Supreme Court of Queensland - Court of Appeal

Farrar v Julian-Armitage & Anor [2015] QCA 289 (18 December 2015)

Last Updated: 5 January 2016

SUPREME COURT OF QUEENSLAND

CITATION:	*Farrar v Julian-Armitage & Anor* [2015] QCA 289
PARTIES:	**VIKI MAREE FARRAR (FORMERLY SWEENEY)** (applicant) **v** **ANGELA JULIAN-ARMITAGE** (first respondent) **GREGG LAWYERS PTY LTD** ACN 137 730 842 (second respondent)
FILE NO/S:	Appeal No 9554 of 2014 Appeal No 9555 of 2014 DC No 319 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Southport – [2014] QDC 194
DELIVERED ON:	18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2015
JUDGES:	Margaret McMurdo P and Morrison JA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	1. **Application for leave to appeal dismissed.** 2. **The applicant pay the respondents' costs of and incidental to the application on the standard basis in an amount to be fixed by the cou unless agreed between the parties by 29 January 2016.** 3. **Failing such agreement:** . **(a) by 5 February 2016 the respondents file and serve written submissions limited to five pages, verified by accompanying affidavit as to the amount at which costs should be fixed;** . **(b) by 12 February 2016 the applicant file and serve written submissions limited to five pages, verified if relevant by accompanyi**

affidavit, as to the amount at which costs should be fixed;
. **(c) by 19 February 2016 the respondents file and serve any written submissions limited to two pages, in reply.**

CATCHWORDS: PROCEDURE – COSTS – APPEALS AS TO COSTS – DISCRETION – where the applicant successfully sought an assessment of legal costs for services invoiced by each respondent in the District Court pursuant to s 33 *Legal Profession Act* 2007 (Qld) – where the respondents appealed the decision of the costs assessor in the District Court pursuant to r 742 *Unifor Civil Procedure Rules* 1999 (Qld) – where the review judge set aside the decision of the costs assessor in each case – where the applicant seeks leave to appeal the decision of the review judge in the District Court pursua to s 118(3) *District Court of Queensland Act* 1967 (Qld) – whether leave to appeal should be granted to correct a substantial injustice to the applicant whether there is a reasonable argument that there is an error to be correct – whether the grounds of appeal advanced in the application warrant interference with the review judge's decision
2007 Barristers' Rule, r 77, r 78

District Court of Queensland Act 1967 (Qld), s 118(3)

Legal Profession Act 2007 (Qld), s 308, s 309, s 310, s 315, s 335, s 340, s 341, s 342

Uniform Civil Procedure Rules 1999 (Qld), r 742

ACI Operations Pty Ltd v Bawden [2002] QCA 286, followed
Cassegrain v CTK Engineering Pty Ltd [2008] NSWSC 457, cited

Frumar v Owners of Strata Plan 36957 (2006) 67 NSWLR 321; [2006] NSWCA 278, cited

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited

Schweppes' Limited v Archer (1934) 34 SR (NSW) 178; [1934] NSWStRp 17, cited

COUNSEL: C Coulsen for the applicant
M Amerena for the respondents

SOLICITORS: Lynn & Rowland Lawyers for the applicant
Gregg Lawyers for the respondents

[1] MARGARET McMURDO P: This is not a suitable case in which to grant leave to appeal for the reasons given by Henry J. I agree with the orders proposed by Henry J.

[2] MORRISON JA: I agree with the orders proposed by Henry J and the reasons given by his Honour.

[3] HENRY J: The applicant and her former lawyers, the respondents, are in dispute over legal costs. The costs assessor's decisions assessing those costs were reviewed and set aside in the District Court. The

applicant now seeks leave to appeal and set aside the District Court Judge's decision.

[4] While there were separate assessments in respect of each respondent the two cases were the subject of a single set of reasons below and it is convenient to follow that course now.

Background

[5] The respondents are Ms Julian-Armitage, a barrister (the "barrister"), and Gregg Lawyers, a solicitors' firm (the "solicitor"). They acted on behalf of the applicant in her family law property settlement dispute with her former husband. The case concerned a property pool worth in excess of $30 million.

[6] The applicant terminated the respondents' services on 17 March 2011 over a year before the property settlement went to hearing in the Family Court. For those services she paid the barrister $208,492.60 and the solicitor $85,522.99. Once new lawyers were acting for her she successfully applied in the District Court for orders there be cost assessments of the respondents' invoices pursuant to s 335 Legal Profession Act 2007 (Qld) ("the Act").

[7] The appointed costs assessor later delivered certificates of assessment assessing costs at significantly less than the amounts that had already been paid. In respect of the barrister the assessed costs totalled $54,461.39, some $154,031.21 less than what had been invoiced and paid.[1] In respect of the solicitor the assessed costs totalled $37,814.57, some $47,708.42 less than what had been invoiced and paid.[2]

[8] The respondents applied to the District Court pursuant to r 742 Uniform Civil Procedure Rules 1999 (Qld) ("UCPR") for a review of the costs assessor's decision. A review proceeded before a District Court Judge who ordered in each case that the decision of the costs assessor be set aside.

Applications for leave

[9] The applications for leave to appeal the review judge's decision are brought pursuant to s 118(3) District Court of Queensland Act 1967 (Qld), which confers a right of appeal to the Court of Appeal "with the leave of that Court".[3] The circumstances under which the discretion to grant leave ought be exercised are not circumscribed by s 118(3) but this court does not ordinarily grant leave to resolve disputes that are of only academic interest.[4] It will usually only grant leave where the appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected.[5] Ultimately though, as was observed by McPherson JA in ACI Operations Pty Ltd v Bawden,[6] the discretion to grant or refuse leave "is exercisable according to the nature of the case".

[10] If leave is given the applicant wants to pursue many grounds of appeal. The merits of the most important grounds were advanced in the leave application by reference to the four most determinative issues in the review judge's decision to set aside the decision. Those issues were:

1. Was the barrister directly retained?

2. Was the barrister obliged to disclose a change in her estimated legal fees?

3. What were the consequences of the barrister and solicitor not disclosing as soon as practicable?

4. Were the assessor's reasons inadequate?

[11] It is those four issues that are the primary focus of these reasons.

