DISTRICT COURT OF QUEENSLAND

CITATION:	*Murdoch v Alex Mackay & Co* [2017] QDC 81
PARTIES:	**PETER MURDOCH** First Appellant AND **NOELA MURDOCH** Second Appellant v **JOSEPH ALEXANDER MACKAY AND PETER PREVITERA trading as ALEX MACKAY & CO (a firm)** First Respondent AND **ABERCLARE PTY LTD** Second Respondent
FILE NO/S:	3831/16
DIVISION:	Civil
PROCEEDING:	Application for Leave to Appeal
DELIVERED ON:	10 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	30 March 2017
JUDGE:	Bowskill QC DCJ
ORDER:	**Application for leave to appeal is dismissed.** **The parties have 7 days in which to make submissions in relation to [56] of the Reasons. If no such submissions are received, the order as to costs will be that the appellants pay the first respondents' costs of the appellants' application for leave to appeal (but not any costs of the first respondents incurred in this proceeding in relation to applications made or steps taken by the second respondent, Aberclare Pty Ltd).**

CATCHWORDS: APPEAL – LEAVE TO APPEAL – where judgment entered in the Magistrates Court against the appellants, in a claim by the first respondent solicitors to recover professional fees, for the amount certified by a costs assessor – where appeal sought to be brought on the basis the Magistrate erred in entering judgment for the amount so certified, rather than the amount of the claim; that the Magistrate erred in finding there was a valid and binding costs agreement, in the face of an argument the costs agreement was void for uncertainty; and on the basis of a failure to give adequate reasons – whether some important principle of law or justice is involved

Legal Profession Act 2007, ss 326, 328, 337, 341, 342

Magistrates Court Act 1921, s 45

Uniform Civil Procedure Rules 1999, rr 737, 742, 743B, 743G, 743H, 743I

American Express International Inc v Hewitt [1993] 2 Qd R 352

Ironside v Thisainayagan [2016] WASC 174

La Spina v Macdonnells Law [2014] QCA 44

Multicon Engineering Pty Ltd v Federal Airports Corporation (1997) 47 NSWLR 631

Ramzy v Body Corporate for GC3 CTS 38396 [2012] QDC 397

Turner v Macrossan & Amiet Pty Ltd [2016] QCAT 5

Twigg & Twigg v Kung (1994) 17 Fam LR 391

University of Wollongong v Metwally (No 2) (1985) 60 ALR 68

Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429

Whisprun Pty Ltd v Dixon (2003) 200 ALR 447

COUNSEL: S Whitten for the Appellants

T Quinn for the First Respondents

SOLICITORS: Robinson Locke Litigation Lawyers for the Appellants

Alex Mackay & Co for the First Respondents

No appearance for the Second Respondent

[1] In May 2015 a firm of solicitors, Alex Mackay & Co, brought proceedings in the Magistrates Court against their clients, Aberclare Pty Ltd and its directors Peter and Noela Murdoch, to recover outstanding professional fees and outlays of $11,805.78 under a costs agreement sent to the clients on 13 August 2014.[1]

[2] Up until September 2016, the defence of the claim, in so far as Mr and Mrs Murdoch in particular were concerned, was on the basis that they did not engage Alex Mackay & Co (even if Aberclare Pty Ltd had, which was effectively denied by that company[2]); and in any event did not receive the costs agreement relied on by the solicitors.[3] On 7 September 2016 a further amended defence was filed on behalf of Mr and Mrs Murdoch, in which those defences were maintained and a new defence was pleaded, that the costs agreement was void for uncertainty, having regard to item 8 of the schedule of fees set out in the costs agreement (discussed below).[4]

[3] In the course of the Magistrates Court proceeding, Alex Mackay & Co applied for an order for assessment of the costs under s 337 of the *Legal Profession Act 2007* and r 743B of the *Uniform Civil Procedure Rules 1999*.[5] That order was made on 29 April 2016.[6]

[4] The assessment was carried out by Mr Neville Hiscox, and a certificate of assessment provided to the Court in July 2016,[7] as required by rr 737 and 743I of the UCPR. Mr Hiscox assessed the costs payable as $16,083.06 (comprising $10,924.76 for professional fees and $5,158.30 for disbursements, including the assessor's fee).

