VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

administrative DIVISION

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| Legal Practice LIST | vcat reference No. J7/2020 |
| CATCHWORDS | |
| Legal Practice List - – claim for loss and damage – jurisdiction – application of *Legal Profession Uniform Law Application Act 2014* (Vic) – claim made under *Australian Consumer Law and Fair Trading Act 2012* – quality of legal service – alleged breaches of consumer guarantees – ss 60, 61, 236, 237, 267, and 269 of *Australian Consumer Law* | |

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| APPLICANT | AKL |
| RESPONDENT | Dan986 Pty Ltd |
| WHERE HELD | Melbourne |
| BEFORE | B. Josephs, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 3 and 4 June 2021, 19 and 20 July 2021 |
| DATE OF FINAL SUBMISSIONS | 5 November 2021 |
| DATE OF ORDER | 21 June 2022 |
| DATE OF WRITTEN REASONS | 21 June 2022 |
| CITATION | AKL v Dan986 Pty Ltd (Legal Practice) [2022] VCAT 677 |

# Order

1. Save for any issue as to costs, the proceeding is dismissed.
2. Costs are reserved
3. Any application for costs must be filed with the Tribunal by **4.00 pm on 18 July 2022**, failing which there will be no order as to costs.
4. In the event an application is made for costs, the Tribunal will make directions on the papers for determination of the costs’ application.
5. Under section 146 (4) (b) of the *Victorian Civil and Administrative Tribunal Act (1998) (Vic)*, the Tribunal directs that no person other than a party to the proceeding or their legal representatives may inspect the Tribunal file.

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| **B. Josephs**  **Member** |  |  |

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| APPEARANCES: |  |
| For the Applicant | AKL in person. |
| For the Respondent | Mr P. Tatti, solicitor |

# Reasons

**The Victorian Civil and Administrative Tribunal (VCAT) is providing these written reasons with the names of certain persons anonymised. Section 121 of the *Family Court Act 1975* (Cth) prohibits the publication of an account of proceedings or any part of proceedings that identifies a party to those proceedings, a person related to or associated with a party to the proceedings or a witness in the proceedings.**

### Background

1. AKL filed an application for order dated 6 February 2020 against Aitken Partners Pty Ltd, claiming an amount of $44,227.50 (**application for order**). AKL had previously lodged a complaint with the Victorian Legal Services Commissioner (**VLSC complaint**).
2. The application for order is made under the *Australian Consumer Law and Fair Trading Act 2012* (**ACLFTA**). Aitken Partners Pty Ltd then traded as the law practice known as ‘Aitken Partners’ (**AP**). AKL became a client of AP in an ongoing Family Court proceeding with his former wife, GDJ (**family law proceeding**). Two separate legal firms had previously acted for AKL in the family law proceeding. There are two children of the marriage, RDY and KUB.
3. As a result of the sale of the law practice, Aitken Partners Pty Ltd ceased trading on 30 June 2021 and changed its name to Dan986 Pty Ltd which has been substituted as the respondent.
4. Under s 17 of the application for order, in paragraphs numbered 1 to 9, AKL provided his reasons for making the application for order.
5. This proceeding did not resolve at a compulsory conference held on 13 October 2020.
6. Witness statements and copies of documents were thereafter filed and served by the parties.
7. The final hearing took place before me on 3 and 4 June 2021 and 19 and 20 July 2021. I reserved my decision and made orders for written submissions which have been filed and served.
8. The orders and these reasons constitute my decision.

