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Supreme Court of New South Wales

Malvina Park Pty Ltd v Johnson [2019] NSWSC 1490 (30 October 2019)

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Supreme Court
New South Wales

Case Name:	Malvina Park Pty Ltd v Johnson
Medium Neutral Citation:	[2019] NSWSC 1490
Hearing Date(s):	29 November 2019
Date of Orders:	30 October 2019
Decision Date:	30 October 2019
Jurisdiction:	Common Law
Before:	Walton J
Decision:	The Court makes the following orders: (1) Leave to appeal is refused. (2) The defendant shall have costs of the appeal as agreed or as assessed.
Catchwords:	APPEAL – leave requirement – Legal Profession Uniform Law – Legal Profession Uniform Law Application Act – Interpretation of Legislation Act 1984 (Vic) – disclosure obligation – construction o 174(3) – principles for leave – application for additional evidence Civil Procedure Act 2005 – absence of error of principle, matter o public importance, or injustice – lack of merit of disclosure and disapplication grounds – small amount claim – remedy as of right the District Court – leave refused
Legislation Cited:	Civil Procedure Act 2005 (NSW) Interpretation Act 1987 (NSW) Interpretation of Legislation Act 1984 (Vic) Legal Profession Act 2004 (NSW) Legal Profession Uniform General Rules 2015 (NSW)

Legal Profession Uniform Law Application Act 2014 (NSW)

Legal Profession Uniform Law Application Act 2014 (Vic)

Legal Profession Uniform Law (NSW)

Local Court Act 2003 (NSW)

Motor Accidents Compensation Act 1999 (NSW)

Motor Accidents Compensation Regulation 2015 (NSW)

Pastures Protection Act 1902 (Cth)

Cases Cited:

Ackerman v Morgan [2019] NSWSC 1250

Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334; [1999] HCA 9

Be Financial Pty Ltd as Trustee for Be Financial Operations Trust Das [2012] NSWCA 164

Certain Lloyd's Underwriters Subscribing to Contract No IH00AA(v Cross (2012) 248 CLR 378; [2012] HCA 56

Clutch & Brake Australia Pty Ltd v Khamis [2018] NSWSC 777

Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594; [1990] HCA 17

Coulter v R (1988) 164 CLR 350; [1988] HCA 3

Credit Tribunal, Re: Ex parte General Motors Acceptance Corp Australia (1977) 137 CLR 545; [1977] HCA 34

eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd (2015) 90 NSWLR 451; [2015] NSWCA 284

Frigger v Madgwicks [2018] VSC 281

Gibson v Drumm [2016] NSWCA 206

Inglis v Robertson [1898] UKHL 2; (1898) 25 R (Ct of Sess) 70; [1898] AC 616

Macquarie v Hunter New England Local Health District [2019] NSWCA 98

Metziya Pty Ltd v ICR Engineering Pty Ltd [2016] NSWSC 1703

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 1 CLR 355; [1998] HCA 28

Provincial Insurance Australia Pty Ltd v Consolidated Wood Products (1991) 25 NSWLR 541

Rose v Tunstall [2018] NSWCA 241

Ryde Developments Pty Ltd v Property Investors Alliance Pty Ltd [2017] NSWCA 339

Saunders v Borthistle (1904) 1 CLR 379; [1904] HCA 13

Secure Parking Pty Limited v Ralan Property Services Pty Limite (No 1) [2018] NSWSC 660

Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35

SZTAL v Minister for Immigration and Border Protection (2017) 3 ALR 405; [2017] HCA 34

Taylor v The Owners – Strata Plan No 11564 (2014) 253 CLR 53 [2014] HCA 9

Texts Cited: Victoria, Parliamentary Debates, Legislative Council, 16 April 201

Category: Principal judgment

Parties: Malvina Park Pty Ltd (Plaintiff)

Benjamin Johnson (Defendant)

Representation: Counsel:

D McLure SC (Plaintiff)

M Castle with A Bailey (Defendant)

Solicitors:

Firths – The Compensation Lawyers (Plaintiff)

Brydens Compensation Lawyers (Defendant)

File Number(s): 2018/195844

Decision under appeal:

Court or Tribunal:	Costs Review Panel
Date of Decision:	14 May 2018
Before:	Robert George Webley and Peter Robert James
File Number(s):	CA 2017/290563

JUDGMENT

1. **HIS HONOUR:** By an amended summons filed 24 August 2018, the plaintiff, Malvina Park Pty Ltd, seeks leave to appeal against a decision of a costs review panel pursuant to s 89(1)(b) of the *Legal Profession Uniform Law Application Act 2014* (NSW) ("the Application Act").
2. Leave is required in this Court as the amount in dispute is less than $100,000, namely, $46,152.70, being the difference between the amount of costs claimed of $70,800 and the amount allowed of $24,247.30.

BACKGROUND FACTS

3. The defendant, Benjamin Johnson, was injured in a motor vehicle accident on 22 May 2016. He made a claim for compensation under the *Motor Accidents Compensation Act 1999* (NSW) ("MACA"). Initially, he was represented by another law practice, Brydens. He entered into a costs agreement with that firm on 2 June 2016.
4. On 22 August 2016, the defendant contacted the principal of the plaintiff, Mr Firth.
5. On 22 September 2016, the plaintiff sent to the defendant documents disclosing the basis upon which the plaintiff would propose to charge, together with a proposed costs agreement. The costs agreement proposed a lump sum fixed fee of $80,000 plus GST, with a discount depending on how long it took to resolve the matter, which was expressed in the following terms:

> **6.1 Professional fees – Lump Sum Fixed Quote**
>
> We will charge you professional fees for the work we do as follows:

6.1.1	(a)	the lump sum of:	$80,000
	(c)	GST	$8,000
		TOTAL (GST inclusive)	$88,000

> **6.2 Reductions in professional fees**
>
> Our lump sum fixed fee quote gives you security. That way you know in advance what the professional fees will be regardless of how long your matter takes and how complicated it may become. We are, however, conscious that if your matter should resolve fairly quickly, and we were required to carry out substantially less work than anticipated, that could result in some unfairness. For that reason, in the event that your matter is completed in less than 9 months from the date we first started investigating your claim, which according to our records was 22/08/2016, the following reductions will be applied to the lump sum fixed fee quote contained in clause 6.1:

If it completes in less than 1 month a	70% reduction

If it completes in less than 2 months a	60% reduction
If it completes in less than 3 months a	50% reduction
If it completes in less than 4 months a	40% reduction
If it completes in less than 5 months a	30% reduction
If it completes in less than 6 months a	20% reduction
If it completes in less than 9 months a	10% reduction

Please note that these reductions only apply to our professional fees as set out in clause 6.1 and do not apply to other charges or disbursements as set out in clause 6.3 and 6.4 below. This provision is designed to provide fairness whilst at the same time affording you the protection of the lump sum fixed fee quote.

6. The defendant signed the costs agreement on 4 October 2016 ("the costs agreement"). Two days later, the defendant sent an email to Mr Firth, in which he said he had been advised by other law firms that the plaintiff's basis for charging was excessive. The defendant said he would take his case to another law firm. Nevertheless, on 12 October 2016 the defendant decided he wished to retain the plaintiff.

7. On 14 December 2016, the defendant accepted an offer to settle his compensation claim for $500,000 inclusive of costs.

8. The settlement proceeds were received from the insurer on 23 January 2017. On that day, the plaintiff provided the defendant with an accounting of how the proceeds would be allocated, including the plaintiff's fee. The defendant signed an authority to disburse the funds, however, on 10 February 2017, Brydens announced that they were again acting for the defendant and sought an itemised bill. Subsequently, Brydens made an application for costs assessment on behalf of the defendant.

9. By a statement of reasons dated 23 January 2018, a costs assessor found that in relation to the costs agreement sent on 22 September 2016, the plaintiff complied with the disclosure obligations imposed by the *Legal Profession Uniform Law* (NSW) ("the Uniform Law") s 174(1), (2)(a) and (6). Those provisions will be set out later in this judgment but, in substance, required the plaintiff to disclose to the defendant in writing information about the basis upon which legal costs would be calculated and an estimate of such costs as well as disclosing certain rights (there is no dispute in these proceedings as to those findings).

10. The costs assessor also found that the plaintiff complied with regs 8(b)-(e) of the *Motor Accidents Compensation Regulation 2015* (NSW) ("the Regulation"). Those provisions set out various requirements that must be met for a law practice and client to contract out of the cap on legal fees for claims under the MACA.

11. However, the costs assessor found that the plaintiff did not comply with s 174(3) of the Uniform Law. That provision required the plaintiff to take all reasonable steps to satisfy itself that the client understood and consented to the costs agreement. The consequence of that finding was that reg 8(a) of the Regulation was not satisfied and the maximum costs recoverable by the plaintiff were capped in accordance with reg 6 and Sch 1.

12. The plaintiff sought a review under s 83 of the Application Act.

13. On 14 May 2018, the costs review panel upheld the finding that the plaintiff failed to comply with s 174(3) of the Uniform Law. Having found non-compliance with s 174(3), the panel determined that the costs agreement was void by reason of s 185 of the Uniform Law.

14. The panel's reliance on s 185 was erroneous. That provision applies only to Ch 4 Div 4 of the Uniform Law. Section 174 is in Div 3.

15. On 25 June 2018, the plaintiff filed the summons in these proceedings, in which it contended, *inter alia*, that the panel erred by relying on s 185. On 2 August 2018, the defendant's solicitors drew the error to the panel's attention.

16. On 14 August 2018, the panel advised the parties that the reference to s 185 of the Uniform Law in its reasons at para 43 was an inadvertent error. The defendant submitted the reference to s 185 was capable of correction as a “mere inadvertent slip”.

17. By the amended summons, the plaintiff sought that the Court set aside the review panel’s decision and substitute a determination as to costs in the sum of $70,800. Alternatively, the plaintiff sought (in order 3) the review panel and the costs assessor’s determination be set aside and that the Court direct Manager Costs Assessment refer the assessment to another costs assessor to make the assessment in accordance with law.

18. The issues in the proceedings will be best examined after the relevant legislative provisions are exposed.

LEGISLATION AND RULES

19. Sections 58 and 59 of the MACA is in the following terms:

> **58 Application**
>
> (1) This Part applies to a disagreement between a claimant and an insurer about any of the following matters (referred to in this Part as ***medical assessment matters***):
>
> > (a) whether the treatment provided or to be provided to the injured person was or is reasonable and necessary in the circumstances,
> >
> > (b) whether any such treatment relates to the injury caused by the motor accident,
> >
> > (c) (Repealed)
> >
> > (d) whether the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10%.
> >
> > (e) (Repealed)
>
> (2) This Part also applies to any issue arising about such a matter in proceedings before a court or in connection with the assessment of a claim by a claims assessor.
>
> **59 Appointment of medical assessors**
>
> (1) The Authority is required to appoint medical practitioners and other suitably qualified persons to be medical assessors for the purposes of this Part.
>
> (2) The terms of any such appointment may restrict a medical assessor to disputes of a specified kind.

(3) The Authority is to ensure that, as far as reasonably practicable, there are medical assessors appointed in the regional areas of the State.

20. Section 63(1) of the MACA provides:

63 Review of medical assessment by review panel

(1) A party to a medical dispute may apply to the proper officer of the Authority to refer a medical assessment under this Part by a single medical assessor to a review panel of medical assessors for review.