[5] A trial of the issues in dispute in the proceeding took place on 12 September 2016.[8] On 16 September 2016, for oral reasons given on that day, judgment was given for the plaintiff firm against Aberclare Pty Ltd and the Murdochs, in the sum of $16,083.06 plus interest and costs.[9]

[6] What this brief outline of the procedural history of the matter does not reveal, but what is apparent from perusal of the Magistrates Court file, is that the conduct of the case was permeated by acrimony and disproportion, on all sides, entirely inconsistently with the overriding obligations on all parties under rule 5 of the UCPR, let alone the simplified procedures in chapter 13, part 9 of the UCPR.

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1 See exhibit GEM-1 to the affidavit of Gabrielle Mumford, exhibit 39 in the trial below.

2 Save in relation to two minor matters, conducting a real property search and writing a short letter. See the defence of Aberclare Pty Ltd (document 3 on the Magistrates Court file).

3 See, for example, amended defence of Mr and Mrs Murdoch filed on 2 September 2016 (document 52 on the Magistrates Court file).

4 Document 59 on the Magistrates Court file.

5 Amended application filed 14 April 2016 (document 21 on the Magistrates Court file).

6 Document 29 on the Magistrates Court file.

7 Document 43 on the Magistrates Court file.

8 Order made on 20 May 2016 (document 44 on the Magistrates Court file).

9 Document 66 on the Magistrates Court file.

[7] In the oral reasons given on 16 September 2016[10] the Magistrate made strong findings adverse to the credit of Mrs Murdoch in particular, saying, among other things, that "[h]er lack of truth, evasiveness, poor demeanour in the witness box and general unreliability whilst giving evidence meant I could not accept or rely upon anything she said". His Honour found that Mr Murdoch's evidence "added little to the Defence case" and, in any event, given the state of the objective documentary evidence, said that he did not accept Mr Murdoch's evidence where it conflicted with that of Mr Previtera, who gave evidence for Alex Mackay & Co, and whose evidence the Magistrate accepted "in total".

[8] The Magistrate found that the costs agreement had been sent to the defendants and received by them and that a "valid and binding contract was thereby formed". His Honour also found that Mr and Mrs Murdoch, but principally the latter, "provided ongoing instructions to Mr Previtera in relation to the conduct of the matter, edited and consented repeatedly to correspondence to be sent by Mr Previtera to her daughter, and suggested responses to correspondence received by him" and that Mrs Murdoch, "by her conduct affirmed the contract and its terms".

[9] His Honour said:

> "I'm satisfied on the balance of probabilities that a valid cost agreement and retainer was entered into between the – the plaintiffs and the three defendants as alleged in the statement of claim. I'm satisfied on the whole of the evidence that the plaintiffs performed work for the defendants pursuant to that agreement and acted thereby upon instructions. Exhibit 40 is the cost assessors certificate in relation to that work. The certificate satisfies me on the balance of probabilities that the work performed by the plaintiffs to the value – it was to the value certified by the assessor. I'm satisfied to the required standard that the plaintiffs have proved their case and I entitle them the sum certified by the cost assessor."

[10] Mr and Mrs Murdoch seek leave to appeal the Magistrate's decision to this court, on the grounds that:

(a) the Magistrate erred in law in granting judgment in favour of Alex Mackay & Co in the amount of $16,083.06, when the amount claimed by that firm was only $11,805.78;

(b) the Magistrate erred in law in granting judgment for $16,083.06 when the cause of action relied on by Alex Mackay & Co, as endorsed on the claim, was for services rendered in the amount of $11,805.78 (there being no evidence adduced to justify a finding of any amount of claim for services rendered in excess of that amount);

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[10] A transcript of which appears as an exhibit to the affidavit of Peter Previtera filed in this court on 4 October 2016.