[12] To give context to a discussion of the four main issues it is helpful to first review the limits of the power to review an assessor's decision and canvass the legislative setting relevant to the assessments.

The power to review under r 742

[13] Rule 742 is contained within Chapter 17A, part 4, of UCPR which, pursuant to r 678(2)(4), applies to costs payable or to be assessed under the Act. It relevantly provides:

"(1) A party dissatisfied with a decision included in a costs assessor's certificate of assessment may apply to the court to review the decision. ...

(5) On a review, unless the court directs otherwise –

(a) the court may not receive further evidence; and

(b) a party may not raise any ground of objection not stated in the application for assessment or notice of objection or raised before the costs assessor.

(6) Subject to subrule (5), on the review, the court may do any of the following –

(a) exercise all the powers of the costs assessor in relation to the assessment;

(b) set aside or vary the decision of the costs assessor;

(c) set aside or vary an order made under rule 740(1);

(d) refer any item to the costs assessor for reconsideration, with or without directions;

(e) make any other order or give any other direction the court considers appropriate. ..."

[14] Thus, while the court on review is confined, unless it otherwise directs, to the evidence and issues which were before the assessor, it has very broad powers. They include exercising all the powers of the costs assessor.

[15] Those powers fall to be exercised cognisant that an assessment of costs commonly involves evaluative determinations and discretionary decisions about questions to which there is not only one correct answer,[7] with the result that courts should generally be unwilling to interfere in the absence of clear error.[8] In Schweppes' Limited v Archer[9] Jordan CJ explained the approach to be taken:

"The Court will always review a decision of a Taxing Officer where it is contended that he has proceeded upon a wrong principle, for the purpose of determining the principle which should be applied; and an error in principle may occur both in determining whether an item should be allowed and in determining how much should be allowed. Where no principle is involved, and the question is whether the Taxing Officer has correctly exercised a discretion which he possesses and is purporting to exercise, the Court is reluctant to interfere. It has undoubted jurisdiction to review the Taxing Officer's decision even where an exercise of discretion only is involved, and will do so freely on a proper case, using its own knowledge of the circumstances ..., but it will in general interfere only where the discretion appears not to have been exercised at all, or to have been exercised in a manner which is manifestly wrong; and where the question is one of amount only, will do so only in an extreme case."[10]

[16] The primary order below was the setting aside of the costs assessor's decision in each case.

[17] His Honour also gave directions for the filing of written submissions as to further orders and adjourned the further hearing of the application to a date to be fixed. The directions and adjournment for

further hearing reflect the practical reality that having set aside the assessor's decision it remains for the District Court Judge to determine by further orders under r 742(6) UCPR how the now incomplete assessment process should proceed. For instance, whether it should be completed by his Honour, whether items should be referred for reconsideration to the assessor or whether some other order or direction ought be made. In any event the further determination of the matters below was interrupted by the present applications for leave to appeal.

Legislative setting

[18] The Act's Ch 3, Pt 3.4, "Cost disclosure and assessment", provides for law practices to make disclosures to clients regarding legal costs, regulates the making of costs agreements and the billing of costs and provides a mechanism for the assessment of legal costs.[11] The law practices to which Pt 3.4 applies include law firms as well as sole practitioners, be they solicitors or barristers, who are admitted to the legal profession and hold a current practising certificate.[12]

[19] A client may, as occurred here, apply pursuant to s 335 for an assessment of legal costs, even if the costs have been paid. The approach to be taken in an ensuing assessment depends significantly upon whether there has been compliance with the Act's requirements as to costs disclosure in Div 3 and costs agreements in Div 5 of Pt 3.4.

[20] Section 341 of the Act sets the criteria for assessment:

"**Criteria for assessment**

(1) In conducting a costs assessment, the costs assessor must consider –

(a) whether or not it was reasonable to carry out the work to which the legal costs relate; and

(b) whether or not the work was carried out in a reasonable way; and

(c) the fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that section 340 applies to any disputed costs.

(2) In considering what is a fair and reasonable amount of legal costs, the costs assessor may have regard to any or all of the following matters –

(a) whether the law practice and any Australian legal practitioner...acting on its behalf complied with this Act;

(b) any disclosures made by the law practice under division 3;

(c) any relevant advertisement as to –

(i) the law practice's costs; or

(ii) the skills of the law practice, or of any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf;

(d) the skill, labour and responsibility displayed on the part of the Australian legal practitioner...responsible for the matter;

(e) the retainer and whether the work done was within the scope of the retainer;

(f) the complexity, novelty or difficulty of the matter;

(g) the quality of the work done;

(h) the place where, and circumstances in which, the legal services were provided;

(i) the time within which the work was required to be done;

(j) any other relevant matter. ...” (emphasis added).

[21] The criterion of “the fairness and reasonableness of the amount” at s 341(1)(c) does not need to be considered by the assessor if s 340 applies. Section 340 provides:

“**Assessment of complying costs agreements**

> (1) A costs assessor for a costs application must assess any disputed costs that are subject to a costs agreement by reference to the provisions of the costs agreement if –

(a) a relevant provision of the costs agreement specifies the amount, or a rate or other means for calculating the amount, of the costs; and

(b) the agreement has not been set aside under section 328;

unless the costs assessor is satisfied that –

(c) the costs agreement does not comply in a material respect with any disclosure requirements of division 3; or

(d) division 5 precludes the law practice concerned from recovering the amount of the costs; or

(e) the parties otherwise agree.

(2) The costs assessor is not required to initiate an examination of the matters mentioned in subsection (1)(c) and (d).”

