



Terms of engagement

A RECENT CASE CONSIDERS THE FORMATION AND VALIDITY OF A CONTRACT IN A COSTS AGREEMENT AND LIABILITY FOR BARRISTERS' FEES. BY ANNABELLE BALLARD

Introduction

In *Trichardt & Anor v Carmelli & Anor* [2023] VMC 10 (24 July 2023) Anton Trichardt and Elizabeth Hardinge (“plaintiffs”) made a contract claim for \$57,030.83 in professional fees against Mirka Carmelli and Mitch Karafili (“defendants”).¹ Trichardt and Hardinge were members of the Victorian Bar. They were introduced to Carmelli (the principal solicitor of MCK Legal) and Karafili (a certified public accountant) by a mutual client.² At a meeting on 29 September 2021, Karafili mentioned having other clients with legal matters, one of which was Lifestyle Residences Hobsons Bay Pty Ltd (“Lifestyle”).³ Lifestyle sought to file a second application to remove a caveat over one of its properties in the Supreme Court,⁴ after its first application was unsuccessful.⁵ Trichardt and Hardinge agreed to assist.⁶ From October 2021 to February 2022 Trichardt and Hardinge continued to communicate with Carmelli and Karafili and perform work on the Lifestyle matter.⁷ Magistrate Greenway ultimately held that Carmelli and Karafili were jointly and severally liable for the plaintiffs’ fees from 16 December 2021 onwards, and that Carmelli was solely liable for the plaintiffs’ fees up until 16 December 2021.⁸

Facts

Trichardt and Hardinge disclosed their fees to Carmelli by emailing Carmelli initial and updated costs disclosure statements and costs agreements on 19 October 2021, and 27-28 October 2021 respectively. On 19 October 2021 Carmelli

emailed Trichardt indicating that his costs agreement should be with Dale Harrison of Lifestyle, not herself. Trichardt responded by email that the Lifestyle matter was litigious, therefore he would not have accepted the brief without an instructing solicitor. Carmelli sent no further response to Trichardt’s email. Carmelli next communicated with counsel about costs on 27 October 2021. In response to Hardinge’s updated costs disclosure statement and costs agreement, Carmelli indicated she would forward Hardinge’s costs agreement to the client for consent. Carmelli never responded to Trichardt’s updated costs disclosure statement and costs agreement.

The plaintiffs conducted client conferences for the Lifestyle matter at Trichardt’s chambers on 19 October 2021, 26 October 2021, 27 October 2021 and 1 November 2021. Both Trichardt and Hardinge gave evidence that Carmelli was present at the 19 October, 26 October and 1 November conferences. According to Trichardt and Hardinge, Carmelli agreed that MCK Legal would be the instructing solicitor at the 19 October conference. Carmelli asserted she attended the 26 October 2021 conference solely because she was invited by Karafili, and she had a “practical interest” in alternative pathways to have the caveat on Lifestyle’s property removed. Karafili gave conflicting testimony – at first asserting that Carmelli only attended one conference on 26 October 2021, then later asserting he could not remember her presence at the 1 November conference.

Between October 2021 and March 2022, the plaintiffs and defendants also exchanged numerous emails discussing the Lifestyle matter, notably:

- on 8 December 2021, Hardinge emailed Karafili requesting a copy of a ruling made in the primary Lifestyle proceedings
- on 16 December 2021, Carmelli responded by email simply stating “FYI”, and attaching a copy of Justice Garde’s reasons
- on 16 December 2021, Karafili urged the plaintiffs to proceed with removing the caveat and promised “I will take the responsibility of paying the fees”
- throughout February 2022, Trichardt emailed Carmelli and Karafili numerous progressive drafts of the affidavit and summons in support of Lifestyle’s caveat removal application. All these drafts listed MCK Legal as the instructing solicitor.

