

IN THE MAGISTRATES' COURT OF VICTORIA  
AT MELBOURNE

Case No. N11438481

ANTON PETRUS TRICHARDT

First Plaintiff

and

MONIQUE ELIZABETH HARDINGE

Second Plaintiff

v

MIRKA CARMELLI

First Defendant

and

MITCH KARAFILI

Second Defendant

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<u>MAGISTRATE:</u>	Magistrate T. W. Greenway
<u>WHERE HELD:</u>	Melbourne Magistrates' Court (online)
<u>DATE OF HEARING:</u>	29, 30 May 2023 Final submissions on 10 July 2023
<u>DATE OF DECISION:</u>	24 July 2023
<u>CASE MAY BE CITED AS:</u>	Trichardt & Anor v Carmelli & Anor
<u>MEDIUM NEUTRAL CITATION:</u>	[2023] VMC 10

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CONTRACT - Costs agreements - Formation - Identification of parties - Acceptance by conduct of offer to enter into costs agreement - Liability for barristers' fees - Alleged contravention of disclosure requirements - *Uniform Legal Profession Law* ss 174(1)(b), 171, 176 and 178.

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<u>APPEARANCES:</u>	<u>COUNSEL</u>	<u>SOLICITORS</u>
For the Plaintiff	Mr P. Agardy	Charles Fice Lawyers
For the Defendant	Mr L. Watts	Kingsford Lawyers

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HIS HONOUR:

*Introduction*

- 1 This proceeding concerns a dispute about legal fees. The plaintiffs (**Trichardt** and **Hardinge**) are practicing barristers and members of the Victorian Bar. The first defendant (**Carmelli**) is the principal solicitor of the legal firm MCK Legal.
- 2 The plaintiffs assert that Carmelli retained them to act on behalf of Lifestyle Residences Hobsons Bay Pty Ltd (**Lifestyle**) in relation to the removal of a caveat (**Lifestyle Matter**).
- 3 In late October 2021, the plaintiffs each provided Carmelli with a Costs Agreement and Disclosure Statement.<sup>1</sup> The plaintiffs then worked on the Lifestyle Matter until approximately February 2022 and rendered invoices for their work. By their Complaint, the plaintiffs now seek the sum of \$57,030.83 (**Fees**)<sup>2</sup> from Carmelli in accordance with their retainer agreements.
- 4 Carmelli disputes any retainer with the plaintiffs. Furthermore, she denies providing the plaintiffs with instructions on the Lifestyle Matter. Alternatively, if the Court were to find a retainer with Trichardt, Carmelli contends that Trichardt has contravened s 174(1)(b) of the Legal Profession Uniform Law (**Uniform Law**)<sup>3</sup> and is barred from maintaining these proceedings<sup>4</sup> until the Fees are assessed. That section relevantly provides:

A law practice must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with sufficient information disclosing the change, including information about any significant change to the legal costs that will be payable by the client.<sup>5</sup>

- 5 The plaintiffs also allege that the second defendant (**Karafili**) is liable for their Fees.

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<sup>1</sup> Dated 27 and 28 October 2022 respectively.

<sup>2</sup> Being \$46,260.00 for Trichardt and \$10,770.83 for Hardinge.

<sup>3</sup> *Legal Profession Uniform Law Application Act 2014* (Uniform Law), Schedule 1.

<sup>4</sup> Uniform Law, s 178.

<sup>5</sup> Uniform Law, s 174(1)(b).

Karafili is a certified public accountant practicing under the name Mitch Karafili & Co. Karafili and Carmelli are domestic partners. They operate their businesses in separate offices located at 103 Lygon Street, Brunswick.

6 To establish liability, the plaintiffs rely upon an email sent by Karafili in respect of their Fees. In that email, Karafili wrote:

“... I just have authorised the barristers to proceed in removing the caveat. Anton and Monique, please proceed with the writ. I will take responsibility of paying the fees...” (16 December Email).

7 Karafili denies that the 16 December Email is legally enforceable. Further and alternatively, Karafili asserts that the plaintiffs have contravened s 176 of the Uniform Law and so are barred from maintaining this proceeding. Section 176 provides:

**176 Disclosure obligations of law practice regarding associated third party payers**

(1) If a law practice is required to make a disclosure to a client of the law practice under section 174 or 175, the law practice must, in accordance with subsection (2), also make the same disclosure to any associated third party payer for the client, but only to the extent that the details or matters disclosed are relevant to the associated third party payer and relate to costs that are payable by the associated third party payer in respect of legal services provided to the client.

(2) A disclosure under subsection (1) must be made in writing –

a. at the time the disclosure to the client is required; or

b. if the law practice only afterwards becomes aware of the legal obligation of the associated third party payer to pay legal costs of the client – as soon as practicable after the practice became aware of the obligation.<sup>6</sup>

8 In these circumstances, the principal issues for the Court’s determination are:

(a) whether Carmelli is liable for the Fees pursuant to the Costs Agreements sent by the plaintiffs;

(b) if so, has Trichardt contravened s 174(b) of the Uniform Law;

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<sup>6</sup> Uniform Law, s 176.

(c) as to Karafili, whether the 16 December Email constitutes a legally binding indemnity; and

(d) if so, have the plaintiffs contravened s 176 of the Uniform Law.

### *Carmelli - Retainer Agreements*

9 The background to the disputed retainer agreements was as follows.

10 The plaintiffs were introduced to Karafili and Carmelli by Mr Scott North (**North**), an accounting client of Karafili with a legal dispute. Together, the parties worked on the North dispute for a short period of time - Carmelli as instructing solicitor, Karafili as accountant, Trichardt and Hardinge as senior and junior counsel respectively.

11 Following this introduction, at a meeting on 29 September 2021 (**29 September Meeting**), Karafili mentioned to Trichardt and Hardinge that he had other clients with legal matters. One of those clients was Lifestyle. Karafili had been contacted by Mr David Burgess (**Burgess**) sole director of Lifestyle, and his son in law, Mr Dale Harrison (**Harrison**), its general manager.

12 At the 29 September Meeting, Karafili informed the plaintiffs that Lifestyle was in dispute with Mr Stergios Xanthoulas (**Xanthoulas**) over alleged entitlements under a Consultancy Agreement. This agreement related to the sale and development of a property at 272-278 Millers Road, Altona North (**Property**).

13 A central issue in the dispute concerned the true parties to the Consultancy Agreement. On the face of the document, Harrison and Xanthoulas were the named parties. However, Xanthoulas alleged that Harrison entered the Consultancy Agreement as Lifestyle's agent. Lifestyle disputed this.

14 Xanthoulas' claim against Lifestyle included \$1.7 million of unpaid commission and 10 per cent (10%) of the total net equity in the development of the Property. These monies were payable in consideration for brokering the sale of the Property to Harrison and/or his nominee. From these monies, Xanthoulas had agreed to deduct

landscaping and carparking costs paid for by the Developer [Harrison] at the Property by clause 22 of the Consultancy Agreement.

- 15 Lifestyle became the registered proprietor of the Property on or around 24 December 2020. In March 2021, Xanthoulas lodged a caveat over the Property to protect his alleged entitlements (**Caveat**). The Caveat prevented Lifestyle's from refinancing. Accordingly, it filed a Supreme Court application to remove the Caveat in April 2021. As part of its application, Burgess and Harrison both deposed that Lifestyle did not enter into the Consultancy Agreement.
- 16 The application was dismissed. The Supreme Court left open a further application to remove the Caveat, upon new circumstances. Orders were then made for Xanthoulas to commence proceedings to substantiate his caveatable interest.
- 17 On or around 4 May 2021, Xanthoulas filed his statement of claim against Lifestyle alleging the entitlements set out above (**Main Lifestyle Proceeding**).<sup>7</sup> Lifestyle retained Carmelli as its solicitor in the proceeding, together with Mr Ian Martindale KC (**Martindale**) as counsel. Carmelli and Karafili were not involved with the first application to remove the Caveat.
- 18 In its amended defence and counterclaim settled by Martindale, Lifestyle pleaded that the Consultancy Agreement was between Harrison and Xanthoulas:
- 13A. Further to paragraph 13, the defendant says that Harrison was not authorised by it to enter into the Lifestyle Consultancy Contract as its agent and did not do so.
- 13B. Upon the proper construction of the Lifestyle Consultancy Contract, if Xanthoulas is entitled to be paid the fee or given the 10% equity interest;
- (a) Harrison is the party liable;
- (b) The Defendant is not liable
- 13C. Harrison's promise to charge the Property with the payment of all amounts that may become owing by him to Xanthoulas under the Lifestyle Consultancy Contract was a charge over property yet to be acquired by him and could only become effective as a charge on the Property upon the

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<sup>7</sup> S ECI 2021 01418.

acquisition of the Property by Harrison.

13D. Harrison did not acquire any interest in the Property over which the charge could take effect.

13E. Therefore, Xanthoulas has no interest in the Property capable of sustaining his caveat number AU169079T (Caveat).

19 In its counterclaim, Lifestyle relied upon paragraphs 13A to 13E (inclusive) to seek an injunction requiring Xanthoulas to remove the caveat forthwith.

20 Returning to the 29 September Meeting, Karafili also informed Trichardt and Hardinge that Lifestyle wanted to make a second application to remove the Caveat. Karafili told them that Carmelli would provide the relevant documents if the plaintiffs were interested in acting in the matter. The plaintiffs agreed to assist.

21 On 29 September 2021 at 1:42pm, Carmelli first sent an email to Trichardt enclosing a series of documents related to Lifestyle's first application to remove the Caveat. Carmelli sent a second email at 1:46pm to Trichardt enclosing documents relating to the Main Lifestyle Proceeding. Trichardt forwarded the two emails and their attachments to Hardinge shortly thereafter.

*19 October 2021 Meeting*

22 On 18 October 2021, Hardinge wrote an email to Karafili and Trichardt following up the progress of the Lifestyle Matter. Relevantly that email stated:

Dear Mitch,

Anton and I wanted to touch base in relation to the other matters which you have mentioned to us over the past weeks.

Matters for Dale Harrison - Caveat Matter and other

Have you already forwarded these matters to Paul Buitendag at Johnson Winter & Slattery? If so, we will make contact with Paul and forward our costs agreements to him. MCK Legal have already provided us with the documents.

We understand there is some urgency with the caveat matter so we would like to attend to it as soon as we can.

## QLD Adverse Possession Matter

We will forward our costs agreements in this matter to you at Mitch Karafili & Co. Could we arrange a meeting on this matter later in the week?...

- 23 From this email, it is apparent that Lifestyle had not yet engaged an instructing solicitor, but a solicitor was contemplated. Karafili replied and scheduled a meeting at Trichardt's chambers for approximately 1:00pm on 19 October 2021. At 1:16pm on 19 October 2021, Karafili's office sent an email to Trichardt and Hardinge enclosing a link to the "Source Documents" relating to Lifestyle.
- 24 The plaintiffs' evidence was that Karafili and Carmelli were present at the 19 October meeting. Both plaintiffs gave evidence that, during conversations, Carmelli agreed that MCK Legal would act as solicitors on the Lifestyle Matter in the same way as the North matter. Further, the parties agreed that Karafili would be the 'main point of call' for instructions and documents in Carmelli's absence. As to more substantive matters, the parties discussed the viability of making a second caveat removal application, including whether there were new circumstances.
- 25 Karafili did not recall Carmelli being present at any meeting at Trichardt's chambers to discuss the Lifestyle matter.<sup>8</sup> In cross-examination, his evidence changed to Carmelli only attending one meeting on 26 October 2021, at his invitation.
- 26 Karafili also disagreed that the arrangement in the North Matter would apply to the Lifestyle Matter. When asked about any differences Karafili said:
- The difference was, I never discussed the issue with Trichardt and MCK Legal to do what I was doing with Trichardt. The only time that I would ever say anything was in passing, rather than sit down and get advice. Because as far as I was concerned, Trichardt was to provide a conference, legal advice as to how we could possibly proceed to remove the caveat.
- 27 Karafili accepted that counsel usually do not proceed in litigious matters without an instructing solicitor.
- 28 Carmelli, a solicitor admitted since approximately 2007, gave evidence that she

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<sup>8</sup> Affidavit of Mitch Mitat Karafili affirmed 2 November 2022 at paragraph [25].

attended only one meeting, on 26 October 2021. She denied attending the 19 October 2021 meeting and denied any agreement to be the instructing solicitor for the Lifestyle Matter. Further, she said that she never opened a file and had no instructions from Harrison or Burgess for the Lifestyle Matter.