(c) the Magistrate erred in law in finding the costs agreement valid and lawful, when in law it was void for uncertainty; and

(d) the Magistrate erred in law in failing to make any finding on the issue as to whether or not the costs agreement was certain, when it was in issue in the proceeding as to whether or not it was void for uncertainty.[11]

[11] For completeness, I note that there was no application made by Mr and Mrs Murdoch or Aberclare Pty Ltd to set aside the costs agreement, on the basis of it being unfair and unreasonable (a process available under s 328 of the *Legal Profession Act 2007*) and no application for review of the cost assessor's assessment (a procedure provided for under rr 742 and 743I of the UCPR) – both of which may be explicable by the fact that, prior to 7 September 2016, the Murdochs' (and Aberclare Pty Ltd's) defence to Alex Mackay & Co's recovery proceedings had been that there was no retainer of the solicitors by any of them, and they had not received the costs agreement relied on.

Leave to appeal

[12] Leave to appeal is required because the amount involved is less than the "minor civil dispute limit", which is $25,000.[12] In such a case, s 45(2)(a) of the *Magistrates Court Act 1921* provides that:

> "an appeal shall lie by leave of the District Court or a District Court judge, who shall not grant such leave to appeal unless the court or judge is satisfied that some important principle of law or justice is involved".

[13] As explained by McGill SC DCJ in *Ramzy v Body Corporate for GC3 CTS* 38396 [2012] QDC 397 at [41]-[42],[13] the test laid down by this provision is one of not granting leave to appeal unless the court is of the opinion that the case is one of gravity, or involving some important question of law, or affecting property of considerable value; or unless it is a case which is otherwise of public importance, or is of a very substantial character".[14]

[14] Further, in *American Express International Inc v Hewitt* [1993] 2 Qd R 352 at 353, Davies JA observed that:

> "…when s 92(2) [the equivalent provision in the *District Court Act 1967* then in force] speaks of an important question of justice, it is not speaking merely of the injustice which a party will generally suffer when a decision is made against that party which appears to be wrong. It is

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11 Amended notice of appeal subject to leave, filed 10 October 2016.

12 See s 45(2) and (5) of the *Magistrates Court Act 1921* and the definitions of "minor civil dispute" and "prescribed amount" in schedule 3 to the *Queensland Civil and Administrative Tribunal Act 2009*.

13 By reference to *Wanstall v Burke* [1925] St R Qd 295, subsequently followed in *Johns v Johns* [1988] 1 Qd R 138.

14 See also *Baker v Arkman Pty Ltd* [2014] QDC 165 at [33] and [34] per Robertson DCJ.

> speaking of a question which goes beyond the correctness or otherwise of the decision… Merely demonstrating that a decision is arguably or even probably wrong does not establish that an important question of justice is involved."

[15] On behalf of Mr and Mrs Murphy, the following are said to be important questions of law, or matters of public importance, involved in the appeal justifying the grant of leave:[15]

(a) whether a magistrate has the discretion to give judgment on a money or debt claim for an amount greater than that sought by the plaintiff in the claim (referred to as the "judgment value issue");

(b) whether a solicitor's costs agreement is void for uncertainty where it incorporates a provision permitting the solicitor to charge an additional amount for "general care and conduct" on the basis of what the solicitor considers to be reasonable having regard to the circumstances of the proceeding (as opposed to by reference to any objective criteria) (referred to as the "uncertainty issue");

(c) what is referred to as "the limits of a Magistrates Court to have regard to a costs assessment certificate when there are issues in dispute not decided, contrary to r 743H UCPR"; and

(d) "the need for Magistrate's [sic] to decide all issues on the pleadings, and to provide adequate reasons for each issue".

