SUPREME COURT OF QUEENSLAND

CITATION:	*Connollys Lawyers Pty Ltd v Davis* [2013] QCA 231
PARTIES:	**CONNOLLYS LAWYERS PTY LTD** ACN 145 392 310 (applicant) **v** **DAVID WILLIAM DAVIS** (respondent)
FILE NO/S:	Appeal No 9293 of 2012 DC No 45 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	23 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2013
JUDGES:	Fraser and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – BILLS OF COSTS – ACTIONS TO RECOVER COSTS – OTHER MATTERS – where the respondent had retained the applicant to act as his solicitor in two separate proceedings – where the parties signed a written costs agreement for each proceeding – where the respondent had difficulty reading, but signed the agreements upon the insistence of the applicant – where, after the termination of the retainers, the costs in both proceedings had exceeded the original estimates – where the respondent alleged the applicant failed to meet its obligations under Part 3.4 of the *Legal Profession Act* 2007 (Qld) ('the Act'), including by failing to make adequate disclosure – where the Magistrates Court granted summary judgment in favour of the applicant – where, on appeal, the respondent acknowledged that his pleading was defective but that the affidavit material disclosed a defence of breach of the costs agreement – where the District Court judge allowed the respondent's appeal and allowed the respondent to file an amended defence and application to set aside the costs agreement under s 328 of the Act – whether the respondent's

evidence raised a real defence on the ground that the applicant did not comply with its disclosure obligations under ss 308(1)(c), 314 and 315 of the Act – whether the District Court judge erred in setting aside the summary judgment

Federal Court of Australia Act 1976 (Cth), s 31A
Legal Profession Act 2007 (Qld), s 3(a), s 299(a), s 308, s 310, s 314, s 315, s 316, s 326, s 328, s 335, s 337, s 340
Uniform Civil Procedure Rules 1999 (Qld), r 292, r 299

Amirbeaggi v Business in Focus (Australia) Pty Ltd [2008] NSWSC 421, cited
Bank of New Zealand v Spedley Securities Ltd (In Liq) (1992) 27 NSWLR 91, cited
Chew v The Queen (1992) 173 CLR 626; [1992] HCA 18, cited
Davis v Connollys Lawyers Pty Ltd, unreported, District Court of Queensland, Richards DCJ, DC No 45 of 2012, 10 September 2012, related
Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd (1983) 155 CLR 129; [1983] HCA 44, considered
Haller v Ayre [2005] 2 Qd R 410; [2005] QCA 224, cited
LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCA 105, cited
Spencer v The Commonwealth (2010) 241 CLR 118; [2010] HCA 28, considered
Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (1988) 19 FCR 469; [1988] FCA 373, cited

COUNSEL: D Cooper QC, with E Gaffney, for the applicant
J R Rivett for the respondent

SOLICITORS: Connollys Lawyers Pty Ltd for the applicant
No appearance for the respondent

[1] **FRASER JA:** In January 2011 the respondent retained the applicant to act as his solicitor in a property settlement proceeding and a domestic violence proceeding. The respondent and the applicant signed a written costs agreement for each matter before the applicant embarked upon its work. Both retainers were terminated in August or September 2011. The applicant was given summary judgment against the respondent in the Magistrates Court for $88,503.05, plus interest, for legal costs due under the costs agreements. A judge of the District Court allowed the respondent's appeal, set the judgment aside, and directed the respondent to file an amended defence and an application to set aside the costs agreements within 28 days. The applicant now seeks leave to appeal under s 118(3) of the *District Court of Queensland Act* 1967 (Qld) against the orders made in the District Court.

Background

[2] The evidence was to the effect that on the same occasion when the costs agreements were concluded, the respondent signed a "disclosure notice" for each matter under

a printed acknowledgment that he had read and understood the contents of the notice. Each notice included an "estimate of the range of total costs" for the matter from the taking of initial instructions through to the end of a trial. By the time the retainers were terminated, the costs in the property proceeding (which had not yet been tried) amounted to $134,124.13 as against the original estimate of total costs inclusive of the trial of between $37,000 and $67,000. In the domestic violence proceeding, the applicant billed total costs of $63,850.31 as against the original estimate of between $27,000 and $46,000.