### Application for order

1. VCAT ordered that the paragraphs numbered 1 to 9 in s 17 of the application for order stand as AKL’s Points of Claim (**PoC**). In the PoC, AKL relevantly said:
   * he entered into a costs agreement with AP on 17 October 2018 (**costs agreement**) for a discrete matter in relation to a spousal maintenance application (**SMA**) made by GDJ in the family law proceeding, and he signed a disclosure statement (**disclosure** **statement**) on the understanding that it related only to the SMA for an estimated fee of $8,000 plus GST if it was to proceed to a hearing;
   * he received a letter dated 20 November 2018 from David De Alwis (a then Senior Associate at AP) (**20 November 2018 letter**) which stated that further to the costs agreement, which was for a discrete matter, AP was required to notify him of new costs in relation to his overall matter which included parenting, schooling, school fees, and property matters, which costs Mr De Alwis estimated to be about $35,000 plus GST plus $3,000 plus GST for disbursements including counsel fees for final trial;
   * Mr De Alwis advised that he was required to enter into a separate cost agreement in due course encompassing the entire scope of his matter including the new estimated fee of $35,000;
   * on 19 November 2018, he had been advised by Mr De Alwis that he needed to make an ‘urgent’ court application (**urgent application**) in relation to the hospitalisation at Monash Children’s Hospital of KUB;
   * he agreed to the preparation of the urgent application on the advice of Mr De Alwis that it would be a quick process but there was no disclosure in relation to legal costs despite AKL’s requests for such a disclosure as this was a new and unforeseen matter;
   * the urgent application was not lodged until February 2019 due to constant delays, contradictory advice and poor management and over – servicing of his file;
   * there was an interim hearing on 12 March 2019;
   * during this time, he was billed legal fees totalling $47,466 which were not disclosed or agreed and which significantly exceeded the legal fee estimate in the 20 November 2018 letter to take his matter to trial;
   * on 13 May 2019, he was advised by Edwin Clark (a Principal of AP) that the sum of $47,466 was applied to AP’s legal fees from AKL’s part property settlement funds held in AP’s trust account;
   * on 26 July 2019, he requested Mr Clark to return the funds to the trust account as there was no cost agreement or disclosure statement for the new fees or services;
   * on 22 August 2019 he received an invoice from AP for additional fees of $25,000 and was advised by Mr Clark that AP would cease to act for him;
   * he received a letter from Mr Clark on 20 September 2019 advising him that $31,761.50 had been withdrawn from funds held in trust by AP for him.
   * he incurred $79,227.50 in legal fees with AP without his matter proceeding to final hearing despite the costs agreement being only for $8,000 plus GST; and
   * Mr Clark refused to meet with him to discuss the matter.