21. Regulation 5 of the Regulation provides:

5 Application of Division

(1) This Division is made under section 149 of the Act and applies to the following costs payable on a party and party basis, on a practitioner and client basis or on any other basis:

(a) legal costs,

(b) costs for matters that are not legal services but are related to proceedings in a motor accidents matter.

Note.

Section 149 (2) of the Act provides that a legal practitioner is not entitled to be paid or recover for a legal service or other matter an amount that exceeds any maximum costs fixed for the service or matter by regulations under section 149.

(2) This Division does not affect costs recovered before 17 December 1999 or for which a bill of costs was issued before that day.

Note.

Section 147 (2) of the Act provides that expressions in Chapter 6 (Costs) of that Act (and consequently expressions used in this Part) have the same meaning as they have when used in relation to legal costs in the legal profession legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*).

22. Regulation 6 fixes maximum costs recoverable by legal practitioners.
23. Regulation 8 provides:

8 Contracting out—practitioner and client costs

(1) Schedule 1 does not apply to costs in a motor accidents matter to the extent that they are payable on a practitioner and client basis if:

> (a) an Australian legal practitioner makes a disclosure under Division 3 of Part 4.3 of the *Legal Profession Uniform Law (NSW)* to a party to the matter with respect to the costs, and
>
> (b) the practitioner enters into a costs agreement (other than a conditional costs agreement, within the meaning of that Part, that provides for the payment of a premium on the successful outcome of the matter concerned) with that party as to those costs in accordance with Division 4 of that Part, and
>
> (c) the practitioner, before entering into the costs agreement, advises the party (in a separate written document) that, even if costs are awarded in favour of the party, the party will be liable to pay such amount of the costs provided for in the costs agreement as exceeds the amount that would be payable under the Act in the absence of a costs agreement, and
>
> (d) the practitioner (but only if the party is a claimant) provides to the Authority, in the manner and time approved by the Authority, a costs breakdown in relation to the claim when the claim is finalised, and
>
> (e) the amount paid in resolution of the claim by way of settlement or an award of damages is more than $50,000.
>
> (2) However, the maximum costs recoverable in any such matter on a practitioner and client basis are fixed at the amount calculated by subtracting $50,000 from the amount paid in resolution of the claim.
>
> (3) For the purposes of subclause (2), the amount paid in resolution of a claim includes any amount payable in connection with the claim on a party and party basis.
>
> (4) The maximum costs specified in subclause (2) are inclusive of all legal services provided in the course of the claim during the period commencing on the acceptance of the retainer and ending on the resolution of the claim.

24. As mentioned, the costs assessor found the conditions of reg 8(b), (c) and (d) had been met, but that the plaintiff had failed to comply with the contracting out provisions (per reg 8(a)) because it had failed to comply with s 174(3) of the Uniform Law. That determination was, in substance, and as earlier noted, confirmed by the review panel (at para 48).

The Uniform Law

25. As the plaintiff was first instructed after 1 July 2015, the applicable law is the Uniform Law, the Application Act and the regulations made thereunder (see cl 18, Sch 4 of the Uniform Law).
26. The Uniform Law is not an Act of the New South Wales Parliament. The Uniform Law was enacted as law in Victoria as Sch 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic). It is applied as a law of NSW by s 4 of the Application Act.
27. One consequence is that, in undertaking the task of statutory construction, the Court is required to apply the *Interpretation of Legislation Act 1984* (Vic) ("Victorian Interpretation Act") rather than the

Interpretation Act 1987 (NSW) (see s 7(1) of the Uniform Law).

28. Section 36 of the Victoria Interpretation Act provides:

> **36 Headings, Schedules, marginal notes and footnotes**
>
> (1) Headings to—
>
> (a) Chapters, Parts, Divisions or Subdivisions into which an Act or subordinate instrument is divided; or
>
> (b) Schedules to an Act or subordinate instrument—
>
> form part of the Act or subordinate instrument.
>
> (1A) Headings to Parts, Divisions or Subdivisions into which a Schedule to an Act or subordinate instrument is divided form part of the Act or subordinate instrument if—
>
> (a) the Act is passed, or the subordinate instrument is made, on or after 1 January 2001; or
>
> (b) the heading is inserted into an Act passed, or subordinate instrument made, before 1 January 2001 by an Act passed, or subordinate instrument made, on or after that date.
>
> (2) A Schedule to an Act or subordinate instrument forms part of the Act or subordinate instrument.
>
> (2A) Headings to—
>
> (a) sections, clauses, regulations, rules or items into which an Act or subordinate instrument, or a Schedule to an Act or subordinate instrument, is divided; or
>
> (b) tables, columns, examples, diagrams, notes (being notes at the foot of provisions and not marginal notes, footnotes or endnotes) or forms in an Act or subordinate instrument—
>
> form part of the Act or subordinate instrument if—
>
> (c) the Act is passed, or the subordinate instrument is made, on or after 1 January 2001; or
>
> (d) the heading is inserted into an Act passed, or subordinate instrument made, before 1 January 2001 by an Act passed, or subordinate instrument made, on or after that date.
>
> (2B) Headings to—

(a) Orders into which a subordinate instrument containing rules or orders regulating the practice and procedure of a court or tribunal is divided; or

(b) Parts into which an Order referred to in paragraph (a) is divided—

form part of the subordinate instrument if—

(c) the subordinate instrument is made on or after 1 January 2001; or

(d) the heading is inserted into a subordinate instrument made before 1 January 2001 by a subordinate instrument made on or after that date.

(3) No marginal note, footnote or endnote in an Act or subordinate instrument and no heading to a provision of an Act or subordinate instrument (not being a heading that forms part of the Act or subordinate instrument by force of subsection (1), (1A) or (2A)) shall be taken to form part of the Act or subordinate instrument.

(3A) An example (being an example at the foot of a provision under the heading "**Example**" or "**Examples**"), diagram or note (being a note at the foot of a provision and not a marginal note, footnote or endnote) in an Act or subordinate instrument forms part of the Act or subordinate instrument if—

(a) the Act is passed, or the subordinate instrument is made, on or after 1 January 2001; or

(b) the example, diagram or note is inserted into an Act passed, or subordinate instrument made, before 1 January 2001 by an Act passed, or subordinate instrument made, on or after that date.

(3B) Punctuation in an Act or subordinate instrument forms part of the Act or subordinate instrument if—

(a) the Act is passed, or the subordinate instrument is made, on or after 1 January 2001; or

(b) the punctuation is inserted into an Act passed, or subordinate instrument made, before 1 January 2001 by an Act passed, or subordinate instrument made, on or after that date.

(3C) A provision number in an Act or subordinate instrument (whether passed or made before, on or after 1 January 2001) forms part of the Act or subordinate instrument.

(3D) An explanatory memorandum or table of provisions printed with an Act or subordinate instrument before the title of the Act or subordinate instrument does not form part of the Act or subordinate instrument.

(3E) An index or other material printed with an Act or subordinate instrument after the endnotes to the Act or subordinate instrument does not form part of the Act or subordinate instrument.

(4) Nothing in subsection (3) shall be construed as preventing in the interpretation of a provision of an Act or subordinate instrument, the consideration pursuant to section 35(b) of any marginal note, footnote, endnote or heading not forming part of that Act or subordinate instrument.

29. Reference may also be made to s 35 of the Victorian Interpretation Act which provides:

35 Principles of and aids to interpretation

In the interpretation of a provision of an Act or subordinate instrument—

(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and

(b) consideration may be given to any matter or document that is relevant including but not limited to—

(i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;

(ii) reports of proceedings in any House of the Parliament;

(iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and

(iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry, Formal Reviews or other similar bodies.

30. The objectives of the Uniform Law are expressed in s 3 of the Act and in the following terms:

3 Objectives

The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by--

(a) providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession; and

(b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and

(c) enhancing the protection of clients of law practices and the protection of the public generally; and

(d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and

(e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and

(f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.

31. The definitions of the Act are found in s 6. The following definitions are relevant:

client includes a person to whom or for whom legal services are provided;

...

costs assessment means an assessment of legal costs under Part 4.3;

costs assessor means—

(a) a person appointed by a court, judicial officer or other official to have the responsibility of conducting costs assessments; or

(b) a person or body designated by jurisdictional legislation to have that responsibility;

...

legal costs means—

(a) amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services; or

(b) without limitation, amounts that a person has been or may be charged, or is or may become liable to pay, as a third party payer in respect of the provision of legal services by a law practice to another person—

including disbursements but not including interest;

32. Part 4.3 is entitled “Legal Costs”. Division 1 is entitled “Introduction” and contains the objectives of Pt 4.3, which are expressed in s 169 and in the following terms:

169 Objectives

The objectives of this Part are—

(a) to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options; and

(b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and

(c) to provide a framework for assessment of legal costs.

33. Division 1 also limits the scope of the part with respect to commercial or government clients in s 170(1)(a) and (2)(a), (b), (e) and (f) as follows:

170 Commercial or government clients

(1) This Part does not apply to—

(a) a commercial or government client; ...

but this section and sections 181(1), (7) and (8), 182, 183 and 185(3), (4) and (5) do apply to a commercial or government client referred to in paragraph (a) or a third party payer referred to in paragraph (b).

(2) For the purposes of this Law, a ***commercial or government client*** is a client of a law practice where the client is—

(a) a law practice; or

(b) one of the following entities defined or referred to in the Corporations Act —

(i) a public company, a subsidiary of a public company, a large proprietary company, a foreign company, a subsidiary of a foreign company or a registered Australian body;

(ii) a liquidator, administrator or receiver;

(iii) a financial services licensee;

(iv) a proprietary company, if formed for the purpose of carrying out a joint venture and if any shareholder of the company is a person to whom disclosure of costs is not required;

(v) a subsidiary of a large proprietary company, but only if the composition of the subsidiary's board is taken to be controlled by the large proprietary company as provided by subsection (3); or

...

(e) a body or person incorporated in a place outside Australia; or

(f) a person who has agreed to the payment of costs on a basis that is the result of a tender process; or

34. The defendant emphasised that he did not fall within the exclusion concerning commercial and government clients.

35. Division 2 is entitled “Legal costs generally”. Section 172 falls under that Division. It bears the hearing, “Legal costs must be fair and reasonable”. Section 172(1) provides as follows:

> **172 Legal costs must be fair and reasonable**
>
> (1) A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are—
>
> (a) proportionately and reasonably incurred; and
>
> (b) proportionate and reasonable in amount.

36. Division 3 is central to the dispute in this matter. That division is entitled, “Costs disclosure”. Section 174 is in the following terms:

> **174 Disclosure obligations of law practice regarding clients**
>
> (1) **Main disclosure requirement**
>
> A law practice—
>
> (a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and
>
> (b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client—
>
> together with the information referred to in subsection (2).
>
> (2) **Additional information to be provided**
>
> Information provided under—
>
> (a) subsection (1)(a) must include information about the client’s rights—
>
> (i) to negotiate a costs agreement with the law practice; and
>
> (ii) to negotiate the billing method (for example, by reference to timing or task); and
>
> (iii) to receive a bill from the law practice and to request an itemised bill after receiving a bill that is not itemised or is only partially itemised; and

(iv) to seek the assistance of the designated local regulatory authority in the event of a dispute about legal costs; or

(b) subsection (1)(b) must include a sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter.