In March 2022 the relationship between the plaintiffs and defendants deteriorated because of differences of opinion about the contents of the draft affidavits and counsel’s fees:

- on 4 March 2022, Trichardt sent Karafili and Carmelli an invoice for the Lifestyle matter via his clerk (his second invoice to date). Karafili disputed Trichardt’s fees, alleging they were excessive for the work done, and questioned why MCK Legal (Carmelli’s firm) had been copied into the email. Trichardt responded, expressing surprise at the dispute and emphasising that MCK Legal had instructed him. Trichardt further advised he had done an additional piece of work which had not been charged
- on 7 March 2022, Trichardt wrote to both Carmelli and Karafili asking when the outstanding \$39,040 from his first invoice would be paid, and what dispute had arisen regarding the second invoice. Karafili responded again querying why Carmelli was copied in, and on 8 March Trichardt stated “I have made it clear that if it is a litigation matter, instructions must be from a solicitor, which you are not”⁹
- on 9 March 2022, Hardinge also sent Carmelli an invoice for the Lifestyle matter via her clerk. Karafili responded to Hardinge’s email, raising concerns about Hardinge’s fees and alleging that Hardinge’s work was minimal. Hardinge maintained her fee agreement was with MCK Legal and that Karafili had separately committed to paying the barristers’ fees by email.

Neither Karafili or Carmelli paid Trichardt and Hardinge’s invoices. Consequently, Trichardt and Hardinge initiated proceedings in the Magistrates’ Court of Victoria to recover their fees.

Issues in dispute

The main issues in dispute were:

- whether Trichardt and Hardinge had valid costs agreements with Carmelli as instructing solicitor
- whether Karafili was separately liable for Trichardt and Hardinge’s fees because of his 16 December email
- whether the dispute over Trichardt and Hardinge’s fees meant their claim was unmaintainable under the Uniform Law s178.

SNAPSHOT

- Solicitors can accept a barrister’s costs agreement by conduct, including silence and ongoing instructions.
- Generally solicitors are joint and severally liable for a barrister’s fee even if someone else voluntarily assumes responsibility for it.
- A 10 per cent difference in total legal costs may not constitute a “significant change” under ss174-175 of the Uniform Law.

The parties’ positions

Trichardt and Hardinge’s case alleged that Carmelli was liable for their fees because she had continued to provide instructions after receiving their costs disclosure statements and costs agreements.¹⁰ Further, Karafili’s email dated 16 December 2021 constituted a separate enforceable promise to pay Trichardt and Hardinge’s fees.¹¹

Carmelli denied ever having given instructions to Trichardt and Hardinge in the Lifestyle matter and asserted that she had expressly refused their costs agreements.¹² In the alternative, she alleged that Trichardt contravened ss174(1)(b) and 175(2) of the Uniform Law by failing to provide updated costs disclosure as soon as practicable after a significant change in his total costs estimate.¹³

Karafili asserted his promise to pay Trichardt and Hardinge’s fees was unenforceable. He also disputed the validity of the costs agreements, alleging both Trichardt and Hardinge contravened s176 of the Uniform Law by failing to make separate costs disclosure to him as a third-party payer.¹⁴

Both defendants contended that because of the alleged contraventions, s178 of the Uniform Law prevented Trichardt and Hardinge from maintaining the proceeding for recovery of their fees.

Findings

Barrister solicitor costs agreements

Costs agreements between barristers and solicitors are agreements between a law practice and another law practice per s180(1)(c) of the Uniform Law. While “it was common ground between the parties that a costs agreement may be accepted by conduct”, Carmelli denied she had ever accepted Trichardt and Hardinge’s costs agreements on the basis she did not sign them or write to Trichardt or Hardinge indicating acceptance on behalf of MCK Legal or Lifestyle.¹⁵ However, as Magistrate Greenway observed, depending on the terms of the costs agreement and an assessment of all the circumstances of the case “a solicitor may accept a barrister’s written engagement terms by continuing to give instructions”.¹⁶

Magistrate Greenway held that Carmelli had accepted Trichardt and Hardinge’s costs agreements by continuing to provide instructions in the Lifestyle matter, having regard to the following circumstances:¹⁷