### Points of Defence

1. AP delivered Points of Defence (**PoD)** dated 23 September 2020 to AKL’s PoC. In its PoD, AP relevantly said**:**
   * in what it termedas the ‘first retainer’, the costs agreementand the disclosure statement were sent to AKL on 16 October 2018 for the purposes of the family law proceeding which were then related to a claim by GDJ for spousal maintenance;
   * in what it termed as the ‘first retainer update’, it sent the 20 November 2018 letter to AKL and said that it was obliged under the first retainer and the *Legal Profession Uniform Law* (**LPUL**) to notify AKL if the costs estimate provided needed to be updated, that the family law proceeding which initially related to a claim for spousal maintenance now put property and parenting matters in issue, and that the 20 November 2018 letter notified AKL that the revised update of legal costs up to the preparation for a trial would be about $35,000 plus GST;
   * it sent another letter to AKL on 15 April 2019 (**15 April 2019 letter**) which provided an update further to the first retainer update;
   * it termed the 15 April 2019 letter as the ‘second retainer update’ and the estimate in it was professional costs of $40,000 plus GST and Counsel’s fees of $20,000 plus GST;
   * the total of the provided cost estimates, inclusive of GST, was $118,800 and included $80,000 for professional costs and $28,000 for disbursements;
   * it denied that AKL was required to enter into a ‘separate costs agreement’ given that by entering into the first retainer, AKL engaged AP to act in the family law proceeding, that the first retainer was necessitated because the work in the family law proceeding extended from the SMA to parenting and property issues more generally in the course of the same proceeding, that the first retainer update was sufficient to extend AP’s retainer without the necessity of a separate costs agreement and costs disclosure being provided and that the content of the first retainer update specifically referred to the documents comprising the first retainer in the context of updating the costs estimated in those documents;
   * it admitted that advice was given concerning the urgent application to be made on or around 19 November 2018 and that it concerned the hospitalisation of KUB on 11 November 2018 and instructions were sought from AKL including particulars of KUB’s illness, reasons for admission to hospital and other matters;
   * KUB was discharged from hospital on or about 4 December 2018 and by agreement with GDJ, KUB spent time with AKL from 28 December 2018 to 8 January 2019 and as a result there was no need for the urgent application to progress at that time;
   * there were further concerns raised by AKL between 8 January 2019 and 31 January 2019 which resulted in the urgent application being made in February 2019;
   * it denied that there was no disclosure as to further legal costs;
   * it denied that the urgent application was not lodged until February 2019 due to delays, contradictory advice and poor management and over - servicing of the file;
   * it denied that there was no disclosure or agreement as to legal fees;
   * it denied that the fees exceeded the costs estimate provided;
   * the total legal costs billed up to 28 March 2019 were $31,466.06 inclusive of GST and disbursements which were within the first retainer and the first retainer update;
   * it admitted payments were made for legal fees rendered from funds held in trust for AKL;
   * it referred to clause 4 of the costs agreement which permitted the funds to be so used and further, or alternatively, it was entitled to apply those funds to its fees under its common law lien against trust funds held;
   * it admitted AKL requested the funds be returned;
   * AKL cannot deny entering into the first retainer;
   * it denied that no cost agreement or disclosure had been entered into for the further fees and services;
   * it admitted rendering an account on 22 August 2019 but denied it was for an amount of $25,000;
   * it admitted that it advised AKL by a letter dated 22 August 2019 (**22 August** **2019 letter**) that it would cease to act for him;
   * it admitted sending a letter on 20 September 2019 to Lander & Rogers (**LR**) who were the new lawyers engaged in the family law proceeding by AKL;
   * at all times, the costs billed to AKL were within, or reasonably close to, the costs estimates provided;
   * in respect of the first retainer, $8,800 inclusive of GST and disbursements was estimated and an account dated 26 November 2018 totalling $10,086.05 was rendered, in which disbursements were higher than estimated and professional costs were lower;
   * between 26 November 2018 and 29 April 2019, $44,000 inclusive of GST and disbursements was estimated. To 29 April 2019, not including the account dated 26 November 2018, the accounts rendered totalled $37,880.01. For this period, the accounts were dated 14 February 2019, 28 March 2019, and 29 April 2019 for amounts respectively of $9,680, $11,700.01, and $16,500;
   * between 29 April 2019 and the end of the first retainer, a further $66,000 inclusive of GST and disbursements was estimated. To 30 August 2019, not including the accounts dated 26 November 2018, 14 February 2019, 28 March 2019 and 29 April 2019, the accounts rendered totalled $28,731. For this period, the accounts were dated 22 August 2019, 22 August 2019, and 30 August 2019 for amounts respectively of $17,908.40, $8,000, and $2,822.60;
   * for the first retainer, the seven accounts rendered totalled $76,697.06 comprised of professional costs of $58,843.28, disbursements of $10,906.35, and GST of $6,947.43;
   * additionally, in what it termed as the ‘second retainer,’ AKL engaged it to act for him in relation to a Magistrates Court proceeding issued against him by Wesley College (**Wesley College proceeding**) pertaining to school fees, which retainer was formalised by a costs agreement and costs disclosure forwarded by email to AKL on 31 January 2019;
   * the estimate in the second retainer was $15,000 inclusive of disbursements;
   * AKL did not execute and return the documents concerning the second retainer but did continue providing instructions and, in so doing, in accordance with clause 9 of the unsigned costs agreement forwarded to AKL, he is deemed to have accepted the second retainer;
   * in accordance with the second retainer, it rendered accounts dated 14 March 2019 and 29 March 2019 to AKL, respectively for $2,035.00 and $995.50 and totalling $3,030.50;
   * the total legal costs incurred by AKL with it were $79,727.56; and
   * upon rendering the accounts, it specifically turned its mind to whether or not the total amounts were fair and reasonable having regard to factors including the nature and complexity of the matter, the nature of the instructions provided, the work that was required to be undertaken as a result of GDJ and third parties involved in the litigation, and the experience, skill and care of the practitioners who were involved in the work.