[3] The respondent alleged that the applicant had not fulfilled its obligations under provisions in Pt 3.4 of the *Legal Profession Act* 2007 (Qld). In Division 3, s 308(1)(c) provides that a "law practice must disclose to a client under this division … 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 …". Section 310 provides that "(1) [d]isclosure under section 308 must be made in writing before, or as soon as practicable after, the law practice is retained in the matter" and that "(3) [d]isclosure made to a person before the law practice is retained in a matter is taken to be disclosure to the client for sections 308 ...". It was not suggested that any of the exceptions to the requirement for disclosure in s 311 was applicable. Section 314(1) provides that "… disclosures to a client under this division … must be expressed in clear plain language …". Section 314(2) provides that "[i]f the law practice is aware that the client is unable to read, the law practice must arrange for the information required to be given to a client under this division to be conveyed orally to the client in addition to providing the written disclosure." Section 315 provides that "[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."

[4] Various consequences follow if a law practice fails to make a disclosure required by s 308 or s 315. The client "need not pay the legal costs unless they have been assessed under division 7" (s 316(1)). The law practice "may not maintain proceedings … against the client … for the recovery of legal costs unless the costs have been assessed under division 7" (s 316(2)). The client "may also apply under section 328 for the costs agreement to be set aside" (s 316(3)), and "[o]n an assessment of the relevant legal costs, the amount of the costs may be reduced by an amount considered by the costs assessor to be proportionate to the seriousness of the failure to disclose" (s 316(4)). Costs agreements are regulated by Division 5. Section 326 provides that, subject to that division and Division 7, "a costs agreement may be enforced in the same way as any other contract." Section 328(1) provides that the Supreme Court or the tribunal may order that a costs agreement be set aside "if satisfied the agreement is not fair or reasonable". Matters which may be taken into account in deciding if a costs agreement is fair or reasonable include whether the law practice failed to make any of the disclosures required under Division 3, and the circumstances and conduct of the parties before, when, and after the agreement was made (s 328(2)(c)-(e)). Section 328(4) provides that "[i]f the Supreme Court or tribunal orders a costs agreement be set aside, it may make an order as it considers appropriate in relation to the payment of legal costs the subject of the agreement." Division 7 deals with costs assessment. Sections 335 and 337 empower a client and law practice respectively to apply for assessment of the legal costs even if the legal costs have been paid. Section 340 relevantly provides that

a costs assessor must assess costs by reference to the provisions of any applicable costs agreement if it has not been set aside under s 328 unless the costs assessor is satisfied that (amongst other things) "the costs agreement does not comply in a material respect with any disclosure requirements of division 3 …".

[5] The applicant's amended statement of claim in the Magistrates Court alleged in respect of both matters that on 23 January 2011 "the Defendant signed a written notice provided to him by the Plaintiff disclosing the matters set out in section 308" and that the applicant "complied with the requirements of section 308". In an amended defence the respondent:

(a) admitted the allegations that he had signed a written notice provided to him by the plaintiff disclosing the matters set out in s 308, but denied that the applicant complied with the requirements of s 308 "as the defendant says that the estimate of fees provided in … the disclosure notice was erroneous and misleading (and did in fact mislead the defendant) in that it grossly underestimated the fees that might be incurred";

(b) alleged that the costs agreements were based on the erroneous and misleading disclosure notices; and

(c) alleged that the applicant overcharged the respondent and the applicant breached an express term of each costs agreement that the applicant would carry out the work with professional skill and diligence in various stated ways, including by wrongly advising the applicant as to the strength of his case, "all of which increased the costs charged way above the estimate of fees provided in the disclosure document".

