NOTICE OF FILING

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Details of Filing

Document Lodged:	Concise Statement
File Number:	VID1648/2018
File Title:	MICHAEL D WYLES Q.C. & ANOR v DLA PIPER AUSTRALIA (A FIRM)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 24/12/2018 11:22:41 AM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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CONCISE STATEMENT

(prepared in accordance with Commercial and Corporations Practice Note (C&C-1)) – Form NCF1

SEAL OF THE FEDERAL COURT OF AUSTRALIA

No. of 2018

Federal Court of Australia
District Registry: Victoria
Division: General

Michael D Wyles Q.C. ABN 66 329 698 590 and Rodrigo Pintos-Lopez ABN 8939 398 7913

Applicants

AND

DLA PIPER AUSTRALIA (A FIRM) ABN 83 508 451 308

Respondent

A. Facts

Mr Wyles

1. On Thursday 31 May 2018, Mr Kon Tsiakis, a partner in DLA Piper Australia ("DLA") telephoned Mr Wyles and requested that he accept a brief to lead Mr Trichardt of Counsel in a matter in the Federal Court of Australia in which the trial was scheduled to commence on the following Tuesday 5 June 2018. Thereafter by email at about 10.00am sent by Mr Ryan an employee of DLA and copied to Mr Tsiakis, Mr Tsiakis confirmed that DLA acted on behalf of Zetta Jet Pte Ltd and Mr Jonathon D King in his capacity as the US Chapter 7 Bankruptcy Trustee of Zetta Jet. At about 11.01am, Mr Wyles sent to Mr Tsiakis by email from his EA, which email stated "please find the attached fee agreement on behalf of Michael D Wyles Q.C., if you have any questions feel free to contact at any time". The letter signed by Mr Wyles stated "You may indicate your acceptance of my terms of retainer by returning to me a signed copy of this letter or by continuing to provide me with instructions in this matter."

2. Thereafter Mr Tsiakis, on behalf of DLA, both directly and via Mr Hennessey an employee of DLA continued to instruct Mr Wyles in the period, 31 May to 12 July 2018. Those instructions were given by telephone, email and in conference. At all times in giving those instructions by telephone and email Mr Tsiakis on behalf of DLA was engaging in conduct using telephonic services within the terms s 6(3) of the ***Competition and Consumer Act 2010 (C'th)***. In the period 31 May to 19 July 2018 (the date of Mr Wyles last invoice to DLA) Mr Tsiakis did not say any words to the effect that Mr Wyles' fees would not be paid in accordance with the terms of the retainer letter sent to him on 31 May 2018.

3. DLA failed and refused to pay Mr Wyles his fees of $348,975.00 (save for a payment of $75,000 made on 18 October 2018): (a) invoice dated 12 June (Tax invoice number 1180725); (b) 19

Filed on behalf of (name & role of party)	Michael Wyles QC and Rodrigo Pintos-Lopez, the Applicant
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June (Tax invoice number 1181413); (c) 22 June (Tax invoice number 1181815); (d) 6 July (Tax invoice number 1183006; and 19 July 2018 (Tax invoice number 1183853). Each of the said invoices was sent to Mr Tsiakis on the date of the invoice and was required to be paid within 14 days.

4. When Mr Wyles sought payment of his fees, (by a telephone call to Mr Tsiakis prior to 29 August 2018) Mr Tsiakis, in an email dated 29 August, suggested for the first time that DLA was not responsible to pay Mr Wyles the fees he had invoiced unless DLA received monies to do so from its client. Prior to Mr Tsiakis' email of 29 August 2018 (including on or about each of the dates when Mr Tsiakis received each of Mr Wyles' said Tax Invoices), in the course of his communications with Mr Wyles by telephone and email, using telephonic services, Mr Tsiakis had not said to Mr Wyles any words to the effect, that DLA would not pay Mr Wyles unless it had first been paid by its client. If Mr Tsiakis had said words to this effect to Mr Wyles on 31 May 2018, Mr Wyles would have declined to accept DLA's instructions. If Mr Tsiakis had said words to this effect to Mr Wyles, after 31 May 2018 up to 12 July 2018, Mr Wyles would have requested Mr Tsiakis to pay his outstanding fees and to put sufficient money in trust to cover any further fees, and in the absence of same having been done would have ceased to act immediately. As Mr Tsiakis at all times held the view that DLA was not responsible to pay Mr Wyles the fees he had invoiced unless DLA received monies to do so from its client and failed to articulate this view to Mr Wyles, his conduct in so failing was in breach of s 18 of the ***Australian Consumer Law*** (being Schedule 2 to the ***Competition and Consumer Act 2010 (C'th)***).