### VLSC complaint

1. This was dated 4 September 2019 and it predominantly contained the allegations subsequently set out in the PoC in this proceeding.
2. It also noted that AP had ceased to act for AKL three weeks prior to his case management hearing in the family law proceeding.
3. On 11 December 2019, the office of the VLSC wrote to AKL confirming that its attempts to resolve his costs dispute had been unsuccessful and that in circumstances where it was unable to make a determination in accordance with the LPUL it would cease dealing with his complaint. It also noted that the VLSC was only able to make a determination in a costs dispute where the costs in dispute are less than $10,000 and that it appeared that the amount disputed by AKL exceeded the jurisdiction of the VLSC.
4. The VLSC informed AKL of his right to make an application to VCAT or the Costs Court of the Supreme Court to have the complaint reviewed. In doing so, AKL was informed that any VCAT application had to be made within 60 days and that VCAT was only able to determine an amount of $25,000 (indexed) or less. The VLSC also informed AKL that an application to the Costs Court for a costs assessment had to be made within 12 months after a bill was received by him.

#### Witness statement of AKL dated 23 December 2020

1. AKL relevantly stated:

* in the costs agreement, the scope of the matter was limited to:
  1. review previous files; and
  2. negotiate spousal maintenance with the solicitors for GDJ; and
  3. if required, prepare responding documents; and
  4. if required, brief Counsel and instruct Counsel; and
  5. all other letters, conferences and other attendances incidental thereto
* on 11 November 2018, KUB was admitted to Monash Children’s Hospital by GDJ without his knowledge or consent. After unsuccessfully trying to contact the treating paediatrician, he called Mr De Alwis requesting that he contact the hospital on his behalf for a diagnosis;
* on 14 November 2018, he attended the hearing of the SMA with Mr De Alwis and Mr Crofts of Counsel at which consent orders were agreed including orders for the sale of an investment property (**investment property**);
* on 19 November 2019, he was advised by Mr De Alwis that he needed to make the urgent application. He agreed to the preparation of it on the advice of Mr De Alwis that it would be a quick process with a custody decision in his favour ‘highly likely’ while KUB remained hospitalised, but there was no disclosure in relation to legal costs, despite AKL’s requests as this was a new, unforeseen matter;
* he then received the 20 November 2018 letter which stated that further to the costs agreement which was for a discrete matter, AP is required to notify him of an increase to costs but the costs in the letter were new costs;
* on 29 November 2018, AKL received an email from Mr De Alwis which requested that he attend the office of AP the next day to sign the affidavit and the urgent application ready for filing;
* also, on 29 November 2018, AKL provided an update to Mr De Alwis on KUB’s continued hospitalisation and about his discussions with KUB’s treating doctor and case officer;
* on 30 November 2018 he was advised by Dylan Chaplin-Burch, a lawyer from AP, not to attend its office because the affidavit was not ready to be signed;
* on 5 December 2018, AKL advised Mr De Alwis that KUB had been released from hospital the previous day into the care of GDJ;
* on 7 December 2018, AKL received a letter from Mr Chaplin – Burch advising that the affidavit was to be amended and a subpoena issued to Monash Children’s Hospital to produce documents relating to KUB’s diagnosis and ongoing hospitalisation and re-admission;
* on 17 December 2018, AKL received a letter from Mr Chaplin – Burch advising that he believed that further evidence was required for the urgent application regarding KUB’s interim living arrangements and his ongoing hospitalisation and that the application should be filed in the new year;
* on 12 January 2019, AKL was able to negotiate interim full custody of KUB through a Child Protection Officer independently of AP or the urgent application;
* he understood that the urgent application was not filed until early February 2019;
* on 7 February 2019 he advised Mr Chaplin – Burch that KUB had been served with an IVO application made by GDJ and KUB was required to attend Court in relation to it on 13 February 2019;
* between 5 March 2019 and 12 March 2019, KUB was re-admitted to hospital due to a random testicular torsion condition that required emergency surgery;
* on 12 March 2019, he attended the interim child custody hearing in relation to the urgent application with Mr Chaplin – Burch and Mr Mort of Counsel;
* interim consent orders were agreed and a further hearing fixed for 28 May 2019;