[6] The applicant's reply to the amended defence pleaded statements in the disclosure notices that the estimates of costs were based on "major variables" that would affect the calculation of the costs, the estimates were based on currently available information and were not quotations but were subject to change, it was not possible to provide an accurate estimate of the total costs, and the estimates would probably change when more information became available. The reply put in issue and gave explanations of denials of the allegations made by the applicant of overcharging and negligence in each matter, and complained of lack of specificity in the respondent's amended defence.

[7] The application for summary judgment was filed on 15 May 2012 and heard and determined on 24 May 2012. Affidavits filed by the applicant included prima facie proof of the elements of its claim for costs and deposed to other matters, including that the applicant sent regular tax invoices in both matters to the respondent. Enclosed with each tax invoice were notices advising that if the recipient of the notice disputed the applicant's legal costs the recipient might contact the applicant to discuss any concerns, request an itemised bill, apply for a costs assessment within 12 months of delivery of a bill or request for payment, or apply to set aside the costs agreement within six years or such at time period of the law permitted. One of the applicant's affidavits exhibited correspondence between the parties' legal representatives. On 13 January 2012 the respondent's barrister wrote to the applicant that the respondent intended to apply under s 328 of the *Legal Profession Act* 2007 to have the costs agreements set aside and for the applicant's claim to be stayed. The barrister suggested that it would be more efficient for the applicant to bring a counter-claim for its claim in the Supreme Court. In the following months

before the hearing in the Magistrates Court the respondent did not apply in the Supreme Court even though the applicant granted extensions of time for that purpose, urged that any such application should be brought promptly, and threatened to apply for summary judgment.

[8] The respondent swore an affidavit in opposition to the summary judgment application in which he deposed as follows:

(a) Many decades earlier, he was badly injured in a motor vehicle accident, leaving him with substantial permanent brain damage and disabilities, including difficulties in organising himself, and an inability to work in formal employment, profound hearing deficiency in both ears, a short term memory problem, and difficulty comprehending written documents requiring him to read documents several times to understand their contents and effects.

(b) In January 2011 at a meeting at Mr Connolly's house, after the respondent had fully and frankly disclosed his medical condition to Mr Connolly, Mr Connolly gave the respondent an oral estimate of a range of fees relating to both matters of between $50,000 and $80,000. Mr Connolly did not differentiate between the property matter and the domestic violence matter but spoke as though there were only one costs agreement. Mr Connolly put some documents before the respondent and asked him to sign them. The respondent did not read the documents, made that clear to Mr Connolly, and said that he would need time to read the documents. Mr Connolly insisted that the respondent sign the documents there and then. The respondent thereupon signed the documents. He did so as a result of Mr Connolly insisting that he do so and because he trusted Mr Connolly. The applicant's recollection was that he signed only one document, although perhaps in two places. Mr Connolly did not leave copies of the documents with the respondent. The first time the respondent saw copies of the documents was shortly before the retainers were terminated.

(c) The applicant never told the respondent during the period of the retainers that the costs were exceeding the applicant's estimate.

(d) The applicant mishandled both matters in various ways which increased the costs of the proceedings.

(e) The respondent believed that he had a defence on various grounds:

(i) He was not given adequate disclosure of the costs.

(ii) The applicant did not make any ongoing disclosure of the fees during the progress of the matters.

(iii) The applicant underestimated the fees for the property matter, which induced the respondent to retain the applicant.

(iv) The applicant did not make any disclosure of the fees for the domestic violence matter.

(v) The applicant gave the respondent negligent advice about the strength of his case.

(vi) The applicant retained counsel despite the respondent's express instructions not to do so.

(vii) The applicant charged "tens of thousands of dollars" for disclosing documents in an exercise which was "wasteful and inadequate", as was evidenced by subsequent requirements for further disclosure.

