SUPREME COURT OF QUEENSLAND

CITATION:	*Body Corporate for 211 Ron Penhaligon Way Offices CTS 25277 v MBA Lawyers* [2019] QSC 314
PARTIES:	**BODY CORPORATE FOR 211 RON PENHALIGON WAY OFFICES CTS 25277** (applicant) **v** **MBA LAWYERS (A FIRM)** (respondent)
FILE NO/S:	BS No 828 of 2019
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2019
JUDGE:	Douglas J
ORDER:	**1. The application be dismissed** **2. Leave is refused for the applicant to amend the originating application to consolidate it with the proceedings in the Magistrates Court** **3. The parties be heard as to costs**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – COSTS AGREEMENTS – OTHER MATTERS – where a corporate lot owner within a community title scheme filed an adjudication application with the Office of the Commissioner for Body Corporate and Community Management – where the applicant, a body corporate, engaged the respondent solicitors to respond to the corporate lot owners' adjudication application which was dismissed as being misconceived and vexatious – where nominees of the corporate lot owner joined the committee of the applicant following a change of control – where the nominees of the corporate lot owner caused the applicant to bring proceedings to set aside two costs agreements between the applicant and respondent solicitors pursuant to s 328 of the *Legal Profession Act*

2007 (Qld) for failure to comply with the disclosure requirements of ss 308(1)(c) and 308(1)(d) – where the applicant further alleged that the costs rendered exceeded the estimate in the second costs agreement where there was no evidence of any update under s 315 of the *Legal Profession Act* to explain the uplift of that estimate – where the applicant sought leave to amend its originating application to consolidate it with a Magistrates Court proceeding – whether the application was authorised by special resolution of the applicant – whether the costs agreements infringe both ss 308(1)(c) and 308(1)(d) of the *Legal Profession Act* – whether it be in the interests of justice to grant the applicant leave to amend its originating application to consolidate it with the Magistrates Court proceeding

Body Corporate and Community Management Act 1997 (Qld), s 312
Civil Proceedings Act 2011 (Qld), s 25(1)

Legal Profession Act 2007 (Qld), ss 308(1)(c), 308(1)(d), 315, 328, 337
Uniform Civil Procedure Rules 1999 (Qld), rr 743A, 743H

Donald Edward Barclay v McMahon Clarke (a firm) [2014] QSC 20 referred

COUNSEL:	K Wilson QC for the applicant B Strangman for the respondent
SOLICITORS:	Australian Property Lawyers for the applicant MBA Lawyers for the respondent

[1] This is an application to set aside a solicitors' costs agreement pursuant to s 328 of the *Legal Profession Act* 2007 (Qld) for failure to comply with the disclosure requirements of ss 308(1)(c) and 308(1)(d) of that Act. Those subsections require the "law practice" to disclose to a client:

> "(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."

[2] A preliminary point is taken that this application has not been commenced validly because there should have been a special resolution of the applicant, a body corporate under the *Body Corporate and Community Management Act* 1997 ("the BCCM Act") to commence the proceeding.

Factual background

[3] The evidence suggests that there has been dissension among the members of the body corporate. A corporate lot owner, 211 Ron Penhaligon Way Offices Pty Ltd, owned four lots within the eight lot community title scheme and, on 6 July 2017, filed an adjudication application with the Office of the Commissioner for Body Corporate and Community Management. The body corporate engaged MBA Lawyers, the current respondent, to respond to the corporate lot owners' adjudication application which was dismissed as being misconceived and vexatious.

[4] Nominees of the corporate lot owner are now on the committee of the body corporate, there having been a change in control, and have caused the body corporate to bring proceedings to set aside the costs agreement between the body corporate as previously controlled and the solicitor respondents to these proceedings.

[5] The criticisms made of the costs agreement include that it did not provide an accurate estimate of the total costs but simply set out the hourly charge-out rate of people within the firm. Nor, it is said, did the agreement disclose an estimate of the total legal costs or a range of estimates of those costs and an explanation of the major variables that would affect their calculations. Nor did the costs agreement disclose the intervals, if any, at which the client would be billed. A disclosure notice was provided, however, which said that invoices would be sent to the client at monthly intervals, upon completion of each step within the matter or upon completion of the work.

[6] A second costs agreement was also criticised although it was conceded that the work to be undertaken was described more comprehensively and a range of costs was given which was different from an earlier estimate given in a letter dated 12 October 2017. The second costs agreement is also said to infringe both ss 308(1)(c) and 308(1)(d).

[7] The costs rendered were also said to have exceeded the estimate of $10,000 to $15,000 in the second costs agreement where there was no evidence of any update under s 315 of the *Legal Profession Act* to explain the uplift of that estimate to the costs rendered of $24,494.24.

[8] The agreements are sought to be set aside on the basis that they are not fair or reasonable where the costs were to be charged at a level well above scale and where compliance with ss 308(1)(c) and 308(1)(d) has not occurred.

[9] The respondent legal firm argues that it is not appropriate to determine the issue of the fairness or reasonableness of the costs agreements in this proceeding because there may be factual disputes in relation to the conduct of the parties before and during the period when the agreements were on foot.

[10] More importantly, however, as I have indicated, they argue that this proceeding is wrongly brought as not authorised by the body corporate.