[22] Thus s 340 requires the assessor to assess costs that are subject to a costs agreement by reference to that agreement unless the assessor is satisfied the agreement does not comply in a material particular with the Act’s costs disclosure requirements.[13]

[23] As to costs disclosure s 308 relevantly provides:

“**Disclosure of costs to clients**

(1) A law practice must disclose to a client under this division –

(a) the basis on which legal costs will be calculated, including whether a scale of costs applies to any of the legal costs; and

(b) the client’s right to –

(i) negotiate a costs agreement with the law practice; and

(ii) receive a bill from the law practice; and

(iii) request an itemised bill after receipt of a lump sum bill; and

(iv) be notified under section 315 of any substantial change to the matters disclosed under this section; and

(c) an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs; and

(d) details of the intervals, if any, at which the client will be billed; and

...

(g) the client's right to progress reports under section 317; and

(h) details of the person whom the client may contact to discuss the legal costs; and

(i) the following avenues that are open under this Act to the client in the event of a dispute in relation to legal costs –

(i) costs assessment under division 7;

(ii) the setting aside of a costs agreement under section 328; ..."

[24] Section 308 applies to the law practice retained or to be retained by the client. It would therefore apply to a barrister directly retained by a client. Whether the barrister in this case was directly retained was at issue – see issue one below.

[25] What though of the more conventional scenario where a law practice, say a firm of solicitors, retains another law practice, say a barrister, on behalf of a client? How does that affect the disclosure obligation of the solicitors' firm and the barrister? In such a situation s 309(1) stipulates the additional disclosure obligation of the solicitors' firm and s 309(2) stipulates the disclosure obligation of the barrister:

"**Disclosure if another law practice is to be retained**

> (1) If a law practice intends to retain another law practice on behalf of a client, the first law practice must disclose to the client the details mentioned in section 308(1)(a), (c) and (d) in relation to the other law practice, in addition to any information required to be disclosed to the client under section 308.
> (2) A law practice retained or to be retained on behalf of a client by another law practice is not required to make disclosure to the client under section 308, but must disclose to the other law practice the information necessary for the other law practice to comply with subsection (1). ...

Example –

If a barrister is retained by a firm of solicitors on behalf of a client of the firm, the barrister must disclose to the firm details of the barrister's legal costs and billing arrangements, and the firm must disclose those details to the client. The barrister is not required to make a disclosure directly to the client."

[26] Thus in the aforementioned conventional scenario, the solicitor must make additional disclosure to the client, namely of the information in s 308(1)(a), (c), and (d) as it relates to the barrister's costs. In contrast the barrister need not make disclosure under s 308 but must disclose to the solicitor the information necessary for the solicitor to make the additional disclosure.

[27] The disclosure obligation of the law practice to the client is a continuing one pursuant to s 315, which provides:

“**Ongoing obligation to disclose**

A law practice must, in writing, disclose to a client any substantial change to anything included in a disclosure already made under this division as soon as is reasonably practicable after the law practice becomes aware of that change.”

[28] Note that s 315’s obligation is that of the law practice to the “client”. An issue in this case is whether s 315 required the barrister, whose legal costs far exceeded her estimate disclosed to the solicitor, to disclose what must have been a substantial change in her estimate to the solicitor’s client – see issue two below.

[29] As to timeliness of disclosure, s 310 provides:

“**How and when must disclosure be made to a client**

> (1) Disclosure under section 308 must be made in writing before, or as soon as practicable after, the law practice is retained in the matter.
> (2) Disclosure under section 309(1) must be made in writing before, or as soon as practicable after, the other law practice is retained.
>
> (3) Disclosure made to a person before the law practice is retained in a matter is taken to be disclosure to the client for sections 308 and 309.” (emphasis added)

[30] Note that s 310 does not refer to s 309(2). That is, it does not stipulate when the barrister in the conventional scenario referred to above must make disclosure to the solicitor. In effect it casts the obligation on the solicitor to ensure as part of the process of retaining the barrister that the barrister’s disclosure is obtained as soon as practicable because the solicitor is obliged to disclose the additional information about the barrister’s costs to the client under s 309(1) as soon as practicable under s 310(2).

[31] The respondents failed to make disclosure as soon as practicable. Issue three is concerned with the consequences of that failure.

Issue One: Was the barrister directly retained?

[32] The costs assessor’s brief reasons relevant to this issue implicitly concluded the barrister was directly retained and did not comply with her costs disclosure obligations as a directly retained practitioner.[14] This by implication included a failure to comply with the disclosure requirements of s 308 as distinct from the less onerous requirements of s 309(2). He therefore assessed all of her costs by reference to the fair and reasonable criterion in s 341 and not by reference to her disclosed basis for calculating costs.

[33] On review the District Court Judge found the barrister was not directly retained and thus not required to have complied with s 308.

[34] The relevant proposed appeal grounds only relate to the application against the barrister. They are:

“7. The Trial Judge erred in concluding that the respondent was not retained directly by the appellant and continued to be directly retained by her.

8. The Trial Judge erred in finding that the respondent was not required to make disclosure to the appellant in terms of Section 308 of the Act.”

[35] Whether there is merit in proposed ground 8 necessarily depends on whether there is merit in proposed ground 7, for s 308 only applies to the barrister if she was directly retained.

[36] There were undoubtedly features of the barrister's dealings with the applicant post-October 2009 which were consistent with her having been directly briefed. For instance, there was a substantial body of evidence that the barrister corresponded directly with the applicant and on the applicant's behalf on many occasions. The review judge acknowledged that the degree of direct dealings with and on behalf of the client by the barrister exceeded the traditional approach of counsel retained by solicitors[15] but did not consider her actions exceeded the bounds set by rr 77 and 78 of the then applicable 2007 Barristers' Rule.[16] Moreover, his Honour noted the barrister's direct dealings had occurred with the concurrence of the solicitor[17] whose file contained copies of the barrister's correspondence with and on behalf of the applicant.[18]

[37] The barrister also forwarded her initial invoice directly to the applicant. The review judge considered that was likely a mistake but in any event did not consider it meant the barrister was directly briefed by the applicant for the period covered by the invoice.[19] Another feature of the post-October 2009 conduct now relied on by the applicant was that the barrister defended the proceedings by serving her own itemised costs statement rather than her fees being claimed as an outlay or disbursement in the solicitor's bill.[20] This was not specifically addressed in the review judge's reasons. While such a course, when taken with the other circumstantial features above, is consistent with the barrister having been directly briefed, it is not determinative.