29 On 19 October 2021 at 5:01pm, Trichardt sent Carmelli an email enclosing a Costs Agreement and Disclosure Statement for the first phase of the matter. It was between Trichardt and MCK Legal (as the Law Practice) in respect of Lifestyle (as Client). The Matter was 'caveat removal'.

30 On 20 October 2021 at 11:00am, Carmelli replied to Trichardt stating that the "costs agreement should be between you and Dale Harrison". Trichardt responded by email of 11:21am and enclosed a Costs Agreement "for Dale Harrison's matter". This Costs Agreement changed the client from Lifestyle to Dale Harrison.

31 Carmelli replied to Trichardt's email at 11:30am stating: "this cost agreement should be with Dale and not me". Trichardt responded at 11:36am stating:

Mitch said yesterday that you will be the solicitor in the matter. The matter is likely to be litigious and thus it is not a direct access matter. So the cost agreement has to be with your firm.

32 Carmelli did not respond to this email. In cross-examination about this, Carmelli said:

I don't have to accept it. I don't have instructions from a client. He [Trichardt] expecting me, just because Mitch Karafili says that I should be the solicitor on the record, which is not the case as far as I know, and he tells me that I should be. Mr Trichardt tells me that I should be. I don't have to accept that.

33 Trichardt's evidence was that he would not have accepted the brief for the Lifestyle Matter without an instructing solicitor.

34 Hardinge also sent a first Costs Agreement and Disclosure Statement to Carmelli, enclosed to an email sent at 10:57am on 20 October 2021. It provided for MCK Legal as the Law Practice and Dale Harrison as the Client. The Matter was Lifestyle Residences Hobsons Bay Pty Ltd (ACN 615 258 305) v Stergios Xanthoulas & Ors. Carmelli did not respond to this email. Hardinge's evidence was that, given the



matter was litigious, she would not have accepted instructions to act without MCK Legal/Carmelli as the instructing solicitor.

*26 October 2021 Meeting*

- 35 On 25 October 2021 at 1:57pm, Hardinge wrote an email addressed to both Carmelli and Karafili requesting further documents that were not uploaded to the “Source Documents” link provided on 19 October 2021.
- 36 On 26 October 2021 at 9:27am, Karafili emailed Trichardt requesting a meeting and the preparation of a ‘map as to where we go’. A meeting time of 1pm that day was subsequently arranged.
- 37 At 9:42am, Hardinge wrote a second email addressed to both Karafili and Carmelli following up her request for documents. Karafili’s office responded attaching some of the requested documents by email sent at 11:41am.
- 38 The meeting then took place at Trichardt’s chambers, around 1:00pm, with all parties present. Carmelli gave evidence that she attended with Karafili after an earlier meeting with Martindale and Karafili regarding the Main Lifestyle Proceeding. Carmelli’s evidence was that she attended because Karafili’s invited her. Carmelli described her interest as ‘practical’ and concerned whether there was an alternative way to lift the Caveat. However, Carmelli denied giving any instructions to the plaintiffs.
- 39 During the meeting, the parties discussed the fact that Lifestyle was the client and not Harrison. Further, a potential conflict of interest was identified in acting for both Lifestyle and Harrison.
- 40 Following the meeting, and in accordance with Karafili’s earlier request, Hardinge sent an email at 5:16pm to Carmelli and Karafili enclosing a ‘roadmap’ of actions required. The roadmap broadly set out the next steps required to proceed with a second application to remove the Caveat.

*27 October 2021 Meeting*

41 A third meeting took place at Trichardt's chambers at approximately 9:00am on 27 October 2021. Karafili and the plaintiffs were in attendance. The discussion at that meeting broadly concerned the 'roadmap' and documents required to progress the Lifestyle Matter.

42 At 12:34pm on 27 October 2021, Hardinge wrote an email addressed to both Carmelli and Karafili confirming the documents that were required and tentatively scheduled a further meeting on 29 October 2021 with Burgess and Harrison (**27 October Email**). The email also requested Karafili and Carmelli to ask Burgess to bring any relevant documents with him to the meeting.

43 The 27 October Email was referred to in cross-examination of the defendants.

44 When asked why the 27 October Email was addressed to her, Carmelli stated:

Because I'd attended that meeting and I don't know whether it was this morning the 27<sup>th</sup>, I thought it was the 26<sup>th</sup> that the meeting was held. And this is what was agreed that I would provide at that meeting.

Q - And I suggest that it would be documents you would provide by way of instructions to counsel? A - no.

Q - How would you describe it? A - courtesy providing documents which were in possession for the purposes of determining whether the caveat matter which was in the hands of Trichardt was viable as a potential court action.

Q - was the arrangement in the caveat matter that Mr Karafili would have been the first point of contact and the main point of contact with the barristers? A - I don't know what arrangements Mr Karafili had with Mr Trichardt but certainly there was no arrangement with me.

Q - I'm just querying why this was sent not only to Mr Karafili but also to you? A - because I had been at the meeting on the 26<sup>th</sup>.

Q - were you surprised to get that email? A - no because that would have been discussed that I would provide certain documents that I had.

45 Carmelli accepted that a costs agreement may be binding without a signature. However, her position was that she did not provide instructions to the plaintiffs.

46 Karafili was also asked about the 27 October Email in cross-examination. When asked why the 27 October Email was addressed to Carmelli, Karafili said:

I've got absolutely no idea.

Q - were you surprised to see her copied in? A - sure.

Q - you were surprised? A - yes.

Q - well you've probably heard the evidence earlier today that she's been copied into many many emails? A - absolutely, I know that, I've seen them.

Q - do you know why that would be? A - no.

Q - and she says she never complained about, never raised an issue about it. Did you raise an issue about it? A - I spoke to Anton on occasions, not very often, and he would say well that's the protocol and I would say well she's not involved, and we left it at that.

Q - well in fact you've sent a couple of emails later in the piece haven't you saying why are you involving Ms Carmelli? A - well that's right cos No. 1 I didn't, at the very beginning, I wanted to maintain the relationship with Mr Trichardt, and he knew that MCK Legal had nothing to do with it and it's clear as daylight.

Q - he knew that MCK Legal had nothing to do with it, was that what you said? A - MCK Legal.

Q - nothing to do with the Lifestyle caveat matter? A - yes, no involvement as far as briefing or instructing.

Q – why do you say that? A – cos she didn't. I never sat across the table from MCK Legal to discuss issues with this.

Q – well I'm not too interested in where you sat, but are you aware that both Mr Trichardt and Ms Hardinge have sent costs agreement to MCK Legal? A - I have, I have seen them.

Q – did you see them at the time? A – probably not exactly at the time, but MCK Legal I think from memory onforwarded them to me yes.

Q – it's pretty likely that happened isn't it, she would have said "look at this"?

A – what's this yes. I said well you need to write to them and tell them you have nothing to do with this and I think she did.

47 At 2:14pm on 27 October 2021, Hardinge emailed Carmelli enclosing an updated Costs Agreement and Disclosure Statement (**Hardinge Costs Agreement**). The email read:

Dear Mirka,

I enclose an updated costs agreement in this matter, now reflecting Lifestyle Holdings as the client rather than Dale Harrison and in respect of the work required in preparation of the application to remove the caveat.

48 The Hardinge Costs Agreement relevantly provided:

Barrister (I or me): Monique Hardinge

Law Practice (you): MCK Legal

Client: Lifestyle Residences Hobsons Bay Pty Ltd

Matter: Lifestyle Residences Hobsons Bay Pty Ltd (ACN 615 258 305) v Stergios Xanthoulas & Ors.

## 2. **Barrister's estimated legal costs**

You have engaged me to advise to prepare for and appear in an application for removal of a caveat in this Matter (Work). Based on the instructions with which I am presently briefed, I estimate that my legal costs to complete the Work will be approximately \$27,500...

## 4. **Billing**

I or my clerk will send you a bill at suitable breaks in the Matter and at the end of the Matter. My bill is payable when you receive it unless otherwise advised in writing.

I or my clerk may give bills to you in any way specified in Rules 73 of the *Legal Profession Uniform General Rules 2015*. For the purpose of Rule 73, you consent to receiving bills by email address or mobile phone number or by any other means of electronic transmission agreed to by you and us.

I may request that you provide payment in advance. These funds will be held in your trust account or my clerk's trust account until I render my fees and payment is required.

## 7. Agreement

By signing and returning a copy of this agreement, you agree to be bound by the terms of this agreement. You may also so agree in accordance with s 9(1) of the *Electronic Transaction (Victoria) Act 2000* (Vic) or by continuing to provide me with instructions in the Matter.

49 Carmelli replied at 2:38pm, stating "Thank you Monique. I will forward to client for his consent". Carmelli did not provide any further response to this email.

50 At 6:29pm, Trichardt sent an email to Hardinge and Karafili enclosing a document setting out his initial views on caveatable interests. Both Hardinge and Karafili responded with their comments the following day.

*28 October 2021*

51 On 28 October 2021 at 11:21am, Trichardt emailed Carmelli enclosing an updated Costs Agreement and Disclosure Statement (**Trichardt Costs Agreement**). It relevantly provided:

Barrister (I or me): Anton Trichardt

Law Practice (you): MCK Legal

Client: Lifestyle Residences Hobsons Bay Pty Ltd

Matter: Removal of caveat – Stergios Xanthoulas

2. Barrister's estimated total legal costs – section 174(1)(a)

Based on the instructions and documents with which I am presently briefed, I estimate that my total legal costs, including my charges and disbursements, for the Matter will be about \$75,200 plus gst...

## PART B – COSTS AGREEMENT

Section 180(1)(c) of the Uniform Law allows a barrister and a law practice to enter into a costs agreement regarding the calculation and payment of my charges.

This document is an offer to enter into a costs agreement in accordance with the information contained in the disclosure statement (Part A) given to you in compliance with Division 3 of Part 4.3 of the Uniform Law.

If you accept these terms, the disclosure statement and this document will make up the complete Agreement between us for the Matter. The Agreement may be enforced in the same way as any other contract.

You may accept the Agreement by writing to me indicating your acceptance, or by returning a signed copy of this document or by continuing to give me instructions in this Matter.

52 Carmelli did not provide a further response to this email.

### *1 November 2021 Meeting*

53 Late on 28 October 2021, Karafili emailed Trichardt and Hardinge to adjourn the 29 October 2021 meeting. The meeting was re-scheduled to 1 November 2021 (the day before Melbourne Cup Day).

54 A fourth meeting occurred at Trichardt’s chambers on 1 November 2021. There was no dispute that the plaintiffs attended the meeting together with Karafili, Burgess, and Harrison. However, there was a dispute as to whether Carmelli attended.

55 Carmelli’s evidence was that she did not attend, and she had taken a day of leave. As stated above, Karafili’s evidence was that he could not recall Carmelli at any meeting at Trichardt’s chambers, save for the 26 October 2021 Meeting. Both plaintiffs gave evidence that Carmelli was in attendance.