(3) **Client's consent and understanding**

If a disclosure is made under subsection (1), the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

(4) **Exception for legal costs below lower threshold**

A disclosure is not required to be made under subsection (1) if the total legal costs in the matter (excluding GST and disbursements) are not likely to exceed the amount specified in the Uniform Rules for the purposes of this subsection (the ***lower threshold***), but the law practice may nevertheless choose to provide the client with the uniform standard disclosure form referred to in subsection (5).

(5) **Alternative disclosure for legal costs below higher threshold**

If the total legal costs in a matter (excluding GST and disbursements) are not likely to exceed the amount specified in the Uniform Rules for the purposes of this subsection (the ***higher threshold***), the law practice may, instead of making a disclosure under subsection (1), make a disclosure under this subsection by providing the client with the uniform standard disclosure form prescribed by the Uniform Rules for the purposes of this subsection.

(5A) To avoid doubt, the uniform standard disclosure form prescribed by the Uniform Rules for the purposes of subsection (5) may require the disclosure of GST or disbursements or both.

(6) **Disclosure to be written**

A disclosure under this section must be made in writing, but the requirement for writing does not affect the law practice's obligations under subsection (3).

(7) **Change in amount of total costs—where previously below lower threshold**

If the law practice has not made a disclosure, whether under subsection (1) or (5), because the total legal costs in the matter are not likely to exceed the lower threshold, the law practice must, when or as soon as practicable after the law practice becomes aware

(or ought reasonably become aware) that the total legal costs (excluding GST and disbursements) are likely to exceed the lower threshold—

(a) inform the client in writing of that expectation; and

(b) make the disclosure required by subsection (1) or (if applicable) subsection (5).

(8) **Change in amount of total costs—where previously below higher threshold**

If the law practice has not made a disclosure under subsection (1) but has made a disclosure under subsection (5) because the total legal costs in the matter are not likely to exceed the higher threshold, the law practice must, when or as soon as practicable after the law practice becomes aware (or ought reasonably become aware) that the total legal costs (excluding GST and disbursements) are likely to exceed the higher threshold—

(a) inform the client in writing of that expectation; and

(b) make the disclosure required by subsection (1).

(9) (Repealed)

37. Section 178(1)(a) and (3) provides:

178 Non-compliance with disclosure obligations

(1) If a law practice contravenes the disclosure obligations of this Part—

(a) the costs agreement concerned (if any) is void; and

...

(3) The Uniform Rules may provide that subsections (1) and (2)—

(a) do not apply; or

(b) apply with specified modifications—

in specified circumstances or kinds of circumstances.

The Application Act

38. Section 89 concerns appeals and is in the following terms:

89 Appeal on matters of law and fact

(1) A party to a costs assessment that has been the subject of a review under this Part may appeal against a decision of the review panel concerned to:

> (a) the District Court, in accordance with the rules of the District Court, but only with the leave of the Court if the amount of costs in dispute is less than $25,000, or
>
> (b) the Supreme Court, in accordance with the rules of the Supreme Court, but only with the leave of the Court if the amount of costs in dispute is less than $100,000.
>
> (2) The District Court or the Supreme Court (as the case requires) has all the functions of the review panel.
>
> (3) The Supreme Court may, on the hearing of an appeal or application for leave to appeal under this section, remit the matter to the District Court for determination by that Court in accordance with any decision of the Supreme Court and may make such other order in relation to the appeal as the Supreme Court thinks fit.
>
> (3A) The Supreme Court may, before the conclusion of any appeal or application for leave to appeal under this section in the District Court, order that the proceedings be removed into the Supreme Court.
>
> (4) An appeal is to be by way of a rehearing, and fresh evidence or evidence in addition to or in substitution for the evidence before the review panel or costs assessor may, with the leave of the Court, be given on the appeal.

Legal Profession Uniform General Rules 2015 (NSW) ("the General Rules")

39. In the discussion of the issues in this matter below, a principal tenet of the plaintiff's contentions is that, even if the review panel could, in law, substitute s 178 for s 185 in its decision, it was wrong in law to find the costs agreement void under s 178 because s 174(3) was not a disclosure obligation under Pt 4.3 of the Uniform Law and the plaintiff had satisfied all applicable disclosure obligations.
40. Nonetheless, the plaintiff raised another issue that, if a practice failed to meet the requirement of s 174(3) (and that the provision was a disclosure obligation), the review panel failed to consider the disapplication of s 178(1) as effected by s 178(3) and r 72A of the General Rules.
41. Rule 72A of the General Rules provides as follows:

> **72A Non-compliance with disclosure obligations—disapplication of section 178 (1) and (2) of the Uniform Law**
>
> (1) This rule applies where a law practice has contravened the disclosure obligations of Part 4.3 of the Uniform Law in relation to a particular matter.
>
> (2) Section 178 (1) and (2) of the Uniform Law do not apply in relation to the law practice (so far as they would otherwise apply to the matter concerned) in circumstances where the relevant authority, a costs assessor, a court or a tribunal is satisfied that:
>
> (a) the law practice took reasonable steps to comply with the disclosure obligations of Part 4.3 of the Uniform Law before becoming aware of the contravention, and

(b) the law practice, no later than 14 days after the date on which it became aware of the contravention, rectified the contravention, as far as practicable, by providing the client with the necessary information required to be disclosed under Division 3 of Part 4.3 of the Uniform Law (including, where relevant, an estimate or revised estimate of the costs), and

(c) the contravention was not substantial and it would not be reasonable to expect that the client would have made a different decision in any relevant respect.

(3) Subrule (2) (b) applies even though the information or estimate is not provided at the times required by the disclosure obligations of Part 4.3 of the Uniform Law.

(4) In this rule:

client includes (where relevant) an associated third party payer.

relevant authority means the designated local regulatory authority for section 178 of the Uniform Law.

THE ISSUES

42. The plaintiff identified four issues for the appeal which were successive, each requiring, in the submission of the plaintiff, determination before the other. The issues so stated by the plaintiff were as follows (with some modifications with respect to Issues 1 and 2):
. (1) Is s 174(3) of the Uniform law a "disclosure obligation" within the meaning of s 178(1)? The plaintiff submitted that it was not.
. (2) If, contrary to the plaintiff's submission, the answer to (1) is "yes", did the plaintiff take reasonable steps to satisfy itself, for the purposes of s 174 (3)? The plaintiff submitted that it did.
. (3) If, contrary to the plaintiff's submission, it failed to reasonably satisfy itself under s 174(3), should the Court be satisfied that the contravention was not substantial and that it would not be reasonable to expect that the client would have made a different decision in any relevant respect? The plaintiff submitted that the Court should be so satisfied.
. (4) If a valid costs agreement provides for a fixed fee for the conduct of a personal injury claim, is it appropriate to determine whether the fee is fair and reasonable by retrospectively calculating the value of the work on an hourly basis following an early settlement? The plaintiff submitted that it was not, and that a proper assessment of the fee should take into account the value of the certainty that a fixed fee agreement provided.
43. Issue 3 invited consideration of r 72A of the General Rules. Issue 4 concerned the question of relief if the Court were to find the costs agreement to be valid.
44. The defendant's submission consisted of two elements.
45. The defendant's primary submission was that leave to appeal should be refused.
46. The defendant, nonetheless, engaged in submissions regarding the above issues both with respect to the question of leave and as to specific issues raised. As to the specific issues raised by the plaintiff, the defendant contended (by reference to the numbered issues raised by the plaintiff above):
. (1) The defendant gave its answer in two parts:
. (a) The defendant accepted the appeal raises a matter of statutory construction. The primary ground is whether s 174(3) of the Uniform Law is a "disclosure obligation" and if so whether the plaintiff

contravened that requirement such that s 178 operates to render the costs agreement void. Nonetheless, he contended the obligation under s 174(3) constituted a disclosure obligation for the purposes of s 178 of the Uniform Law.

. (b) Secondly, it was submitted as follows:

> [6] An alternate finding made by the costs assessor (with which the review panel agreed) was that if she was wrong about s. 174(3) then s.199 of the Uniform Law gave her *"the power to assess the costs in any event to ensure that the legal costs charged are no more than fair and reasonable in accordance with the Act'* The alternate finding is not challenged by any ground of the Amended Summons. If that finding is not disturbed, the Court cannot grant the relief sought. Consequently, the appeal lacks utility; a determination of it by this Court would amount to an advisory opinion: see, eg, *Firth* v *Yang* [2014] NSWCA 92 at [4].

(2) The plaintiff failed to comply with s 174(3) and, hence, the costs agreement was void. This contention corresponded to the Contention filed by the defendant on 3 August 2018.

(3) The plaintiff should not be entitled to raise, for the first time on appeal, the operation of r 72A of the General Rules. Alternatively, r 72A was not engaged by the circumstances of the matter.

(4) This issue does not constitute a valid ground of appeal, does not arise in the proceedings and any judgment in relation to the same would amount to an advisory opinion: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [1999] HCA 9 ("*Bass*").

47. There was also an issue as to whether the plaintiff should be granted leave to adduce evidence via the affidavit of Mr Firth sworn on 3 August 2018 and various documents exhibited thereto. The area of dispute narrowed during the proceedings with the defendant not objecting to primary documents exhibited to Mr Firth's affidavit sworn 3 August 2018 constituted by Exhibits A-J and, it would appear, the various annexures to Mr Firth's affidavit.

48. It was agreed by the parties at the hearing of this matter that it was appropriate and convenient to consider the admission of the balance of the evidence of Mr Firth in the course of the Court's deliberation on the issues on the appeal.

49. The plaintiff's written submissions in this respect appeared in a reply submission in the following terms:

> 8. To the extent the evidence in Mr Firth's affidavit was not before the review panel, the plaintiff seeks leave to adduce that additional or substitute evidence pursuant to s 89(4) of the *Legal Profession Uniform Law Application Act 2014* (NSW) (Application Act).
>
> 9. While s 89(4) labels this proceeding as an appeal by way of rehearing, the true character of an appeal depends on factors including interpretation of the relevant legislation and the jurisdiction, powers, composition and functions of the tribunal from whose decision the appeal lies.

10. An appeal under s 89 has little in common with an appeal from a final judgment of a court of record. Costs assessors and review panels do not exercise judicial power; they make administrative decisions. Costs assessors and review panels are not bound by the rules of evidence and may inform themselves on any matter in the manner they think fit: Application Act s 69(2), 85(3).

11. Section 89(4) is not limited to the introduction of "fresh evidence" in the sense that term is used in appeals by way of rehearing from a court to an appellate court, but extends to "evidence in addition to or in substitution for the evidence before the review panel or costs assessor". The wider power to receive evidence on appeal reflects that it is an appeal from administrative decision-makers who were not bound by the rules of evidence. It is not productive to consider whether the evidence sought to be adduced on appeal is "fresh", when the assessor and the review panel were free to inform themselves in any manner they saw fit. The real question is whether it would be fair to allow the additional or substituted evidence to be adduced on appeal.