* he also agreed that a new family report be prepared by Vincent Papaleo following upon a recommendation to this effect from Mr Mort and Mr Chaplin – Burch. It was considered by Mr Mort, Mr Chaplin – Burch, and Mr De Alwis that the previous report provided by another person (**previous family report**) was not favourable enough and that a new report, if prepared by Mr Papaleo, would certainly favour ‘the father’ as this was ‘usually the case’. In response to his query regarding the previous family report and how the report by Mr Papaleo would be more favourable, Mr De Alwis responded by saying ‘you got what you paid for’ suggesting that although Mr Papaleo’s report would be significantly more expensive at $12,000.00, it was ‘guaranteed’ to provide the desired outcome;
* on 14 March 2019, he received an invoice relating to the overall family law proceeding which had a different account reference to the SMA invoice, despite there being only one cost agreement and disclosure statement;
* the 15 April 2019 letter, among other matters, provided an increased costs estimate but contained incorrect details regarding previous fee estimates;
* on 24 April 2019 (**24 April 2019 letter**) he emailed Mr De Alwis and Mr Dylan – Burch summarising the invoices received to that date, compared to initial estimates and advice, and he requested an opportunity to discuss and negotiate a fair and reasonable fee structure consistent with AP’s initial advice;
* on 7 May 2019 (**7 May 2019 letter**) he emailed Mr Clark and raised the inconsistencies in accounts owing contained in the 15 April 2019 letter and regarding previous fee estimates, and he requested an opportunity to discuss the fees and services incurred to that date to ensure there were no errors or doubling up of accounts, and also the estimated ongoing legal fees should the matter go to trial. Mr Clark did not provide him with the opportunity to meet with him and discuss the fees and accounts in a reasonable manner;
* on 13 May 2019 he received a letter from Mr Clark (**13 May 2019 letter**) responding to the 7 May 2019 letter. In the 13 May 2019 letter, Mr Clark, among other matters, tried to justify the amount of fees charged and further stated that $50,000 in part property settlement funds paid to AKL and recently deposited into AP’s trust account would then be used to settle outstanding accounts of $47,966 ‘pursuant to the authority you furnished us in the costs agreement’ and despite Mr Clark’s awareness they were in dispute;
* on 15 May 2019, he received a copy of Mr Papaleo’s report which was not favourable and did not achieve the desired outcome, contrary to the advice from Mr Chaplin – Burch and Mr De Alwis;
* on 16 May 2019 he emailed his disappointed response to Mr Chaplin – Burch (**16 May 2019 letter to Mr Chaplin – Burch**) in which he wrote…. ‘I now feel having followed your advice, that I was ill – advised to commission this report.’
* on 16 May 2019 he emailed Mr Clark (**16 May 2019 letter to Mr Clark**), and among other matters, stated that he did not authorise AP using his part property settlement funds to pay for outstanding legal fees, which were in dispute, except for the $8000 SMA fee. He requested a cost report itemising legal fees broken down into the categories of spousal maintenance, the urgent application, the sale of the investment property and the property settlement including GDJ’s inheritance. Further, he requested clarification about why the accounts covered overlapping periods and also about advice from AP which had resulted in excessive legal fees and had related to the preparation of the urgent application and the over servicing of the file between November 2018 and March 2019, the preparation of an affidavit relating to the urgent application that was never filed, the need for a new ‘favourable’ family report from Mr Papaleo which was detrimental to his case, and unauthorised work undertaken in relation to the investment property, the sale of which another legal firm was handling;
* on 23 May 2019 (**23 May 2019 letter**), he received a letter from Mr Clark in which, among other matters, Mr Clark ignored his request for clarification of the items specified in the 16 May 2019 letter to Mr Clark but referred to clause 4 of the costs agreement relating to trust money;
* on 26 July 2019 (**26 July 2019 letter**), he emailed Mr Clark disputing that AP had acted in accordance with the costs agreement which he maintained only related to the SMA and, as such, was limited to a specific scope for a specific fee. He had sought and obtained independent legal advice that the costs agreement was limited in scope and fee and should not be relied upon for his overall matter. Mr Clark did not respond to his further request to meet to resolve the fee dispute;
* he confirmed receipt of the 22 August 2019 letter;
* his claim is for reimbursement of $47,727.50 (sic) being the difference between the fee estimate of $35,000 in the 20 November 2018 letter and the amount of $79,727.50 transferred from trust in payment of the fees charged by AP.