[9] The respondent deposed that he had instructed his lawyer to apply in the Supreme Court to set aside the costs agreements, and that he had tried to complete the necessary affidavit for several months but had been unable to do so because of his health and because the unresolved property proceedings put him under pressure. The respondent's barrister swore an affidavit in which he gave an explanation of how the respondent's disabilities, together with the time required to prepare for a trial of the property proceedings, had impacted on the time taken to prepare court documents. The barrister estimated that he needed another four weeks to complete the respondent's affidavit in support of an application to the Supreme Court for an order setting aside the costs agreements. Dr Dwyer, a consulting psychiatrist, opined that the respondent's longstanding brain injury had led to significant frontal lobe damage, which was associated with various symptoms including "perserveration (an inability to move away from a particular topic, despite it no longer being relevant to the discussion)". Dr Dwyer considered that the respondent's behaviour described by his barrister was caused by the brain injury in the context of severe stress resulting from the litigation.

[10] Mr Connolly, a director of the applicant, swore an affidavit in reply in which he attributed the cost overruns in each matter to a number of factors, including the "unreasonableness and intransigence of both parties", and the respondent's "incessant and lengthy calls, numerous emails and demands for interim court applications".[1] Mr Connolly deposed that on 23 January 2011 he conferred with the respondent for about five and a half hours about the property settlement proceeding and the domestic violence proceeding. His file note recorded the length of the conference but contained no details of what was said. Mr Connolly deposed that he explained paragraph 3 of each disclosure notice (which included the range of cost estimates and detailed qualifications upon their reliability) before the respondent signed the notice; he made it clear that the applicant was not bound by the estimates and the costs would increase if the work increased. Mr Connolly deposed that the respondent said words to the effect that he understood the documents before signing them in his presence, after which Mr Connolly counter-signed the documents.

Decision in the Magistrates Court

[11] In granting summary judgment, the Magistrate held that: the grant of summary judgment would not preclude the respondent from bringing an action in negligence; Mr Connolly's affidavit deposed that the disclosure notice followed the standard procedure required under the Act and that he had explained each notice to the respondent, and that regular interim bills were sent after being checked and signed; the affidavits for the applicant stated that the disclosures required by the Act had been made; even allowing for the respondent's mental condition, the respondent had been afforded more than a reasonable opportunity to have the matter removed to the Supreme Court.

Decision in the District Court

[12] The District Court judge recorded that the respondent's counsel had acknowledged that the respondent's pleading was defective but the affidavit material disclosed a defence of breach of the costs agreement by the applicant's negligence. The judge referred also to the allegations in the respondent's affidavit that the costs agreement and disclosure notice were not explained to the respondent even after he had

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1 Affidavit of David Anthony Connolly sworn 23 May 2012, para 20 and 21.

indicated that his mental disability prevented him from reading and comprehending them, noted that this was not pleaded in the amended defence, and held that the respondent's argument that the applicant was prevented by s 316 from pursuing its claim for costs without an assessment "would be correct if the lack of disclosure was acknowledged by the respondent or if that situation had been proved." The judge observed that the amended defence was defective in not pleading the non-disclosures deposed to in the respondent's affidavit and that the respondent could apply in the Supreme Court or the Queensland Civil and Administrative Tribunal to have the costs agreements set aside,[2] and held that, if the costs agreement were set aside, the quantum of costs would be in dispute. The judge concluded that there was a "case to decide and certainly a factual dispute as to whether the costs agreement should be set aside following a lack of disclosure", the delay in applying to set aside the costs agreement was explained in detail, and although the defence was defective the respondent should have been given an opportunity to amend it in circumstances in which his evidence established the "enormous difficulties with obtaining instructions from [the respondent] given his incapacity".[3] The judge held that the appropriate order would have been to allow an adjournment with costs awarded against the respondent to allow time for him to apply in the Supreme Court under s 328 of the *Legal Profession Act* and for the defence to be amended properly to plead his case.

The proposed appeal

[13] Ground 1 in the draft notice of appeal contends that the District Court judge misdirected herself in law. The applicant explained that this ground relied on grounds 2 – 5.