[38] The direct evidence of the retainer arrangements entered into and the sequence of events in October 2009 when the respondents were first retained is more likely to provide the best indication of who retained whom. It is therefore unsurprising that the learned review judge placed particular weight upon such evidence.

[39] As between the barrister and solicitor, it was the barrister who first had dealings with the client. The barrister was also proactive in arranging for the applicant to engage the solicitor (another firm of solicitors, CPL, having earlier been acting for the applicant). As against this the evidence of when the solicitor first became involved was telling.

[40] His Honour noted the date of the first work for which the barrister invoiced was 6 October 2009. The solicitor's itemised account did not commence until 22 October 2009.[21] However, his Honour concluded from the state of the solicitor's file that the solicitor had in fact been retained earlier than that, noting that on 5 October 2009 the applicant had signed an authority for CPL to send the file to the solicitor.[22] It is not suggested that important factual conclusion involved error. The apparent commencement of the solicitor's role as the applicant's new solicitor was a day before any invoiced work of the barrister. His Honour noted that if the barrister had performed any directly briefed work for the applicant prior to 6 October 2009 it was inconsequential and in any event had not been the subject of any charge.

[41] His Honour concluded from the documentary evidence the barrister's retainer by the solicitor commenced on about 6 October 2009.[23] He noted the costs agreement pursuant to which the barrister had purported to charge from 6 October 2009 was predicated on a retainer by the solicitor. This was consistent with the barrister having been retained by the solicitor rather than directly briefed. Further, it was expressed as a costs agreement made between the barrister and the solicitor, not between the barrister and the client.[24]

[42] While there were aspects of the barrister's conduct which gave circumstantial support to the argument the barrister had been directly retained, his Honour was correct to give less weight to that evidence than the direct evidence of the retainer arrangements actually entered into and the documentary evidence of the sequence of events in October 2009. The review judge's reasoning towards the conclusion of fact that the barrister was not directly retained was orthodox.

[43] It should be acknowledged this conclusion involved substituting a different view of the facts than that which the assessor apparently arrived at. Such an approach would not ordinarily be taken on a review in the absence of manifest error on the part of the costs assessor (see [13] above).

[44] The difficulty here is that the assessor's reasons as to the present issue were so scant that any error in reasoning would not be manifest. Even the assessor's finding that the barrister was directly retained only became apparent as a matter of implication from the limited relevant reasons which he did give. Those reasons were:

"Between 6 October 2009 and 9 March 2010 the Second Respondent provided legal services in respect of which she charged legal costs without having complied with Rule 83 of the Barrister's Rule 2007 or her Costs Disclosure obligations under the Legal Profession Act 2007.

I accepted the submissions in paragraphs 22-31 of the Outline of Argument on assessment and for the period 6 October 2009 to 9 March 2010 assessed the Second Respondent's fees according to what may be regarded as fair and reasonable."[25]

[45] It is arguable whether the force of the relevant factual considerations supporting a conclusion contrary to that reached by the assessor was so great as to inevitably compel a conclusion of error in the way discussed in House v The King.[26] However, the force of that evidence considered in combination with the fact there was such limited reasoning on so important an issue marked the issue as appropriate for intervention on review despite the review court's normal reluctance to interfere with a costs assessor's decision in the absence of clear error. To adopt the above quoted language of Jordan CJ in Schweppes' Limited v Archer[27] this was a "proper case" for the court to interfere "using its own knowledge of the circumstances".

[46] There is no reasonable argument that there is an error to be corrected in respect of this issue.

Issue Two: Was the barrister obliged to disclose the change in her estimated legal fees?

[47] The barrister's estimate of fees inclusive of the hearing of the matter was disclosed in a letter to the solicitor in March 2009 as being in the range of $60,000 to $100,000 plus GST. Her letter foreshadowed she would "bill monthly, or less frequently depending on the volume of work required under the retainer". The total eventually invoiced by her substantially exceeded this estimate.

[48] The costs assessor's finding the barrister did not comply with her cost disclosure obligations went beyond the implicit finding of non-compliance with s 308 (a finding premised on the erroneous view the barrister was directly retained) to a finding that she also breached her "continuing disclosure obligations".[28]

[49] While the costs assessor's reasons did not identify what provision the barrister had been in breach of he must have meant s 315, which deals with the ongoing obligation to disclose. However, the learned review judge found s 315 had no application to the barrister.

[50] The applicant's relevant proposed appeal ground only relates to the barrister. It is:

“2. The Trial Judge erred in finding that Section 315 of the Act had no application to the respondent.”

[51] As already noted, the barrister’s total costs far exceeded her estimate disclosed to the solicitor. If s 315 applied to her she would have been in breach of it.

[52] In reasoning s 315 did not apply to the barrister, the review judge observed:

“[71] On its face *s 315* seems to apply to a law practice, here the solicitor, which has a direct disclosure obligation to the client rather than the disclosure which a barrister retained by a solicitor is required to make to the solicitor.

[72] Whilst a barrister is clearly a law practice the disclosure “*already made*” by the barrister under *div 3* is that required to be made to the solicitor under *s 309(2)* and not directly to the client. ...

[76] *Section 315* does not seem to impose an ongoing obligation to disclose “*any substantial change to anything included in a disclosure already made under div 3*” on a barrister retained by a solicitor.”[29]

[53] There is no apparent error in his Honour’s interpretation. In effect his Honour reasoned that s 315’s reference to “a disclosure already made under this division” must, in context, be a reference to a disclosure already made to a client. In this case that was the disclosure made by the solicitor to the client. The solicitor retained the barrister and the barrister’s disclosure obligation was therefore to the solicitor, not the client. Having assumed no disclosure obligation to the client, the barrister assumed no ongoing disclosure obligation to the client either.