5. DLA remains indebted to Mr Wyles in the sum of $273,975.00 plus interest at the cash target rate plus 6%, which fees DLA refuses to pay.

6. On or about 13 November 2018, Mr Wyles sought to resolve DLA's refusal to pay his fees by attending a mediation conference convened by Mr Finkelstein A.O., Q.C. as mediator. Then by open offer made on 15 November 2018, Mr Wyles offered, by way of compromise, to accept the sum of $214,975 paid as to $110,000 on 18 November 2018 and the remaining $104,975 by 31 January 2019, which offer was left open for acceptance until 17 November 2018.

Mr Pintos-Lopez

7. On 8 June 2018, Mr Hennessey, on behalf of DLA, emailed Mr Pintos-Lopez requesting that he accept a brief in relation to an appeal in the Federal Court of Australia in which Mr Pintos-Lopez would be led by Mr Wyles. On that same day, at about 12:30 PM, Mr Pintos-Lopez provided to DLA his fee agreement by email stating "attached is my fee agreement for this matter".

8. The fee agreement, at clause 10, provides that it may be accepted by DLA by signing and returning a copy of the agreement or, alternatively, by continuing to provide Mr Pintos-Lopez with instructions in the matter. The scope of the work to be undertaken under the fee agreement was to prepare appeal papers for the Full Federal Court of Australia, and any variation of scope by

reference to any further instructions received from DLA. The fee agreement constituted the complete agreement between Mr Pintos-Lopez and DLA for the matter. Mr Pintos-Lopez was to be paid in the ordinary manner by submitting an invoice for work performed and for disbursements. Clause 9 of the fee agreement provides that payment to Mr Pintos-Lopez is due 30 days from the invoice date and that, failing payment within 30 days, interest may be charged from the date the invoice was issued at a rate not exceeding the cash target rate, fixed by the Reserve Bank Australia, plus 2%.

9. Following DLA's email of 8 June 2018, DLA provided instructions to Mr Pintos-Lopez and thereby entered into the fee agreement. Those instructions were given by telephone, email and in conference by Mr Tsiakis and Mr Ryan on behalf of DLA. At all times, those instructions from Mr Tsiakis and Mr Ryan on behalf of DLA constituted conduct using telephonic services within the terms of s 6(3) of the ***Competition and Consumer Act 2010 (C'th)***.

10. From on or about June 2018 until August 2018, Mr Tsiakis and/or Mr Hennessey represented to Mr Pintos-Lopez, on behalf of DLA and/or themselves, that he would be paid under the terms of the fee agreement for work performed. Those representations were made in trade and commerce. Those representations were false, misleading and deceptive, or likely to mislead or deceive, and were made in contravention of s 18 of the Australian Consumer Law in that:

    (a) the representations were likely to induce Mr Pintos-Lopez to do the work instructed by Mr Tsiakis and/or Mr Hennessey;

    (b) Mr Tsiakis and/or Mr Hennessey did not have reasonable grounds for making those representations; and

    (c) Mr Tsiakis and/or Mr Hennessey did not disclose to Mr Pintos-Lopez that they would not pay him on the terms of his fee agreement.

11. Mr Pintos-Lopez performed the work under the fee agreement and submitted invoices for that work:

    (a) On 29 June 2018, Mr Pintos-Lopez submitted a tax invoice (fee slip 341665) to DLA for work performed by Mr Pintos-Lopez from 8 June 2018 until 28 June 2018 in the amount of $53,240.