12. The plaintiff submits that there are six factors which favour admitting the additional / substitute evidence in Mr Firth's affidavit:

> a) *First*, the assessor and review panel received written submissions from the parties that made various assertions of fact, including assertions about communications between Mr Firth and Mr Johnson, and assertions about the contents of documents. The assessor dealt with this by giving directions calling for the production of documents she wished to see. It may be inferred from this that where the assessor did not call for production of the document or require an oral hearing, she was prepared to accept the reliability of the assertion made in the submissions where relevant.
>
> b) *Second*, almost all of the material in Mr Firth's affidavit was before the costs assessor and the review panel: see the table annexed to these submissions. The small amount of additional or substitute evidence involves putting assertions about conversations and documents into admissible form.
>
> c) Third, it was never suggested by the decision-makers or the parties that the assertions of fact in the submissions should be verified or tested in an oral hearing.
>
> d) *Fourth*, the issues to be decided have not changed at all. The central premise of the plaintiffs case has always been that the defendant understood the essential elements of the costs agreement and that Mr Firth was reasonably entitled to believe this based on their interactions.
>
> e) *Fifth*, it is in the interests of justice to decide the appeal on the best available evidence. The question whether Mr Firth complied with s 174(3) and whether rule 72 A applies depends in part on making an assessment of his state of mind and whether he formed a reasonable opinion about his

> client's understanding of the costs agreement. Mr Firth made assertions about those matters in the written submissions to the assessor and the review panel. It is appropriate for this Court to receive those same assertions on Mr Firth's oath.
>
> f) *Sixth*, the defendant will not be prejudiced. The submission at DS [26] that the defendant would have sought to impugn the costs agreement on the basis of undue influence arising from the loans should be rejected. Evidence of the loans was before the assessor and review panel (Ex E pg 96, 98; Ex G pg 134 [1.17]) and included documents put into evidence by the defendant himself: Ex D pg 92 item 11.
>
> [Footnotes omitted.]

50. The defendant's submissions in this respect, in summary, appear below:

. (1) As to Mr Firth's affidavit, the evidence given concerned matters which occurred prior to or during the currency of the retainer. Such evidence was available at the time of costs assessment and the review. No explanation of why it was not before the costs assessor has been provided. Nor is there an explanation of why, once the costs assessor's views were known, the plaintiff did not seek to put the material before the review panel.

. (2) As the defendant referred to in written submissions, the plaintiff was informed of the case it was required to meet on costs assessment. In relation to the primary ground of appeal, that it failed to comply with s 174(3) and that s 174(3) was a "disclosure obligation", the defendant's submissions stated:

> The Cost Respondent has failed to satisfy the requirement under Part 4.3, Division 3 (specifically Section 174(3)) of the Legal Profession Uniform Law (NSW). The Cost Respondent simply sent the Cost Applicant three (3) complex letters (comprising of 5 pages) referring to various legal terms such as "Clause 8 of the Motor Accidents Compensation Regulation 2015", "Schedule 2 of Legal Profession Uniform Law Application Act" and a "fixed quote. The Cost Applicant has no legal training and is not a sophisticated person. The Cost Respondent was aware that the Cost Applicant was not an educated man, based on their dealings with him between 22 August 2016 and 22 September 2016, and any complex legal terms and matters needed to be explained to him.
>
> Instead of making arrangements to meet with the Cost Applicant in order to discuss and explain the Cost Agreement the Cost Respondent chose to simply send three (3) confusing and complex letters to their client.
>
> Section 174(3) imposes a much higher duty on solicitors to not only provide a client with a Cost Agreement and additional costs disclosure documentation, in writing, but to "take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs ".
>
> In this case that did not occur. There is no evidence which has been put

> forward by the Cost Respondent confirming they took any steps at all to satisfy themselves that the Cost Applicant understood the Cost Agreement and was providing his consent to the proposed course of action and conduct of the matter, other than simply sending it to the client and asking him to sign and return it. It is not surprising the Cost Applicant did not understand the cost agreement and what he was acknowledging by singing the document without any guidance or clarification from the Cost Respondent.

(3) The plaintiff chose to answer that contention in the following way:

> The purpose of the requirement in s 174(3) is to advance the objective stated by s. 169(a) of the LPUL in ensuring that clients are able to make informed choices about their legal options. The information sheet published by the Legal Services council in October 2016 titled "Legal Costs and Costs Disclosure Obligations" states in regard to this obligation that "Making a disclosure in writing may not be sufficient alone to satisfy this requirement" (emphasis added). It is submitted that what are "reasonable steps" will depend on the individual circumstances of each matter, including the particular characteristics of the client.

(4) There is no evidentiary material which the plaintiff now seeks to adduce which would not have been available to it during the costs assessment or review. Furthermore, to the extent that evidence was required to be tested on oath, a costs assessor and a review-panel, have that power: see s 69(1A), s 93(1)(b)(ia) of the Application Act, s 79 of the *Interpretation Act 1987* (NSW).

(5) The plaintiff, a legal practice, chose to adopt a particular strategy on costs assessment and review.

(6) An appeal by way of rehearing is not a chance to begin again, so that a different strategy can be adopted. The Courts are reluctant to entertain such an approach: *Suttor v Gundowda Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418 at 438; [1950] HCA 35.

(7) The defendant further submitted:

> 26. Furthermore, there is injustice to the defendant in allowing such a course: had the additional evidence been before the costs assessor and the review panel it would have opened up a different course to the defendant, ie, to impugn the costs agreement on the basis of undue influence. Mr Firth's evidence is that his firm provided eight personal loans to the defendant during the course of the retainer. One or two of those loans (the evidence in unclear) was provided before a costs agreement was provided to the defendant. Mr Firth's evidence is that prior to entering into the costs agreement the defendant stated in an email to Mr Firth that *"the main reason that I changed to you guys was because you said you were able to help me with some financial help while I'm waiting for my claim to finalise"*.
>
> 27. There is, without more, a presumption of undue influence when a

solicitor enters into a costs agreement with a client: *Malouf v Constantinou* [2017] NSWSC 923. Where the client is in financial distress and the solicitor provides loans, it will be difficult for the solicitor to rebut the presumption. Where it is not rebutted, the contract is voidable.

[Footnotes omitted.]

51. A good deal of the material in Mr Firth's affidavit was in evidence before the review panel as demonstrated, for the most part, by the table attached to the reply submissions of the plaintiff filed on 21 November 2018. It may be noted that Mr Firth's statements of belief (paras 30 and 37-39) were not put before the review panel (or costs assessor) as evidence but rather were the subject of a submission. It was submitted that the contentions have been put in admissible form as evidence although most of the paragraphs in question appeared in the form of a submission or opinion.

52. It is unnecessary to resolve the issues raised by the plaintiff as to the operation of s 89(4), save to note the recent discussion of the Court of Appeal as to the meaning of the expression rehearing in the context of a trial as opposed to an appeal: *Macquarie v Hunter New England Local Health District* [2019] NSWCA 98 at [8] and [9].

53. Notwithstanding the force of the defendant's submissions as to why the Court should refuse the additional or substituted evidence (over that which was before the review panel), I consider that it is appropriate to receive the evidence sought to be led by the plaintiff in order to consider the plaintiff's application for leave pursuant to s 89(1)(b) of the Application Act as the evidence will expose the nature and content of the evidence the plaintiff would rely upon in relation to the issues raised by it if leave were granted and, more broadly, illuminate the issues of principle and merit sought to be ventilated by the plaintiff or any shortcomings with respect to the same for the purpose of determining the question of leave.

54. However, one additional observation should be made at this juncture. The plaintiff sought to rely on Mr Firth's evidence in order to make good its contentions with respect to issues 2 and 3 by referring, in that respect, to Mr Firth's state of mind and whether he formed a "reasonable opinion" about his client's understanding of the costs agreement (based, in part, upon the paragraphs of his affidavit referred to at [51] of this judgment).

55. Those matters may be relevant to the issues raised under s 174(3) and r 72A(2) although the evidence of those subjective beliefs of Mr Firth as a principal of the law practice needs to be assessed in the light of the actions taken by the law practice at the time of the disclosure under s 174 and, in particular, the actual steps taken by the law practice to meet its obligations under s 174(3). Importantly, the question raised by s 174(3) is whether the law practice took *all reasonable steps* to satisfy itself that the client had understood and given cost to the *proposed course of action* and the proposed costs agreement.

56. Thus, the obligation imposed upon the law practice is to take "all reasonable steps" in order to satisfy itself the client has understood and gave consent. "Steps", in that respect, refers to the measures or actions taken by the law practice. The provision focuses on the "proposed course of action" in addition to "the proposed costs agreement" and focuses upon the steps actually taken to reach a state of satisfaction.

57. Plainly, a law practice may make an assessment of the client's understanding and consent for the purpose of meeting its obligations under s 174(3) based upon the surrounding circumstances at the time the obligations are required to be discharged but it must, nonetheless, actively take all reasonable steps available to it to ensure the requisite understanding and consent under the subsection. In this case, that obligation obviously extended to the component of the costs agreement which stipulated a fixed price

agreement in the context of the litigation in contemplation (and the likely course of the same). Thus, the question becomes what steps did the law practice actually take to satisfy itself of the client's understanding and consent of proposed costs of that kind and whether those steps conformed with the obligation imposed on the law practice to take "all reasonable steps" in that respect.

SECTION 174(3): DISCLOSURE OBLIGATIONS

Submissions for the Plaintiff

58. As to the first issue, the plaintiff submitted:

. (1) The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. A legislative instrument must be construed on the *prima facie* basis that its provisions are intended to give effect to harmonious goals: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 ("*Project Blue Sky*") at [69]-[71].

. (2) Section 178(1)(a) of the Uniform Law provides that a costs agreement is void if a law practice contravenes the "disclosure obligations" of Pt 4.3. The only disclosure obligations relevant to this case are contained in Div 3, s 174. Section 174(1), (2) and (6) impose disclosure obligations on the law practice. They require the law practice to disclose information to the client in writing. Section 174(3) does not require the disclosure of information to the client. Rather, it imposes a duty on the law practice to satisfy itself that the client has understood and consented to, in this case, the proposed costs agreement.

. (3) "Disclosure" is a noun related to the verb "disclose". The natural meaning of "disclose" is to reveal, make known, divulge, tell, impart, communicate or pass on information by one entity to another. The expression "disclosure obligation" is inapt to describe a duty to satisfy oneself of another's state of mind. The expression "disclosure obligation" naturally describes the provision of information by a law practice to a client as required by s 174(1) and (2).

. (4) A strong indicator of the meaning to be ascribed to "disclosure obligation" is found in r 72A of the General Rules, which provides for disapplication of s 178(1). Rule 72A(1) provides that the rule only applies where the law practice has contravened a disclosure obligation. To be relieved from the consequence of the contravention, the Court must be satisfied that the law practice took reasonable steps to comply with the disclosure obligation: r 72A(2)(a). It would be incoherent to find a contravention of s 174(3) on the basis that the law practice did not take reasonable steps to satisfy itself about the client's understanding, then allow for relief from that contravention by a finding under r 72A(2)(a) that the law practice did take reasonable steps to comply. Section 174(3) could not be a disclosure obligation because "it produces an incoherent result where one has to find a contravention of a requirement to take reasonable steps and then the possibility of being satisfied that reasonable steps were taken to disapply that". This points to a conclusion that the disclosure obligations contemplated by s 178(1) and r 72A are the obligations in s 174(1), (2) and (6), but not the duty in s 174(3).