[14] Ground 2 contends that the judge's statement that the Magistrate had found that "there were no prospects of success in this matter and that there was no triable issue" misstated the Magistrate's finding that "… there is no need for a trial in this matter and that [the Respondent] has no real prospects of success in this matter …". The misstatement had no consequence for the judge's decision. The judge referred to the correct text by quoting r 292 of *UCPR*. The real question is whether on the evidence before the Magistrate, "the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim" and that "there is no need for a trial of the claim or the part of the claim".[4]

[15] Ground 3 contends that the judge misdirected herself in various ways in concluding that the Magistrate erred in giving summary judgment. The applicant argued that the judge failed to determine the application in accordance with the requirements of *UCPR* by failing to give any or sufficient weight to issues admitted and pleaded by the respondent and by misconstruing the effect and relevance of *Spencer v Commonwealth of Australia*.[5] The analysis in that case of s 31A of the *Federal Court of Australia Act* 1976 (Cth) (which permits summary judgment if the court is satisfied that the opposite party "has no reasonable prospect of successfully defending the proceeding") provides no particular assistance in the proper

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2 *Davis v Connollys Lawyers Pty Ltd*, unreported, District Court of Queensland, Richards DCJ, DC No 45 of 2012, 10 September 2012 at [25].

3 *Davis v Connollys Lawyers Pty Ltd*, unreported, District Court of Queensland, Richards DCJ, DC No 45 of 2012, 10 September 2012 at [27].

4 *Uniform Civil Procedure Rules* 1999 (Qld), r 292(2).

5 (2010) 241 CLR 118.

application of the different test expressed in r 292 of *UCPR*, but *Spencer* was relied upon only for the correct proposition that, regardless of the precise terms of the test for summary judgment, the power to dismiss an application summarily should not be exercised lightly: see *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd*.[6]

[16] The applicant argued that the judge's statement that "[t]he fact that the defence was defective simply meant that there should have been an opportunity to amend given" was based upon an erroneous interpretation of *Spencer*. That statement instead reflected the judge's conclusions that the respondent's affidavit established an arguable defence which was not pleaded and that it was appropriate to allow the respondent an opportunity to plead it. That approach was consistent with French CJ and Gummow J's statement in *Spencer* that the provision for summary judgment in that case applied where "the pleadings disclose no reasonable cause of action *and their deficiency is incurable*" and where "there is unanswerable or unanswered evidence of a fact fatal to the pleaded case *and any case which might be propounded by permissible amendment*."[7] The applicant also contended that the respondent required leave to withdraw the admissions in the amended defence of the allegations in the amended statement of claim in relation to each matter that "[o]n or about 23 January 2011, the Defendant signed a written notice provided to him by the Plaintiff disclosing the matters set out in section 308 …" of the *Legal Profession Act*.[8] Although the amended defence went on to deny the allegations in the statement of claim that "the Plaintiff complied with the requirements of section 308 …" of the *Legal Profession Act*,[9] that denial was explained by an allegation that the estimate of fees in the disclosure notice "was erroneous and misleading (and did in fact mislead the defendant) in that it grossly underestimated the fees that might be incurred". However the applicant did not argue in the Magistrates Court or the District Court that the respondent required leave to withdraw an admission in order to plead the foreshadowed defences. Had any such argument been advanced the proceedings in those courts might have taken a different course. It would not be appropriate to grant leave to appeal to permit that argument to be raised for the first time in this Court.

[17] The applicant contended that the judge was mistaken in holding that the appropriate order "would have been to allow an adjournment with costs awarded against [the respondent] to allow time for an application to be filed under section 328 of the *Legal Profession Act* and for the defence [to] be amended properly to plead the case". That was submitted to be an error because there was no application by the respondent for an adjournment for either purpose. In fact the respondent submitted in the Magistrates Court that, whilst the pleadings were defective and the respondent would have to plead his claim properly if the case proceeded in the Magistrates Court, the respondent's affidavit should lead the Magistrate to the conclusion that the respondent "should be allowed to plead it properly when he's able to do so."[10]

[18] The applicant contended that the judge erred in an observation in her reasons that, if the respondent sent a letter in August 2011 to the applicant terminating the retainer and challenging the costs charged by the applicant, either the applicant or the

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6 [2011] QCA 105 at [29].