### Costs Agreement

1. It is headed ‘Family Law Matters’. ‘The scope of matter,’ is as set out in AKL’s witness statement. In its ‘Preamble,’ among other matters it is stated:

This document is an offer to enter into a Costs Agreement in accordance with the information contained in the Disclosure Statement given to you, and in compliance with [the LPUL].

If you accept these terms, the Disclosure statement and this document will make up the complete Costs agreement between us for this matter.

You may accept the Costs Agreement by writing to us indicating your acceptance, by returning a signed copy of this document as provided in the Acknowledgement at the end of this document or by continuing to give us instructions in this matter.

1. Under clause 4 headed ‘Trust Money,’ it is stated:

If we receive money into our trust account on your behalf, you authorise us to draw on that money to pay any amount due to us in accordance with the provisions of [the LPUL] and the Legal Profession Uniform General Rules 2015 relating to the withdrawal of trust money for legal costs. A trust statement will be forwarded to you upon completion of the matter.

1. Under clause 8, AKL is advised to seek independent legal advice prior to signing the costs agreement or otherwise agreeing to the terms of the costs agreement and the disclosure statement.
2. At the end of the costs agreement under ‘9. Acknowledgement’, among other matters, it is stated that in the absence of signing and returning the costs agreement, AKL agrees to be bound by its terms by the act of continuing to provide instructions to AP.

### Disclosure Statement

1. The disclosure statement, among other matters, recorded that it was provided under the LPUL and it contained the same heading and scope as the costs agreement.
2. Clause 1 set out the basis on which AP’s legal costs would be calculated which was hourly rates charged in six-minute units and, among other matters, it tabulated hourly rates of staff likely to be involved in working on the matter which included Mr De Alwis and Mr Chaplin-Burch.
3. Under clause 2, AP provided an estimate of its total legal costs of $8,000 plus GST comprised of $5,000 plus GST for its charges and $3,000 plus GST for disbursements. It was then stated:

This estimate of total legal costs is NOT BINDING on us, as the work required may change, but it is our best advice at this point in time. The estimate is based on our current understanding of the present circumstances of this matter. If the scope of this matter or your instructions to us change in a way that results in a significant change to anything we have previously disclosed, including this estimate, we will revise the estimate as soon as practicable.

1. Clause 3 sets out AKL’s rights which included to request an itemised bill of costs within 30 days after receiving a bill that is not itemised, or is only partially itemised, and to seek the assistance of the designated local regulatory authority in the event of a dispute about legal costs.
2. As to jurisdiction, clause 9 provides that the LPUL is applicable to legal costs in this matter.

### 20 November 2018 letter

1. This letter, signed by Mr De Alwis, is headed ‘Family Law Matters’. It then relevantly reads:

We refer to previous correspondence particularly our cost letter to you of 16 October 2018, which was for a discrete matter.

We are required to provide you with a notification of increase to costs in relation to your overall matter.

Since you first consulted with the writer in late October 2018, it has become apparent that your matter needs preparation from both a parenting and property perspective.