[54] His Honour’s interpretation of s 315 is consistent with the express reference to s 315 in s 308(1)(b)(iv), dealing with the disclosure obligation the solicitor had, and the absence of such a reference in s 309, dealing with the disclosure obligation the barrister had.

[55] It is unsurprising the Act does not expressly impose an ongoing disclosure obligation upon a barrister conventionally retained by a solicitor. It is after all the solicitor who briefs the barrister to perform ongoing work. The solicitor is therefore well placed to stay properly informed of the progress of the barrister’s likely billing by reference to the solicitor’s instructions to the barrister to perform ongoing work and the basis upon which the barrister disclosed the barrister’s legal costs would be calculated when first making disclosure to the solicitor pursuant to s 309(2). Indeed the solicitor should monitor the barrister’s likely billing in order to comply with the solicitor’s ongoing obligation of costs disclosure to the client under s 315.

Issue Three: What were the consequences of not disclosing as soon as practicable?

[56] The solicitor and barrister had been retained back in October 2009. It was not until 9 March 2010 that the barrister wrote to the solicitor making written disclosure pursuant to s 309(2) of the Act and offering to enter into a cost agreement with the solicitor pursuant to s 322(1)(c) of the Act. It is common ground the solicitor accepted the barrister’s offer.

[57] The solicitor then wrote to the applicant on 10 March 2010, providing the solicitor’s written disclosure notice and offer to enter into a costs agreement.[30] The solicitor’s letter also enclosed a copy of the barrister’s letter of 9 March 2010. It is common ground the applicant accepted the solicitor’s offer.

[58] It is therefore apparent that both respondents allowed more than four months to go by after being retained before proffering written disclosures and cost agreement offers.

[59] The assessor's reasons indicated he had assessed the solicitor's costs for work performed to 9 March 2010 by reference to a rate he regarded as fair and reasonable, namely $300 per hour plus GST. [31] His reasons carry the implication that for work after that date he applied the hourly rate of $400 stipulated in the solicitor's disclosure. In contrast, the assessor's reasons asserted he had assessed the barrister's costs for the entire billing period, ie both before and after 9 March 2010, by reference to a rate the assessor regarded as fair and reasonable, namely a rate of $350 per hour plus GST.[32] This was substantially less than the hourly rate of $550 per hour plus GST that was stipulated as the barrister's rate in her costs disclosure of 9 March 2010.

[60] Curiously the assessor's marked up copies of the respondents' itemised accounts suggest he sometimes applied their disclosed hourly rates notwithstanding that his reasons suggest he applied a rate he regarded as fair and reasonable. In any event, the broader issue for the review judge to consider was whether costs for work performed after the belated costs disclosure had occurred ought to have been assessed pursuant to the costs agreement. His Honour concluded they should have been so assessed.

[61] The applicant's relevant proposed grounds of appeal in the application against the barrister are:

"1. The Trial Judge erred in finding that the respondent made disclosure in writing before or as soon as practicable after she was retained in terms of Section 310 of the *Legal Profession Act 2007* ("the Act").

...

3. The Trial Judge erred in finding that the respondent could recover some costs under the costs agreement dated 9 March 2010 or 10 March 2010 pursuant to Section 319 of the Act."

[62] The applicant's relevant proposed grounds of appeal in the application against the solicitor are, similarly:

"1. The Trial Judge erred in finding that any disclosure by the respondent was made in writing before or as soon as practicable after the respondent was retained in terms of Section 310 of the *Legal Profession Act 2007* ("the Act").

2. The Trial Judge erred in finding that the respondent could recover costs under the costs agreement made on 10 March 2010 pursuant to Section 319 of the Act."

[63] In fact the review judge did not, as the above grounds 1 allege, find the disclosure of the respondents was made as soon as practicable. Rather, accepting that the respondents had failed to disclose as soon as practicable, his Honour gave consideration to whether because of that failure the eventual disclosures were of no effect at all or would at least apply in respect of costs incurred thereafter.

[64] In determining that issue his Honour did not, as the above grounds 3 and 2 imply, place any particular reliance upon s 319, which explains the basis upon which legal costs are recoverable. The issue here was the basis upon which legal costs were assessable, making ss 340 and 341 the key sections to consider.

[65] The critical feature of ss 340 and 341 for present purposes is that s 340(1)'s requirement a costs assessor assess by reference to a costs agreement, as distinct from the fairness and reasonableness criterion in s 341, is subject to an exception in s340(1)(c). The requirement does not apply if the costs assessor is satisfied "the costs agreement does not comply in a material respect with any disclosure requirements of division 3". One such requirement is the requirement in s 310 that disclosure – which

includes disclosure of the basis upon which legal fees will be calculated and the client's right to enter into a costs agreement – be made as soon as practicable after being retained.

[66] That did not occur here. Does that mean during a costs assessment that the entirety of the costs are not required to be assessed under the agreement or is it only those costs incurred for work performed prior to the belated agreement which are not required by s 340 to be assessed under the agreement? The former conclusion relies upon the literal meaning of the words of s 340 ("the literal interpretation") while the latter conclusion draws more upon the meaning of those words considered in the broader context of the Act ("the contextual interpretation").

[67] The applicant contends for the literal interpretation. The review judge favoured the contextual interpretation.

[68] After discussing s 340(1)(c)[33] his Honour reasoned:

"[93] For present purposes this has the consequence that the costs agreements so far as they concern the period between early October 2009 and 10 March 2010, do not comply in a material respect with the disclosure requirements of *div 3*, in particular *s 310(1)* for the solicitor, and *s 310(2)* for the barrister,[34] in which case their costs for that period are to be assessed under *s 341* according to what is fair and reasonable (and not the costs agreements) with the risk also of a reduction under *s 316(4)* and sanctions under *s 316(7)*.