[16] In determining this matter, the legislative context in which costs agreements between solicitors and their clients are regulated is important.

[17] Relevantly, s 326 of the *Legal Profession Act 2007* provides that "subject to this division [division 5] and division 7, a costs agreement may be enforced in the same way as any other contract". Division 5 contains ss 322 to 328 in relation to the making and effect of costs agreements, as well as the process for applying, to the Supreme Court or QCAT, to set aside a costs agreement which is not fair and reasonable. Division 7 contains ss 334 to 344 dealing with applications for costs assessments, whether that is by the client, a third party payer, or the law practice; and the process and criteria for assessment. So it is immediately apparent that, although enforceable as a contract, a costs agreement is an agreement the making, performance and enforcement of which occurs in and subject to a particular legislative context.

[18] The UCPR contains provisions dealing with applications for costs assessments, whether that occurs within a recovery proceeding or separately. So, for example, r 743A provides in general terms for the making of an application for a costs assessment; and r 743B provides for the making of such an application, as an

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15 See the appellants' written submissions dated 28 October 2016; and the "skeleton outline of appellant's oral argument" dated 30 March 2017.

application in the proceeding, where a law practice has started a recovery proceeding.

[19] Rule 743G provides for a directions hearing in relation to an application for a costs assessment, at which directions may also be given for the conduct of a related recovery proceeding (r 743B(2)), including as to whether it is appropriate for any question to be tried before the costs are assessed. As observed in the annotations to r 743G, if there are significant issues to be decided which will affect the assessment of costs, it is appropriate that these be decided by the court prior to the costs assessor commencing the assessment.[16]

[20] Rule 743H then provides:

> "(1) This rule applies if a certificate of assessment is filed in the relevant court.
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> (2) The court or any party may, on notice to all parties who participated in the assessment, have the application relisted before the court.
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> (3) In relation to any issue in dispute between the parties, the court may give directions or decide the issue.
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> (4) If there are no issues in dispute, the court may give the judgment it considers appropriate having regard to the certificate.
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> (5) The court may delay giving a judgment, or stay the enforcement of a judgment given, pending a review by the court of a decision of the costs assessor."

[21] The criteria for assessment are set out in s 341 of the *Legal Profession Act,* and include the fairness and reasonableness of the amount of legal costs in relation to the work.

[22] Relevantly, once a costs assessment has been completed, the costs assessor must "certify the amount or amounts payable by whom and to whom in relation to the application, having regard to (a) the amount at which costs were assessed; and (b) the costs of the assessment" (r 737). A party to the costs assessment may request "information about the outcome of the costs assessment" (r 737A) and may request written reasons from the costs assessor (r 738). A party dissatisfied with the decision included in a costs assessor's certificate may apply to the court to review the decision (r 742). Each of these provisions apply to an assessment of costs under the *Legal Profession Act* by operation of r 743I.

[23] So the scheme of the *Legal Profession Act 2007* provisions, as well as the *UCPR* provisions, is clear in that either the law practice, or a party said to be liable to pay

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16 See also *Paroz v Clifford Gouldson Lawyers* [2012] QDC 151 at [6].

legal costs, has the ability to seek an independent assessment of the costs, before becoming liable to pay them.[17] There is scope for judicial review of the costs assessment (r 742). There is also scope for judicial determination of issues in dispute in relation to liability to pay the costs more generally, whether that is before or after the costs assessment has been carried out (r 743G(2) and (3) and 743H(3)).

[24] But subject to those rights of review, and the determination of any issues in dispute by the court, the parties to the assessment are bound by it – and a law practice which seeks to recover its costs, which have been assessed, is entitled to judgment by reference to the certificate of assessment (which will include the assessor's determination of the costs of the assessment, and who is to pay them). Plainly that could be a potential benefit or a burden to the party liable to pay the costs – a benefit, in the sense that the amount may be reduced on an assessment; but a burden in the event that the costs are not reduced, or not reduced significantly, because of the addition of the cost of the assessment.