- Trichardt and Hardinge’s costs agreements expressly provided for acceptance by the provision of continued instructions
- Trichardt and Hardinge’s assertion that they would not have accepted the brief on a direct access basis was corroborated by an email from Hardinge to Karafili indicating she and Trichardt would send their costs agreements to the appropriate solicitor
- Magistrate Greenway preferred Trichardt and Hardinge’s evidence over Carmelli’s in relation to Carmelli’s attendances at conferences in the Lifestyle matter because it was not undermined in cross-examination and was corroborated by Hardinge’s fee slips.

Costs agreements

Looking at the email correspondence between the parties, Magistrate Greenway also considered Carmelli's silence in response to Trichardt's assertion that MCK Legal had to be the solicitor on record was consistent with acceptance, having regard to the circumstances that:¹⁸

- there was no evidence that Trichardt and Hardinge had ever dealt with Lifestyle and its officers directly
- Carmelli attended conferences and provided documents to Trichardt and Hardinge after receiving their costs agreements
- Carmelli raised no concerns in February 2022 when Trichardt sent her draft court documents bearing on their face a representation that MCK Legal was the instructing solicitor.

Karafili liability

A promise to pay must be supported by consideration, otherwise it is unenforceable. Magistrate Greenway held that the promise in Karafili's email dated 16 December 2021 was enforceable because Trichardt and Hardinge had continued to work on the Lifestyle matter in exchange for Karafili accepting responsibility for their fees.¹⁹ However, Magistrate Greenway also observed the extent of Karafili's liability for Trichardt and Hardinge's fees was a "question of contractual interpretation".²⁰ Contrary to Trichardt and Hardinge's submission that Karafili was liable for all their fees, Magistrate Greenway held Karafili was only liable for fees incurred after 16 December 2021 because Karafili's email concerned prospective action and his promise was worded in the future tense: "I will take responsibility for paying the fees".²¹

Alleged contraventions of ss174-175 of the Uniform Law

Magistrate Greenway summarised the effect of ss174-175 of the Uniform Law on the costs disclosure obligations of barristers and solicitors at [161]-[163]. While barristers are not obliged to disclose their costs directly to the client, they are obliged to make sufficient disclosure to instructing solicitors to enable their instructor to disclose to the client the basis on which legal costs will be calculated and a total estimate of legal costs.²² These obligations are ongoing, meaning barristers must make further disclosure to their instructing solicitor if there is a material change in the basis on which their fees are calculated or their total costs estimate.²³

The defendants submitted that Trichardt had contravened ss174-175 because his invoices evinced that his total costs estimate did not accurately reflect the fees he charged for each stage of the proceeding.²⁴ The defendants further submitted that had Trichardt finalised all the items of work set out in his costs estimate, his total costs would have exceeded his costs estimate by 36.4 per cent.²⁵ This figure was calculated by a comparison between Trichardt's invoices and the projected costs of items of work that were not completed before the end of his engagement ("projected costs").²⁶

Trichardt submitted that his obligation to provide further disclosure could only be triggered by a significant change to the information underlying his estimate, rather than a mere belief there may be a significant change to something previously disclosed.²⁷ Further, the mathematical process adopted by the defendants to estimate projected costs involved "unwarranted speculation as to the progress of litigation"²⁸. Trichardt also gave evidence he intended to complete the remaining items of work within his total estimate.