56 After the meeting, Hardinge wrote an email at 3:27pm to Karafili, Trichardt, and Carmelli entitled “Lifestyle v Xanthoulas – further documents needed” (**1 November Email**). That email was addressed to Karafili and thanked him for his time that afternoon. It confirmed receipt of various company searches and requested further information, as had been discussed in the meeting.

57 In cross-examination, Carmelli was asked why the 1 November Email was copied to her. She said:

No idea. A lot of documents were copied to me.

Q - were you surprised to receive copies of emails? A - No I was not surprised,

Q - did you ever ring or write back and say why are you involving me in this?

A - My recollection was that Mitch had made it very clear at that first meeting that he was responsible for all fees and instructions in this matter.

Q - do you remember that? A - well yes.

Q - what did he say? A - well exactly, he said he would be responsible for instructions and fees.

Q - as closely as you remember, what words did he use? A - I can't recall the precise words, but it was to the effect.

Q - are you sure it was at the first meeting? A - I think so yes. I'm pretty sure it was because I was under no illusion that I wasn't to be the instructing solicitor. I had no instructions from the client. I did not speak to the client about this matter at all. And I had reservations about starting this matter in the first place.

Q - there's nothing in the witness statement of either Mr Trichardt or Ms Hardinge to confirm what you've just said namely that Mr Karafili was responsible for the payment of fees. A - could you repeat that question?

Q - it was said to His Honour that at the first meeting, about 19<sup>th</sup> October, you remember going to the first meeting. A - the first meeting I remember I went to was on the 26<sup>th</sup> October, that was the first meeting that I went to.

Q - I have a recollection from your answers from my learned friend's

question that on your version you only went to one meeting A – correct.

Q – not to two, not to three? A – no.

Q – well I’ll come back to that. At that first meeting, what you’re telling the court is that Mr Karafili said he was responsible for payment of fees? A – I’m pretty sure he said something to that effect.

Q –I suggest to you he didn’t. And I suggest to you that if he had said that, it would have been recorded in the witness statement of Mr Trichardt or Ms Hardinge because it was a critical matter who’s paying the fees A – that was my recollection.

Q – did you make any notes? A – no I did not.

Q – did you send an email to anybody confirming that? A – I did not.

Q – did you send an email saying I’m not responsible for fees, do you understand everybody? You didn’t say that? A – No I did not because my clear understanding was that I was not involved. I was not the instructing solicitor.

58 Hardinge was pressed in cross-examination that her recollection of the 1 November 2021 Meeting was mistaken. The following exchange took place:

Q – in terms of that meeting, Ms Carmelli’s clear recollection is she was not at that meeting because she had taken a long weekend off, that’s a clear conflict of evidence between you, and I put it to you that you are in fact mistaken that she attended that meeting? A – No I am confident that Ms Carmelli was in attendance at the meeting on the 1<sup>st</sup> of November. My fee slip records who was in attendance at each meeting and for the 1<sup>st</sup> of November it records that Mr Trichardt, and I were in attendance. Mr Karafili and Ms Carmelli were in attendance and Mr Burgess and Mr Harrison also attended.

...



Q - [referring to paragraph 25(d) of Carmelli's witness statement as to whether instructions were given] that was correct? A - incorrect. As I said earlier, after that costs disclosure and agreement Ms Carmelli attended the meeting on the 1<sup>st</sup> of November where she provided instructions on the matter.

Q - what were her instructions on that day? A - the instructions in that meeting were in relation to...

Q - I asked what were her instructions, what did she say? A - I don't specifically recall her saying "my instructions are" that's not the way things generally work in these matters, she attended the meeting. At that meeting we were discussing the application and how it might be progressed. We were speaking with Mr Burgess. We discussed further materials needed moving forward to prepare.

Q - I don't have an issue that those matters were discussed, however, in that conference did Ms Carmelli say anything to the effect that as to what you were to do? A - yes Ms Carmelli was involved in those discussions as well.

Q - do you recollect anything specifically Ms Carmelli said? A - not specific words but that we were collecting that information in order to move forward and discussing how the application would go.

Q - no, you were collecting that information, that is correct, but if you are saying she gave you instructions at that meeting, my question is, what were those instructions? A - those instructions were that we were to continue considering the application and preparing the relevant materials.

Q - that's what she said, or Mr Karafili or what the clients said? A - that's what she said, both she and Karafili made contributions to that. But certainly, Ms Carmelli was involved in making those requests that we continue....

Q - and apart from what you say was her participation in that 1<sup>st</sup> of November meeting, you didn't get any written instructions from her? A - save for the provision of the materials, no other written instructions no.

59 Trichardt also maintained that Carmelli attended the 1 November 2021 Meeting. His evidence was that Carmelli never said she was not the instructing solicitor for Lifestyle and continued to be involved in meeting and receiving emails and documents.

60 On 3 November 2021 at 6:17pm, Trichardt sent an email to Carmelli, Karafili, and Hardinge enclosing a memorandum on the second caveat removal application (**3 November 2021**) It requested further information and documentation to draft and settle the application.

61 In cross-examination, Carmelli was taken to the 3 November Email. That exchange was as follows:

Q - do you know why you were copied in that document? A - no idea.

Q - do you remember receiving a copy? A - no I do not.

Q - did you think it was a normal thing to do? A - I thought maybe they wanted to keep me informed as to what was happening, but I didn't really take much notice of it because I was not providing instructions.

Q - well of course they wanted to keep you informed, I suggest to you that's because you were the instructing solicitor. A - I'm not the instructing solicitors, I've never been the instructing solicitors in this matter.

Q - if you weren't the instructing solicitor why would you want to be informed? A - why do you ask me?

Q - so you've had a series of these emails so far, there's more to come, not always addressed to you but you're copied into them, and you never objected to receiving them or you never said, 'why are you involving me?' A - no I did not.

62 Trichardt also emailed an updated memorandum to Karafili and Hardinge on 4 November 2021 at 2:01pm. Karafili replied advising the requested information

would be forwarded soon.

63 In mid-November 2021, Xanthoulas applied to amend the statement of claim in the Main Lifestyle Proceeding. On 5 November 2021, Hardinge wrote two emails to Carmelli and Karafili with attachments. The first email was sent at 3:16pm and said:

Dear Mitch and Mirka,

I attach a short note from Anton and I on the proposed amended statement of claim as it relates to the application for removal of the caveat.

There are a number of documents referred to in the note which we do not have copies of – we would be grateful if you could please follow these up and provide to us.

Many thanks.

64 The second was sent at 4:17pm

Dear Mitch and Mirka,

I attach a note from Anton and I on the relevant legal principles in relation to making a second application for removal of the caveat.

If you have any questions, please let us know.

65 On 10 November 2021, Hardinge wrote an email addressed to both Carmelli and Karafili requesting 21 ‘dot points’ of further information.

66 From mid-November 2021, there was a delay in the caveat removal application as Xanthoulas applied to join Burgess to the Main Lifestyle Proceeding. On 11 November 2021, Carmelli wrote to the Supreme Court advising that she acted for Lifestyle and Burgess.

67 On 19 November 2021, Trichardt emailed Karafili and Carmelli requesting an update as to when the further documents would be provided. Trichardt sent a further email to Karafili on 25 November 2021 forwarding Hardinge’s email of 10 November 2021.

68 On 24 November 2021, Carmelli emailed Trichardt enclosing the transcript of the Supreme Court application on 15 November 2021 stating, ‘Mitch has asked me to provide this to you’.

69 On 30 November 2021, Karafili provided Trichardt with the proposed amended statement of claim in the Main Lifestyle Proceeding. Trichardt also wrote to Karafili and Carmelli forwarding Hardinge's email of 10 November 2021. He wrote:

Dear Mitch

I hope you are well – no doubt very busy.

Could you please give me an indication as to when we will be receiving the information/documents mentioned below?

At this time of the year the courts tend to get busy with everyone wanting to have their matters heard, and I am concerned that we need to get moving if we want to get the application before Garde J this year.

Also please note that I will not be in chambers from 21 December 2021 and 8 January 2022.

I look forward to hearing from you.

70 On 3 December 2021, Trichardt wrote to Karafili regarding the amendment application in the Main Lifestyle Matter. He said:

Dear Mitch,

How did the pleading amendment application go today?

Any movement re providing us with the information and documents to finalise the application for the removal of the caveat? We are running out of time if we need to be in court this year.

I look forward to hearing from you.

71 On 8 December 2021, Trichardt emailed Karafili regarding the Supreme Court application. He wrote:

Hi

Hope you are well.

Did Garde J publish reasons for the dismissal of the application to amend the pleadings or is there a transcript? Looking forward to the info to settle the caveat application.

72 On 16 December 2021, Carmelli emailed Trichardt and Karafili enclosing the revised ruling dated 8 December 2021 in relation to the Supreme Court application. The

email simply read "FYI".

73 On 16 December 2021 at 8:59am, Karafili wrote the 16 December 2021. It provided:

Dale and David I just have authorised the barristers to proceed in removing the caveat

Anton and Monique, please proceed with the writ.

I will take the responsibility of paying the fees.

74 Karafili was taken to the 16 December Email in cross-examination. His evidence was that he sent the 16 December Email out of good will and had no costs agreement with the plaintiffs. The following exchange took place:

Q - and when you were referring to the fees, were you referring to fees in the future starting from 16 December, or were you referring to all the fees since the plaintiffs were retained? A - I was referring to the bills that were incurred prior to the 16<sup>th</sup> of December.

Q - you didn't get any invoices before the 16<sup>th</sup> of December did you? A - I'm not sure. I know the invoices by Mr Trichardt were addressed to me.

Q - let's go back, earlier today, there was an invoice of 21 January 2022 for \$51,040, that was the first invoice you received from either of them? A - Yes, I would pay this in advance to give them comfort that we're good for the money.

Q - I'll just ask that question again now, when you say 'paying the fees', were you referring to all fees incurred by the barristers in this matter? A - yes.

Q - not just the fees after December? A - no, the fees incurred up to the date, I don't know what they were, in good will, that's what normal people do.

Q - fees up to date and fees for the future as well? A - just up to date, whatever they were.

Q - you're saying this relates only to fees up to 16 December A - yes, I didn't

know what the fees are going to be in the future after that.

Q - but you got a bill on 21 January for 51 thousand odd dollars and you made part payment of that bill? A - yes.

Q - that bill related to work done before the 16<sup>th</sup> of December and some after the 16<sup>th</sup> of December? A - possibility, yes because I did not know what the total bill was up to the 16<sup>th</sup> of December.

Q - you didn't make a distinction along those lines? A - No.

...

Q - before the 16<sup>th</sup> of December, I put it to you that you weren't actually responsible personally for any counsel fees? A - no.

Q - this is when you adopted liability as it were? A - yes.

Q - now do you know that both counsel, Mr Trichardt and Ms Hardinge had been doing work before the 16<sup>th</sup> of December? A - yes.

Q - who did you consider to be liable for those fees? A - possibly myself.

Q - what do you mean possibly? A - I could have been cos there was no-one else. The person that I thought with absolute responsibility was Dale Harrison and David Burgess. They were responsible for their fees.

Q - but they didn't have an agreement with Mr Trichardt and Ms Hardinge?  
A - well neither did I. I didn't have one neither.

Q - well you accepted earlier today that counsel do not proceed in any matter that might be litigious without an instructing solicitor? A - sure.

Q - who was the instructing solicitor in this matter? A - there wasn't one.

Q - well who was liable for fees before the 16<sup>th</sup> of December? A - Dale Harrison and David Burgess.

Q – but this wasn't a direct brief, was it? You know what a direct brief is? A – not really no.