[25] Here, at the time the order was made for a costs assessment to be carried out, the only "issue in dispute" was a flat denial of any liability for the costs, on the basis that there was no retainer, and neither the Murdochs nor Aberclare Pty Ltd were bound by the costs agreement, because it was never received.

[26] The contention that the costs agreement was void for uncertainty, because of item 8, was not raised until after the cost assessor's certificate had been filed.

[27] Nevertheless, in those circumstances, it was appropriate for the Magistrate to proceed in accordance with r 743H(3) – in relation to all the issues in dispute between the parties, to decide the issues.

[28] The Magistrate did that – following the trial on 12 September 2016 – and having decided the issues against the Murdochs and Aberclare Pty Ltd, entered judgment for the amount certified by the costs assessor in the filed certificate (exhibit 40).

[29] Contrary to the submission on behalf of the Murdochs, the present case is entirely distinguishable from *La Spina v Macdonnells Law* [2014] QCA 44. In that matter, there were proceedings commenced in this court by the solicitors seeking to recover fees for legal services. They were actively defended by the client. In the course of those proceedings, an order for a costs assessment was made, and the assessment undertaken. That was subject of a review (taken to be under r 742 and 743I), which was dismissed. Subsequently, the solicitors filed an application in the recovery proceedings seeking judgment in their favour in the amount certified by the costs assessor, which was set down to be heard 2 days later. The day after that application was filed, the (self-represented) client filed an amended defence, and sent an email to the solicitors and the judge's associate, notifying of her inability to attend the hearing the following day and complaining of the short notice. The solicitor's application for judgment proceeded to be heard, in the absence of the client, and judgment was

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[17] In this regard, see s 338 of the *Legal Profession Act*.

entered for the amount certified. An appeal against that decision, and judgment, was allowed, on the basis that proceeding with the hearing in the absence of the client, and before the time for service prescribed under the rules had elapsed, constituted a denial of natural justice.

[30] Although unnecessary to do so, Muir JA, giving the reasons of the Court of Appeal, also addressed the other issues raised in the appeal. It was contended in that case that "no issues in dispute" in r 743H(4) meant "no triable issues requiring determination in the action". Muir JA observed that "[t]hat construction places a gloss on or qualification of the plain words of sub-rule (4)" and "[i]n any event, the point is academic as the primary judge did not consider the issues raised on the pleadings" (at [26] and [36]). Muir JA also referred to a view expressed by the primary judge in argument, that the proceedings were effectively determined by the review of the costs assessor's certificate (at [27]). Muir JA said that view was erroneous, going on to say (at [28]):

> "The costs assessed by the costs assessor were the costs of the matrimonial proceedings. The assessment may have fixed the quantity of those costs but it did not determine the appellant's liability to pay them. Such liability was disputed in the District Court proceedings commenced by the respondent [solicitors]. If the claim was to be struck out, so as to conclude the proceedings, the appellant was entitled to proper notice of any strike out application and of the grounds on which it was based."

[31] Although, if given leave to appeal, the Murdochs would contend the Magistrate erred in finding the costs agreement was valid and binding, and complain of an inadequacy of reasons for reaching that conclusion (in light of their contention that it was void for uncertainty), it cannot be said that there was any denial of natural justice, in the sense of not being given the opportunity to be heard. Unlike in *La Spina,* in this matter a trial of the issues in dispute did take place. They were determined adversely to the Murdochs (and Aberclare Pty Ltd), and since there was no other basis for disputing the amount certified by the costs assessor, there was no reason why judgment for the amount so certified should not be entered.

