

the Badanami Centre for Indigenous Education and later as a study smart tutor assisting students with academic literacy. Following this, I completed a Master of Digital Information Management at the University of Technology, Sydney with the aim of working in information management. This led to a position as a research administrator in what was formally the Research and Innovation Office at UTS. This role primarily involved providing administrative support to academics in preparing applications for research funding and funding agreements for research projects.

After working at UTS for about two years, I moved overseas to Canada for approximately 18 months between

2018–2020. I lived in Quebec City in the French province of Quebec. Here, I learned basic French and how to survive winters with temperatures of minus 20 degrees Celsius.

When the COVID-19 pandemic hit, I returned home to Sydney via London. It was at this point that I became a casual lecturer in the Graduate Diploma of Australian Migration Law program and later the B Laws program at Western Sydney University. Given I was working as a casual academic who loved teaching the law, I decided it was time to attempt the NSW Bar exam and commence practice as a barrister.

After successfully passing the Bar Exam in June 2021, I commenced

reading in May 2022. As a junior barrister, I am still very much at the beginning of my career. Having said that, I have come to appreciate the ability to make a real impact on the lives of people through my work as a barrister and as a casual lecturer.

For anyone who is contemplating a career at the Bar, the only advice I have is to step forward and embrace it. You will make mistakes and you will have many difficult days which will serve as memorable learning experiences. Having said that, you will engage in a profession that enables you to have a meaningful impact on the lives of others in a way that is both intellectually rewarding and emotionally satisfying. ■

By Dipal Prasad

## Can a solicitor's spouse become liable for barristers' fees?

**T**richardt v Carmelli<sup>1</sup> was a dispute over legal fees involving two plaintiffs, practising barristers, and two defendants, the principal solicitor of MCK Legal and her domestic partner, a public accountant.

The plaintiffs claimed \$57,030.83 for work related to the removal of a caveat for Lifestyle Residences Hobsons Bay Pty Ltd. The defendant solicitor disputed the retainer and denied instructing the plaintiffs. The plaintiffs alleged the second defendant was also liable based on an email. The Court determined the solicitor's liability for the barristers' fees, the consequences of potential contravention of costs disclosure obligations by the barristers and, for the solicitor's domestic partner, the enforceability of an email as a binding indemnity.<sup>2</sup>

### RETAINER AGREEMENTS: THE DANCE

The dispute revolved around the acceptance of retainer agreements by the solicitor. The Court meticulously analysed the conduct of the parties, emphasising the nuanced nature of accepting retainer agreements through actions and communication.

Magistrate Greenway discussed the legal principles applicable to the formation of costs agreements, observing the barristers' contention that s180(1)(c) of the *Legal Profession Uniform Law Application Act 2014* (Vic) (LPUL) applied, that is, that a costs agreement may be made 'between a law practice and another law practice that retained that law practice on

behalf of a client'.<sup>3</sup> The barristers asserted that the solicitor, by her conduct, accepted the terms of their respective costs agreements.<sup>4</sup> The solicitor rebutted this by stating that she had 'expressly rejected' the barristers' proposals set out in the costs agreements and did not provide instructions.<sup>5</sup>

While it was common cause between the parties that a costs agreement may be accepted by conduct, the Court, faced with conflicting positions, had to determine '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>6</sup>

The Court scrutinised the terms of each plaintiff's costs agreement, focusing on cl 7 of the second plaintiff's, which allowed agreement to be established by signing, electronically or by continued instruction. Despite the solicitor's lack of response to the initial agreement sent on 20 October 2021, her subsequent actions, including her active participation in meetings and acknowledgment of emails, were deemed by the Court as implicit acceptance.<sup>7</sup> Upon receiving the second plaintiff's costs agreement on 27 October 2021, the solicitor expressed gratitude and indicated her intent to forward it to the client for consent. Crucially, she neither contested the agreement's terms nor disputed her firm's liability for the second plaintiff's fees. The Court interpreted the solicitor's inclusion in correspondence and her attendance at client-present meetings as implicit acceptance, deeming her legally bound by the terms of the second plaintiff's costs agreement.<sup>8</sup>