. (5) While not a "disclosure obligation", contravention of the duty imposed by s 174(3) is capable of having consequences that are harmonious with the object of the Uniform Law. Contravention of s 174(3) is capable of being an offence (s 39) and is capable of constituting unsatisfactory professional conduct or professional misconduct (ss 34, 35, 178(1)(d) and 298(a) of the Uniform Law).

. (6) The only decision to have considered the correct construction of ss 174(3) and 178(1) is *Frigger v Madgwicks* [2018] VSC 281 ("*Frigger*"). In that matter, Gourlay JR decided at [28] and [43] that s 174(3) did not impose a "disclosure obligation" on the law practice. Rather, it required the law practice to reach a state of self-satisfaction. Accordingly, the Court held that any failure to comply with s 174(3) could not engage s 178(1).

. (7) The defendant's argument that the headings of both Div 3 and s 174 indicate that s 174 contains disclosure obligations and therefore that s 174(3) is a disclosure obligation should be rejected. Other subsections of s 174 are clearly not disclosure obligations. The plaintiff submitted that s 174(4) is not a disclosure obligation as it simply provides an exception to the obligations under s 174(1). Subsection (5) similarly provides an alternative to s 174(1). The plaintiff submitted that subs (6) is not a disclosure requirement as it governs the way in which information, the subject of other disclosure obligations, is to be provided to a client. In the light of the other subsections of s 174, the heading of the Division and the section are not determinative of the contents of each subsection.

Submissions for the Defendant

59. As to the first issue, the defendant submitted:

. (1) The plaintiff's contention that the word disclosure is inapt to describe requirements imposed by s 174(3) and, therefore, that section could not be a "disclosure obligation" was at odds with the overall structure of the Act. It was also contrary to the second reading speech of the Uniform Law, in which it was stated that: "Section 174 deals with the disclosure obligations of law practices regarding clients" (Victoria, *Parliamentary Debates*, Legislative Council, 16 April 2015, 1006, (Sue Pennicuik)).

. (2) The plaintiff's characterisation of the obligation imposed by s 174(3) is also in error. It is not merely an obligation that the law practice is satisfied that the client has understood and consented to the proposed "costs agreement" in the sense that the client understood the contractual terms presented by the law practice. The provision required the law practice to be satisfied that the client both understood and gave consent to the proposed costs. Consent means informed consent, in the provision and concerned information important to a client regarding a cost agreement and a solicitor's state of satisfaction regarding the client's understanding and consent as to the proposed course of action in a matter and proposed costs. It is entirely possible, if not likely, that attendant on this obligation will be a requirement that a lawyer actively engage with and discuss the proposed costs with a client. Such an obligation fits squarely within the concept of "imparting, communicating or passing on information by one entity to another".

. (3) As to the construction of the Act, in particular the headings within the Uniform Law, it was submitted that, unlike the provisions of the *Interpretation Act 1987 (NSW)* applied, the Victorian Interpretation Act deems that headings to individual sections and clauses form part of the Act. Accordingly, the sections of the Uniform Law are not merely to be "interpreted by the light" of their headings – those headings form part of the operative text of the Act and inform the meaning to be given to the words under them: *Inglis v Robertson* [1898] UKHL 2; (1898) 25 R (Ct of Sess) 70; [1898] AC 616 ("*Inglis*"). Headings in the Uniform Law must therefore inform the maxim *noscitur a sociis* whereby words in a statute take their colour from the context in which they appear.

. (4) Section 178(1) of the Uniform Law does not state: "If a law practice contravenes any obligation arising under this Part to disclose information to a client". The section imposes sanctions for conduct that "contravenes the disclosure obligations of this Part".

. (5) The defendant did not dispute that the word "disclosure" has a natural and obvious meaning. However, the words 'disclosure obligations' when paired together must be construed as a composite phrase. The meaning of that phrase cannot be arrived at by simply defining its constituent elements. As Mahoney JA observed in *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products* (1991) 25 NSWLR 541 ("*Consolidated Wood*") at 560:

> The meaning of the words used in a statute or document is not merely the sum of the individual meanings of the words used, ascertained from

> dictionaries. To adapt the much cited comment of Holmes J, a word is the skin of a living thought, and it is the thought which the court must ascertain and apply.

(6) This is consistent with the majority statement in *Project Blue Sky* at [78] that:

> [78] ... the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

(7) Section 178 is placed at the conclusion of Div 3 of Pt 4.3 of the Uniform Law. Section 178(1) contains consequences of contravention. The first is that any costs agreement will be void. That gives strong support to the proposition that it is a condition of validity of a costs agreement that the obligations under the heading "Disclosure of law practice regarding clients" are complied with. This is reinforced by a consideration of the nature of the obligation in s 174(3), being to take reasonable steps to satisfy itself that the client "has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs". That state of understanding may well not be achieved by the client merely by being given information about costs such as would satisfy the obligations in s 174(1) and (2). It is not difficult to accept that a client – especially one who is unsophisticated – to whom s 174(1) and (2) information has been imparted may nevertheless still not understand and consent to the course of conduct of the matter and the proposed costs. Disclosure under subss (1) and (2) is capable of giving the client information but not understanding.

(8) It is submitted that the framework of Div 3, taken with the headings therein, reveal an intention of Parliament to enumerate "the disclosure obligations of [Part 4.3]" as referred to in s. 178(1). In effect, the headings of the statute point to where one will find a “disclosure obligation”.

(9) In *Saunders v Borthistle* (1904) 1 CLR 379; [1904] HCA 13 the High Court considered the scope of the phrase "travelling stock" found in s 97 of the *Pastures Protection Act 1902* (Cth). In doing so, regard was had to the principle laid-down in *Inglis*, namely, that where sections of an Act are collected by headings they must be read in connection with those headings.

(10) In essence, the defendant contended that s 174(3) is an ancillary "disclosure obligation" that attaches to the "main disclosure requirement" in s 174(1). Hence, the opening words of s 174(3), “If a disclosure is made under subsection (1)”, merely concerns the ancillary operation because a solicitor cannot reasonably assure a state of satisfaction without there being disclosed information. The purpose of the section is to ensure that a law practice cannot merely engage in perfunctory mechanical compliance with ss 174(1) and (2). In practice, s 174(3) will impose additional obligations on a law practice to impart

> information that will vary from client to client. The scope and nature of those precise obligations is to be objectively measured by the “reasonable steps” taken by the practice. This approach to s 174(3) is consistent with a stated object of the Act, namely, "to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options". A choice which is not informed by understanding and consent is not an "informed choice".
>
> (11) The defendant contended that the decision of Gourlay JR in *Frigger* is wrong and should not be followed. The Court appeared not to have had the benefit of full argument on the matter, and in any event the clients conceded that they "understood and gave consent to the course of action as outlined in the Disclosure Statement and pursuant to the oral and written instructions of the applicant": at [6].

Plaintiff’s Reply Submissions

60. In reply, the plaintiff submitted:
. (1) The defendant correctly observed that the headings form part of the text of the Act, however, this provides little assistance in deciding whether the requirement in s 174(3) to reach a personal state of satisfaction should be characterised as a disclosure obligation.
. (2) The defendant submitted that s 174(3) imposes an obligation on the lawyer to actively engage with and discuss the proposed costs agreement with a client. Even if that is correct, an obligation to engage is not the same thing as an obligation to disclose information.

Consideration

61. The principles of statutory construction were outlined by French CJ and Hayne J (with whom Kiefel J agreed in this respect) in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [23]- [26] as follows:

> [23] It is as well to begin consideration of this issue by re-stating some basic principles. It is convenient to do that by reference to the reasons of the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:
>
> > “This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.”
>
> [24] The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, “[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute” (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision “by reference to the language of the instrument viewed as a whole”, and “the context, the general purpose and policy of a provision and its consistency and

fairness are surer guides to its meaning than the logic with which it is constructed".

[25] Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted...

[26] A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose...

[Footnotes omitted.]

62. In *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9 the High Court (French CJ, Crennan and Bell JJ) further dismissed those principles and stated at [39] as follows:

[39] Lord Diplock's three conditions (as reformulated in *Inco Europe Ltd v First Choice Distribution (a firm)*) accord with the statements of principle in *Cooper Brookes* and McColl JA was right to consider that satisfaction of each could be treated as a prerequisite to reading s 12(2) as if it contained additional words before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision. However, it is unnecessary to decide whether Lord Diplock's three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that "the modified construction is reasonably open having regard to the statutory scheme" because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour's further observation, "[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances."

63. In *SZTAL v Minister for Immigration and Border Protection* (2017) 347 ALR 405; [2017] HCA 34, Kiefel CJ, Nettle and Gordon JJ said at [14]:

[14] The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

[Citations omitted.]

64. Reference may also be made to *Ryde Developments Pty Ltd v Property Investors Alliance Pty Ltd* [2017] NSWCA 339 per Payne JA (with whom Beazley P and Barrett AJA agreed) at [39]-[40]:

> [39] The relevant principles of construction were not controversial on the appeal. The meaning of words and phrases is influenced by the immediate context in which they are used. The meaning of the whole may be different to the sum of the meaning of the parts: *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389; [1996] HCA 36 at 396-397 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ) citing Lord Hoffmann in R v Brown [1996] 1 AC 543 at 561.
>
> [40] The modern approach to statutory interpretation uses "context" in its widest sense "to include such things as the existing state of the law and the mischief which, by legitimate means ... one may discern the statute was intended to remedy": *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; [1997] HCA 2 at 408 (per Brennan CJ, Dawson, Toohey and Gummow JJ).

65. In this case, "legitimate means" include reference to headings of provisions of Pt 4.3 Div 3. The headings act as a significant aid to construction (see *Credit Tribunal, Re: Ex parte General Motors Acceptance Corp Australia* (1977) 137 CLR 545; [1977] HCA 34 ("*Credit Tribunal*"); see also *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; [1990] HCA 17 ("*Concrete Constructions*"). However, in these proceedings, they form part of the text of the provisions of the division and directly inform the meaning to be given to the words of the section (per s 36 of the Victorian Interpretation Act).
66. A construction that would promote the principle or object underlying the Act (whether or not that purpose or object is expressly stated in the Act) shall be preferred to a construction that would not promote that purpose or object (s 35(a) of the Victorian Interpretation Act).
67. Section 178 of the Uniform Law provides that a costs agreement will be void if a law practice contravenes the "disclosure obligations of this Part". The Part to which the provision refers is Pt 4.3 which concerns "Legal Costs". It is common ground that any disclosure obligation relevant to this case is to be found in that Division.
68. The expression "disclosure obligations" is not defined in the Uniform Law.
69. The plaintiff contended that the natural and ordinary meaning of "disclose" is to reveal, make known, divulge, tell, impart, communicate or pass on information from one entity to another. Section 174(1), (2) and (6) conforms with that meaning because those subsections require the conveyance of information and its nature and content. Section 174(3) has no such function and imposes no such obligation, it was contended, but rather imposes a duty in a law practice to satisfy itself that the client has understood and consented to various things. It follows, it was submitted, that s 174(3) was not a disclosure obligation.
70. The difficulty with the plaintiff's contention in this respect is that it fails to appreciate that the provisions of s 178 concern "disclosure obligations", an expression which, as the defendant properly submitted, is a composite phrase, the meaning of which cannot be arrived at by simply defining its constituent elements: *Consolidated Wood* at 560-561 and, in particular, deriving the meaning from the ordinary meaning of the word "disclosure".
71. That the expression "disclosure obligation" takes a composite form in s 178 is emphasised by the word "the"; namely, in the expression "the disclosure obligations". It might also be observed that the

provisions of s 174 recognise a distinction between “disclosure obligations”, a phrase used in the headings of ss 174-178, and “disclosure” *per se*, such as the main disclosure requirement in s 174(1) which stipulates the context of the information to be provided to the client by the law practice.