    (b) On 2 August 2018, Mr Pintos-Lopez submitted a tax invoice (fee slip 342352) to DLA for work performed by Mr Pintos-Lopez from 29 June 2018 until 17 July 2018 (and for repayment of a disbursement for a flight to Sydney), in the amount of $44,314.48.

The total amount for the two invoices referred to above is $97,554.48.

12. On 26 October 2018, Mr Pintos-Lopez's clerk, Mr Andrews, made demand of DLA to pay the outstanding invoices due to Mr Pintos-Lopez.

13. DLA did not query the invoices referred to above at the time they were presented or for many months thereafter. The demands made by DLA for work in relation to the matter required Mr Pintos-Lopez to work for long hours and outside normal business hours, sometimes requiring him to work until the early hours of the morning.

14. After receiving the demand for payment of his fees, DLA suggested for the first time in a letter dated 20 November 2018 that it was not responsible to pay Mr Pintos-Lopez the fees he had invoiced unless DLA received monies to do so from its client, Prior to DLA's letter of 20 November 2018 (including on or about each of the dates when DLA received each of Mr Pintos-Lopez' said tax invoices), in the course of his communications with Mr Pintos-Lopez by telephone and email, using telephonic services, Mr Tsiaskis and/or Mr Hennessey had not said to Mr Pintos-Lopez words to the effect, that DLA would not pay Mr Pintos-Lopez unless it had first been paid by its client. If Mr Tsiakis and/or Mr Hennessey said words to this effect to Mr Pintos-Lopez on 8 June 2018, Mr Pintos-Lopez would have declined to accept DLA's instructions.

15. Relying upon the representations referred to above, Mr Pintos-Lopez did the work as instructed. Had the representations not been made, Mr Pintos-Lopez would not have done the work.

B. Relief

Mr Wyles seeks orders that DLA immediately perform the retainer and pay to him the sum of $273,975 plus interest at the cash target rate, fixed by the Reserve Bank Australia, plus 6%, alternatively orders pursuant to s 236 or s 237 of the Australian Consumer Law that he be put in the position that he would have been in but for Mr Tsiakis' failure and refusal to inform Mr Wyles on 31 May 2018 that DLA was not responsible to pay Mr Wyles the fees he had invoiced unless DLA received monies to do so from its client, namely to have declined DLA's instructions and billed other solicitors for work for their clients on the days when Mr Wyles performed work for DLA for its client in the period 31 May 2018 to 12 July 2018.

Mr Pintos-Lopez seeks orders that DLA immediately perform the retainer and pay to him the sum of $97,554.48 plus interest the cash target rate, fixed by the Reserve Bank Australia, plus 2% from the date the bill was issued, alternatively orders pursuant to s 236 or s 237 of the Australian Consumer Law, mutatis mutandis the relief sought by Mr Wyles.

C. Legal grounds

Mr Wyles and Mr Pintos-Lopez proceed in breach of contract, alternatively relying upon s 6(3) of the ***Competition and Consumer Act 2010 (C'th)*** and paragraph 4(1)(a) and ss 18, 236 and 237 of the ***Australian Consumer Law.***

D. Harm suffered by Mr Wyles and Mr Pintos-Lopez.

Mr Wyles has suffered the loss of the use of $273, 975 (less GST) since at least 18 October 2018 and remains without the use of that money and has now been caused to expend legal fees and further time in recovering this debt.

Mr Pintos-Lopez has suffered the loss of the use of $97,554.48 (less GST) since at least 2 September 2018 and remains without the use of that money and has now been caused to expend legal fees in further time in recovering this debt.

This Concise Statement has been prepared by Mr Leath Nicholson of Nicholson Ryan Lawyers.

Dated: 20 December 2018.

Certificate of lawyer

I Leath Nicholson certify to the Court that, in relation to the concise statement filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 20 December 2018

Signed by Leath Nicholson
Lawyer for the Applicants