substituted service was filed by leave on 18 May 2005. The matter came on before Byrne J on 18 May 2005. The transcript of those proceedings and orders are included in the material filed on this application.<sup>8</sup> Since Mr Edward Amos appeared, the application for substituted service was dismissed with Mr Edward Amos being ordered to pay the costs. Those costs by order were to be deducted from Mr Edward Amos' share of the estate and paid to the respondent solicitor. Mr Edward Amos was removed as executor and trustee and Byrne J made orders vesting the property in Mr Leonard Amos as sole executor and trustee. The proceedings to set aside the Deed were dismissed. Mr Edward Amos, through his counsel, gave undertakings to the court in the following terms:

“1. that the Respondent will not file any further claims, applications or proceedings in or arising out of the matters litigated in Actions OA 1885 / 00 and proceeding S4673 / 00 and resolved by settlement deed on 15 September 2004 without an order for leave of the court first being obtained.”

- [16] His Honour directed that:

“...LEONARD RALPH AMOS, as sole executor and sole trustee of the estate or his agent Ian Kennedy Fry for the sale of the estate property at 58 Melville Tce Wynnum, may deduct such costs from the Respondent's share of the estate or the proceeds of the said sale, and pay the same to Ian Kennedy Fry as the solicitor for the Applicants.”

- [17] Mr Leonard Amos had also sought an order for possession of the Wynnum property.<sup>9</sup> On that application Mr Edward Amos undertook not to lodge a caveat in respect of the Wynnum property without leave of the court having first been obtained and not to do other things which would interfere with the auction of the property or the obtaining of a development application for the demolition of the house and to deliver up possession of the Wynnum property. In respect of that application the court ordered that Mr Leonard Amos pay Mr Edward Amos' costs because there had been no prior request to deliver up the property.
- [18] Mr Edward Amos did not produce the grant of probate which he had undertaken to deliver to the registry within seven days of Byrne J's order on 18 May 2005. An application was heard before Moynihhan J on 20 July 2005 at which Mr Edward

<sup>7</sup> No. S3003 of 2005.

<sup>8</sup> Applicant's IPB, A214 – A215.

<sup>9</sup> In proceedings no. S4763 of 2000.

Amos undertook to the court to deliver the grant of probate within seven days “of locating it” and undertook not to use it for any purpose pending that delivery. The court directed that the registrar issue probate to Mr Leonard Amos notwithstanding that the joint probate issued on 19 April 1999 had not been delivered into the registry. Mr Edward Amos was ordered to pay costs and those costs were to be deducted from his share of the estate and paid to the respondent solicitor.

- [19] Notwithstanding his undertakings, Mr Edward Amos’ solicitors wrote to the estate solicitor indicating that he “may” lodge a caveat claiming an entitlement to a one-third share as a tenant in common pursuant to the will, and leaving it to the remaining beneficiaries to sell their interest at auction.
- [20] Mr Edward Amos commenced two claims in the Magistrates Court<sup>10</sup> claiming respectively \$2,347.50 for cleaning the Wynnum property after the death of his father and interest and reimbursement for rates of \$1,410.25. Mr Leonard Amos contended that both of those matters were compromised in the Deed.
- [21] Mr Leonard Amos brought an application in the administration proceedings<sup>11</sup> seeking orders restraining Mr Edward Amos from vexatiously commencing any proceedings. On 11 April 2006 Douglas J made orders upon Mr Edward Amos by his counsel giving undertakings in the following terms:

- “A. that the Respondent [Mr Edward Amos], his servants and agents will not lodge any documents in the land registry touching or concerning the estate property at 58 Melville Tce Wynnum without leave of the court having first been obtained;
- B. that the Respondent and his solicitors servants and agents will not commence or continue any proceedings against Leonard Ralph Amos or any agents employed by Leonard Ralph Amos without leave of the court having first been obtained;
- C. that the Respondent by his solicitors will present to the applicants for signature, sign and file a notice of discontinuance in Action No M4 of 2005 and in Action No M 2416/06 commenced in the Magistrates Court at Brisbane within 14 days.”

The orders were:

- “(a) the defendant pay to the applicant the unnecessary extra costs for the administration of the estate caused by any vexatious correspondence of the respondent or by his unreasonable failure to respond to correspondence from the applicant, his servants or agents, to be assessed on an indemnity basis but only such costs that are not otherwise recoverable under any other costs order obtained by the applicant against the respondent;

<sup>10</sup> No. M4 of 2005 and M2416 of 2006.