[94] Because of disclosure on 10 March 2010, the costs agreements ceased to be non-compliant for charges thereafter. The client was then informed in proper detail of what fees the practitioners would charge. That seems to be the purpose of *div 3*. The practitioners are penalised in respect of their charges before that date. If it were otherwise the practitioners would, for the entirety of their retainer, be prevented from the benefits associated with making proper disclosure to the client. Faced with that consequence, it is artificial to suggest ... that the practitioners should terminate their retainer and start afresh. The fact is that the barrister and solicitor are not able to charge pursuant to their costs agreements for the period up to 10 March 2010 not because there was no costs agreement covering charges for that period but because they did not until then comply with their *div 3* disclosure obligations. The costs agreements are valid once the *div 3* disclosure obligations were satisfied but only for fees from then on, not before. Those before are to be assessed according to what was fair and reasonable. ...

[96] It follows from what I have said, that I am unable to accept ... that a failure to comply with disclosure requirements as soon as practicable after the practitioners were retained forever means they cannot charge pursuant to a subsequent costs agreement made after compliant disclosure."[35]

[69] Despite the considerable pragmatic appeal of the contextual interpretation favoured by his Honour the literal interpretation is also at least reasonably arguable. In short that argument is that the reference in s 340 to "any disputed costs that are subject to a costs agreement" must necessarily include costs incurred after the agreement is entered into so that if the agreement is entered into without material compliance with Div 3's requirements the costs assessor is not required to assess such costs by reference to the agreement. Such an interpretation is consistent with the meaning of the words of s 340 and creates no inconsistency with s 341.

[70] If section 340(1)(c) applies it merely means the assessor is not required to assess by reference to the provisions of the costs agreement. It does not preclude the costs assessor, when assessing costs for work performed after the agreement[36] and considering what is a fair and reasonable amount of costs

pursuant to s 341(2), from having regard to the basis upon which the client agreed to pay costs in the costs agreement. That would at the very least be a relevant matter pursuant to s 341(2)(j). That point heralds a different problem for the applicant.

[71] Accepting there exists at least a reasonable argument there is an error to be corrected this court would still not ordinarily grant leave unless it were necessary to correct a substantial injustice. Where is the substantial injustice in the assessment of costs for work performed after the client entered into the agreement being assessed by reference to the rates in the agreement? They are after all the rates the client agreed to and that agreement is a matter that could be taken into account anyway under s 341(2).

[72] There may be cases where the delay in entry into the agreement is so great and the matter has advanced so far that the client does not have any realistic commercial choice other than to enter into the costs agreement. In such cases an assessor may properly give no weight to the agreement as relevant under s 341(2). However, there is no suggestion this was such a case. Even when the applicant finally did terminate the retainer, another year after entering into the agreement, the case was still not at the trial stage.

[73] In this case there would be no substantial injustice in the costs for work performed after the entry into the costs agreement being assessed by reference to the rates the applicant agreed to. I would therefore decline leave in respect of the above proposed grounds.

Issue Four: Were the assessor's reasons inadequate?

[74] The costs assessor's reasons in each case involved lengthy quoting from the client's written submissions followed by brief purported explanations of the approach the assessor took in the assessment. Those purported explanations sometimes involved references to earlier passages in his reasons that did not materially assist in explaining why he took the approach he did. More problematically, in many instances where his assessment substituted a lower cost than that charged it was not possible to tell by reference to his reasons or his marked up endorsements on the respondents' itemised accounts why he had so assessed the cost.

[75] The learned review judge concluded the assessor's reasons were inadequate.

[76] The relevant proposed appeal ground in respect of both the barrister and solicitor is the same, namely:

"5. The Trial Judge erred in finding the reasons of the assessor were inadequate as the reasons were adequate for a costs assessment."

[77] The applicant does not dispute the validity of orders made at the outset of the review process below, requiring the costs assessor to deliver marked up itemised bills and reasons for his decision in respect of each bill.[37] Rather, the applicant contends the review judge expected a level of detail beyond that required for a costs assessor's reasons.

[78] A costs assessor's reasons need not detail separate reasons in respect of every reduction or adjustment but the reason for the reduction or adjustment should be ascertainable, at least inferentially, from such reasons as are given.[38] This is because the statutory right of review would be rendered illusory without the ability to ascertain whether there has been an error of the kind warranting interference on review.[39]

[79] Ordinarily this requirement will be readily met in respect of the same category of reduction or adjustment by providing brief reasons in respect of what was done for the category, assuming of course that the same pattern was followed in respect of the reductions or adjustments made within that category. Unfortunately in the present case the same pattern was not always followed and it is not otherwise possible to consistently ascertain from such reasons as were given, including the assessor's marked up copies of the itemised accounts, what the reasons for the varying reductions or adjustments must have been.

[80] The review judge cited two examples that demonstrate the problem.

[81] The first example related to the solicitor. His Honour noted:

"[145] Where the only objection to the **solicitor's** bill was that "*the time claimed is excessive*" this inevitably led to the amounts claimed being reduced, mainly by half with no reasons given in each case so it is not possible to say why this was done. All one can do is see what was done, not why."

[82] His Honour went on to list about 114 items that had variously been reduced by half, two-thirds, one-third, one-quarter, three-quarters, 90 per cent or entirely, where the sole basis for objection had been that the time claimed was excessive. His Honour continued:

"[146] No reasons were given for these reductions other than that the costs assessor said he relied on "*the reasons stated in the objection*" and "*the matters referred to in paras 32 and 46 of my reasons*". This is not particularly enlightening as all that is said in the client's objection is "*the time claimed is excessive*"; *para 32* merely recites *s 341 LPA*; and *para 46* effectively says the costs assessor adopted a rate of $300.00 per hour...as a fair and reasonable rate. No other reasons are given. No reference, eg, was made to number of pages, subject matter or complexity."[40]

[83] In the second example which related to the barrister, his Honour listed a total of 79 items "where the sole objection was that the amount claimed was excessive and $350.00 per hour was more appropriate". [41] For each of those items the reductions corresponded to amounts less than a reduction calculated by reference to a rate of $350 per hour. Moreover, the reductions involved no consistent pattern or patterns from which the underlying reasoning might have been inferred.