Q – This was not a brief from Mr Harrison, Mr Burgess, or Lifestyle to the plaintiff's, was it? A – well it depends on your definition because when we saw Mr Trichardt, from memory I stand to be corrected, it was the three of us, so therefore that was the people who gave him a direct brief. I can't remember if I was first and they came in later, whatever it was, the fees are the responsibility was Dale Harrison and David Burgess and that's why I promised Mr Trichardt the money and I rang the clients and they promised they would give me some money before, but they didn't, and I honoured my commitment, and these people reimbursed me. So, at the end of the day, the money came from Dale Harrison and David Burgess.

75 Also on 16 December 2021, Trichardt emailed Karafili and Carmelli regarding the Lifestyle Matter. He wrote:

Dear Mitch

I refer to our discussion this morning.

Mirka has emailed Garde J's ruling, and I have forwarded it to Monique.

You:

- have asked us to forward the email with the list of documents and information we need to finalise the application and affidavits to Amritaa – Monique could you please do so?
- Will let us know when the cut off date for the financing documents to be executed etc so that we know by when to issue the application and seek a hearing date. Although I will not be in chambers from Tuesday for the festive season, if it is necessary to do work on it and Monique has time to draft, I will access my emails etc and will settle documents – otherwise we can sort it out in the new year
- Dale has got money for the matter to proceed
- Have instructed us to proceed to settle the application, affidavits and the written outline of submissions.

Once we have the settled application etc, we will then approach the other

side and seek their agreement to withdraw the caveat, failing which the application be issued etc.

76 Later that afternoon, Hardinge forwarded the 10 November 2021 email to Amritaa at Karafili's office requesting the additional documents.

77 On 21 December 2021 at 2:37pm, Karafili wrote to Trichardt and Hardinge advising as to his thoughts on the caveat removal application. He said;

We've collated all the information you have requested and it's ready to be onforwarded to you but before we do that, we think that it's imperative that clause 8.1 be read in conjunction with clause 22 on the contract dated 29 November. According to our interpretation of that clause the consultant [Xanthoulas] is to pay for landscaping and carparking as stated on clause 22. A screenshot of both clauses are below for your reference and the full agreement is attached.

According to the developer the total fees of \$1,643,688 would therefore need to be deducted from the \$1.7m leaving a balance of ~57,000. So we say that we're happy to pay that amount for the sake of convenience.

Let us know of your interpretation of the above-mentioned clauses (8.1 & 22) in terms of this approach and if you agree with our thinking.

From what we have learned now, we think it is imperative that a counter claim should be filed against the consultant.

Please give us a call when you're free. I know you're currently overseas but I'm happy to have a quick chat with you about this.

78 Karafili, Trichardt and Hardinge had a telephone conversation at 8:00am on 22 December 2021 regarding these issues.

79 On 24 December 2021, Carmelli emailed the solicitors for Xanthoulas enclosing a letter which read:

We refer to your statement of claim dated 4 May 2021

Pursuant to clause 22 of the Consultancy Agreement between your client and Mr Dale Harrison a fee of \$1.7 million plus GST is alleged to be payable to your client less an amount equal to the cost of landscaping and carparking on the Greek Community Land paid by the developer.

For the purposes of clause 22 we advise that we hold copies of all invoices paid by Lifestyle Residencies Hobson's Bay Pty Ltd for landscaping and carparking works on land retained by Greek Orthodox Community of



Hobsons Bay Inc following the sale of part of its land pursuant to the contract of sale dated 30 November 2017 as varied by a Deed of Variation of Contract dated 12 December 2019. These invoices are to the value of \$1,643,688.00. There is also an additional payment of \$100,000 for consultancy fees payable to Mr Giannakoulis.

Please contact our office to arrange an inspection of the Lifestyle Residences Hobson's Bay Pty Ltd invoices.

Given the foregoing we suggest a meeting in the new year to try to resolve this matter without the need to incur further legal costs.

80 On 12 January 2022 at 3:59pm, Karafili wrote to Trichardt (copied to Harrison and Burgess) advising he had spoken to Harrison and Burgess and that both agreed to proceed with making the second caveat removal application.

81 At 4:32pm, Hardinge wrote to Karafili and Amritaa forwarding the 10 November 2021 email and requesting further information.

82 On 13 January 2022, Amritaa from Karafili's office wrote to Hardinge, Trichardt and Karafili providing an update as to the requested documents. She wrote:

Hi Monique,

I have discussed and gone through the files with Mitch and we agree that some of the documents you've requested in your email are relevant, and some we're not sure how they may be related to the removal of the caveat.

We believe and say that the most crucial documents that are related to the caveat are:

#### 1. Consultancy Agreement

- clause 8.1 regarding the \$1.7m
- clause 22 where it says it's been agreed that Xanthoulas will pay for landscaping, car park etc from his consultancy fees (as a form of contribution to his community - also mentioned in his attached affidavit)

#### 2. Contract of Sale

- clause 8.1(i) where it's very clearly stated that the purchaser will reimburse the vendor the cost of ancillary works (see attached COS)

3. Agreement where Xanthoulas' uncle is to receive a fee. Although the amount is not stated, the amount to be paid to the uncle was understood and

agreed by all parties to be \$100,000 from the fee of \$1.7m

4. Affidavit of Xanthoulas acknowledges points 1 & 2 above dated 12 April 2021

The above-mentioned documents are attached. Please advise the relevance of the other documents requested in our email (forwarded below). Are we not deviating from what we are trying to achieve by introducing other arguments and other documents?

Have we not established, by making reference to the above that there are no monies owing and if there is any money owing it would only be a small amount (and we are happy to put this amount in court)?

The previous application lodged with the court to have the caveat removed does not address any of the above, other than a lot of legal jargon without addressing the true facts and position of the matter on hand.

Please let us know your thoughts in relation to the above. We say the application should be as brief as possible and yes, all the matters of the Supreme Court of recent date should be attached but that is something for which we will rely on your advice.

We don't think we should argue before the court as to who owes the money (either Dale or Lifestyle) if there's any money owing, that is. We say that regardless of whoever owes the money or is responsible for the consultancy agreement, there's no outstanding monies. If anything, either Dale Harrison or Lifestyle are out of pocket.

We have asked Lifestyle to give us an itemised list of payments made and monies outstanding to be paid to do with the roadworks and landscaping per clause 22 of the Consultancy Agreement signed by Xanthoulas.

We have not yet onforwarded an invoice to Xanthoulas in reference to the monies he is required to contribute which would mean that it then becomes a set off.

Please feel free to reach out via phone or email if you'd like to discuss anything further.

83 At 3:58pm, Hardinge responded to Amritaa confirming that she and Anton would prepare the affidavit based on their assessment of the relevant issues and would highlight whether any further information was required.

84 On 14 January 2022 at 9:34am, Karafili emailed Trichardt and Hardinge stating '[he] was in a dilemma about sending the invoice to the Greek [Orthodox Community of Hobsons Bay Inc] by Lifestyle given that all the arguments have been that the

agreement was with Dale?”. Karafili requested a conference.

85 To that time, the pleadings and evidence in the Main Lifestyle Proceeding and first caveat removal application proceeded upon the basis that Lifestyle was not a party to the Consultancy Agreement. In contrast, the matters raised in Carmelli’s letter of 24 December 2021 and Amritaa’s email of 13 January 2022 suggested that Lifestyle was in fact a party to the Consultancy Agreement, so that it could obtain the benefit of cl 22.

86 Trichardt synthesised these matters in an email to Karafili and Hardinge on 17 January 2022 at 11:37am. In short, Trichardt outlined a two-fold approach. The principal argument was that Lifestyle was not liable to Xanthoulas pursuant to the Consultancy Agreement. Alternatively, if Lifestyle were liable, it was entitled to a set-off of landscaping and carparking costs pursuant to cl 22 of the Consultancy Agreement. Trichardt also informed Karafili that he and Hardinge would prepare the second caveat removal application and supporting submissions.

87 At 3:39pm, Amritaa from Karafili’s office forwarded the invoices for landscaping and car park development to support the clause 22 set-off.

88 On 21 January 2022, Trichardt’s clerk sent his first invoice to Karafili. It was not sent to Carmelli at that time. Karafili forwarded the invoice to Trichardt and stated: “by the time we end in court it will cost over \$100k.” Trichardt responded “Ok, what do you propose?”.

89 On 27 January 2022 at 11:25am, Trichardt wrote an email to Karafili and Amritaa which requested further clarification and information to finalise Burgess’ draft affidavit.

90 Amritaa and Karafili responded by email sent at 4:47pm. They wrote:

Hi Anton,

Sorry that we haven’t been able to get back to you as quickly as we’d have liked to.

We've considered all options in relation to this and if we say all this is Dale then we cannot pursue [Xanthoulas] for landscaping etc.

Lifestyle has a contract with McCorkel and has paid for the works related to the car park and landscaping works. We also have the Affidavit of [Xanthoulas] where he says he will pay for these costs...

We think that [Xanthoulas] never thought about what the costing is going to be. We say we should formulate the invoice and ask [Xanthoulas] to pay for these costs within 7 days or claim a set-off against consulting fees.

91 Trichardt responded by email at 4:57pm stating that such an approach was contrary to previous instructions and evidence. Trichardt followed up at 5:45pm requesting a meeting and the information requested. He also confirmed the principal and alternative arguments, as previously discussed with Karafili.

92 On 28 January 2022 at 11:11am, Karafili replied in a lengthy email. In summary, he stated that the application could not proceed to court on the previous arguments, as they did not represent the true events - namely, that, in his view, Harrison was representing Lifestyle. Karafili wrote relevantly:

My dilemma, in all this - how does one correct the legal mess created by the previous representatives as we cannot go to court on the previous arguments which to me as an accountant do not represent the true events that took place at the time and do not represent the intention of both parties. The question now is how does all this get resolved?

93 On 31 January 2022, Trichardt and Hardinge met with Karafili and Amritaa at Trichardt's chambers. Once again, the two arguments for the second caveat removal application were discussed together with further documentation that was required. The information requested related to Lifestyle's financing agreement and building contract. Hardinge circulated the minutes of the meeting at 5:21pm that evening. This was the last work performed by Hardinge on the Lifestyle Matter.

94 On 8 February 2022 at 8:58pm, Trichardt wrote an email to Karafili, following up a conversation that day, and confirmed that he would only involve Hardinge as and when requested by Karafili. Karafili responded on 9 February 2022 at 7:26am:

Anton I thought we dealt with Monique's involvement. Anton you introduced [Hardinge] you said you will introduce a junior to keep costs

down and we went along in what you said I am not sure why you bring it up.

95 On 10 February 2022 at 2:54pm, Trichardt emailed Karafili and Amritaa requesting a copy of any amended statement of claim in the Main Lifestyle Proceeding. Amritaa responded that “Mitch is organising to get this, as well as previously requested documents to you”.

96 On 11 February 2022 at 10:59am, Carmelli forwarded the Amended Writ and Statement of Claim dated 27 January 2022 in the Main Lifestyle Proceeding to Trichardt and Karafili.

97 On Monday 14 February 2022 at 9:51am, Karafili wrote to Trichardt stating that the application to remove the caveat had to be lodged soon. He wrote:

Anton we have to lodge all application to remove the caveat no later than Wednesday my hook or by crook. We have to lodge the application with the affidavits with what we have on hand. Please I am sending to you \$7k this morning from me. And I will pay you by the week end. Please let me know if you have an issue with my request.

98 At 6:52pm, Trichardt emailed Karafili and Amritaa and enclosed a draft affidavit of Burgess in support of the second caveat removal application. Karafili responded with his comments by email dated 15 February 2022 at 9:49am.

99 Trichardt responded to Karafili’s comments by email of 10:32am. In short, Trichardt reiterated the principal and alternative arguments previously discussed with Karafili and requested a conference with Burgess to discuss the draft affidavit. No such meeting occurred.