<sup>11</sup> No. 4763 of 2000.

- (b) Ian Kennedy Fry the agent for the sale of the estate property at 58 Melville Tce Wynnum under the Deed of Settlement dated 15 September 2004, may deduct such costs from the Respondent's share of the estate and the proceeds of sale and pay the same to Ian Kennedy Fry as the solicitor for the applicant.
- (c) the respondent EDWARD AMOS pay the applicant's costs of and incidental to this application to be agreed or assessed and that Ian Kennedy Fry the agent for the sale of the estate property at 58 Melville Tce Wynnum under the Deed of Settlement dated 15 September 2004, may deduct such costs from the Respondent's share of the estate and the proceeds of sale and pay the same to Ian Kennedy Fry as the solicitor for the applicant."

[22] It appears that on 7 August 2008 Mr Edward Amos purported to assign his interest as a beneficiary under the will and pursuant to the Deed to a company, Property Renovations Pty Ltd, and gave notice of that assignment the following day.

[23] Mr Edward Amos brought an application filed on 23 September 2008 in the administration proceedings seeking a distribution of the estate in terms of the Deed, in default, the removal of Mr Leonard Amos as trustee. On 1 October 2008, the return date of the application and after extensive argument before Fryberg J, the parties agreed to a timetable whereby the trustee agreed:

- to produce a final bill of costs for the administration and costs payable under the Deed by 30 October 2008;
- to produce a full accounting by 20 November 2008;
- to retain in a separate account any monies for tax liabilities and accountancy fees and costs;
- to notify the beneficiaries of their likely distribution by 15 December 2008;
- if no objections were received the trustee was to distribute the funds in his hands in accordance with the notice by 15 January 2009.

[24] The trustee did those things and received an objection from Mr Edward Amos on 17 November 2008 who gave notice that he intended to bring an application for leave to bring an application to have the costs assessed. This he did by an application filed on 9 December 2008 in the administration proceedings. He sought leave to make an application to have an independent costs assessor appointed by the court to assess the costs of Mr Leonard Amos as executor and Mr Ian Fry as agent pursuant to the Deed. That application was heard by Fryberg J on 18 December 2008. The transcript of those proceedings is contained in the material.<sup>12</sup>

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<sup>12</sup> Applicant's IPB A42-49 (Exhibit IKF7 to the affidavit of Ian Kennedy Fry sworn 8 December 2009).

- [25] Mr Cooke, representing Mr Edward Amos, told his Honour that he was not expecting any appearance from the other side. Mr Cooke read the order of Douglas J of 11 April 2006 and several affidavits of Mr Glenn Collinson, solicitor and principal of Mr Edward Amos' firm of solicitors, Keller Nall & Brown. Mr Leonard Amos, as executor/trustee, was not appearing, as his Honour understood, in order to save estate costs since Mr Edward Amos was seeking leave. If he were successful then the matter would be argued on a subsequent occasion. His Honour dismissed the application and concluded that:

“... the material is insufficient to demonstrate a reasonable likelihood that any application brought pursuant to leave granted by me would succeed. The prospects of success on the material before me seem low. There is no reason to think that the applicant will succeed in the application on the merits and to give him leave to proceed would simply be to enable him once again to force the estate to incur further costs.

In my judgment, strong grounds would need to be shown to warrant the granting of leave as sought. The purpose of the order is evidently to prevent any further similar behaviour of the applicant. The material before me does not persuade me that the applicant's prospects of success on a substantive application are sufficient to warrant the grant of leave.”<sup>13</sup>

- [26] No appeal was lodged from his Honour's refusal to grant leave. The trustee distributed the estate notifying the beneficiaries by letter dated 9 April 2009. Each of Mr Leonard Amos and Mrs Frances Williams were to receive \$148,000. Mr Leonard Amos has opined that the sum of approximately \$245,000 for legal costs incurred by him as executor/trustee were due to the conduct of Mr Edward Amos and were deducted from his share of the estate.
- [27] Mr Edward Amos commenced fresh proceedings<sup>14</sup> against the respondent solicitor by application filed 14 October 2009 for an order for the assessment of the invoices from the respondent solicitor, for \$10,803.25 and \$255,318.68. No notice of that application was given to Mr Leonard Amos as executor/trustee, or, it would seem, to the assignee of Mr Edward Amos' interests in the estate and Deed. Consistently with the *Uniform Civil Procedure Rules 1999 (UCPR)* the solicitors for Mr Edward Amos filed a consent by Mr Stephen Hartwell to carry out the assessment of costs of the two invoices and a further invoice of McKelvey & Hu solicitors to the respondent solicitor for \$11,846.52.
- [28] When the matter came on before Ann Lyons J on 11 December 2009,<sup>15</sup> Mr Cooke for Mr Edward Amos relied upon several affidavits of Mr Collinson, an affidavit of Mr Gino Milani, solicitor, and Mr Christopher Pike, a costs assessor. Mr Milani deposed that he was eligible to be appointed a costs assessor pursuant to r 743J. He deposed that he had reviewed the two tax invoices, opined that the memoranda of professional fees and outlays delivered by the respondent solicitor failed to contain sufficient details to enable a client to make up his mind on the subject of assessment and that the amount of the costs, having regard to the value of the estate assets of