[84] His Honour observed:

"[150] I am at a complete loss to understand the costs assessor's reasoning process in relation to these items ... The reductions bear no relationship to $350.00 per hour (or $350 plus GST per hour). His reasons were the same for each item, namely

'*The objection was acceded to or partially acceded to for the reasons stated in the objection and after consideration of the matters referred to in paras 19 and 23 of my reasons.*

[151] In each case all the client's objection said was that "*an hourly rate of $350 per hour is more appropriate in the circumstances*"; *para 19* merely recited *s 341 LPA* and *para 23* referred to how he arrived at $350.00 per hour, which I have already mentioned. No other reasons are given." [42]

[85] When the assessor's decision-making in this example was put to the applicant's counsel in the course of oral submissions in this court, the applicant's counsel fairly acknowledged he could not explain the assessor's reasoning process.[43]

[86] It is unnecessary to recite further examples and sufficient to observe his Honour's conclusion as to the inadequacy of reasons was apparently well founded. There is no reasonable argument that he erred in reaching that conclusion.

The other potential grounds

[87] For the above reasons I would decline leave to appeal any of the grounds connected with the above four main issues.

[88] The applicant contended for a number of other grounds of appeal not yet canvassed in these reasons ("the other potential grounds"). Because I have concluded leave should not be granted in connection with any of the four main issues then the decision setting aside the costs assessor's decision below would inevitably stand, regardless of whether leave were granted in respect of any of the other potential grounds.

[89] The point is simply illustrated by reference to the failure to give adequate reasons. That was an error infecting the assessment generally. The finding of error was sufficient reason standing alone for the review judge to set aside the costs assessor's decisions. Since I would decline leave to appeal that finding there is therefore no prospect of overturning the decision setting aside the costs assessor's decisions, even if the review judge did err in some other respect. This appears to render the other potential grounds academic.

[90] It follows leave to appeal is unnecessary to correct a substantial injustice in connection with any of the other potential grounds, save arguably for the purposes of correcting error so as to prevent its repetition in the assessment which remains to be performed afresh. A number of the other potential grounds are irrelevant to that purpose and need not now be considered.[44] Two of the other potential grounds might be relevant to that purpose. However, for the reasons that follow, neither of them gives rise to a reasonable argument that there is an error to be corrected.

Abandoned claim for uplift

[91] A proposed appeal ground in respect of the solicitor relates to the solicitor's abandoned claim for an uplift fee. It is:

"6. The Trial Judge erred in his determination of the appropriate order as to costs of the assessment in finding that the assessor was wrong to take account of the abandoned claim for the uplift fee."

[92] The solicitor's costs agreement with the client included reference to the charging of an uplift fee. In the solicitor's two rendered tax invoices, of 30 September 2010 and 7 April 2011, such a fee was not included. Those invoices, which charged a total of $85,522.99, were each paid by the applicant. Later, after the application for an order for costs assessment had been filed, the solicitor rendered an itemised account. It claimed a total of $112,141.43 including a one-third uplift fee of $27,002.80. The solicitor withdrew the claim for the uplift fee before the assessment commenced.

[93] An issue arose as to whether the uplift fee formed part of the legal costs of the assessment because it had the potential, by reason of s 342(2)(a) of the Act, to determine which party would be liable to pay the costs of the assessment. Section 342(2) relevantly provides:

"Unless the costs assessor otherwise orders, the law practice to which the legal costs are payable or were paid must pay the costs of the costs assessment if —

(a) on the assessment, the legal costs are reduced by 15% or more; or

(b) the costs assessor is satisfied the law practice failed to comply with division 3."

[94] The costs assessor took the uplift fee into account as a reduction on the assessment in determining the solicitor should pay the costs of the assessment.[45] The review judge disagreed. He concluded the uplift fee should not have been taken into account for the purposes of s 342(2) because by the time the assessor commenced his costs assessment the fee had been withdrawn and it was not a legal cost which the assessor needed to consider in performing his assessment.

[95] The review judge's conclusion was unremarkable. The obvious purpose of s 342 is to help determine who should be liable to pay for "the costs of the assessment". Here there had been an unequivocal indication before the assessment began that a cost which had not been paid was not claimed. That cost did not need be assessed once the assessment began. It was contrary to the obvious purpose of s 342 to have included that cost in calculating the extent to which the ensuing assessment reduced legal costs.

Are non-legal fees "legal costs"?

[96] A proposed ground of appeal in respect of the barrister also relates to s 342, specifically, whether non-legal fees are legal costs. It is:

"6. The Trial Judge erred in law in finding that a costs assessor (in deciding the appropriate order for costs of the assessment) could not take into account the costs for work which were costs charged for non-legal services."

[97] The barrister's two tax invoices of 26 October 2010 and 1 April 2011, totalled $208,492.60, which was paid by the applicant. Those costs included $42,626.50 for acting as a director including director's fees ("the director's work"), which amount was also included in the barrister's itemised bill of costs. It is common ground the director's work was not legal work and the reductions made by the assessor in assessing costs included the amount charged for that work.

[98] In determining who should pay costs pursuant to s 342 the assessor took the reduction of the fee for the director's work into account.[46] The review judge disagreed with that course. He observed that "legal costs" are not defined by the Act but concluded by reference to the definitions of "legal services" in Sch 2 and the use of that term in reference to the definition of client at s 334 that legal costs "must mean the costs for legal services".[47] He found the fee for director's work was not a fee for legal services so it was not "legal costs" within the meaning of s 342(2).