7 (2010) 241 CLR 118 at [22]. I have added the emphasis.

8 Amended statement of claim, paragraphs 4 and 22.

9 Amended statement of claim, paragraphs 5 and 23 and amended defence paragraphs 2 and 11.

10 Magistrates Court transcript 24 May 2012 at 1-7.

respondent could have applied for a costs assessment. The applicant also challenged the judge's conclusion that summary judgment should be withheld because of the prospect of a future application in the Supreme Court to set aside the costs agreement. These arguments did not address the real issues, which arise in relation to the respondent's submission in the Magistrates Court and the District Court that, upon the respondent's affidavits, the applicant had failed to make the required disclosure, with the result that the applicant's claim was barred by s 316. Whilst the amended defence did not properly plead that the applicant failed to make the disclosures required by ss 308(1)(c) and 315 or the consequences of those alleged failures, the respondent's barrister argued those points in the Magistrates Court and submitted that the respondent should be allowed an opportunity to plead them. The Magistrate did not reject that submission on the ground that it was too late or inappropriate to allow time to amend the defence. Rather, the Magistrate rejected the submission on the sole ground that the applicant's affidavits established that the disclosures required by the Act had been made. That was a fair summary of the applicant's evidence but it failed to take into account the respondent's affidavits and arguments. That was an error. The judge was correct to reconsider the matter afresh.

[19] The applicant argued that the judge should have affirmed the Magistrate's decision because summary judgment should not be withheld based merely upon a "speculative" defence.[11] That characterisation might have been appropriate in relation to the respondent's allegations of negligence and over-charging, which were bereft of necessary particulars, but the alleged failures by the applicant to make disclosures required by the legislation were in a different category. The respondent's case in the latter respect was articulated in his arguments in the Magistrates Court and sworn to in detail in his affidavits. An application for summary judgment under r 292 may only be brought after the defendant has filed a notice of intention to defend, but it does not follow that summary judgment must be given when available defences have not been pleaded. Rule 299 of *UCPR*, which empowers courts to order costs against a party who applies for summary judgment when that party "ought reasonably to have been aware that an opposite party relied on a point that would entitle that party to have the application dismissed", is consistent with the view that the failure by a defendant to plead an available defence does not necessarily preclude such a defence from being taken into account. In light of the sworn explanation for the respondent's delay and the articulation of the non-disclosure defences in the respondent's affidavit and arguments, there was no error justifying appellate correction in the judge's decision that it was appropriate to allow the respondent an opportunity to amend the defence to make it accord with his evidence of the applicant's failure to make disclosures required by the *Legal Profession Act*.

[20] That conclusion assumes an affirmative answer to the main question which was submitted to justify the grant of leave to appeal, namely, whether the respondent's evidence raised a real defence on the ground that the applicant did not comply with the disclosure obligations in ss 308(1)(c) and s 314 of the *Legal Profession Act* or the continuing obligation of disclosure in s 315 of the Act. The applicant pointed out that the respondent had not filed an affidavit responding to Mr Connolly's affidavit in reply, but that was unnecessary because the respondent's affidavit set

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[11] See *Haller v Ayre* [2005] 2 Qd R 410 at 432 [65] and *Amirbeaggi v Business in Focus (Australia) Pty Ltd* [2008] NSWSC 421 at [18].

out an apparently comprehensive version of events about disclosure which was irreconcilable with Mr Connolly's version. In the absence of evidence from the applicant of sufficient force to justify summary rejection of the respondent's version it was necessary to proceed upon the assumption that the respondent's evidence might be accepted at trial. Upon that evidence it would be open to a trial judge to find that the applicant's oral estimate of a range of fees comprehending both matters was substantially lower than the sum of the estimates in the disclosure notices, the respondent signed the acknowledgments in the disclosure notices without reading them in reliance upon that incorrect oral estimate and under pressure from the applicant, the disclosure notices were placed in front of the respondent only for a period of time sufficient for him to sign them, having regard to the effect of the respondent's brain injury that period of time was insufficient for him to read the printed acknowledgments much less the content of either notice, copies of the notices were not left with the respondent, and the applicant knew each of those facts.