<sup>13</sup> Applicant's IPB A51-52.

<sup>14</sup> No. S11549 of 2009.

<sup>15</sup> See the transcript at A316-342 of the Applicant's IPB.

\$677,000 appeared to be excessive. Similarly, Mr Pike perused the tax invoices and regarded the lack of detail as making the bills deficient and that the total amount of the bills to finalise an estate valued at \$677,000, appeared to be excessive. The respondent solicitor relied on the itemised costs schedules prepared by Mr James McLellan, a practising legal costs assessor, to which Mr Milani and Mr Pike take exception. He responded by affidavit to those criticisms. He denied duplicating any work. He responded to the comparison of the value of the estate with the amount of the legal costs by Mr Milani and Mr Pike noting that that approach would be a reasonable comparison if the administration of the estate in question was straightforward and uncontested and did not involve any litigation. He deposed:<sup>16</sup>

“The administration of this estate has been anything but straightforward and uncontentious from my reading of the file and from my involvement in the various proceedings to enforce the numerous costs orders made in favour of Leonard Ralph Amos against the applicant.”

[29] In order to decide the respondent’s application to stay permanently or strike out the appeal, the prospects of success of the appeal must be considered. It is a serious matter to deprive a litigant of an opportunity to pursue an appeal if it is in the interests of justice that he should be permitted to do so.<sup>17</sup> There are three matters to be considered:

- Is leave required?
- Was the matter disposed of by Fryberg J?
- Does Mr Edward Amos have standing to seek a costs order?

### **Leave**

[30] Mr Edward Amos accepts through his counsel that he requires the leave of the court to institute his appeal from the decision of Ann Lyons J refusing him leave to seek a costs assessment order.<sup>18</sup>

### **Was the matter disposed of by Fryberg J?**

[31] The proceedings before Fryberg J were between Mr Edward Amos and the trustee/executor of the estate. His Honour dismissed the application for leave on the basis that there was no reliable material before the court to demonstrate that the charges were excessive against the background, as understood by his Honour, of the way in which Mr Edward Amos had prolonged the administration. His Honour concluded that no order for a costs assessment would be made were leave to be given and dismissed the application for leave accordingly. His Honour observed, in the course of argument, that if Mr Edward Amos’ independent costs assessor pronounced the bills excessive then leave would be granted.<sup>19</sup>

<sup>16</sup> At [26] of his affidavit at A330 of the Appellant’s IPB.

<sup>17</sup> *von Risefer & Ors v State of Queensland Department of Natural Resources and Mines; von Risefer & Ors v State of Queensland* [2005] QCA 136 at [20]; *Raedel & Anor v Jezer Construction Group Pty Ltd* [2008] QCA 368.

<sup>18</sup> An appeal is a proceeding: *UCPR*, r 8.

<sup>19</sup> See the transcript at A46 of the Applicant’s IPB.

- [32] The complaint articulated by Mr Cooke for Mr Edward Amos, to his Honour was that without the solicitor's files, it would not be possible to have the costs assessed by an independent assessor in any useful fashion. Mr Fry deposed, subsequent to that hearing, that the costs attributed to Mr Edward Amos' conduct and interference in the due administration of the estate were readily ascertainable in the trail of correspondence in Mr Edward Amos' own solicitor's files. The affidavits of Mr Milani and Mr Pike do not suggest that they were provided with those files nor that they understood the history of the administration of this estate. In those circumstances their comments are of no or little value in understanding whether the bills are excessive and, to that extent, matters have not been advanced from the hearing before Fryberg J. Ann Lyons J below made similar observations about the opinions of those deponents. Mr Collinson is not, and was not said to be, independent, being Mr Edward Amos' own solicitor. Her Honour thus concluded that there was no new evidence to support an order and said that the matter was "*res judicata*"; that "issue estoppel" prevented re-litigation; and that Fryberg J's decision had not been appealed.
- [33] I doubt that *res judicata* would apply to these proceedings vis-à-vis the proceedings between Mr Edward Amos and the executor/trustee before Fryberg J. The principle was discussed by Fullager J in *Jackson v Goldsmith*:<sup>20</sup>