100 On 15 February 2022 at 1:32am, Trichardt emailed Carmelli and Karafili enclosing a draft of the Burgess supporting affidavit. Carmelli was taken to this email in cross-examination and the following exchange took place:

Q – in February 2022 Mr Trichardt is including you in the discussion, correct?

A – yes.

Q – did that surprise you? A – well not really. It didn’t surprise me, I thought

that it had been a pattern of behaviour from Mr Trichardt and Ms Hardinge.

Q – The plaintiffs are saying ‘we’ve got to send this to our solicitor’ here it is. And you’re saying you’re not the solicitor but you’re not saying to them why are you bothering me with this? A – it was also sent to Amirtaa from Mitch Karafili’s office, this is the email of the 15<sup>th</sup> of February.

Q – but I’m focussing on why it was sent to you and why you think it was sent to you? A – I have absolutely no idea why. I wasn’t involved in the matter.

101 At 11:48am, Trichardt emailed Karafili and Carmelli attaching the draft summons for the second caveat removal application. Both the draft Burgess affidavit and the draft summons recorded MCK Legal/Carmelli as the solicitor on the record.

102 On 18 February 2022 at 12:53pm, Trichardt emailed Karafili, Amritaa, and Carmelli enclosing a document recording his understanding of the facts and documents after further discussions with Karafili. Further documents were again requested. Karafili then forwarded Trichardt’s email to Burgess for his urgent attention.

103 On 22 February 2022 at 3:19pm, Trichardt wrote an email to Karafili, Amritaa, and Carmelli enclosing a further updated draft Burgess affidavit. By email of 3:24pm, Trichardt forwarded an amended summons. Again, the draft affidavit and summons recorded MCK Legal/Carmelli as the solicitor on the record. These documents were shown to Carmelli in cross-examination. The following exchange occurred:

Q – Who’s the instructing solicitor set out in these documents? A – it says it’s prepared by MCK Legal.

Q – that’s your firm? A – yes that’s my firm.

Q – you’ve seen those documents before? A – yes, I think so. Yes.

Q – you were copied into the email. So, if you’re not the instructing solicitor, how does your name appear on a draft summons and a draft affidavit in

support of the application to remove a caveat? A – well whoever prepared the document put my name there. I did not prepare that document, nor did I give instructions for the preparation of the document.

Q – just focussing on the document for the moment, you’re saying you’re not the instructing solicitor and you get from the barristers a draft summons and a draft affidavit with your name on it, and what do you say then? A – I didn’t say anything.

Q – that’s the point isn’t it, did you ring Mr Trichardt and Ms Hardinge to say “why did you put my name of this document”. It’s a serious matter isn’t it. They’re about to go to court, with this summons and an affidavit in support, I know they’re only drafts, but the documents recite that MCK Legal is the instructing solicitor, and those documents were sent to you? A – yes.

Q – and you did nothing about it? A – no I did not.

Q – did you ring Mr Trichardt and say “what are you doing? Why did you put my name on this document?” A – the documents were drafts, draft documents.

104 Karafili was also cross-examined on the draft summons and affidavit. The following exchange occurred:

Q – did you see the draft summons? A – sure.

Q – did you see the draft affidavit of Mr Burgess? A – sure.

Q – did you see the front cover? A – sure.

Q – and it said there “solicitor on the record – MCK Legal” – sure.

Q – which is Ms Carmelli? A – every time we had a meeting, that matter got brought up with Mr Trichardt. I never spoke to her in relation to this matter.

Q – but you saw her name on the court documents? A – sure, but there’s a lot

of people in my office that get cc'd, but the question is what their involvement is. There was no involvement from MCK Legal, I never spoke to her about this matter.

Q - well do you know why her name was on the court documents? A - Mr Trichardt is only one who can answer that.

Q - when you saw her name on those court documents, did you say anything? A - to who?

Q - were you surprised to see her name on the court documents? A - sure.

Q - given that degree of surprise, did you speak to Mr Trichardt about it? A - I spoke about it, that's why the word protocol came about because I kept on saying to him.

Q - no, I'm asking you now about a different point, I'm asking you what your reaction was when you saw Ms Carmelli's name of draft summons and the draft affidavit? A - that was a surprise and also that other documents that I received from Mr Trichardt had her name, she was cc'd onto it and when we met, I would say 'why are you cc'ing her' I mean she's got nothing to do with it.

Q - did you respond by email at any stage about that issue, which is, why is her name on the draft summons and affidavit? A - I did by saying in the email whatever date...

105 On 23 February 2022 at 4:41pm, Trichardt emailed Karafili, Amritaa, and Carmelli asking Burgess to review the affidavit and provide additional information.

106 On 24 February 2022, Karafili emailed Trichardt recording that he intended to pay him \$5,000 today and another \$5,000 the following Monday. At 10:53am, Karafili wrote an email entitled 'Commitment' to Harrison and Burgess. It read:

Must have commitment to pay the barrister it's a must guys you can not



undertake such a huge litigation without having a budget.

The barrister has to be paid and there is also court fees that need to get paid

My fees as well I have to devote less time on your matters and to spend more time on paying clients sorry guys.

- 107 By email of 10:39am, Karafili confirmed to Trichardt that Burgess had agreed to pay \$7,000. This was paid on 28 February 2022.
- 108 Trichardt then wrote to Karafili on 28 February 2022 at 3:56pm suggesting that once the Burgess affidavit was settled, the other side should be asked to withdraw the caveat. On 1 March 2022, Trichardt emailed a further draft of the Burgess affidavit to Karafili.
- 109 On 2 and 3 March 2022, Karafili wrote two emails to Trichardt about the latest Burgess affidavit and expressed his concerns as to its emphasis. Trichardt responded in a lengthy email of 3 March 2022 at 9:59am.
- 110 From this date on, the parties' working relationship deteriorated significantly. Karafili had paid \$12,000 to Trichardt, which he recouped from Burgess and Harrison.
- 111 On 4 March 2022, Trichardt's clerk sent Karafili and Carmelli his second invoice. Karafili replied advising that the fees were disputed and enquired why MCK Legal had been copied into the email. At 1:02pm, Trichardt wrote an email to Karafili as follows:

Dear Mitch

My clerks notified me that you dispute my latest invoice. I must say, I am surprised.

Please let me know on what basis - I have performed the work set out in the invoice in fact, I have done more for which I have not charged.

The invoice was copied because MCK Legal has instructed me.

There is still a significant amount outstanding and overdue in respect of my previous invoices (only \$12,000 has been paid) - your email of 16/12/21 stated that you took responsibility for paying the fees of the barristers. After

receiving my previous invoice your assured me on a number of occasions that my fees would be paid. I ask that you please attend to the payment of the outstanding amount of the invoice forthwith as it is overdue.

I have at all times dealt with you professionally, respectfully, openly, etc and trusted you, and based on that, and the costs agreement, I performed the work,

I think it is important that we meet to discuss the further conduct of the Lifestyle matter and the alleged issues with the latest invoice as soon as possible

I look forward to hearing from you.

112 On 7 March 2022 at 3:37pm, Trichardt wrote an email to Karafili and Carmelli entitled "Fees" asking when the \$39,040 outstanding under the first invoice would be paid, and what dispute had arisen in respect of the second invoice. Karafili's response at 4:42am on 8 March 2022 was that Trichardt's fees were "excessive for work done or should have been done". He also queried why Carmelli was copied into Trichardt's emails.

113 Trichardt responded by email of 8 March 2022 at 6:33am that "MCK Legal has a costs agreement with me". Karafili wrote back at 8:28am stating "Anton [Carmelli] was never involved you asked for the cost agreement by saying to comply with the protocol. What I am saying your fees are ... excessive". In cross-examination, Karafili explained what he meant by 'protocol':

As the matter was coming to an end, and Mirka was becoming involved in all this, I'm saying to Trichardt every time we had a conference because I didn't want it to create an issue. Why is Mirka involved. And he was saying because it's the protocol well what protocol, it's got nothing to do with it.

Q - you used the word protocol, didn't you? A - he would say you need an instructing solicitor and sure I've got no problem with that, but Mirka is not your instructing solicitor.

Q - who used the word protocol, your word? A - my word.

114 Trichardt replied by email at 9:17am to Carmelli and Karafili:

We are going around in circles.

The costs agreement is not just a protocol – it is required by the Legal Profession Uniform Law (Vic), as Mirka no doubt knows. And I have made it clear that if it is a litigation matter, instructions must be from a solicitor, which you are not. MCK’s Legal arrangement with you is for MCK Legal, but it does not excuse its liability to me for fees, and is in addition to your confirmation and assurance that you would be responsible for the barristers’ fees.

115 In cross-examination, Karafili said this email was self-serving and sent by Trichardt because Karafili kept bringing up Carmelli’s involvement. Karafili said Trichardt knew all along that Carmelli had nothing to do with the matter.

116 On 9 March 2022, Hardinge’s clerk sent Carmelli her invoice in the sum of \$10,770.88 for work done between 19 October 2021 and 31 January 2022. On 11 March 2022 an email exchange took place between Karafili and Hardinge. At 11:36am, Karafili wrote an email entitled “Fees” to Hardinge. It read:

Monique for the record Mirka had nothing to do with work that you are claiming to have performed in your invoice. The client has received an invoice from Anton as well and I must say quite a large invoice.

I have [been] under the understanding that a senior barrister engages a junior barrister and the junior barrister does most or all the work and the senior barrister reviews the work and obviously expresses his legal thinking.

In this case sorry Monique but every time we met you were taking minutes in what was said.

I am not going to begrudge your fees but have to be fair to the client.

It was said from the outset that MCK legal was named mainly to comply with legal protocol and that was said by Anton as Anton had said it to me post office box.

117 Hardinge responded by email at 12:24pm as follows:

Thanks for your email.

The invoice was sent by my clerk to Mirka as MCK Legal are the instructing solicitors for the matter and my fee agreement is with MCK Legal. Of course, you or the client can make the payment that is due under that invoice issued to MCK Legal if that suits you better.

118 Karafili responded at 12:27pm "Sorry Monique I can accept you terms of events. I dint [sic] think you received a brief from Mirka in real terms you were engaged by Antoine".

119 Hardinge replied at 6:07pm on 11 March 2022:

I am confused by your email – I was not engaged by Antone. As noted below, my fee agreement is with MCK Legal. Additionally, you'll remember that when you instructed us to continue the work in December last year, you indicated you would take responsibility for our fees – your email on same is attached.

I trust that MCK Legal or you will make the necessary arrangements.

120 On 21 March 2022 at 10:38am, Karafili wrote an email to Trichardt stating:

We have now Conflicting advise you un-qualified advise is that the application to have the caveat removed will be successful. Sure the lifestyle will proceed with that but the issue is your excessive fees. Sure there are fees owing to you no one is going to deny you that but the fees have to be with in reasons.

121 Karafili wrote a further email to Trichardt at 10:53am stating "Mirka has no involvement in any of this remember you referred to her as a post officer box".

122 Mediation of the Main Lifestyle Proceeding was scheduled for 20 May 2022 and subsequently extended. Throughout May 2023, Trichardt emailed Karafili following up payment of the invoices.

123 On 23 May 2023 at 3:42pm, Trichardt emailed Karafili requesting an update on the outstanding fees. Karafili replied on 25 May 2022 at 9:42am that "Mirka had nothing to do with any of this so lets not have an argument about that".

124 In a further email at 10:27am, Karafili said: "Anton to repeat your words 'Mirka will not be required to pay my fees we need to meet the ethical commitments', your words not mine. I don't want to fight with you neither or argue you never received any instruction from Mirka none at all."

125 On 31 May 2022 at 12:27pm, Hardinge wrote an email to Carmelli and Karafili:

Dear Mirka and Mitch,

I trust you are both well.

The attached bill remains overdue and is accruing interest.