72. I accept the submission of the defendant that the framework of Div 3, when taken with the headings of each section therein revealed an intention of the Parliament to enumerate the disclosure obligations of Pt 4.3 as referred to in s 178(1).

73. As was observed by the High Court in *Credit Tribunal* at 561, the division of a statute will often be a significant aid in its construction: see also *Concrete Constructions* at [6]-[13].

74. Further, the meaning of the composite phrase may, in my view, be derived, in part, from the heading of s 174 which refers generally to “disclosure obligations of law practice regarding clients”. There is no differentiation, in that respect, between the constituent elements of s 174.

75. Contrary to the submissions of the plaintiff, the provisions of s 174(4), (5) and (7) are not demonstrative that s 174 deals with matters other than disclosure obligations because the provisions deal with circumstances which confine or limit the nature or content of the disclosure required under the main disclosure obligation in s 174(1). They form part of the overall framework as to what constitutes a disclosure obligation for the purposes of that section.

76. It is true that the heading to s 174(3) is “Client’s consent and undertaking” but the opening words of that subsection create, in my view, a connection between the main disclosure required in s 174(1) and that the requirement reflected in the heading of s 174(3) suggestive of statutory intention that a “disclosure obligation”, as referred to in the heading of s 174, requires not only the provision of disclosure by way of designated information but a requirement to impart that information so as to ensure, as subsection states, the client understands and consents.

77. This construction is consistent with the objects of Pt 4.3 as reflected in s 169(a), namely, to “ensure that clients of law practices are able to make *informed choices* about their legal options and costs associated with pursuing those options” (emphasis added). I accept the submission of the defendant that an “informed choice” connotes understanding and consequently informed consent. This conclusion is reinforced by the terms of s 174(3) itself. The obligation imposed by the provision is that the law practice takes all reasonable steps to satisfy itself that the client has understood and given consent to both “the proposed course of action for the conduct of the matter” and “the proposed costs”.

78. As the defendant contended, that state of understanding, so far as it requires an understanding of a proposed course of action for the conduct of the matter (in contrast to the mere conveyance of proposed costs) is consistent with a conclusion that the legislature intended the disclosure obligation to extend beyond the provision of the information provided in s 174(1) and (2). I accept that, in the circumstances, the legislature’s intention was that the law practice’s reasonable steps to satisfy itself of the client’s understanding and consent is a precondition to the validity of a cost agreement such that the agreement would, pursuant to s 178, be rendered void by a failure to meet that obligation.

79. In any event, attendance upon the obligation in s 174(3), as described in the preceding paragraph must be an obligation for the law practice to engage with the client to discuss the proposed course of action and the proposed cost agreement consistently with the meaning of disclosure so far as it concerns communicating information.

80. The plaintiff contended that a strong indication of the meaning to be ascribed to a disclosure obligation was to be found in r 72A of the General Rules. It was submitted that it would be incoherent to find a contravention of s 174(3) on the basis that the legal practice did not take reasonable steps to satisfy itself about the client’s understanding and consent but then to allow relief from the contravention by a finding under r 72A(2)(a) which concerns whether a law practice took reasonable steps to comply with the disclosure obligations of Pt 4.3 of the Uniform Law.

81. The submission, however, fails to recognise the different operation of the provisions of s 174(3) and r 72A(2)(a).

82. Rule 72A is designed to ameliorate the operation of Pt 4.3 of the General Rules in cases of contravention where a cost assessor is satisfied:

. (1) the law practice took reasonable steps to comply but had in fact previously failed to comply (the provision refers to “before becoming aware of the contravention”);

. (2) the law practice rectified, as far as practicable, the contravention within 14 days of becoming aware of it; and

. (3) the contravention was not substantial and it would not be reasonable to expect that the client would have made a different decision in any relevant respect.

83. Rule 72A only operates where the law practice has contravened the disclosure obligations of Pt 4.3 in relation to a particular matter. That may concern the main disclosure requirement or any other disclosure requirement.

84. In that context, the question raised by r 72A(2)(a) is not whether the law practice had taken reasonable steps to satisfy itself of the matters referred to in Pt 4.3 *per se* (because it had contravened the provision) but whether the law practice had taken reasonable steps “to comply” before becoming aware of a contravention. In other words, the question raised by r 72A(2)(a) was whether the law practice had taken reasonable steps, notwithstanding the contravention, to comply. The “reasonable steps” there referred to concern steps taken to comply. The assessment made by the Court or costs assessor is whether there were reasonable steps taken “to comply” with Pt 4.3 in the circumstances where the law practice had contravened those obligations, and therefore, concerned steps taken in rectification of some omission or deficiency (which may or may not have arisen with respect to the obligations under s 174(3)).

85. I accept the submission of the defendant that r 72A is intended to cover circumstances in which there has been an inadvertent contravention of the disclosure obligations which is rectified and the contravention was not material to the client's decision.

86. So much is true of contraventions of s 174(3), the subject matter of the present proceedings.

87. Further, the provisions of r 72A(2) only provides an amelioration of the effect of the effect of s 178 if the law practice also complies with r 72A(2)(b) and (c) which, *inter alia*, concern rectification (so far as practicable) where the law practice learns of a contravention by providing the “information” required to be “disclosed” under Pt 4.3 Div 3 (no submission was made as to the use of the word information when read in that context is not wide enough to include disclosure obligations under s 174(3)).

88. Ultimately, the plaintiff’s submissions conflated the requirements to take reasonable steps under s 174(3) and r 72A(2)(a), when they are addressed to those different situations.

89. It follows from the totality of these conclusions, I would, with respect, not follow the judgment of Gourlay JR in *Frigger* at [28] and [43], although it may be noted, that it would not appear that there was full argument in that matter and Gourlay JR appeared to rule (at [28]) that the client had understood and consented, as follows:

> [28] Section 174(3) does not impose a disclosure obligation on the law practice. Rather the section requires the respondent to be satisfied that the client understood proposed course of action for the conduct of the matter and the proposed costs. On signing and returning the acceptance of the costs agreement it was reasonable for the respondent to be so satisfied. Indeed the Notice of Objections states that:
>
> > 6. The applicants understood and gave consent to the course of action as outlined in the Disclosure Statement and pursuant to the oral and written

instructions of the applicant.

90. Thus, at [43], Gourlay JR stated:

> [43] ... Section 178(1)(a) states that the costs agreement is void if it contravenes the disclosure obligations in part 4.3 of the Act. No finding has been made that there was such a contravention.

Conclusion

91. It follows that I reject the plaintiff's submissions with respect to issue 1 and answer the question raised at [42(1)] of the judgment in the affirmative. The review panel was correct in the conclusion reached that s 174(3) was a disclosure obligation for the purposes of s 178(1) of the Uniform Law.

LEAVE TO APPEAL

Relevant Principles

92. In *Ackerman v Morgan* [2019] NSWSC 1250, the Court considered principles concerning leave to appeal, with respect to an issue of costs, albeit in a different statutory context, namely, an appeal under s 40(2)(c) of the *Local Court Act 2007* (NSW) as follows (at [49]-[53]):

> [49] The principles to be considered in deciding whether leave to appeal should be granted have been the subject of enunciation in a number of cases in the Court of Appeal: *Zelden v Sewell Henamast Pty Ltd* [2011] NSWCA 56 ("*Zeldon*") at [22] per Campbell JA (with Young JA agreeing); *Be Financial Pty Ltd v Das* [2012] NSWCA 164 ("*Be Financial*") at [32]–[36] per Basten JA (Tobias AJA agreeing); *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 ("*Jaycar*") at [46] per Campbell JA (with Young and Meagher JJA agreeing); *Carolan v AMF Bowling Pty Ltd t/as Bennetts Green Bowl* [1995] NSWCA 69 ("*Carolan*") (per Sheller and Cole JJA).
>
> [50] In *Be Financial*, Basten JA set out the principles relevant to leave applications (at [32]-[39]). That summary is extracted below:
>
> > [32] The principles governing cases such as these have recently been restated in *Zelden v Sewell; Henamast Pty Ltd v Sewell* [2011] NSWCA 56. As Campbell JA noted (with the agreement of Young JA) at [22]:
> >
> > > "It is of some importance to reiterate the principles that were stated in *Carolan v AMF Bowling Pty Limited* [1995] NSWCA 69, where Sheller JA said that an applicant for leave must demonstrate something more than that the trial judge was arguably wrong in the conclusion arrived at. Cole JA relied on a principle that where small claims are involved, it is important that there be early finality in determination of litigation, otherwise the costs that will be involved are likely to swamp the money sum involved in the dispute."
> >
> > [33] In *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 Campbell JA, with the agreement of Young and Meagher JJA, expanded on his summary of

Carolan, noting that Kirby P had recognised "that ordinarily it was appropriate to grant leave to appeal only concerning matters that involve issues of principle, questions of general public importance or an injustice which is reasonably clear, in the sense of going beyond [what is] merely arguable": at [46].

[34] Kirby P in *Carolan* set out a number of reasons for the constraint on rights of appeal in such cases. Not all of them have been repeated in later cases. Not all are universally relevant. Thus, the delay in obtaining a hearing in this Court appears to have been greater at that time than is the case presently, although an overly liberal approach to leave applications might well result in an increase in the period between filing and hearing.

[35] In *Coulter v The Queen* [1988] HCA 3; 164 CLR 350, dealing with a challenge to a refusal of the South Australian Full Court to grant leave to appeal in a criminal matter, the majority noted that a leave requirement was a preliminary procedure "recognised by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention": at 356 (Mason CJ, Wilson and Brennan JJ). That statement is clearly applicable to civil, as well as criminal, appellate jurisdiction.

[36] As the High Court has noted, an application for leave is not a proceeding in the ordinary course of litigation but a preliminary procedure: *Collins v The Queen* [1975] HCA 60; 133 CLR 120 at 122; *Coulter* at 356. On the other hand, there is no reason to doubt that s 58 of the *Civil Procedure Act 2005* (NSW), requiring a court to act in accordance with "the dictates of justice" when making an order or direction "for the management of proceedings", applies in respect of a leave application. One of the factors to be taken into account pursuant to s 58 is "the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction": s 58(2)(b)(vi). That provision, like s 56, identifying the overriding purpose of the *Civil Procedure Act* as being to facilitate the just, quick and cheap resolution of the real issues in the dispute, recognises that questions of injustice are relative. Similarly, the requirement that this Court not order a new trial unless it appears that "some substantial wrong or miscarriage" has been occasioned, also reflects a principle of parsimony in requiring that the parties be put to the expense of a second trial: UCPR, r 51.53.