"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. This rule is not, to my mind, correctly classified under the heading of estoppel at all. It is a broad rule of public policy based on the principles expressed in the maxims "*interest reipublicae ut sit finis litium*" and "*nemo debet bis vexari pro eadem causa.*"<sup>21</sup>

The rule as to issue estoppel is ... that parties and privies are "precluded from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them ... has been, on such issue joined, solemnly found against them." ... The same rule was concisely stated by Dixon J in *Blair v Curran* ... where his Honour said:- "A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies."

It is unnecessary here to discuss these two principles further beyond noting two points.

In the first place, if A sues B to judgment and in subsequent proceedings between them a plea of *res judicata* is raised, the primary question will be whether the cause of action in the later proceedings is the same as that which was litigated in the former proceedings. ...

<sup>20</sup> (1950) 81 CLR 446 at 466-7.

<sup>21</sup> Translated by Holmes and Chesterman JJA in *Cordes v Dr Peter Ironside Pty Ltd* [2009] QCA 302 as "it is in the interest of the State that law suits not be protracted" and "it is a rule of law that a man shall not be twice vexed for one and the same cause".

In the second place, it follows from the very nature of the difference between the plea of *res judicata* and the plea of issue estoppel that different materials are relevant in each case. Where the plea is of *res judicata*, only the actual record is relevant. Where the plea is of issue estoppel, any material may be looked at which will show what issues were raised and decided.”

- [34] In the present matter, the parties are different and the basal causes of action are different from those before Fryberg J, even if the underlying issue (how much of the bill ought properly be attributed to Mr Edward Amos’ conduct) is the same, or very nearly. A party in Mr Edward Amos’ position, even if *res judicata* or issue estoppel strictly do not apply, bringing subsequent proceedings may find that to prosecute those proceedings constitutes an abuse of process or is vexatious. However, this application can, I think, be disposed of without considering this factor further.

### **Mr Edward Amos’ standing**

- [35] Mr Edward Amos brings his application for a costs assessment pursuant to r 743A of the *UCPR*. That rule is in Part 4 – Assessment of costs under the *Legal Profession Act 2007*, which is located in Chapter 17A – Costs. Rule 743A provides, relevantly:

- “(1) A person applying for a costs assessment must apply to the relevant court.
- (2) The application must –
  - (a) be in the approved form; and
  - (b) state the names of any persons to whom notice must be given under the *Legal Profession Act 2007*, section 339(1); and
  - (c) if practicable –
    - (i) nominate a particular costs assessor for the assessment; and
    - (ii) state the applicable hourly rate of the nominated costs assessor; and
  - (d) be accompanied by the following –
    - (i) an affidavit;
    - (ii) if applicable, the nominated cost assessor’s consent to appointment to carry out the costs assessment and confirmation that, if appointed, there would be no conflict of interest;
    - (iii) the prescribed fee.”

- [36] Section 339 of the *Legal Profession Act 2007* provides, relevantly:

- “(1) The applicant for a costs assessment must, under the Uniform Civil Procedure Rules, give notice of the costs application to any other person the applicant knows is 1 of the following –
- (a) a law practice to whom the legal costs have been paid or are payable;
  - (b) the law practice that retained a law practice to whom the legal costs have been paid or are payable;
  - (c) the client;
  - (d) a third party payer.”

No notice was given to any other person and not to Mr Leonard Amos as executor/trustee of the estate nor, so far as the material reveals, to the company to which Mr Edward Amos allegedly assigned his interest in the estate.

- [37] Mr Edward Amos contended that he has standing to seek a costs assessment order against the respondent solicitor because he is a third party payer within the meaning of that expression in the *Legal Profession Act 2007*. By s 335:

- “(1) A client may apply for an assessment of the whole or any part of legal costs.
- (2) A third party payer may apply for an assessment of the whole or any part of legal costs payable by the third party payer.
- ...
- (10) Subject to this section, a costs application under subsection (1) or (2) must be made in the way provided under the Uniform Civil Procedure Rules.”