[11] They also rely upon a decision of Byrne J in *Donald Edward Barclay v McMahon Clarke (a firm)*[1] to the effect that in determining whether a non-disclosure would be sufficient to satisfy the court that a costs agreement was not fair, the court could consider the conduct of the parties before and when the agreement was made.[2]

[12] Before the change in control of the body corporate, there was no indication in the material filed in this proceeding which raised concerns with the performance by the solicitors' firm of the legal services they provided, in effect, in having the corporate lot owners' adjudication application dismissed as misconceived and vexatious.

[13] A majority of votes at an annual general meeting of the body corporate held on 28 March 2018 also supported a resolution to raise a special levy to pay for the fees invoiced by the solicitors. They were then paid to the solicitors' trust account.

[14] Since that resolution, a Mr Massey, associated with the corporate lot owner, has become the chair of the body corporate committee and resists the payment of those fees from the solicitors' trust account to the solicitors' general account.

[15] It is against that background that this application has been brought allegedly in the name of the body corporate.

Jurisdictional issue

[16] Section 312 of the BCCM Act provides that the body corporate for a community title scheme may start a proceeding only if the proceeding is authorised, relevantly, by special resolution by the body corporate.

[17] That does not apply to a prescribed proceeding which includes a counterclaim, third party proceeding or other proceeding in a proceeding to which the body corporate is already a party: see s 312(4).

[18] To that end, the body corporate sought to rely upon proceedings in the Magistrates Court at Southport between the body corporate and the solicitors. That was an application for assessment of the solicitors' legal costs pursuant to s 337 of the *Legal Profession Act* and r 743A of the *Uniform Civil Procedure Rules* 1999 ("the UCPR").

[19] An order was made in that proceeding to appoint a costs assessor. The body corporate here argues that that did not finally determine the rights of the parties: see r 743H of the UCPR.

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1 [2014] QSC 20.

2 See at paras [27]-[30].

[20] Accordingly, the body corporate sought to have that proceeding in the Magistrates Court transferred to this Court to permit this claim to be made in reliance on s 312(4) of the BCCM Act.

[21] While it is feasible to transfer proceedings from the Magistrates Court to this court, that course was opposed by the solicitors on the basis that the application in the Magistrates Court had been finally determined by the appointment of a costs assessor. The solicitors further submitted that an oblique attempt to transfer the Magistrates Court proceedings to this Court would not resolve the contention that this proceeding was nevertheless commenced without the requisite special resolution.

[22] Mr Strangman, for the solicitors, submitted that it would be bizarre for both proceedings to be consolidated when this proceeding had been commenced without authority and where there was no issue apparently still pending in the Magistrates Court pursuant to s 25(1) of the *Civil Proceedings Act* 2011. There were no matters awaiting or pending resolution by the Magistrates Court. For that reason, he submitted that I should not exercise my jurisdiction to transfer the proceedings to this court.

[23] He also relied upon the discretion inherent in s 25 by the use of the word "may" to argue against the proposed transfer because its purpose was to avoid the statutory requirement to authorise the proceedings by special resolution and there was no utility in transferring the proceedings because there was nothing to determine in the Magistrates Court matter.

[24] He submitted that s 312 of the BCCM Act provided an important protection to lot owners within a community title scheme by ensuring that legal proceedings that often involve significant exposure to legal costs both incurred and ordered against the body corporate are not commenced if more than 25% of lot owners disagree. In this case, three out of the seven lot owners voted against the commencement of these proceedings and one infers that those currently in a majority in the body corporate are not in a position to have a special resolution passed. He submitted that the lot owners are obviously concerned about incurring further legal fees in a Supreme Court action when the real issue in dispute was factionalism within the body corporate.

[25] That jurisdictional issue, coupled with the exercise of discretion sought by the invocation of s 25 of the *Civil Proceedings Act*, persuades me that I should not make the orders sought by the applicant and should dismiss the application on that jurisdictional basis alone.

Submissions on the Merits

[26] Even if I were wrong about the jurisdictional basis for dismissing the application, it seems to me that I ought to accept most of the solicitors' further submissions, namely that:

(a) there had been only a partial failure to comply with the statutory prescriptions in respect of their bills of costs;

(b) there was no evidence that the omitted information was of any significance to the applicant;

(c) there was no evidence to suggest that the first and second costs agreements would not have been concluded on the same terms if the omitted disclosures had been made;

(d) there was no evidence to suggest the first and second costs agreements did not provide the applicant with all the information it desired to make informed decisions whether to enter into the agreements and, if so, on what terms;

(e) there was no evidence that the applicant was misled by the first and second costs agreements because of what they disclosed or otherwise left unexpressed;

(f) the applicant must have understood the operation of the agreements; and

(g) after having a reasonable time to consider the first costs agreement, including a request for amendments, the applicant made a free choice to enter into it with information sufficient for its needs.[3]

[27] The solicitors also resisted the application as inappropriate as an originating application because it was likely that any application to set aside the costs agreement would require cross-examination and should therefore have been commenced by way of application in the Queensland Civil and Administrative Tribunal as allowed by s 328(1) of the *Legal Profession Act*.

Conclusion and Orders

[28] For these reasons the application is dismissed as it was not authorised by special resolution of the applicant. Nor should the application to amend the originating application to consolidate it with the proceedings in the Magistrates Court be permitted as it is not in the interests of justice to transfer that matter to the Supreme Court.

[29] I shall hear the parties as to costs.

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[3] See *Donald Edward Barclay v McMahon Clarke (a firm)* [2014] QSC 20 which was relied on for the solicitors.