I have received the below email which Mirka sent to my Clerk last month and I am disappointed that you both appear to be sending me around in circles, each denying responsibility for payment. If possible, I would like to resolve any issues in respect of this bill amicably.

It is clear that Mirka was the instructing solicitor on this matter and that she provided instructions to me. My fee agreement is with MCK Legal (see attached). The agreement was sent to Mirka on 27 October 2021 and Mirka personally acknowledged receipt of the agreement on the same date. My fees are within the estimate provided. Additionally, Mitch committed to being responsible for the fees in this matter on 16 December 2021 (email attached). I know Mitch has received this bill already, as he contacted me about it by email on 11 March 2022.

To date, no specific issues with the bill have been identified by either of you and it remains unpaid. As noted above, I would like to resolve payment of this bill without the need for proceedings if we can, given that will only waste further costs and time for all of us.

I would be grateful if you could arrange payment as soon as possible.

126 Karafili replied to Harindge by email at 12:42pm as follows:

The fact is that there [sic] the money is fees are in dispute. The only think that Monique did was take notes and type what ever was said at the meeting.

Mirka had nothing to do with this.

The account is in dispute and I will write to the legal commission about all this and let them deal with it and give us their opinion.

127 Further attempts to compromise the dispute between the parties proved unproductive. Upon being served with the Complaint dated 7 July 2022, Karafili wrote two further emails to Trichardt. First, at 10:07am he wrote:

Anton, you have authorised the complaint against me and mirka, and before all this it because some what very embarrassing... And I will involve the legal commission as well. Mirka never gave you a brief it was you that said she would merely be a post office box so emails can be send the same example you gave to do with some solicitor in St Albans to do with Kyabram lender that went broke.

128 Secondly, at 5:21pm he wrote:

Anton you told me that you acted and opposed an application where a solicitor was being sued where he acted as post office are you now going against your advice?

*Applicable Legal Principles – Costs Agreements*

129 Section 180(1) of the Uniform Law states that a costs agreement may be made in four ways:

- (a) between a client and a law practice retained by the client; or
- (b) between a client and a law practice retained on behalf of the client by another law practice; or
- (c) between a law practice and another law practice that retained that law practice on behalf of a client; or
- (d) between a law practice and an associated third party payer.

130 A law practice includes a sole practitioner.

131 The plaintiffs' pleaded case falls within the category specified in s 180(1)(c). In essence, they submit that Carmelli, by her conduct, accepted the terms of their respective costs agreements in that:

- (a) she received the costs agreements;
- (b) she provided documents to the plaintiffs;
- (c) she attended conferences with the plaintiffs;
- (d) she sent emails to, and received many emails from, the plaintiffs;
- (e) her name was on draft court documents recording her as the solicitor on the record; and
- (f) she admitted receiving the emails and draft court documents, and she raised

no objection to their contents or to the fact that they had been sent to her.

132 On the other hand, Carmelli submits that she did not accept the plaintiffs' costs agreements and says that:

- (a) by email sent to Trichardt on 20 October 2021 at 11:30am, she informed him that any Costs Agreement for work in the Lifestyle Matter should not be with her but with Dale Harrison;
- (b) she did not subsequently inform Hardinge of the client's consent to the Hardinge Costs Agreement;
- (c) she did not write to Trichardt or Hardinge indicating her acceptance of their respective costs agreements;
- (d) she did not sign the plaintiffs' costs agreements;
- (e) after receiving the said document, she gave no instructions to Trichardt or Hardinge, nor did she provide a brief to Trichardt or Hardinge, noting she had no instructions from Harrison and/or Lifestyle to brief Trichardt or Hardinge in the Lifestyle Matter; and
- (f) she had a conflict of interest and could not provide said instructions.

133 In the above circumstances, Carmelli submitted that she had expressly rejected the plaintiffs' offers as set out in the costs agreements and had not provided instructions.

134 It was common ground between the parties that a costs agreement may be accepted by conduct. The issue is therefore whether the conduct of the offeree, including their silence, would be regarded by a reasonable bystander as signalling to the offeror that the offer had been accepted.<sup>9</sup> Specifically, a solicitor may accept a barrister's written

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<sup>9</sup> *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2018] VSC 347, [456]; see, for example, *PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd* [2007] VSCA 310 [6] (Nettle JA), [63]-[64], [68] (Ashley JA, with whom Maxwell P agreed); *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1998) 14 NSWLR 523, 530B (Kirby P); 535E (McHugh JA, with whom Samuels JA agreed).

engagement terms by continuing to give instructions.<sup>10</sup>

*Trichardt's Costs Agreement*

135 Clause 10 of the Trichardt's Costs Agreement provided:

By signing and returning a copy of this document, you agree to be bound by the terms in it. *You may also agree to the terms of this document by continuing to provide me with instructions in the Matter.* [emphasis added]

136 Whether Carmelli is bound by the Trichardt Costs Agreement depends upon an assessment of all the circumstances of the case. Having reviewed the matters set out above, I consider the objective factors support a finding, on the balance of probabilities, that Carmelli was bound by the Trichardt Costs Agreement. My reasons are as follows.

137 The starting point is that Carmelli acted as instructing solicitor in the Main Lifestyle Proceeding. That proceeding sought removal of the Caveat. Commencing a second application to remove the Caveat was therefore an interlocutory step in the Main Lifestyle Proceeding. As Carmelli acknowledged, she had a practical interest in attending the 26 October 2021 conference with the plaintiffs to discuss alternative means of removing the Caveat.

138 Next, the Lifestyle Matter was litigious, and an instructing solicitor was contemplated by Karafili and the plaintiffs. This was confirmed by the email sent by Hardinge on 18 October 2021 to Karafili, advising that the plaintiffs would send costs agreements to the appropriate solicitor.

139 In accordance with this email, the plaintiffs sent the first version of their costs agreement to Carmelli after the meeting on 19 October 2021. As to the attendees of the 19 October 2021 Meeting and 1 November 2021, I prefer the evidence of Hardinge to Carmelli and Karafili. Her evidence that Carmelli attended the 19 October and 1 November 2021 was not undermined in cross-examination. Rather,

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<sup>10</sup> *Kliger Partners (a firm) v Lotzof* [2016] VSC 185, [70], [73], [75], [79], [85]-[86] (Cavanough J); *Swaab v Sayed* [2013] NSWSC 887 [26]-[28] (Kunc J).



she remained confident that her fee slip accurately recorded who was in attendance at each meeting. Having reviewed the voluminous contemporaneous documentation prepared by Hardinge, I accept her documents accurately record the events that occurred.

140 In contrast, Karafili changed his evidence as to which meetings Carmelli attended. I also consider Carmelli gave inconsistent evidence as to the events of the first meeting she attended. This is discussed further below.

141 The email exchanges between Carmelli and Trichardt are also important. Upon receipt of Trichardt's first costs agreement, Carmelli did not state that she had no instructions, or that she could not act as solicitor. Her email of 11:00am on 20 October stated: "the costs agreement should be between you and Dale Harrison". She reiterated her position by email at 11:21am stating: "this costs agreement should be with Dale [Harrison] and not me". Construed objectively, Carmelli was endeavouring to inform Trichardt that Harrison would be responsible for his fees and not her.

142 However, Trichardt did not accept that proposition. Trichardt replied at 11:36am that "this was not a direct access matter and so the costs agreement had to be with MCK Legal". Carmelli did not respond.

143 Pausing here, there was no evidence that the plaintiffs ever dealt directly with Lifestyle, Burgess, or Harrison. As to the liability for the plaintiffs' fees prior to 16 December 2021, I consider the defendants' evidence to be inconsistent and unclear. Carmelli maintained that Karafili had informed the plaintiffs that he would be liable for their fees from the first meeting, on her version, the 26<sup>th</sup> of October 2021.

144 I do not accept this evidence. By 26 October 2021, Carmelli was aware of Trichardt's costs agreements purporting to be with her firm. Carmelli's response was that Harrison was responsible for the fees, not Karafili. Her position was also inconsistent with Karafili's own evidence to the effect that Harrison and Burgess were ultimately responsible for fees prior to 16 December 2021. I consider the question of liability for

the plaintiffs' fees was an important, and relatively straightforward, matter for the plaintiffs. They make no reference to such a conversation in their evidence. I find there was no such discussion. Furthermore, for the reasons set out, I do not accept Karafili's evidence that Burgess and Harrison had a direct brief with the plaintiffs.

145 Carmelli's inaction then falls to be considered against all the circumstances. Having not disputed Trichardt's email of 20 October 2021 at 11:36am, Carmelli then attended meetings on 26 October and 1 November 2021. She was also copied into emails requesting documents and setting out advice on 25 October, 26 October, 27 October, 1 and 3 November 2021 (as set out above). At no stage, did she query why she was included in such correspondence or inform Trichardt that she was not accepting the terms of his first costs agreement. Further, Carmelli was aware, by those emails, that Trichardt was performing work on the Lifestyle Matter.

146 Carmelli also did not dispute Trichardt's Costs Agreement, which was sent to her at 11:21am on 28 October 2021. The terms of that document made clear that MCK Legal was engaging Trichardt on behalf of Lifestyle and would be liable for his fees, if Carmelli continued to give Trichardt instructions.

147 Following receipt of the Trichardt Costs Agreement, Carmelli attended and participated in, the 1 November 2021 meeting, together with her clients, Burgess and Harrison on behalf of Lifestyle. She was copied into the 1 November 2021 email requesting further documents, as well as the 3 November 2021 enclosing a memorandum as to removing the Caveat. The 21 'dot point' email of 10 November 2022 was also copied into Carmelli.

148 Furthermore, Carmelli provided documents that were requested by Trichardt and Hardinge and included:

- (a) on 24 November 2021, Carmelli emailed Trichardt enclosing the transcript of the Supreme Court application on 15 November 2021, stating "mitch has asked me to provide this to you"

(b) on 16 December 2021, Carmelli emailed Trichardt enclosing the revised ruling of the Supreme Court dated 8 December 2021, stating “FYI”; and

(c) on 11 February 2022, Carmelli forwarded the Amended Writ and Statement of Claim in the Main Lifestyle Proceeding.

149 I reject Carmelli’s characterisation of providing these documents out of courtesy. When evaluated in the context of the plaintiffs repeatedly requesting documents to perform their brief, I consider Carmelli’s provision of these documents to be a form of giving instructions. As previously stated, I consider there was a degree of overlap between the two matters. Such a conclusion is evidenced by Carmelli’s letter dated 24 December 2021, which contains matters that Karafili directly discussed with the plaintiffs. In these circumstances, the documents provided by Carmelli were relevant to the work being performed by Trichardt and Hardinge.

150 It appears that Carmelli was not copied in emails from approximately 12 January 2022 to 14 February 2022. During that time, Trichardt sent his first invoice to Karafili but not Carmelli. Whilst this evidence tends against Trichardt’s claim, I do not consider it is sufficiently probative to displace the other factors I have set out. This is because Trichardt considered both Carmelli and Karafili liable for his fees.

151 Finally, Carmelli did not raise any concerns when she received the draft affidavit and summons in mid-February 2022 bearing MCK Legal as the instructing solicitor. If Carmelli had not been the instructing solicitor for the Lifestyle Matter, I consider it likely that she would have objected to having her firm presented as the instructing solicitor. In this way, Carmelli’s inaction is evidence consistent with Carmelli acting as instructing solicitor and continuing to provide instruction to the plaintiffs.

152 In summary, I consider the above matters in totality support a finding that Carmelli did continue to give instructions to Trichardt. If Carmelli did not want to be liable for Trichardt’s fees, it would have been a simple matter to advise Trichardt of that fact. As I have found, Carmelli’s evidence as to the liability for the plaintiffs’ fees was inconsistent and unclear. In her email of 20 October 2021, she requested the costs

agreement be with Harrison. In evidence, she said Karafili undertook such liability from 26 October 2021. Both of the plaintiffs' costs agreements were sent after 26 October 2021, yet Carmelli did not raise either of those matters. The substance of her evidence remained that she was not the instructing solicitor for the Lifestyle Matter.