- [38] In Division 7 of Part 3.4, where provision is made for a costs assessment, “client”:

“means a person to whom or for whom legal services are or have been provided”.

By s 301:

- “(1) A person is a ***third party payer***, in relation to a client of a law practice, if the person is not the client and –
- (a) is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client; or
  - (b) being under that obligation, has already paid all or a part of those legal costs.
- (2) A third party payer is an ***associated third party payer*** if the legal obligation mentioned in subsection (1)(a) is owed to the law practice, whether or not it is also owed to the client or another person.

- (3) A third party payer is a *non-associated third party payer* if the legal obligation mentioned in subsection (1)(a) is owed to the client or another person but not the law practice.
- (4) A legal obligation mentioned in subsection (1) can arise by or under contract or legislation or otherwise.
- (5) A law practice that retains another law practice on behalf of a client is not on that account a third party payer in relation to that client.”

[39] Mr Edward Amos contends that he has a legal obligation to pay the respondent solicitor’s costs which have been attributed by the executor/trustee, Mr Leonard Amos, to his conduct by virtue of Douglas J’s order on 11 April 2006. Her Honour below concluded that he was under no legal obligation to pay all or any part of the legal costs for the legal services provided to the client as a third party payer, an associated third party payer or a non-associated third party payer. Essentially, this was because there was no cause of action which the respondent solicitor could bring against Mr Edward Amos as beneficiary.

[40] Counsel for Mr Edward Amos submitted that by virtue of Douglas J’s order he became a third party payer of the solicitor’s fees “absolute”. This was said to be because nothing was distributed to him under his late father’s will but his share went to pay the respondent solicitor’s bills of costs. It is useful to restate the relevant terms of the order:

- “(a) the defendant [Edward Amos] pay to the applicant the unnecessary extra costs for the administration of the estate caused by any vexatious correspondence of the respondent [Edward Amos] or by his unreasonable failure to respond to correspondence from the applicant, his servants or agents, to be assessed on an indemnity basis but only such costs that are not otherwise recoverable under any other costs order obtained by the applicant against the respondent;
- (b) Ian Kennedy Fry, the agent for the sale of the estate property at 58 Melville Tce Wynnum under the Deed of Settlement dated 15 September 2004, may deduct such costs from the Respondent’s share of the estate in the proceeds of sale and pay the same to Ian Kennedy Fry as the solicitor for the applicant;
- (c) the respondent EDWARD AMOS pay the applicant’s costs of and incidental to this application to be agreed or assessed and that Ian Kennedy Fry the agent for the sale of the estate property at 58 Melville Tce Wynnum under the Deed of Settlement dated 15 September 2004, may deduct such costs from the Respondent’s share of the estate and the proceeds of sale and pay the same to Ian Kennedy Fry as the solicitor for the applicant.”

[41] Mr Leonard Amos, as executor/trustee, approved the amounts calculated as referable to Mr Edward Amos’ conduct. Reference was made to the decision in

*Equuscorp P/L v Short Punch & Greatorix & Ors.*<sup>22</sup> Equuscorp Pty Ltd was the owner of the majority of the units in a unit trust and brought proceedings against the trustee and the manager of the trust. Each of the trustee and manager retained firms of solicitors who rendered bills of costs to their respective client. Equuscorp sought to challenge those bills under the *Queensland Law Society Act 1952*. Relevantly, the Act provided that:

“...the client...may apply to a court...for the court to decide the reasonableness of the fees and costs charged in the account.”<sup>23</sup>

The term “client” was defined in s 3 to include:

“a person who has paid, or is liable to pay, the account of a client.”