[21] Whether that evidence raises an arguable defence depends upon the proper construction of the relevant statutory provisions. The applicant cited *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd*[12] for the proposition that because s 316(7) of the Act imposes the very serious consequence that a failure by a law practice to comply with s 315 is capable of constituting unsatisfactory professional conduct or professional misconduct, s 315 should be given a lenient construction in favour of the law practice. That argument would seem to apply equally to the proper construction of ss 308 and 314. In the cited passage Mason, Deane and Dawson JJ applied the rule that the prima facie construction of a penal provision is that "any real ambiguity persisting after the application of the ordinary rules of construction is to be resolved in favour of the most lenient construction". If that approach is applicable in relation to the subject provisions, it is significant that a lenient construction is mandated only where the meaning of the provision remains doubtful after application of the ordinary rules of construction.[13] In the construction exercise it is appropriate to take into account that the main purpose of those provisions is "to provide for law practices to make disclosures to clients regarding legal costs",[14] that being an aspect of one of the main purposes of the Act of providing "for the protection of consumers of the services of the legal profession".[15] In that context, the word "disclose" in s 308(1) and the phrase "unable to read" in s 314(2) should not be given unduly narrow meanings. Consistently with dictionary definitions of "disclose",[16] the object of ss 308 and 314 is to ensure that the law practice "reveals" the specified information to the client. Depending upon how the evidence fell out at a trial, it might be concluded that this was not a case in which a client simply elected to sign the disclosure notices without reading them. Rather, it might be held that an effect of the respondent's disability in the circumstances disclosed by the evidence was that he was "unable to read" the notices for the purposes of s 314(2) and that the applicant's conduct was apt to conceal rather than to reveal the ranges of costs estimates in the disclosure notices. Accordingly, there was a real issue requiring resolution at a trial whether the applicant failed to disclose to the respondent the costs estimate in the disclosure notices in accordance with ss 308(1)(c) and 314(2).

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12 (1983) 155 CLR 129 at 145 – 146.

13 See also *Chew v The Queen* (1992) 173 CLR 626 at 632.

14 *Legal Profession Act* 2007, s 299(a).

15 *Legal Profession Act* 2007, s 3(a).

16 See, for example, The Chambers Dictionary, 11th ed.

[22] The respondent also deposed and his barrister argued that the applicant failed to tell him at any time during the period of the retainers that the costs would exceed the applicant's estimate. The applicant argued that it satisfied its obligation of continuing disclosure in s 315 because its regular invoices to the respondent made it obvious that the total of the upper limit of the estimates for both matters had been substantially exceeded within about two months after the costs agreements were concluded. Again depending upon how the evidence fell out at trial, this aspect of the evidence might permit an inference to be drawn that the applicant had become aware before the total invoiced amount in each matter exceeded the upper limits of the range of costs estimates that the upper limit of the range stated in each notice had by then proved to be a gross underestimate. If so, and in the context of the obligation in s 308(1)(c) to provide a costs estimate or a range of costs estimates in advance of the costs being incurred, it is arguable that the obligation in s 315 to disclose "any substantial change to anything included in a disclosure … as soon as is reasonably practicable after the law practice becomes aware of that change" was not satisfied by the delivery of invoices which took the total invoiced amounts above the estimated costs. It is also arguable that the requirement in s 308(1)(c) to disclose the "change" required the applicant to communicate a fresh costs estimate or range of costs estimates. That argument is open upon the literal meaning of the statutory text and is consistent with the context that s 308(1)(b)(iv) requires that disclosure to include disclosure of "the client's right to … be notified under section 315 of any substantial change to the matters disclosed under this section …". As the respondent submitted, such a construction would impose a very onerous burden upon solicitors, but the imposition of that burden is not inconsistent with the text of s 315 or the expressed purposes of the *Legal Profession Act*. I would hold that the proper conclusion is that the respondent's evidence raised a real issue requiring resolution at a trial whether the applicant failed to comply with its obligation under s 315.