153 For the above reasons, I find that Carmelli was bound by the Trichardt Costs Agreement.

*Hardinge's Costs Agreement*

154 Clause 7 of the Hardinge Costs Agreement provided that:

By signing and returning a copy of this agreement, you agree to be bound by the terms of this agreement. You may also so agree in accordance with s9(1) of the *Electronic Transaction (Victoria) Act 2000*, or by continuing to provide me with instructions in the Matter. [emphasis added]

155 The first costs agreement that Hardinge sent Carmelli on 20 October 2021 went answered. After receipt, Carmelli was copied into emails on 25 and 26 October requesting documents relevant to the Lifestyle Matter. Carmelli then attended and participated in the 26 October 2021 Meeting.

156 Upon receiving the Hardinge Costs Agreement on 27 October 2021, Carmelli replied: "Thank you Monique. I will forward to client for his consent". The terms of the Hardinge Costs Agreement made clear that MCK Legal was engaging Hardinge on behalf of Lifestyle and would therefore be liable for her fees if Carmelli continued to provide [Hardinge] with instructions.

157 Importantly, Carmelli's response does not take issue with these terms. Rather, Carmelli states that she will ask the client for his consent to Hardinge's Costs Agreement. Objectively construed, I consider the reference to 'client's consent' to mean the appointment of Hardinge as junior counsel on the Lifestyle Matter. Carmelli did not dispute that her firm would be liable for Hardinge's fees.

158 Carmelli was then copied into correspondence requesting documents and setting out advice on 25 October, 26 October, 27 October, 1 and 3 November 2021 (as set out

above). At no stage, did she query why she was included in such correspondence or inform Hardinge that she was not accepting the terms of his first costs agreement. Carmelli was also aware, by those emails, that Hardinge was performing work on the Lifestyle Matter.

159 Further, Carmelli attended and participated in conferences on 26 October 2021 and 1 November 2021. Importantly, Burgess and Harrison (the clients referred to in Carmelli's email of 27 October 2021) were in attendance. The attendance of the clients and Carmelli, when viewed against the background set out above, is sufficient client consent to the Hardinge Costs Agreement.

160 For the above reasons, I find that Carmelli was bound by the Hardinge Costs Agreement.

*Trichardt Uniform Law – ss 174 and 175*

161 Carmelli and Karafili submit that Trichardt has contravened s 175(2) of the Uniform Law. To consider s 175, it is first necessary to set out s 174 which provides:

**Main disclosure requirement**

A law practice –

- (a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and
- (b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client –

together with the information referred to in subsection (2)

(2) **Additional information to be provided**

Information provided under –

...

- (b) subsection 1(b) must include a sufficient and reasonable amount of information about the impact of the change on the legal costs that will

be payable to allow the client to make informed decisions about the future conduct of the matter.

162 Section 175 of the Uniform Law provides:

**175 Disclosure obligations if another law practice is to be retained**

- (1) If a law practice (the *first law practice*) intends to retain another law practice (the *second law practice*) on behalf of a client, the first law practice must disclose to the client the details specified in section 174(1) in relation to the second law practice, in addition to any information required to be disclosed to the client under section 174.
- (2) If a law practice (the *first law practice*) retains or intends to retain another law practice (the *second law practice*) on behalf of a client, the second law practice is not required to make a disclosure to the client under section 174, but must disclose to the first law practice the information necessary for the first law practice to comply with subsection (1).

163 In summary, where a law practice (solicitor) intends to retain another law practice (barrister) on behalf of a client, section 175 of the Uniform Law prescribes that:

- (a) the second law practice (barrister) is not required to make a disclosure to the client under section 174;
- (b) the first law practice (solicitor) must disclose to the client the details specified in section 174(1) in relation to the second law practice's (barrister's) costs in addition to any information required to be disclosed to the client under section 174; and
- (c) the second law practice (barrister) must disclose to the first law practice (solicitor) the information necessary for the first law practice (solicitor) to comply with subsection 174(1)

164 The disclosure and estimate of legal costs must be in writing.

165 The defendants submit that Trichardt failed to provide an updated estimate of his total legal costs, after becoming aware that there was a significant change to the amount of work required to complete the Lifestyle Matter.

166 The total estimate of legal costs estimated by Trichardt was as follows:

<b>Nature of work</b>	<b>Estimate time required</b>	<b>Value</b>
1. Review of briefed material	3 hours	\$3,520
2. Advice	8 hours	\$5,280
3. Preparation and meetings with Mitch Karafili	4 hours	\$3,520
4. Preparation and meetings with Mitch Karafili, Mr Burgess and investors	5 hours	\$4,400
5. Settling applications and affidavits	30 hours	\$26,400
6. Settling written submissions in lifting of caveat application and also proposed amended statement of claim application	15 hours	\$13,200
7. Review of respondent's affidavits	6 hours	\$5,280
8. Settling reply affidavits	2 hours	\$3,520
9. Preparation of both applications	10 hours	\$8,800
10. Appearance to argue applications	Day	\$8,800
		<b>\$82,720 inc GST</b>

167 Of Trichardt's \$82,720 total costs estimate, the estimated total costs:

- (a) Steps 1 to 4, up to setting of applications and affidavits was estimated by Trichardt to be \$16,720 (inc GST); and
- (b) Steps 1 to 5, inclusive of settling the applications and affidavits, was estimated to be \$43,120 (inc GST)

168 Trichardt rendered two invoices totalling \$73,260 (inc GST):

<b>Invoice No.</b>	<b>Date of Invoice</b>	<b>Period covered</b>	<b>Amount inclusive of GST</b>
INVAPT616	21 January 2022	23/10/2021 to 10/11/2021	\$51,040
INVAPT621	4 March 2022	14/01/2022 to 21/02/2022	\$22,220

169 The 21 January 2022 invoice (**First Trichardt Invoice**) provided the following:

<b>Date</b>	<b>Particulars</b>	<b>Fees (inc GST)</b>
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23/10/2021	1. Review briefed documents (Hours Worked: 3h 0m)	\$2,640.00
25/10/2021	2. Review documents, research of legal issues re second interlocutory applications, bankrupts, review proposed amend statement of claim application (Hours Worked: 4h 0m)	\$3,520.00
26/10/2021	3. Review of folders provided by Mitch Karafili, meeting with Monique Hardinge and then with Mirka Carmelli and Mitch Karafili as well, and further meeting with Monique Hardinge (Hours Worked: 7h 0m)	\$6,160.00
27/10/2021	4. Research, note about lifting caveats, meeting with Monique and then also with Mitch Karafili, review of documents (Hours Worked: 6h 0m)	\$5,280.00
28/10/2021	5. Note to Mitch Karafili, preparation for application, research, telephone call with Monique Hardinge (Hours Worked: 3h 0m)	\$2,640.00
29/10/2021	6. Research on lifting caveats (Hours Worked: 1h 0m)	\$880.00
01/11/2021	7. Review further documents, discussion with Monique Hardinge, meeting with Mitch Karafili, David Burgess, Dale Harrison, Monique Hardinge (Hours Worked: 4h 0m)	\$3,520.00
02/11/2021	8. Research re 'and/or nominee' review of documents re timeline note to Monique Hardinge (Hours Worked: 3h 30m)	\$3,080.00
03/11/2021	9. Telephone discussion with Monique Hardinge, memorandum re documents required and legal arguments/issues for settling application, affidavits and submissions (Hours Worked: 10h 0m)	\$8,800.00
04/11/2021	10. Updating memorandum of 3 Nov 21 and further research (Hours Worked: 5h 0m)	\$4,400.00
05/11/2021	11. Telephone discussions with Monique Hardinge, notes on proposed amended statement of claim, its potential impact on the application to lift the caveat, and on second interlocutory applications (Hours Worked: 6h 0m)	\$5,280.00
08/11/2021	12. Telephone discussion with Monique Hardinge, review and request for outstanding documents, research and notes to settle application which were said to be made by end of November 2021 (Hours Worked: 3h 0m)	\$2,640.00
10/11/2021	13. Meeting with Mitch Karafili and Monique Hardinge and discussion with the latter re the	\$1,760.00



	foreshadowed application (Hours Worked: 2h 0m)	
10/11/2021	14. Settle note re outstanding documents and information to settle the application to lift the caveat by the end of November 2021 (Hours Worked: 0h 30m)	\$440.00
21/01/2022	15. Please note, this invoice is for work performed up until end of December 2021	
		<b>TOTAL - \$51,040</b>

170 The 4 March 2022 invoice (**Second Trichardt Invoice**) provided the following:

<b>Date</b>	<b>Particulars</b>	<b>Fees (inc GST)</b>
14/01/2022	Review of documents and preparation of note and for meeting with Mitch Karafili, meeting with Mitch Karafili (Hours Worked: 1h 0m)	\$880
28/01/2022	Review note from instructors and replay re documents required, information required and approach to application (Hours Worked: 0h 45m)	\$660
31/01/2022	Meeting with Mitch Karafili, Aamritha, Monique Hardinge (Hours Worked: 1h 0m)	\$880.00
08/02/2022	Meeting with Mitch Karafili, review of document forwarded by Amrithaa (Hours Worked: 1h 0m)	\$880.00
11/02/2022	Meeting with Mitch Karafili, list of outstanding issues, preparation of application and submissions (Hours Worked: 3h 0m)	\$2,640.00
14/02/2022	Settling application for removal of caveat, telephone call with Mitch Karafili, notes re questions and request for documents (Hours Worked: 6h 30m)	\$5,720.00
15/02/2022	Notes to instructors, amending draft affidavit, settle summons (Hours Worked: 3h 0m)	\$2,640.00
16/02/2022	Settling application documents, memorandum on issues to put to David Burgess, arguments for submissions (Hours Worked: 3h 0m)	\$2,640.00
17/02/2022	Meeting with Mitch Karafili, telephone discussion with Dale Harrison, research re trustee company and caveat (Hours Worked: 2h 0m)	\$1,760.00
21/02/2022	Telephone discussion with Mitch Karafili, settle application for removal of caveat (Hours Worked: 4h 0m)	\$3,520.00

171 Carmelli and Karafili submit that steps 1 to 4 of the costs estimate (\$16,720) were reached on 27 October 2021, by reference to items 1 to 4 (\$17,600) of the First Trichardt Invoice.

172 Steps 1 to 5 of the costs estimate (\$43,120) were reached on 5 November 2021, by reference to items 1 to 10 (\$40,920) of the First Trichardt Invoice.

173 Carmelli and Karafili acknowledge that the Uniform Law does not require a law practice to give estimates for stages of proceedings, only an estimate of total costs. Nonetheless, they submit that the actual costs reached at various stages provides the objective evidence of the ongoing accuracy of the costs estimate. Reliance is placed upon the following matters:

- (a) the First Trichardt Invoice in the sum of \$51,040, for work done between 23 October 2021 and 21 January 2022, was 61.7% of the total costs estimate. This did not include fees for settling the application and supporting affidavit;
- (b) the Second Trichardt Invoice in the sum of \$22,220, for work done between 14 January 2022 and 21 February 2022, was 88.6% of the total costs estimate;
- (c) Trichardt's services were terminated prior to Trichardt being able to render all the items of work set out in the total costs estimate;
- (d) The data in Trichardt's own material discloses that, as of 4 March 2022, an estimate of Trichardt's total costs would, at the minimum, have been \$112,860, being a figure 36.4% higher than the total costs estimate of \$82,720; and
- (e) The \$112,860 estimate comprises the following data from Trichardt's own documents:

Particulars	Fee inclusive of GST
First Trichardt Invoice	\$51,040
Second Trichardt Invoice	\$22,220

Settling written submissions in lifting of caveat application and also proposed amended statement of claim application	\$13,200
Review of respondent's affidavits	\$5,280
Settling reply affidavits	\$3,520
Preparation of both applications	\$8,800
Appearance to argue applications	\$8,800
<b>TOTAL - \$112,860</b>	

174 Finally, Carmelli and Karafili submit that the Burgess affidavit was not finalised, and therefore additional work was required.