- [42] The Chief Justice held that the words “liable to pay” in s 3 carried their usual meaning as “responsible in law”, referring to *Littlewood v George Wimpey & Co.*<sup>24</sup> and “a person liable to pay” meaning “a person against whom payment of the (costs) can be enforced”, referring to *Deputy Commissioner for Taxation v Moorebank Pty Ltd.*<sup>25</sup> His Honour concluded that the ownership of the units created no liability to pay the solicitors’ costs, “any more than would ownership of shares in a company which retained solicitors”.<sup>26</sup>
- [43] Mr Stephens, for the respondent solicitor, contended that the expression “under a legal liability to pay” in the *Legal Profession Act 2007* is narrower than the expression “liable to pay” in the *Queensland Law Society Act 1952*, although the Chief Justice’s approach seems to be a “legal” obligation to pay. His Honour observed that although the point did not arise, it seemed that the definition of “client” in s 3 of the *Queensland Law Society Act* was not intended to exclude situations where the liability was owed to someone other than the solicitor, for example, a mortgagee or lessor. His Honour noted, however, that the right to seek a costs review previously conferred by s 31 of the *Costs Act 1867* no longer existed.<sup>27</sup>
- [44] In his reasons for judgment in *Equuscorp*, McPherson JA opined that s 31 of the *Costs Act 1867* which entitled a beneficiary or other person interested in property out of which costs were paid or to be payable, to obtain an order for taxation, may have been “inadvertently” omitted. If that were so, the legislature has had ample opportunity since the 1952 Act and the decision in *Equuscorp* to insert such an enabling provision but has not.
- [45] Mr Murphy and Mr Cooke referred to *Re Freehill Hollingdale & Page’s Bill of Costs*<sup>28</sup> in the course of the hearing to support their contention that Mr Edward Amos was “under a legal obligation to pay” the solicitor’s costs. The legislation under consideration was the *Legal Practitioners Act 1995* where the expression in s 13 “be liable to pay” gave standing to apply to the court for a

<sup>22</sup> [2000] QCA 407.

<sup>23</sup> s 6ZF(1).

<sup>24</sup> [1953] 2 QB 501 at 515.

<sup>25</sup> [1987] 1 Qd R 414 at 416.

<sup>26</sup> *Equuscorp P/L v Short Punch & Greatorix & Ors* [2000] QCA 407 at [11].

<sup>27</sup> *Boyce v McIntyre* [2009] NSWCA 185, a decision referred to by Mr Murphy SC and Mr Cooke, concerned the obligation of a sub-lessee to pay legal costs and is within the expression “legal” obligation to pay.

<sup>28</sup> [1998] 1 Qd R 616.

reference for the taxation of the bill of costs. The issue was whether such a person could obtain an appointment directly from the Taxing Officer pursuant to s 7(1) of the Act. The third party was the lessee of premises and was, in accordance with the lease, obliged to pay the lessor's legal costs associated with the preparation of the lease. Clearly, the third party was under a legal obligation to pay those costs and the issue discussed by Lee J was not relevant to the present proceedings. However, in the course of this discussion his Honour considered that substantial issues could arise on an application by a party claiming to be a party not chargeable with a bill but legally liable to pay which would be beyond the jurisdiction of a taxing officer to resolve. His Honour referred to a passage concerning persons liable to pay in the first edition of Halsbury *The Laws of England*<sup>29</sup> which, at first sight, may support Mr Edward Amos' contention that he has standing:

“... any party to a compromise, as regards the costs which he has agreed to pay, or which being payable out of a fund, fall upon his share...”

That passage appears virtually unchanged in the fourth edition.<sup>30</sup> Amongst the authorities cited only *Re Early*,<sup>31</sup> a decision of the Court of Appeal of Ireland, would support standing by Mr Edward Amos. In that case, after compromise, a widow beneficiary was dissatisfied at the quantum of the solicitor's costs which had not been taxed and which had been agreed to by the executor. She successfully sought an order for taxation as a person “liable to pay”, the expression in the applicable statute.

- [46] It is to the statute that resort must be had. Mr Edward Amos is not legally liable to pay the respondent solicitor's costs. The respondent solicitor, were he minded to do so, could not recover his costs incurred in work for the estate from a beneficiary. The decision in *Equuscorp* supports that conclusion.
- [47] Mr Edward Amos' status as beneficiary was not altered by the orders of Byrne J and Douglas J. It was the decision of Mr Leonard Amos as trustee/executor to approve the bill of costs from the respondent solicitor charging the “extra” costs “unnecessarily” incurred which the court authorised the executor/trustee to deduct from his share of the estate. It is to him that Mr Edward Amos should have looked, as he did in the proceedings before Fryberg J. I am satisfied that Mr Edward Amos had no standing to bring these proceedings and her Honour was correct to refuse leave on the ground that there was no prospects of success on the application proper.
- [48] Furthermore, a perusal of the invoices does not suggest excessiveness when even the brief history is contemplated, nor is there conduct of a kind which would enliven the inherent jurisdiction of the Supreme Court, preserved in s 17 of the *Legal Profession Act 2007*, to control and discipline its officers.
- [49] In *von Risefer*<sup>32</sup> this Court struck out the notice of appeal and dismissed the appeal. The Court noted its jurisdiction to prevent abuse of the Court's processes by bringing a vexatious appeal to a summary end.<sup>33</sup> It was not submitted for

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<sup>29</sup> Volume 26 at [1289].