[23] The applicant submitted that non-compliance with the obligation of disclosure in s 308 or the ongoing obligation of disclosure in s 315 did not amount to a defence to a claim for costs under a costs agreement. It was submitted that, like s 52 of the *Trade Practices Act* 1974 (Cth), ss 308 and 315 established a "norm of conduct" the failure to observe which gave rise to remedies, including an application by the client to set aside the costs agreement, but otherwise created no liability or cause of action.[17] That analogy cannot prevail against the provisions of the *Legal Profession Act* which express the consequences of a failure by a law practice to disclose to the client anything required by Division 3 of Pt 3.4 to be disclosed; "the client … need not pay the legal costs unless they have been assessed …" (s 316(1)), the law practice "may not maintain proceedings against the client … for the recovery of legal costs unless the costs have been assessed …" (s 316(2)), and the applicant's costs may be assessed otherwise than by reference to the costs agreements (s 340). The procedural provisions in rr 743A, 743B, and 743G of *UCPR* to which the applicant also referred do not purport to qualify those unambiguous statutory provisions. The applicant submitted that pursuant to s 316(3) the respondent should have applied under s 328 for the costs agreement to be set aside, but s 316(3) in terms confers a right which is additional to the rights or immunities conferred by

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[17] The applicant referred to *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1988) 19 FCR 469 at 473 – 474 and *Bank of New Zealand v Spedley Securities Ltd (in Liq)* (1992) 27 NSWLR 91 at 99.

ss 316(1) and (2): "… the client … may **also** apply under section 328 for the costs agreement to be set aside".

[24] The applicant argued that the trial judge failed to appreciate that there were two separate costs agreements dealing with the two separate matters. There is some support for that in the order directing the respondent to file an application to set aside the "costs agreement" and in some paragraphs of the judge's reasons referring also to "costs agreement". On the other hand the judge clearly appreciated that there were two separate retainers and two separate disclosure notices, two separate claims for the property settlement proceeding and the domestic violence proceeding, and separate allegations concerning each proceeding; and the statement of the proposed order at the end of the judge's reasons (and in the cover sheet) refers to an application to set aside "the costs agreements". The references to "the costs agreement" elsewhere in the reasons and in the order were simply slips which had no bearing upon the judge's decision to allow the appeal and set aside the summary judgment.

[25] Under ground 4 in the draft notice of appeal, the applicant argued that the District Court judge's exercise of the discretion to direct the respondent to file "the Supreme Court application"[18] miscarried for various reasons. Because the respondent had foreshadowed the filing of such an application and did so before the hearing of the application for leave to appeal, and because the respondent, whose interests were directly affected by the direction, did not complain of it, it would not be appropriate to grant leave to appeal merely to permit the applicant to challenge that direction. The applicant's arguments under this ground were apparently not directed to the setting aside of the direction, but rather to a contention that the prospect of a future application to set aside the costs agreement was not a ground for refusing summary judgment. If that contention is correct, the applicant's alleged failures to make disclosures required by the Act nevertheless justified the judge's orders allowing the appeal and setting aside the summary judgment. I have already discussed the other contentions advanced under ground 4 and the contentions in ground 5 of the draft notice of appeal that the direction to the respondent to replead his defence involved a miscarriage of the judge's discretion in various respects.

Proposed order

[26] The application for leave to appeal should be refused with costs.

[27] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[28] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Fraser JA and with the order proposed.

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[18] In fact the order did not specify the court in which the application was to be brought.