[37] The idea that injustice may be measured on a scale reflects a number of underlying considerations. First, the ability to assess the existence of an injustice in a preliminary proceeding, such as a leave application, is limited. In assessing the merit of a proposed appeal, the Court may well apply a vague criterion, such as whether the judgment below is attended by "sufficient doubt". Secondly, injustice involves a balancing exercise. The delay and cost of further litigation will constitute a form of injustice to the successful party below, whatever the outcome of the appellate process.

Thirdly, the entitlement of the parties to justice is not unconditional, but is dependent upon the resources of the court made available by the government and the appropriate allocation of resources by the parties, which may depend upon their individual assessments of the importance of the issues in dispute. The parties may well make disparate assessments in a particular case.

[38] The last point is reflected in the terms of s 60 of the *Civil Procedure Act*:

> "60 Proportionality of costs
>
> In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute."

[39] This direction has an important operation in respect of leave applications involving amounts below the statutory threshold. Where, as in the present case, the costs of the trial are disproportionate to the amount in dispute, the incurring of additional costs, for a potentially uncertain return, will be a factor weighing heavily against a grant of leave. Particularly is that so where there is a real prospect that, if successful, an appeal will not resolve the matter but will require a new trial.

[51] In *Chapmans Ltd v Yandell* [1999] NSWCA 361 ("*Chapmans*"), Fitzgerald JA (with whom Mason P and Davies AJA agreed) said:

> [11] On the other hand, it is important to keep in mind the purpose of a requirement of leave to appeal. It is intended to act as a filter to ensure that unsuitable appellant proceedings which are not able to be brought with the demands which that places upon the resources of the Court and the burden which it places upon other parties and the delays which it causes to other litigants. See for example *Coulter v Regina* (1988) 166 CLR 350 about 359.
>
> [12] It is also in my opinion important to keep in mind that s 208M must be considered in the context of s 208L, which restricts an appeal as of right to matters of law. In considering whether or not leave to appeal is granted, it must be decided whether or not, there not being a matter of law arising in the proceeding and there being an appeal as of right only as to a matter of law, there is some other matter which in justice requires that leave to appeal be granted to allow that matter to be relitigated. The party seeking leave to appeal obviously bears the burden of establishing that justice does require that leave to appeal be granted. Further, the master when considering whether to grant leave to appeal obviously has a very wide discretion: see *CDJ v VAJ* [1998] HCA 67 per McHugh, Gummow and Callinan, JJ.

[52] The High Court in *Coulter v The Queen* (1988) 164 CLR 350; [1988] HCA 3 ("*Coulter*"), Deane and Gaudron JJ said (at 359):

> The requirement that leave or special leave be obtained before an appeal will lie is a necessary control device in certain areas of the administration of justice (e.g. appeals to a second appellate court) in this country. As a filter of the work which comes before some appellate courts, it promotes the availability, the speed and the efficiency of justice in those appeals which are, in all the circumstances, appropriate to proceed to a full hearing before the particular court. It also represents a constraint upon the overall cost of litigation by protecting parties, particularly respondents, from the costs of a full hearing of appeals which should not properly be entertained by the relevant court either because they are hopeless or, in the case of a civil appeal to a second appellate court, because they do not possess special features which outweigh the prima facie validity of the ordinary perception that the availability of cumulative appellate processes can, of itself, constitute a source of injustice.

[53] The relevant principles may be summarised as follows:

> (1) An applicant for leave must demonstrate something more than that the trial judge was arguably wrong in the conclusion arrived at, and that where small claims are involved, it is important that there be early finality in determination of litigation, otherwise the costs that will be involved are likely to swamp the money sum involved in the dispute: *Carolan*.
>
> (2) Ordinarily it is appropriate to grant leave to appeal only concerning matters that involve issues of principle, questions of general public importance or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable: *Jaycar* at [46].
>
> (3) The leave requirement is a preliminary procedure "recognised by the legislature as a means of enabling the Court to control in some measure the volume of appellate work requiring its attention": *Coulter* at 356 (Mason CJ, Wilson and Brennan JJ). Whilst that was a criminal matter, the statement is clearly applicable to civil, as well as criminal, appellate jurisdiction: *Be Financial* at [32]-[36] (per Basten JA, with Tobias AJA agreeing).
>
> (4) A requirement of leave to appeal is intended to act as a filter to ensure that unsuitable appellant proceedings are not able to be brought, with the demands they place upon the resources of the Court and the burden they place upon other parties and the delays which they cause to other litigants: *Chapmans* at [11] per Fitzgerald JA (with whom Mason P and Davies AJA agreed).
>
> (5) An application for leave is not a proceeding in the ordinary course of litigation but a preliminary procedure: *Collins v The Queen* [1975] HCA 60; (1975) 133 CLR 120 at 122; [1975] HCA 60.

> (6) Section 58 of the *Civil Procedure Act* applies and requires the Court to consider "the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction": s 58(2)(b)(vi). Leave should be granted only where there are substantial reasons to allow an appellate review (*Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 104 FCR 564; [2000] FCA 1572, such as where there is an error of principle which, if uncorrected, will result in substantial injustice.

93. Those principles are, generally speaking, applicable in the present matter.
94. Reference may also be made to a number of other authorities in the present context as discussed below.
95. The determination of an application for leave is "is a preliminary procedure recognized by the legislature as a means of enabling the Court to control in some measure the volume of appellate work requiring its attention": *Coulter v R* (1988) 164 CLR 350; [1988] HCA 3 ("*Coulter*") at [9].
96. In *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 ("*Be Financial*") at [35], the Court of Appeal (per Basten JA, with Tobias JA agreeing) held that the High Court's statement in *Coulter* "is clearly applicable to civil, as well as criminal, appellate jurisdiction".
97. In *Gibson v Drumm* [2016] NSWCA 206 the Court of Appeal (per Beazley P and Simpson JA) stated, in the context of an appeal from a costs judgment of Young AJ, at [19]:

> [19] There are no exhaustive or rigid rules of practice or criteria governing the grant of leave to appeal: *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; 148 CLR 170. However, it has been consistently stated that leave should only be granted where there are substantial reasons that call for appellate review: *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2000] FCA 1572; 104 FCR 564, and, in particular, where there is an error of principle, a matter of public importance, or injustice which is reasonably clear in the sense of going beyond what is merely arguable: see *Darrell Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* [1969] VicRp 50; [1969] VR 401; *Niemann v Electronic Industries Ltd* [1978] VicRp 44; [1978] VR 431; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VicRp 72; [1985] VR 756; *Carolan v AMF Bowling Pty Ltd t/as Bennetts Green Bowl* [1995] NSWCA 69; *Minogue v Williams* [2000] FCA 125; (2000) 60 ALD 366; *Jaycar Pty Limited v Lombardo* [2011] NSWCA 284; *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164; *Clarke v State of New South Wales* [2015] NSWCA 27. In *Collier v Lancer (No 2)* [2013] NSWCA 186, the Court reiterated that appellate review will be warranted where, for instance "*there is an error of principle which, if uncorrected, will result in substantial injustice*".

98. I also accept what was observed by Schmidt J in *Metziya Pty Ltd v ICR Engineering Pty Ltd* [2016] NSWSC 1703 at [12]:

> [12] The circumstances in which leave to appeal will be granted were discussed in *Gibson v Drumm* [2016] NSWCA 206 at [19]- [20]. The amount in issue on an appeal is a relevant consideration, but the mere fact that the amount is small, will not preclude the grant of leave where the appeal raises errors of principle, matters of public importance, or injustice going beyond what is merely arguable.

99. Reference may also be made to the judgment of McCallum J in *Secure Parking Pty Limited v Ralan Property Services Pty Limited (No 1)* [2018] NSWSC 660 at [12] as follows:

> [12] In oral submissions this morning, Secure Parking also drew my attention to the decision of Schmidt J in *Metziya Pty Ltd v ICR Engineering Pty Ltd; ICR Engineering Pty Ltd v Metziya Pty Ltd; ICR Engineering Pty Ltd v Blayney Cold Storage Distribution Pty Ltd* [2016] NSWSC 1703 where her Honour noted at [12] that the mere fact that the amount involved is small will not preclude the grant of leave where the appeal raises errors of principle, matters of public importance or injustice going beyond what is merely arguable. I would respectfully agree. Cases involving small sums are no less susceptible to error of principle and often entail complexity disproportionate and even inversely proportionate to the amount at stake. Accordingly, I do not approach the present case on the basis that leave should be refused for that reason alone. However, it is a relevant factor and, indeed, an important factor in the present case, in my view.

100. In *Clutch & Brake Australia Pty Ltd v Khamis* [2018] NSWSC 777, Harrison AsJ refused leave for the following reasons (at [42]):

> [42] The evidence in this appeal does not go so far as to establish that the operation of the Practice Note is a recurring issue in the Local Court. The amounts in dispute are modest. Legal costs have already been expended in the costs assessment process and before the review panel. There are no substantial reasons that call for appellate review and, in particular, there is no error of principle, no matter of public importance or injustice that is reasonably clear. It is my view that the plaintiff's chances of success on appeal are, at best, poor. Taking these circumstances into account, in the exercise of my discretion, leave to appeal should be refused.

101. A number of provisions of the *Civil Procedure Act 2005* (NSW) apply in respect of an application for leave: *Be Financial* at [36]-[39]; see also *Rose v Tunstall* [2018] NSWCA 241 at [15]- [18].

102. These include s 58, which relevantly provides:

> **58 Court to follow dictates of justice**
>
> (1) In deciding:
>
> > (a) whether to make any order or direction for the management of proceedings...
>
> the court must seek to act in accordance with the dictates of justice.
>
> (2) For the purpose of determining what are the dictates of justice in a particular case, the court:
>
> > (a) must have regard to the provisions of sections 56 and 57, and
> >
> > (b) may have regard to the following matters to the extent to which it considers them relevant:

...

(vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction...

103. Section 60 is also relevant. It provides:

60 Proportionality of costs

In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

104. In *Be Financial* the Court considered the relevance of s 58 in an application for leave to appeal to the Court of Appeal and said (at [36]):

[36] ... there is no reason to doubt that s 58 of the *Civil Procedure Act 2005* (NSW), requiring a court to act in accordance with "the dictates of justice" when making an order or direction "for the management of proceedings", applies in respect of a leave application. One of the factors to be taken into account pursuant to s 58 is "the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction": s 58(2)(b)(vi). That provision, like s 56, identifying the overriding purpose of the *Civil Procedure Act* as being to facilitate the just, quick and cheap resolution of the real issues in the dispute, recognises that questions of injustice are relative.

105. In relation to the relevance of s 60 the Court said at [39]:

[39] This direction has an important operation in respect of leave applications involving amounts below the statutory threshold. Where, as in the present case, the costs of the trial are disproportionate to the amount in dispute, the incurring of additional costs, for a potentially uncertain return, will be a factor weighing heavily against a grant of leave.