Similarly, after a comprehensive assessment of the circumstances, the Court found that objective factors bound the solicitor to the first plaintiff's costs agreement on the balance of probabilities. Notably, she acted as an instructing solicitor in the substantial proceeding with Lifestyle Residences Hobsons Bay Pty Ltd, where caveat removal was an interlocutory step. The solicitor attended meetings on 26 October and 1 November 2021, and was copied into various emails requesting documents, indicating her active involvement.<sup>9</sup> In addition, the solicitor provided documents requested by the first plaintiff, which the Court considered a form of instruction, contributing to her involvement in the matter.

Email exchanges between the first defendant and the first plaintiff played a crucial role, as the defendant solicitor did not dispute the agreement's terms and actively participated. She attempted to attribute liability to the general manager of Lifestyle Residences Hobsons Bay Pty Ltd, but the barrister did not accept this, and the solicitor did not dispute further.<sup>10</sup> Her lack of objection, and inconsistencies in her evidence, contributed to the Court's conclusion that she was indeed bound by the barrister's costs agreement.<sup>11</sup> The Court emphasised that the solicitor's inaction and failure to communicate her non-liability for the barrister's fees were key factors in this determination. The Court also clarified that 'a solicitor may accept a barrister's written engagement terms by continuing to give instructions'.<sup>12</sup>

### CONSEQUENCES OF COSTS DISCLOSURE CONTRAVENTION

The defendants argued that the first plaintiff contravened his costs disclosure obligation pursuant to pt 4.3 of the *LPUL* and was barred from maintaining debt recovery proceedings pursuant to s178.<sup>13</sup>

In October 2021, the first plaintiff disclosed his estimate of total legal costs, amounting to \$82,720, inclusive of GST.<sup>14</sup> The total legal costs billed for services rendered between 23 October 2021 to 21 February 2022 amounted to \$73,260 – well within the disclosed estimate. Despite this, the defendants argued that the first plaintiff violated s175(2) of the *LPUL* by not providing an updated estimate of total legal costs after a significant change in the scope of work, given that his services were terminated before he was able to complete all tasks outlined in the total costs estimate.

The defendants alleged that the data in the first plaintiff's own material demonstrated that, as of 4 March 2022, an estimate of his total costs would, at the minimum, have been \$112,860 (by adding fees invoiced and previous estimates for stages of work not yet carried out).<sup>15</sup>

Magistrate Greenway confirmed that the barrister 'was bound, upon any significant change to the estimate of total legal costs (as a matter of fact)' to supply the solicitor 'with information disclosing that change', pursuant to s175(2)(b).<sup>16</sup> His Honour further explained that 'whether there has been a "significant change" will depend upon an assessment of all the relevant circumstances'.<sup>17</sup>

During this assessment, his Honour found that some of the not-yet-carried-out work was nearly complete and was included in the last invoice.<sup>18</sup> The only outstanding tasks were reviewing the respondent's affidavits, settling reply affidavits and a one-day appearance.<sup>19</sup> Given that the costs invoiced

were \$9,460 less than the estimated total costs, and the Court's calculation indicated that, if all work was completed, the barrister's fees could have been \$8,140 more than the total costs estimate – representing less than a 10% increase, the Court did not deem this change significant.<sup>20</sup>

In light of this, the barrister was not found to have violated s175(2), thereby avoiding statutory bar under s178 from pursuing the debt recovery proceeding.

The Court's scrutiny demonstrates a crucial point: even if a practitioner's fees are lower than the disclosed amount, non-compliance with disclosure obligations may be asserted if the retainer terminates before the practitioner can charge their full fees which, on objective analysis, would have exceeded the disclosed amount. In such instances, the Court could find a failure to comply with disclosure obligations for not providing an updated estimate of total legal costs after recognising a significant change in the scope of work and costs.

### INDEMNITY BY THE SOLICITOR'S DOMESTIC PARTNER

The barristers claim against the solicitor's domestic partner was based on a promise he made in an email dated 16 December 2021:

'... I just have authorised the barristers to proceed in removing the caveat.

