Court of Appeal
Supreme Court

New South Wales

Case Name:	Ian Jones v The Owners Strata Plan No 69008
Medium Neutral Citation:	[2018] NSWCA 272
Hearing Date(s):	On the papers
Date of Orders:	15 November 2018
Decision Date:	15 November 2018
Before:	Macfarlan JA Barrett AJA
Decision:	Summons seeking leave to appeal dismissed with costs
Catchwords:	APPEAL – leave to appeal – interlocutory order striking out solicitor's claim to recover legal costs referable to period before costs disclosure made – submission that subsequent costs disclosure removed barriers to suing for costs for prior services – such submission at odds with statutory language and intent – no exceptional circumstances or well-based apprehension of miscarriage of justice warranting leave to appeal
Legislation Cited:	Legal Profession Act 2004 (NSW)
Category:	Principal judgment
Parties:	Ian Jones (applicant) The Owners Strata Plan No 69008 (respondent)
Representation:	Solicitors: Buckner Jones (plaintiff) Adrian Batterby Lawyer (respondent)
File Number(s):	2018/135310
Decision under appeal:	

Court or Tribunal:	District Court of New South Wales
Jurisdiction:	Civil
Citation:	[2017] NSWDC 430
Date of Decision:	17 December 2017
Before:	Neilson DCJ
File Number(s):	2016/327009

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **THE COURT**: The applicant is a solicitor. In 2016, he commenced proceedings in the District Court against the respondent to recover legal costs said by him to be due and payable for legal services provided by him to the respondent. On 17 November 2017, his Honour Judge Neilson ordered that the action be struck out to the extent that it related to a sum of $23,256.82 for legal services provided before 9 July 2010.

2 His Honour found that the plaintiff (present applicant) had done work for the defendant (present respondent) as a solicitor from February 2009 to 8 July 2010 without having made the disclosures with respect to costs required by Division 3 of the *Legal Profession Act 2004* (NSW) as in force at the relevant time. No costs disclosure was made until 9 July 2010.

3 Section 317(1) of the 2004 Act provided that if a lawyer had not complied with the costs disclosure requirements, the client “need not pay the legal costs unless they have been assessed under Division 11”. Section 317(2) provided that a lawyer who had not duly disclosed “may not maintain proceedings against” the client for recovery of legal costs unless the costs had been

assessed. The costs relevant to the period February 2009 to 8 July 2010 have apparently never been assessed.

4 Central to the judge's decision was the view that disclosure in accordance with the costs disclosure requirements could not have, as it were, retrospective effect – in other words, that disclosure, once made, served only to remove the s 317 constraints in relation to legal costs charged after the making of the disclosure.

5 The applicant seeks leave to appeal in order to challenge that interpretation. The parties agreed on 14 October 2018 that the application should be dealt with on the papers. The applicant says, in effect, that, once disclosure was duly made under the 2004 Act, it not only precluded the operation of s 317(1) and 317(2) in relation to legal costs charged for future services but also removed such s 317 constraints as had already come to operate in relation to legal costs for past services.

6 That construction is quite at odds with the language and apparent purpose of the legislation. The disclosure provisions of the 2004 Act were concerned with charging for work yet to be done. An obvious purpose of the regime was to ensure that a client had, in advance, information material to the decision whether or not to retain the lawyer. Under s 310, written disclosure was required "before, or as soon as practicable after," the lawyer was retained. The intention, clearly enough, was that the client should be made aware of the relevant matters regarding costs at the very outset, that is, before committing to the retainer or, if that was not practicable, as soon as practicable after the instructions were taken.

7 Of particular significance is the fact that failure to make disclosure did not deprive a lawyer of the right to be remunerated. Section 317 put obstacles in the way of legal proceedings for recovery but left the lawyer fully able and entitled to resort to the costs assessment process as a means of obtaining quantification of costs and, ultimately, recovering costs so quantified.

8 Leave to appeal is necessary because the decision of the primary judge was interlocutory. A grant of leave is warranted in such a case only if there is some

exceptional circumstance or a well-based apprehension of miscarriage of justice. Neither of those criteria is satisfied here.

9 The summons seeking leave to appeal is dismissed with costs.

****