Submissions for the Defendant

106. The defendant advanced the following submissions in favour of leave being refused:
. (1) The clearly expressed legislative intention is for appeals involving amounts less than $100,000 to be heard in the District Court, unless leave is granted. In this matter the amount of costs in dispute is $46,152.70. Relative to that amount, the costs of the appeal are likely to be substantial. There is no compelling reason why leave should be granted in this Court. Consideration should be given to ss 56 and 60 of the *Civil Procedure Act*, and particularly the issue of proportionality.
. (2) The District Court has had jurisdiction in relation to appeals from review panels since 2004 (under the *Legal Profession Act 2004* (NSW) (since repealed) and continues to have jurisdiction under the Application Act, including in appeals where the amount in dispute is over $100,000. The District Court is the more appropriate forum. Thus, there has been a general repository of jurisdiction in the District Court since 2004 in exercising the jurisdiction to deal with appeals from review panels.
. (3) The giving of leave in this Court would encourage parties in future to skip the jurisdiction of the District Court in matters under $100,000 and would subvert the legislative intention for such appeals to be heard there. There has been a general reluctance in the Court of Appeal to grant leave when the

matter is under the jurisdictional limit unless there is a good reason to do so, particularly when, as in this case, the Court would then exercise the powers of the review panel (see s 89(2) of the Application Act). . (4) The plaintiff contends that leave should be granted because, *inter alia*, the District Court does not have power to grant order 3 of the Amended Summons. The implication is that the Supreme Court would have the power to make order 3, That is incorrect: neither the District Court nor the Supreme Court has power to make order 3; to do so would be to act in excess of jurisdiction. Both the Supreme Court and the District Court have the same power as a costs assessor and a review panel: s 89(2). The Supreme Court has additional powers to remit a matter to the District Court: s 89(3) or to remove a matter from the District Court into the Supreme Court: s 89(3A). Accordingly, the reason given in the Amended Summons as to power does not provide a cogent reason why leave should be granted. . (5) The combination of those factors against the grant of leave is illustrated by issue 4. This would require the Court to examine the line by line determination made by the costs assessor to determine whether they are fair and reasonable because it was submitted by the plaintiff that the costs assessor erred in conducting a line by line determination.

Submissions for the Plaintiff

107. In written submissions in reply, the plaintiff made the following submissions in favour of the grant of leave

> 3. The plaintiff may appeal as of right to the District Court, but needs leave to appeal to this Court due to the amount involved. The defendant did not oppose this matter being set down for final hearing in this Court, nor did he seek a separate determination of the application for leave. It would be waste of public and private resources to refuse the application for leave, only for the parties to reconvene in the District Court on the same issues: cf s 56 of the *Civil Procedure Act.*
>
> 4. The parties agree that an important issue in this case is the proper construction of s 174(3) of the Uniform Law: DS [5]. That legislation applies in New South Wales and Victoria, which covers about 70% of the Australian legal profession. Section 174(3) is a provision which will be engaged in the overwhelming majority of cases where a client engages a solicitor. Given its importance and general application, it is desirable for this Court to give an authoritative ruling on the construction of s 174(3).
>
> 5. There is presently only one decision analysing s 174(3), namely, *Frigger v Madgwicks* [2018] VSC 281. That decision favours the plaintiff, however, the defendant submits that it is wrongly decided and should not be followed: DS [43]. As a matter of judicial comity, it would be preferable for that issue to be resolved by this Court.
>
> 6. There is also a controversy between the parties over the construction of rule 72A of the *Legal Profession Uniform General Rules 2015* (NSW) (LP General Rules). There is presently no authority on that issue. For the reasons given above, it is desirable for this Court to give an authoritative ruling on that issue.
>
> 7. The costs assessor determined that even if the fixed fee costs agreement was enforceable, it was open to her under s 199 of the Uniform Law to assess whether the fee was fair and reasonable by reference to hourly rates. Again, that raises an important issue

> of general application on which it would be desirable for this Court to rule.
>
> [Footnotes omitted.]

108. In oral submissions, Mr D McLure SC, for the plaintiff, contended that it was consistent with s 56 of the *Civil Procedure Act* for the Court to fully resolve all controversies between the parties. If there is a legal error by the review panel then the question of proportionality does not support the refusal of leave because the issue arising as to the construction of s 174(3) will have to be dealt with "elsewhere" with the further expedition of costs and time. This would be contrary to the proper administration of justice.

Consideration

109. I consider that leave should not be granted under s 89(1)(b) to bring the appeal for the following reasons.

110. First, the principal basis for the grant of leave advanced by the plaintiff was that there was an error of law by the costs assessor and the review panel (whether explicitly or implicitly made) in the construction of s 174(3) and, in particular, finding that s 174(3) was a disclosure obligation for the purposes of s 178(1) of the Uniform Law.

111. The issue raised by the plaintiff in that respect by issue 1 (as it appears at [42(1)] of the judgment) has been answered in the affirmative, contrary to the contentions advanced by the plaintiff.

112. Secondly, the grounds arising out of issues 2, 3 and 4 raise no error of principle, matters of public importance or injustice and certainly none which are reasonably clear in the sense of going beyond what is merely arguable. The plaintiff raised an issue of law with respect to issue 3, but the plaintiff's contention as to the disapplication effect of r 72A in the present case lacks merit and the contention that there was an error of law in that respect is weak and may be doubted.

113. As to issue 2 and as a matter of principle, the following contention by the plaintiff as to the nature of the requirements imposed by s 174(3) may be accepted:

> The legislation does not prescribe how a law practice must discharge the duty under s 174(3). This reflects the reality that what will be necessary to discharge the duty will vary according to the circumstances of the case and the client. The steps a law practice may need to take will be influenced by the attributes of the client and what the client communicates before and after receiving the disclosure documents.

114. However, that description immediately confirms the absence of the factors of the kind referred to in this second reason.

115. Further, the contentions of the plaintiff as to why that obligation had been met essentially concerned the nature and quality of the information provided to the defendant: the disclosure obligations under s 174(1), (2) and (6) had been met; the information, so supplied was clear and concise; the defendant acknowledged he had read understood and agreed to the costs agreement; he had an opportunity to seek legal advice and did so (including querying the rates); he had previously entered into a costs agreement and that there was evidence that he recognised the lump sum he was to be paid. Part of the contested evidence is that Mr Firth satisfied himself that the defendant understood what the cost agreement entailed (the affidavit of Mr Firth at paras 30 and 38-39).

116. However, I accept the submissions of the defendant that there is no evidence that the defendant was informed as to the risks occasioned by a fixed price agreement. As Ms M Castle, who appeared with Mr A Bailey for the defendant, properly contended, the risks went both ways but the risks for the defendant are twofold. First, there is a risk that the legal practice may be incentivised to minimise the

work contributed to a particular matter. Secondly, and more significantly, there was a risk that the client will pay more than a matter is objectively worth under such an agreement, even if the discounts under the costs agreement were applied. Mr Firth's assessment was, in essence, that he surmised the client understood and consented from the surrounding circumstances and the client's communications and that, if asked, he would have dealt with any query in that respect. Accepting the client was debating his legal fees and seeking legal advice (of some kind) elsewhere, the taking of that approach does not constitute reasonable steps to satisfy himself the client had understood and given consent to proposed costs, when formulated on a fixed price basis, let alone, the proposed course of action for the conduct of the matter in that light. No inquiry was made as such of the client as to his understanding or consent specifically in relation to the fixed price component of the costs agreement and its implications in the context of the specific litigation under consideration.

117. As to issue 3, whilst the plaintiff submitted that the omission of the review panel to consider the interaction between r 72A and s 178(1) constituted an error of law, warranting the grant of leave, the merits of the plaintiff's case for disapplication under r 72A are, in any event, weak.

118. In substance, the plaintiff contended that:

. (1) The factors relied upon to demonstrate that the provisions of s 174(3) had been complied with by the law practice demonstrated, with greater force, why disapplication would be granted. There was an honest and rational basis for the principal of the law practice to believe the defendant understood.

. (2) Rule 72A(2)(b) was not relevant as the plaintiff and Mr Firth could not be said to have become aware of the contravention until the cost assessor's determination (it was said the contravention of r 72A(2)(c) was not substantial).

119. I do not accept these submissions. On the construction of r 72A(2) undertaken with respect to issue 1, in order to attract the ameliorating effects of that provision the plaintiff was required to take reasonable steps to comply. The defendant took no steps in rectification.

120. Further, as the defendant contended, reliance cannot properly be placed upon a contention that the law practice was not aware until a costs assessment arose where there has been an active denial by the law practice that the obligation existed. The law practice's position was not mere inadvertence or oversight when seen in the light of the plaintiff's case (even though propositions advanced before the Court are advanced in succession).

121. It is not entirely clear why the plaintiff contends that the standard required to meet the duty under r 72A(2)(a) must be lower than the standard imposed under s 174(3).

122. Ultimately, the contention that a law practice took reasonable steps is a contention of fact.

123. The costs assessor found that the plaintiff had taken no time to explain how $80,000 might be considered fair, reasonable or proportionate. There is no proper basis demonstrated for the purposes of leave to traverse such a finding, particularly when the contention is advanced in circumstances when the disapplication provisions of r 72A(2) were not relied upon by the plaintiff before either the costs assessor or the review panel: *eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd* (2015) 90 NSWLR 451; [2015] NSWCA 284 at [5] (per Beazley P), [47]-[49] (per Basten JA) and [108] and [112] (per Simpson JA).

124. The provision is concerned with affecting compliance. The reasonable steps concern the actions to achieve the same. It is not clear what steps relied upon with respect to issue 2 meet this condition given that the provision is triggered in circumstances of contravention. In any event, the conclusions reached with respect to issue 2 below, demonstrate why, in addition to the above analysis, the provision of r 72A(2) may not be satisfied.

125. Finally, in relation to this issue, there is substance in the defendant's submission, having regard to the above conclusions, that r 72A was not engaged.

126. Thirdly, the issue raised by question 4 is predicated upon a finding that, contrary to my earlier conclusion, there is a valid costs agreement. Further, I accept the submissions advanced by the defendant that issue 4 does not raise a valid ground of appeal, does not arise in the proceedings and any judgment in respect of it would constitute, in substance, an advisory opinion: *Bass* at [47]-[48].

127. I also accept the submission that the inquiry raised by the defendant would, in substance, have the Court undertake a line by line assessment of costs. Whilst the legislation provides that the Court has "all of the functions of the review panel", this is a relevant discretionary consideration against the grant of leave in that respect.

128. Fourthly, it is necessary to consider the cost assessor's conclusion under s 199 of the Uniform Law given the conclusions I have reached regarding the operation of s 174(3).

129. Fifthly, as to the submission of the plaintiff that only this Court may remit a matter to the review panel, it would appear the power of this Court is confined under s 89(3) to a remitter to the District Court. The Court may otherwise exercise the same power as the review panel.

130. Sixthly, the clearly expressed legislative intention is for appeals involving amounts less than $100,000 to be heard in the District Court, unless leave is granted. In this matter the amount of costs in dispute is small, namely, $46,152.70. Relative to that amount, the costs of the appeal are likely to be substantial. For the reasons I have given, there is no substantial reason why leave should be granted in this Court either as a matter of law, principle, justice or merit. The conclusion to refuse leave is properly informed, in my view, by ss 56 and 60 of the *Civil Procedure Act*, particularly the issue of proportionality.

Conclusion

131. In all of the circumstances, leave to appeal under s 89(1)(b) of the Application Act is refused.

ORDERS

132. The Court makes the following orders:

. (1) Leave to appeal is refused.

. (2) The defendant shall have costs of the appeal as agreed or as assessed.

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