Magistrate Greenway observed that while Trichardt was bound to give Carmelli an updated costs estimate on any significant change to his estimated legal costs, whether a "significant change" had occurred was a question of fact dependent on an "assessment of all the relevant circumstances".²⁹ Magistrate Greenway held that there had been no significant change to Trichardt's total costs in the Lifestyle matter because Magistrate Greenway calculated that the only items not included in Trichardt's invoices would have cost \$17,600. Therefore, had Trichardt completed all the items of work in his costs estimate, he would have exceeded his costs estimate by \$8140 (approximately 10 per cent). Magistrate Greenway considered that a mere 10 per cent variance from Trichardt's initial estimate was not a significant change in total legal costs, having regard to the following circumstances:³⁰

- Trichardt had invoiced the defendants for \$9460 less than his total costs estimate before his engagement ended
- the defendants' estimated projected costs disregarded items of work Trichardt had already completed or partially completed
- contrary to the defendants' submission that significant additional work was required, the draft court documents including the "Burgess affidavit" and counsel's written submissions were almost complete
- the state of the draft court documents corroborated Trichardt's evidence he would have completed the remaining items of work within his estimate.

Alleged contraventions of the Uniform Law

Karafili alleged that Trichardt and Hardinge had contravened s176 of the Uniform Law by failing to send him a separate costs disclosure statement and costs agreement in his capacity as an associated third-party payer. Magistrate Greenway acknowledged that Karafili was a third-party payer because he was not the client and was legally obliged to pay some of Lifestyle's legal expenses.³¹ However, Magistrate Greenway also observed the obligation to make costs disclosure to third-party payers is conditional on a law practice being obliged to make disclosure directly to the client.³² Magistrate Greenway held that neither Trichardt nor Hardinge ever had an obligation to make separate costs disclosure to Karafili as a third-party payer because s175(2) of the Uniform Law expressly provides a law practice engaged by another law practice is not obliged to make costs disclosure directly to the client.³³

Effect of the Uniform Law on Trichardt and Hardinge's claim

Trichardt and Hardinge were not barred by s180 of the Uniform Law from recovering their fees because the defendants failed to prove any contravention of the costs disclosure requirements in the Uniform Law.

Key insights

- Solicitors may accept a barrister's terms of engagement by conduct. The court may find a solicitor's silence in response to a barrister's costs agreement amounts to acceptance of its terms if there is objective evidence the solicitor continued to provide instructions in the matter.
- Where a third-party payer or client voluntarily assumes responsibility for the payment of a barrister's fee:

- the instructing solicitor is jointly and severally liable for payment of the barrister's fee unless they have expressly communicated to the barrister in writing that the firm does not accept liability for the barrister's fee
- the costs disclosure obligation in s176 of the Uniform Law still falls on the instructing solicitor rather than the barrister.
- A difference of 10 per cent in total legal costs may not be a significant change for the purpose of enlivening the obligations in ss174(1)(b) and 175(2) of the Uniform Law to provide an updated costs estimate. However, what amounts to a significant change in any given case depends on an assessment of all the relevant facts of the matter. It is therefore a subjective test. ■

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1. *Trichardt & Anor v Carmelli & Anor* [2023] VMC 10, at [2]
2. Note 1 above, at [10]
3. Note 1 above, at [11]
4. Note 1 above, at [20]
5. Note 1 above, at [16]
6. Note 1 above, at [20]
7. Note 1 above, at [2]
8. Note 1 above, at [206]-[207]
9. Note 1 above, at [114]
10. Note 1 above, at [1]-[2]
11. Note 1 above, at [5]-[6]
12. Note 1 above, at [3]
13. Note 1 above, at [3]
14. Note 1 above, at [7]
15. Note 1 above, at [132]-[134]
16. Note 1 above, at [134]-[136]
17. Note 1 above, at [137]-[160]
18. Note 1 above, at [143]-[160]
19. Note 1 above, at [192]
20. Note 1 above, at [194]-[195]
21. Note 1 above, at [194]-[195]
22. Note 1 above, at [163]-[164], and [178]-[180]
23. Note 1 above, at [163]-[164], and [178]-[180]
24. Note 1 above, at [171]-[173]
25. Note 1 above, at [173]
26. Note 1 above, at [173]-[174]
27. Note 1 above, at [175]
28. Note 1 above, at [176]
29. Note 1 above, at [180]-[181]
30. Note 1 above, at [182]-[186]
31. Note 1 above, at [202]
32. Note 1 above, at [203]
33. Note 1 above, at [204]-[205]

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