[32] There is no substance, in my view, to the appellants' "judgment value issue". The amount claimed by the plaintiff was the amount of its bill, issued in accordance with the costs agreement. A dispute having arisen about liability to pay that bill, recovery proceedings were commenced (appropriately, claiming the amount of the bill) and, in the course of those proceedings, an order for assessment of those costs was made. On that assessment, it is apparent that there was some reduction in the amount of the professional fees. But also, the practical consequence of the assessment was that the costs of that process were added to it. Those additional costs were not payable under the costs agreement, but by operation of the legislative provisions, as contemplated by s 342 of the *Legal Profession Act 2007.* Once the issue of liability

to pay was determined by the Magistrate, the quantum of the amount to be paid was appropriately determined by reference to the costs assessor's certificate.

[33] Turning then to the "uncertainty issue".

[34] At the trial, the only basis for challenging the validity of the costs agreement was that it was void for uncertainty having regard to item 8 of the schedule of fees/charges set out in clause 2.1.2 of the costs agreement, described as "general care and conduct", which provided that, in addition to an amount allowed under another item of the schedule:

> "… the amount that is to be allowed for our care and conduct of a proceeding is the amount considered by us to be reasonable having regard to the circumstances of the proceeding including, for example –
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> (a) the complexity of the proceeding; and
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> (b) the difficulty and novelty of any question raised in the proceeding; and
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> (c) the importance of the proceeding to you; and
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> (d) the amount involved; and
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> (e) the skill, labour, specialised knowledge and responsibility involved in the proceeding on the part of the solicitor; and
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> (f) the number and importance of the documents prepared or perused, without regard to the length of the documents; and
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> (g) the time spent by the solicitor; and
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> (h) research and consideration of questions of law and fact."[18]

[35] The contention before the Magistrate was that this clause rendered the costs agreement void for uncertainty, because it provided for no objective standard, leaving it entirely to the subjective opinion of the solicitor what the amount of the charge might be.

[36] Given that was the only basis on which it was contended the costs agreement was void, it may be inferred from the Magistrate's express finding that he was "satisfied on the balance of probabilities that a valid cost agreement and retainer was entered into…", that his Honour rejected the contention. It is apparent, from the oral argument at the end of the trial on 12 September 2016 that the Magistrate did not regard the "uncertainty" argument as having any particular merit. The only decision

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[18] The wording of this clause 8 is almost identical to item 1 in each of schedule 1 (Supreme Court scale of costs) and schedule 2 (District Court scale of costs), save that those items refer to the amount the registrar considers reasonable, having regard to those matters.

referred to his Honour was a decision of Carmody J, sitting as a member of QCAT, in *Turner v Macrossan & Amiet Pty Ltd* [2016] QCAT 5. In that case, the costs agreement included a care and conduct provision, in terms that:

> "In addition to the item charges the firm is entitled to charge a general care and conduct component at the rate up to 50% based on the total itemised professional costs taking into account the following matters…" (see at [96] and [97]).

[37] Whilst accepting that "there is some lack of precision in the care and conduct charge", Carmody J found that it did not "give rise to intractable semantic uncertainty", noting, among other things (at [99]):

> "The rate of the general care and conduct charge is also subject to an implied constraint: s 328(1) of the LP Act requires it to be 'fair and reasonable". The contract should be construed in its proper regulatory context. Accordingly, it is not correct to suggest that the rate of the general care and conduct charge is entirely at the discretion of the respondent".

[38] On behalf of the Murdochs, at trial, it was argued that *Turner* was distinguishable, because it incorporated an upper limit on the discretionary charge for care and consideration. In oral argument, the Magistrate observed that item 8 in the present case "isn't any different to the clause in this case [referring to *Turner*]. The only difference is the upper limit of the total itemised professional costs that's included in this one, but the amount of the uplift is still determined by the firm".[19] His Honour also referred to another constraint on the discretion of the solicitor, observing that, once the care and conduct charge has been determined by the solicitor, "then it's assessed and either allowed or disallowed".[20]

[39] Having regard to that, as I have said, it may be inferred from the express finding made – as to the validity of the costs agreement – that the Magistrate rejected the contention that the agreement was void for uncertainty.