<sup>30</sup> Volume 44 at [182].

<sup>31</sup> [1897] 1 IR 6.

<sup>32</sup> [2005] QCA 136.

<sup>33</sup> *Ibid* at [19].

Mr Edward Amos that a single Judge of Appeal did not have power to make the orders sought by the respondent solicitor.<sup>34</sup>

### **Extension of time**

- [50] The respondent solicitor has sought an extension of time “if necessary” to bring this application. It is not an initiating application but has been brought only because an appeal against the judgment below has been brought. It is not an application of the kind envisaged in para 28 of Practice Direction 1 of 2005.<sup>35</sup> The appeal was filed and served on 5 January 2010. Mr Edward Amos did not first seek and obtain leave to do so. He filed his outline of submissions on 25 March 2010. This application was filed on 20 April 2010. The time limits imposed for appeal/applications of 28 days do not apply to this application. There was ample time to respond before the date for its hearing was reached. If I am incorrect in that conclusion, I would extend time.

### **Costs**

- [51] Unless there are submissions to the contrary, Mr Edward Amos should pay the costs of the application and the appeal to the respondent.

### **Orders**

1. Mr Edward Amos’ Notice of Appeal No. 86 of 2010 be dismissed.
2. Mr Edward Amos pay the respondent’s costs of the application and the appeal to be assessed on the standard basis unless, within seven days of the delivery of judgment short written submissions are made seeking some different order. The responding party to file his response within seven days of receipt of those submissions, if any.

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<sup>34</sup>

*Supreme Court of Queensland Act 1991*, s 43(1); *UCPR*, r 767.

<sup>35</sup>

Practice Direction 2 of 2010 does not apply to the filing of this appeal or application.

**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE

NUMBER: S4763/ 00

AND OA NO 1885 of 2000

Plaintiff            **LEONARD RALPH AMOS** as executor of the will of  
**CHARLES EDWARD AMOS** late of Wynnum in this State,  
deceased

and

Defendant:        **EDWARD AMOS**

**DEED OF SETTLEMENT**

Whereas Leonard Ralph Amos an Executor and Trustee of the Will of Charles Edward Amos late of Wynnum in this State, deceased has applied in OA 1885 / 00 for relief as to the administration of the estate of the late Charles Edward Amos, including a direction that he commence proceedings against the respondent the other executor and trustee of the said Will to recover certain moneys, and to resolve matters relating to the interest of the respondent in the said estate, and certain other matters concerning the estate.

And Whereas a second proceeding S4763 / 00 was commenced after a transfer was filed by Edward Amos transferring the property at 58 Melville Terrace Wynnum to himself and the plaintiff filed a caveat and the second action seeks a declaration that Edward Amos holds the property on trust for the estate and an order for the repayment of the sum of \$80,500.00.

And Whereas the Defendant has counter-claimed for compensation for the use and occupation of trust premises, removal of the caveat and other relief.

And Whereas the parties to the Application and Action have reached a compromise of all their claims (except those as beneficiary) in relation to the estate.

And Whereas the beneficiaries Francis Williams, Edward Amos and Leonard Ralph Amos agree to the terms of this deed of settlement.

It is agreed between the parties and the beneficiaries as follows:

1. This settlement is in full and final settlement of all claims arising in relation to the administration of the estate and any claims the estate might have against any of the beneficiaries, the executors and trustees and in particular:
  - (a) The executors and trustees hereby compromise any claim for commission or expenses;