[99] His Honour's conclusion was again sound. The act of a legal practitioner claiming costs in an invoice or including them in an itemised bill of costs does not make all of the costs included therein "legal costs". Whether they are legal costs depends upon the nature of the service or outgoing for which the costs are claimed. The relevant focus of s 342(2) is whether "on the assessment, the legal costs are reduced by 15% or more" (emphasis added). A costs assessment should disregard costs that are not in the character of legal costs because they are not claimable at all as legal costs. Hodges J succinctly explained that approach long ago in In re Ridgeway & Irwin:[48]

"For any work which is the ordinary work of an attorney, he is entitled to charge as an attorney, and is entitled to have the bill taxed as an attorney. But directly he gets outside that, the taxing officer cannot tax the item – he must simply strike it out."

[100] The assessor here was correct to disregard the fee for the director's work because it was not legal costs. However, disregarding costs that are not legal costs is quite different from reducing costs that are legal costs. It is the latter with which s 342(2) is concerned.

Conclusion

[101] I would refuse the application for leave to appeal with costs.

[102] Given the nature and duration of this dispute it seems prudent for this court to fix costs, if they are not agreed to, rather than leave them to be assessed. There should be an opportunity for the parties to file written submissions verified by affidavit where relevant, in respect of the amount at which the respondents' costs should be fixed.

Orders

[103] I would order:

1. Application for leave to appeal dismissed.

2. The applicant pay the respondents' costs of and incidental to the application on the standard basis in an amount to be fixed by the court unless agreed between the parties by 29 January 2016.

3. Failing such agreement:

(a) by 5 February 2016 the respondents file and serve written submissions limited to five pages, verified by accompanying affidavit, as to the amount at which costs should be fixed;

(b) by 12 February 2016 the applicant file and serve written submissions limited to five pages, verified if relevant by accompanying affidavit, as to the amount at which costs should be fixed;

(c) by 19 February 2016 the respondents file and serve any written submissions limited to two pages, in reply.

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[1] AR V4 p1650.

[2] AR V4 p1652.

[3] Section 118(3) is subject to s 118B which provides an appeal "only in relation to costs" lies only by leave of the District Court Judge. No such leave was sought or given here. However in *Lessbrook Pty Ltd (in liq) v Whap; Stephen; Bowie; Kepa & Kepa* [2014] QCA 63, [50] in respect of a like provision, the words "in relation to costs" were interpreted narrowly as only relating to the exercise of the judicial discretion in making or failing to make an order as to costs. It was not submitted that s 118B applies in the present case.

[4] *R v Ogawa* [2009] QCA 307 [175].

[5] *Rodgers v Smith* [2006] QCA 353 [4], *State of Queensland v Munro* [2014] QCA 231 [48].

[6] [2002] QCA 286.

[7] *Amos v Monsour Pty Ltd* [2009] QCA 65; [2009] 2 Qd R 303, 305.

[8] *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621, 628.

[9] [1934] NSWStRp 17; (1934) 34 SR (NSW) 178, 183-184.

[10] Citations omitted; followed in *Amos v Monsour Pty Ltd* [2009] QCA 65; [2009] 2 Qd R 303, 305-306, *King v Allianz Australia Insurance Ltd* [2015] QCA 101.

[11] Per relevant main purposes of the part at s 299.

[12] Per definitions of law practice in Sch 2 and of Australian lawyer and Australian legal practitioner in ss 5 and 6.

[13] *Legal Profession Act* 2007 (Qld) s 340(1)(c).

[14] AR V4 p1679.

[15] AR V5 p2258 [58].

[16] AR V5 p2257 [55]-[56]; now see the *2011 Barrister's Rule*.

[17] AR V5 p2258 [58].

[18] AR V5 p2257 [56].

[19] AR V5 p2258 [58].

[20] The relevance to the legal foundation for the client's application as against the barrister for a court ordered assessment if the barrister was not directly retained by the client was not raised in this application and requires no analysis in these reasons.

[21] AR V5 p2256 [50]-[51].

[22] AR V5 p2256 [52].

[23] AR V5 p2256 [53].

[24] AR V5 p2257 [53].

[25] AR V4 p1679.

[26] (1936) 55 CLR 499, 505.

[27] [1934] NSWStRp 17; (1934) 34 SR (NSW) 178.

[28] AR V4 p1679.

[29] AR V5 pp2260-2262.

[30] AR V3 p1305.

[31] AR V4 p1761.

[32] AR V4 p1679.

[33] His Honour also alluded to s 316 but only to conclude it was of no assistance. Section 316, which deals with the effects of a failure to disclose anything required to be disclosed under Div 3, does not relevantly address the applicability for assessment purposes of a costs agreement which is not entered into as soon as practicable.

[34] Unless the barrister is directly retained s 310(2) does not actually impose the obligation of timely disclosure to the client upon the barrister, as already explained at [26] of these reasons. However, the consequences of that require no further analysis here, the matter having been litigated by the respondent accepting the barrister's costs prior to the time of her disclosure were not assessable under the agreement.

[35] AR V5 pp2265-2266.

[36] Its irrelevance to work performed earlier is self-evident in light of the non-disclosure, which of itself may prompt a reduction pursuant to s 316(4).

[37] The footnotes to his Honour's reasons at [18] suggest these orders were made pursuant to r 738, which entitles a party to reasons on written request by the party but does not expressly confer a power for the court to order such reasons. It seems likely the court's exercise of such power was founded on s 742(6)(e) which allows the review court to make any order or direction considered appropriate.

[38] *Cassegrain v CTK Engineering Pty Ltd* [2008] NSWSC 457.

[39] *Frumar v Owners of Strata Plan 36957* [2006] NSWCA 278; (2006) 67 NSWLR 321.

[40] AR V5 pp2279-2280.

[41] AR V5 pp2280-2282.

[42] AR V5 p2282.

[43] T1-35 L29, T1-36 L20.

[44] The grounds that require no further consideration are, ground 4 in respect of the barrister and grounds 3 and 4 in respect of the solicitor (to the extent the argument in respect of those grounds went generally to the approach to be taken by the review judge that topic has in any event been dealt with in these reasons).

[45] AR V4 p1838.

[46] AR V4 p1725.

[47] AR V5 pp2292-2293.

[48] [1904] VicLawRp 18; (1903) 29 VLR 130, 134.