[40] Nevertheless, it is arguable that, by failing to expressly address the uncertainty issue in his Honour's oral reasons, there has been a failure to give adequate reasons, since the underlying intellectual process which has given rise to the conclusion reached has not been disclosed in those reasons.[21] A failure to give adequate reasons is of course an error of law.

[41] However, even if such an error has been made, that issue of itself – the failure to give reasons – cannot be said to involve either an important principle of law or justice,

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19 Transcript from the trial, at p 1-120.5.

20 Transcript from the trial, at p 1-119.46.

21 See *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [57]-[64]; but see also *Gartner v Brennan* [2016] WASC 89 at [58].

such as to justify the grant of leave to appeal. It is a matter affecting only the parties to this proceeding.

[42] I am also not persuaded that the underlying issue – as to whether the costs agreement could be said to be void for uncertainty due to the form of item 8 in the schedule of costs – involves an important principle of law or justice, such as to justify the grant of leave to appeal.

[43] In so far as the merits of the contention are concerned, as I have already said above, consideration of disputed issues in relation to costs agreements under the *Legal Profession Act 2007* must take account not only of the terms of the agreements themselves, but also the legislative context in which they are regulated, as to formation, performance and enforcement – including the rights conferred by statute to apply to set aside an agreement, on the basis it is not fair and reasonable; the right to seek an independent assessment of the costs, which also involves an assessment of the fairness and reasonableness of the amounts charged; and the right to seek review by the court of that independent assessment.

[44] In those circumstances, it is difficult to see that a provision such as item 8 – which essentially mirrors the "general care and conduct" item in the scale of costs applicable in the Supreme and District Court – could be such as to render the whole of the agreement void for uncertainty, because of the absence from it of an objective upper limit. Significantly, whilst a provision in terms of item 8 may give rise to dispute – as to whether the amount charged is reasonable – that is a matter which can readily be adjudicated upon by a costs assessor. The provision is capable of a meaning, even if in its application, it may lead to dispute.[22] The regulatory context in which costs agreements must be construed and enforced makes provision for any such dispute to be resolved.

[45] The issue of uncertainty is distinct from issues of fairness or reasonableness.[23] In this regard, the Murdochs' reliance, in support of their argument, on the decision of Ipp J in *Brown v Talbot* (1993) 9 WAR 70 is misplaced. That was an application for review of a costs agreement, under s 59 of the *Legal Practitioners Act 1893 (WA),* on a challenge of unreasonableness (the equivalent of s 328 of the *Legal Profession Act 2007 (Qld)*). The agreement in *Brown v Talbot* was held to be unreasonable, among other things, on the basis of the omission of a specific hourly rate (leaving it to the solicitor to "charge such hourly rate … as it considers appropriate…"). The conclusion in *Brown v Talbot* was not that such a provision rendered the agreement void for uncertainty.

[46] But in any event, there is nothing before me to indicate this is an issue of general application, going beyond the interests of the parties to this particular proceeding, in

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22 Cf *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436-7. See also *Ironside v Thisainayagan* [2016] WASC 174 at [115]-[123] per Beech J.

23 *Twigg v Kung* (1994) 17 Fam LR 391 at 392.

relation to the particular costs agreement between them, such as to warrant further consideration of it in the context of an appeal.

[47] For these reasons, I am not satisfied that an important principle of law or justice is involved in this matter, as those concepts have been explained in the authorities.

[48] In their submissions in support of the application for leave to appeal (but not in the notice of appeal subject to leave) the Murdochs relied on an additional point, not raised before the Magistrate – that because item 8 contains no basis for calculation of the amount of the charge for general care and conduct, other than being at the subjective discretion of the solicitor, there was a breach of the obligation to disclose "the basis on which legal costs will be calculated" imposed by s 308(1)(a) of the *Legal Profession Act 2007*. The effects of a failure to disclose are set out in s 316, and include that the client is not required to pay the costs unless they have been assessed (s 316(1)), that the amount may be reduced by an amount proportionate to the seriousness of the failure to disclose (s 316(4)), and that the solicitor may have to pay the costs of the assessment (s 342(2)).