175 Trichardt disputes any contravention of s 175(2) or 174(1)(b) and says further that the defendants have mischaracterised the effect of the provisions. It was submitted that s 175(2) requires a written estimate of total legal costs,<sup>11</sup> not individual stages of work. It is only a significant change to this estimate that triggers the obligation to provide information disclosing the change. A belief that there may be a significant change to something previously disclosed, including information about any significant change to the legal costs that will be payable by the client, is not sufficient to engage the provision.<sup>12</sup>

176 Trichardt also submitted that the process adopted by the defendants involved unwarranted speculation as to the progress of litigation. The court should recognise that estimating total legal costs is an inexact science, which involves a degree of informed guesswork.<sup>13</sup> Trichardt also gave evidence that he intended to perform the work for no more than the estimate he had provided.

177 In accordance with these principles, there was no scope for a line-by-line analysis of the costs associated with stages of work to be performed

***Determination of s 175(2)***

178 First, I consider that Trichardt was bound, upon any significant change to the

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<sup>11</sup> *Johnson v Dimos Lawyers* [2019] VSC 462, [17] and [19] per Wood AsJ.

<sup>12</sup> *Wills v Woolworths Group Ltd* [2022] FCA 1545 at [35] (Wills).

<sup>13</sup> *Cameron v Thomson Geer* [2020] VSC 75, [19] per Wood AsJ.

estimate of total legal costs (as a matter of fact), to provide Carmelli with information disclosing that change.

179 Section 175(2)(b) required Trichardt (a second law practice) to disclose to Carmelli (a first law practice) the information necessary for the first law practice to comply with s 175(1).

180 In turn, s 175(1) required a first law practice to disclose to their client the s 174(1) disclosure in relation to the second law practice (ie how counsel's fees are calculated, counsel's costs estimate and any significant change to these details), in addition to any information required to be disclosed under s 174. Consequently, a barrister must provide this information to their instructing solicitor.

181 Secondly, whether there has been a 'significant change' will depend upon an assessment of all the relevant circumstances. On the facts, I do not consider there was a significant change to the estimate of total costs for Trichardt's fees in the Lifestyle Matter.

182 The additional costs relied upon by the defendants do not make allowance for previous work completed by Trichardt. The items relied upon were:

1. Settling written submissions in lifting of caveat application and also proposed amended statement of claim application	\$13,200 or 15 hours
2. Review of respondent's affidavits	\$5,280 or 6 hours
3. Settling reply affidavits	\$3,520 or 4 hours
4. Preparation of both applications	\$8,800 or 10 hours
5. Appearance to argue applications	\$8,800 or 1 day

183 For the reasons set out below, I find that Items 1 and 4 were almost complete at the time the Second Trichardt Invoice was issued on 4 March 2022. Items 2, 3 and 5 were future matters. It is also important to note that the amount billed by Trichardt was \$9,460 less than his estimate of total costs.

184 Trichardt had already completed work associated with preparation (step 4) and settling submissions (step 1) on the following dates:

- (a) 27/10/21 – research, note about lifting caveats, meeting with Hardinge and Karafili and review of documents – 6 hours;
- (b) 28/10/21 – note to Karafili, preparation for application, research, telephone call with Hardinge – 3 hours
- (c) 28/10/21 – research on lifting caveats – 1 hours;
- (d) 3/11/21 – telephone discussion with Hardinge, memorandum re documents required and legal arguments/issues for settling application, affidavits and submissions – 10 hours;
- (e) 4/11/21 – updating memorandum of 3 November 21 and further research – 5 hours;
- (f) 10/11/21 – settle note re outstanding documents and information to settle the application to lift the caveat – 0.5 hours;
- (g) 11/2/22 – Meeting with Karafili, list of outstanding issues, preparation of application and submissions – 3 hours;
- (h) 16/2/22 – settling application documents, memorandum on issues to put to Burgess, arguments for submissions – 3 hours.

**Total – 31.5 hours**

185 When cross-references against Hardinge’s invoice to allow for conferences and applying an even division of time across the work mentioned, I consider that between 20 - 24 hours of work relates to preparation, research, and submissions. Accordingly, I find that the preparation and written submissions were almost complete when Trichardt rendered his second invoice. This conclusion is also supported by Trichardt’s evidence that he would complete the remaining work

within his estimate.

186 Further, I reject the contention that extensive additional work was required to settle the Burgess affidavit. Having reviewed the ultimate draft attached to Trichardt's email of 22 February 2022, I consider it almost entirely complete.

187 It follows that items 2, 3 and 5 were the only matters not part of Trichardt's invoices and the amount billed. This estimate of work totals \$17,600 for a 1-day appearance, review of respondent's affidavits and settling affidavits in reply. From this, the balance of the total costs estimate must be deducted: \$17,600 less \$9,460, which equals \$8,140 more than the total costs estimate. This equates to less than a 10% increase on the total costs estimate. In the above circumstances, I do not consider the increase amounts to a significant change.

188 In those circumstances, I find Trichardt has not contravened s 175(2).

*Hardinge Uniform Law – ss 174 and 175*

189 The defendants submit that Hardinge also contravened ss 174 and 175(2) of the Uniform Law. Such a defence was disallowed by the Court on 6 December 2022. Accordingly, it is not a defence currently before the Court.

*Karafili Indemnity*

190 The plaintiffs' claim against Karafili is based on the 16 December 2021 Email. It read:

Dale and David I just have authorised the barristers to proceed in removing the caveat

Anton and Monique, please proceed with the writ.

I will take the responsibility of paying the fees.

191 The plaintiffs submit this amounts to an enforceable promise and a primary liability (**Promise to Pay**), separate from Carmelli's liability. Karafili denies this and submits the Promise to Pay is unenforceable.

192 To be enforceable, the Promise to Pay must be supported by consideration. Here, the

plaintiffs continued to perform work on the Lifestyle Matter in exchange for the Promise to Pay. In those circumstances, I consider the Promise to Pay is enforceable.

193 The next issue relates to the fees covered by the Promise to Pay. On this point, the plaintiffs submit that the Promise to Pay related to all the fees of the plaintiffs, whether previously incurred or in the future.

194 This is a question of contractual interpretation. The construction of a written contract is concerned with ascertaining what a reasonable person would have understood the parties to mean. Consideration should be given not only to the language of the document, but also to the surrounding circumstances known to the parties and the apparent purpose and object of the transaction.<sup>14</sup>

195 When assessed objectively, I consider the 16 December 2021 Email amounts to a promise by Karafili to pay the plaintiff's fees of and incidental to the Caveat removal application, on a prospective basis. The language relates to actions about to take place. This interpretation follows from the combined use of the words, "I have just authorised the barristers to proceed... please proceed" and future tense "I will take responsibility of paying the fees". It is also supported by timing. By 16 December 2021, the Lifestyle Matter had progressed past initial conferences, and was more focussed on the application and supporting affidavit itself.

196 Having reviewed Trichardt's and Hardgine's invoices, I consider Karafili's liability to the plaintiffs is as follows:

(a) Trichardt - \$22,220.00 being the Second Trichardt Invoice for work carried out post 16 December 2021

(b) Hardinge = \$3,833.33 being the items on Hardinge's invoice after 16 December 2021.

*Uniform Law – s 186*

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<sup>14</sup> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165.

197 In his defence, Karafili claims that Trichardt and Hardinge have contravened s 176 of the Uniform Law, in that they have not provided him with adequate disclosure as an associated third party payer.

198 Section 176 of the Uniform Law provides:

**176 Disclosure obligations of law practice regarding associated third party payers**

(1) If a law practice is required to make a disclosure to a client of the law practice under section 174 or 175, the law practice must, in accordance with subsection (2), also make the same disclosure to any associated third party payer for the client, but only to the extent that the details or matters disclosed are relevant to the associated third party payer and relate to costs that are payable by the associated third party payer in respect of legal services provided to the client.

(2) A disclosure under subsection (1) must be made in writing –

- (a) at the time the disclosure to the client is required; or
- (b) if the law practice only afterwards becomes aware of the legal obligation of the associated third party payer to pay legal costs of the client – as soon as practicable after the practice became aware of the obligation.

199 Section 171 of the Uniform Law refers to third party payers:

**171 Third party payers**

(1) For the purposes of this Law –

- a. a person is a “third party payer”, in relation to a client of a law practice, if the person is not the client and –
    - i. is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client; or
    - ii. has already paid all or a part of those legal costs under such an obligation; and
  - b. a third party payer is an associated third party payer if the legal obligation referred to in paragraph (a) is owed to the law practice, whether or not it is also owed to the client or another person; and
  - c. a third party payer is a non-associated third party payer if the legal obligation referred to in paragraph (a) is owed to the client or another person but not the law practice.
- (2) The legal obligation referred to in subsection (1) can arise by or under contract or legislation or otherwise.



- (3) A law practice that retains another law practice on behalf of a client is not on that account a third party payer in relation to that client.
- (4) The Uniform Rules may provide that particular references in this Law to a client include references to an associated third party payer.

200 Karafili submits that the combined effect of ss 175 and 176 required the plaintiff to disclose to the first law practice (Carmelli) the information necessary for Carmelli to comply with her disclosure obligations under s 175(1), pertaining to the plaintiff's costs. Such disclosure was required immediately upon receiving the 16 December 2021 Email.

201 In response, the plaintiffs submit as follows:

The disclosure obligation under section 176(1) of the Uniform Law is that of the law practice under section 174 (in this case, Carmelli) or the first law practice under section 175 of the Uniform Law (in this case Carmelli), because the second law practice under section 175 (in this case Trichardt and Hardinge) does not have any disclosure obligation under s 174 and it only has the limited disclosure obligation under section 175(2) to the first law practice (in this case, Carmelli). Since neither Trichardt nor Hardinge has a disclosure obligation under section 174 or 175(1) of the Uniform law, section 176 does not apply to them.

202 In my view, for the reasons substantially advanced by the plaintiffs, I consider that the plaintiffs were not required to provide disclosure to Karafili pursuant to s 176(1). First, there is no doubt that Karafili is an associated third party payer, having become liable to the plaintiffs for payment of all or part of their legal costs for legal services provided to Lifestyle. Further, Karafili has made payments pursuant to that obligation.

203 However, the obligation to make disclosure to an associated third party payer is conditional upon a law practice being required to make a disclosure to a *client of the law practice* under section 174 or 175.

204 Section 175(2) makes clear that a second law practice (barrister) is "not required to make a disclosure to the client under section 174". That disclosure is required of the first law practice (solicitor who retained the barrister) under s 175(1). The second law practice's obligation to disclose is to the first law practice pursuant to s 175(2).

205 For those reasons, the plaintiffs have not contravened s 176 of the Uniform Law.

*Conclusion*

206 Subject to further hearing, the result of conclusions set out above is that Karafili and Carmelli are jointly and severally liable for fees after 16 December 2021:

(a) \$22,220.00 to Trichardt; and

(b) \$3,833.33 to Hardinge

207 Carmelli is solely liable:

(a) \$24,040 to Trichardt; and

(b) \$6,937.59 to Hardinge.

208 I will hear the parties on the question of costs and the appropriate form of orders.

MAGISTRATE GREENWAY

25 July 2023