- (b) The estate hereby compromises any claim it may have against any of the beneficiaries;
  - (c) The beneficiaries hereby compromise any claims they may have against the executors and trustees for the administration of the estate;
  - (d) Edward Amos hereby compromises any claim he might have to the property of the estate;
  - (e) The estate hereby compromises any claim it may have for loans due by Edward Amos, Leonard Amos or Frances Williams to the estate;
  - (f) The estate hereby compromises any claims against Leonard Amos or Frances Williams for gold coins, bank accounts or other assets of the estate.
2. The trustees will immediately distribute an amount up to the sum of \$52,000.00 out of the estate money held in various bank accounts to the beneficiaries Francis Williams and Leonard Ralph Amos in equal shares between them in advance of their respective entitlements to a distribution in the estate, but shall deduct therefrom sufficient funds to pay rates and fire, storm and tempest insurance on the Melville Terrace property up to the time of the sale to be made pursuant to this Deed.
3. The Melville Terrace property is estate property and the executor and trustees irrevocably appoint Ian Kennedy Fry as their agent to sell the property at 58 Melville Terrace, Wynnum.
4. The said Ian Kennedy Fry will have full discretion in the marketing and sale of the property including all decisions as to the appointment of agents, the setting of a reserve and the decision to sell the property either by auction or by private treaty, save only that he shall not be negligent in the conduct of the sale.
5. The said Ian Kennedy Fry will at his discretion consult with the beneficiaries and the solicitors for the defendant in the execution of his duties and will not sell the Melville Terrace property privately or otherwise than by public auction without giving to each beneficiary reasonable notice of his intention to do so and an opportunity to purchase the same on equal terms.
6. Any party or beneficiary is at liberty to bid at any auction or make earlier or later offers for the purchase of the property.
7. The executors and trustees Edward and Leonard Ralph Amos will do all things necessary and conducive for the sale and in particular:
- (a) Irrevocably appoint the said Ian Kennedy Fry their attorney for the sale of the property;
  - (b) Will do all things that may reasonably be requested of either or both of them to facilitate and complete the sale;
  - (c) Edward Amos will sign any contract for the sale of the property tendered to him for signature by Ian Kennedy Fry, and the estate

hereby indemnifies him for any losses he may sustain as a result, except for any breach by him of this agreement;

- (d) Edward Amos will execute a blank transfer of the property and give the same to the said Ian Kennedy Fry;
  - (e) Edward Amos will give the Certificate of Title to the said Ian Kennedy Fry to hold on behalf of the estate and to carry out the terms of this settlement;
  - (f) Will give a letter of instruction to the said Ian Kennedy Fry to fill up the blanks on the said transfer;
  - (g) If a fresh Certificate of Title issues Edward Amos will direct that the new Certificate of Title will issue to Mr Fry;
  - (h) Undertake to do all things necessary to ensure that Edward Amos and the said Ian Kennedy Fry can give clear title to any purchaser of the property including withdrawal by Leonard Ralph Amos of his existing caveat.
8. The executor and trustee Edward Amos undertakes:
- (a) He has no creditors who are in a position to levy execution on the property and that there are no unsatisfied judgments against him and
  - (b) he has not made, caused or permitted and has no knowledge of any unregistered dealings with respect to the Melville Terrace property and will not hereafter prior to the termination of this deed create any such dealing except in pursuance of his obligations under this deed;

Upon breach of these undertakings or any breach of this agreement (and an affidavit of the Plaintiffs solicitors deposing to the same shall be prima facie evidence of that fact) Edward Amos will consent to an Order that he remedy the breach and or compensate the estate for any loss or damage it has sustained by reason of such breach and the Plaintiff shall be at liberty to bring enforcement proceedings of this Deed in the present actions or at the Plaintiffs option terminate this Deed and relist the Application and Action for trial, in which event the rights of the parties shall be unaffected by this Deed and any property transferred or moneys paid shall be retransferred or repaid.

9. The proceeds of sale will be made payable to the estate of CE Amos and deposited by the said Ian Kennedy Fry into his trust account to be distributed as follows:
- (a) In payment of all costs fees and charges properly incurred in carrying out the sale;
  - (b) Secondly in payment of his professional fees in the sale;
  - (c) Thirdly in payment of any taxes payable by the estate and any other costs and charges including accountancy costs incurred in the

administration of the estate and in carrying out the terms of this Deed;

- (d) after the adjustment for payments in advance made pursuant to clause 2 hereof:
  - (i) as to 1/3<sup>rd</sup> thereof to or to the order of Frances Williams.
  - (ii) as to 1/3<sup>rd</sup> thereof to or to the order Leonard Ralph Amos.
  - (iii) as to 1/3<sup>rd</sup> thereof to Keller Nall and Brown Trust Account, the present solicitors for Edward Amos.

10.

- (a) Upon the final distribution as aforesaid the parties agree to sign notices of discontinuance of the action and the application;
- (b) The executors and trustees will ensure that any other estate asset not separately provided for herein shall be applied pursuant to the will with the intent that the beneficiaries will take in equal shares.

11. Each party shall bear their own costs of the action including reserved costs and no party will seek to enforce any order made for costs to date.

12. Any duty or tax liability payable on this deed shall be borne as a cost of the administration of the estate.