[49] The principle was clearly stated in *University of Wollongong v Metwally (No 2)* (1985) 60 ALR 68 at 71 that:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

[50] The reasons for this general position were explained by Gleeson CJ, McHugh and Gummow JJ in *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 at [51]:

> "It would be inimical to the due administration of justice if, on appeal, a party could raise a point that was not taken at the trial unless it could not possibly have been met by further evidence at the trial. Nothing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not taken at the trial and could or might possibly have been met by rebutting evidence or cross-examination. Even when no question of further evidence is admissible, it may not be in the interests of justice to allow a new point to be raised on appeal, particularly if it will require a further trial of the action. Not only is the successful party put to expense that may not be recoverable on a party and party taxation but a new trial inevitably inflicts on the parties worry, inconvenience and an interference with their personal and business affairs."[24]

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[24] Footnotes omitted.

[51] Even if no further evidence may have been led, or elicited, had this issue been raised at trial,[25] it remains a question for this court to consider whether it would be expedient and in the interests of justice to allow the point to be entertained on an appeal.[26] It would inevitably involve a further trial, and argument in relation to a number of matters beyond the initial question of whether there had been a failure to disclose as required by s 308(1)(a) – as is apparent by the variety of discretionary considerations that arise under s 316 (as to the effect of a failure to disclose) and ss 341 and 342. I am not satisfied it would be in the interests of justice to permit the Murdochs to depart from the manner in which their case was argued at trial.

[52] In any event, having regard to the matters I have already addressed, the purported reliance on this new point does not persuade me that this is an appropriate matter in which to grant leave to appeal.

[53] Leave to appeal is refused.

[54] This decision should not be taken as an endorsement of the reasonableness of the inclusion in a costs agreement of a provision such as item 8. The decision is based on application of the test for grant of leave to appeal. It would be speculatory to comment on what might have occurred had an application to set aside the agreement, or part of it, been made under s 328 of the *Legal Profession Act 2007* or if a review of the costs assessment had been sought, under rr 742 and 743I of the UCPR. The fact is that neither of those avenues were pursued because the primary avenue of defence was a complete denial of any retainer by the appellants, in respect of which they were thoroughly disbelieved by the Magistrate, and from which findings there has been no application for leave to appeal.

[55] It is appropriate that the appellants pay the first respondents' costs of the application for leave to appeal in this court.

[56] Although Aberclare Pty Ltd was named, by the appellants, as the second respondent to the appeal, it did not appear at the hearing.[27] Nevertheless, it appears from this court's file in relation to this proceeding that there have been steps taken by Aberclare Pty Ltd (for example, for an extension of time in which to bring its own appeal). The costs recoverable by the first respondents ought only be those incurred by it in respect of the appellants' – Mr and Mrs Murdoch's – application to this Court; not those incurred by it in respect of any step taken in this proceeding by Aberclare.

[57] I will give the parties 7 days in which to make submissions in relation to what I have said in [56]. If no such submissions are received, the order as to costs will be that the

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25 As to which see *Suttor v Gundowa Pty Ltd* (1950) 81 CLR 418 at 438 and *Coulton v Holcombe* (1986) 162 CLR 1 at 7–8.

26 *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631 at 645-646.

27 It seems Aberclare Pty Ltd separately brought an application for leave to appeal (proceeding no. 4313 of 2016), but this was dismissed by consent in February 2017.

appellants pay the first respondents' costs of the appellants' application for leave to appeal (but not any costs of the first respondents incurred in this proceeding in relation to applications made or steps taken by the second respondent, Aberclare Pty Ltd).