Anton [Trichardt] and Monique [Hardinge], please proceed with the writ.

I will take responsibility of paying the fees.<sup>21</sup> The second defendant denied that the email was legally enforceable. The Court found that, for the promise to pay to be enforceable, it had to be supported by consideration. The ongoing work performed by the barristers in removing the caveat was deemed sufficient consideration, rendering the promise to pay enforceable.<sup>22</sup>

The second defendant raised a defence under s176 of the *LPUL*, alleging that the plaintiffs failed to provide the adequate disclosure required to be made to him – an associated third party payer – and so, pursuant to s178, were barred from maintaining this debt recovery proceeding.<sup>23</sup>

Magistrate Greenway agreed that the defendant accountant was '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' and had 'made payments pursuant to that obligation'.<sup>24</sup> According to s176(1), if a law practice is required to disclose information to a client under s174 or s175, it must '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'.<sup>25</sup>

However, his Honour confirmed that s176 did not apply to the plaintiffs, since s175(2) clarifies that a second law practice (in this case, the barristers) is not required to make a disclosure to the client under s174. The obligation to disclose lies with the first law practice (the solicitor, in this case) under s175(1). The second law practice's obligation is limited to disclosing to the first law practice under s175(2).<sup>26</sup>

With respect of the scope of the promise to pay, the barristers asserted that it covered all their fees, both incurred and future. The Court approached this issue through contractual

interpretation, considering the language, surrounding circumstances and the purpose of the transaction.<sup>27</sup> The Court concluded that the promise to pay related to the barristers' fees of and incidental to the Caveat removal application, on a prospective basis, based on the wording of the email and its timing in the progression of the case.<sup>28</sup>

The Court then assessed the accountant's liability for the barristers' legal fees. The breakdown included \$22,220 to the first plaintiff for work post 16 December 2021, and \$3,833.33 to the second plaintiff for relevant items on the invoice after the specified date.<sup>29</sup> Additionally, the Court ruled that the defendants were jointly liable for these amounts, with the first defendant bearing sole responsibility for an additional \$24,040 to the first plaintiff; and \$6,937.59 to the second.<sup>30</sup>

**LESSONS LEARNED: CLARITY IN LEGAL RELATIONSHIPS**

*Trichardt v Carmelli* is a cautionary tale, highlighting the intricacies of accepting retainers and fulfilling disclosure obligations in legal relationships. The Court's meticulous examination of conduct and communication underscores the need for practitioners to express their intentions explicitly. Failure to do so may not only lead to misunderstandings but also trigger potential liabilities for fees. This tale also unveils a

unique scenario where an instructing solicitor's domestic partner found himself entangled in a legal web, assuming liability for the fees of two barristers, and reveals the far-reaching consequences of ambiguity in professional engagements. ■

**Notes:** 1 [2023] VMC 10 (*Trichardt*). 2 Ibid [8]. 3 Ibid [129]. 4 Ibid [131]. 5 Ibid [133]. 6 Ibid [134] citing *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2018] VSC 347 [456] (Elliott J). 7 Ibid [154]–[155]. 8 Ibid [156]–[160]. 9 Ibid [145]. 10 Ibid [31]. 11 Ibid [135]–[153]. 12 Ibid [134] citing *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). 13 Ibid [3]. 14 Ibid [166]. 15 Ibid [173]. 16 Ibid [178]–[179]. 17 Ibid [181]. 18 Ibid [183]–[185]. 19 Ibid [182]–[183]. 20 Ibid [187]. 21 Ibid [73]. 22 Ibid [192]. 23 Ibid [7]. 24 Ibid [202]. 25 Ibid [7]. 26 Ibid [203]–[205]. 27 Ibid [194]. 28 Ibid [195]–[196]. 29 Ibid [206]. 30 Ibid [207].

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This issue of *PRECEDENT* is cited as (2024) 180 *PRECEDENT*. ISSN 1449-7719 © 2024 Australian Lawyers Alliance, ABN 96 086 880 499  
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*PRECEDENT* is printed on Monza Recycled paper.