On the current material available to us, the following must occur:

Parenting

1. Preparation of the parenting aspect of your matter including:

…………..

Property Matters

2. There is significant case preparation work to be done for the final hearing with respect to property matters and they include:

……………

It is our view that given the significant work involved in your matter, our estimated fees up to the preparation for a trial will be about $35,000 plus GST. We estimate further $5,000 for disbursements including Counsel’s fees………………………………………

…………………………………….

1. Under ‘Parenting’ items a. to i. were set out and under ‘Property Matters’ items a) to f) were set out.

### Invoices

1. Each of the invoices included a Notification of Rights under the LPUL setting out the avenues available to AKL if he was not happy with the bill. These avenues included requesting an itemised bill or having the costs assessed before the Costs Court.
2. Also included with each of the invoices was notice that if money had been paid into AP’s trust account for AKL, AP would withdraw such money from trust and apply it towards payment of AP’s legal costs that are owed, in accordance with the LPUL and the Legal Profession Uniform General Rules 2015.

### 15 April 2019 letter

1. This letter, signed by Mr Clark, Mr De Alwis, and Mr Chaplin – Burch, is headed ‘Family Law Matters’ and includes the Court number of the family law proceeding. It then relevantly reads:

We refer to previous correspondence with you in relation to your fees incurred in your matter and ongoing costs.

We note that when we provided our previous Cost Agreement and Disclosure Statement we anticipated that our costs up until the conclusion of your matter would be $37,500.

However, due to [GDJ’s] ongoing litigious nature, the fact that several applications have had to be brought to Court or nearly to have matters addressed and the fact that [GDJ’s] solicitors send correspondence on every issue (which we have to read and provide our advice or thoughts on) we are obliged to increase your costs estimate. Furthermore, the issues in relation to the children have significantly exacerbated and have become more complex, requiring more attendances and will need to be addressed in significant detail prior to the trial.

Please see below our table of anticipated costs:

Documents Cost

……………………….. $.......

Reviewing

……………………….. ……

Preparation

………………………. ……

Trial

……………………… …….

Total $48,000

Mr Mort’s fees $20,000

We note that we anticipate our professional fees will be approximately $48,000 more than what you have already paid. However, due to the ongoing nature of your matter and that your fees have significantly increased, we propose to offer you a 20% discount of your fees. You can expect to pay $40,000 plus Mr Mort’s fees plus GST.

The above is based on there being no further interim applications being made by you or [GDJ].

…………………………..

1. There are six items under ‘Documents,’ four items under ‘Reviewing’, and five items under ‘Preparation.’ An estimate of the fee for each item is set out under ‘Cost.’ For ‘Trial’ a cost of $7,000 was estimated for instructing at trial up to a maximum of three days. Mr Mort’s fees were ‘for appearing and preparation for up to 3 days including 2 days preparation’.

### 24 April 2019 letter

1. Further to his witness statement, AKL’s letter relevantly reads:

……………

While I wish to reiterate that I’m not dissatisfied with the legal service I have received to date, it has come at a considerably higher cost than initially indicated. In addition, apart from the original legal fee estimate for both the first court appearance in response to [GDJ’s SMA], which was approx.$8000 + GST maximum, and the estimate up to and including the final hearing of approx.$35000 + GST, (which included the $8000 for the [SMA] ) all other fees charged for legal services have been on a ‘time charge’ basis which wasn’t part of our agreement.

This has meant that the total fee estimate has been exceeded more than three – fold from $35000 to over $110000 + GST.

*………………*

### 7 May 2019 letter

1. Further to his witness statement, AKL’s letter relevantly reads:

………………

While I am generally satisfied with the legal advice I have received to date, without being entirely satisfied with the outcomes, I’m less satisfied with the ultimatum in your letter.

……………………

I am only prepared to discuss legal fees once I know they are accurate.

With all due respect, while I understand that additional time has been invested in my case, I fail to understand how my case has escalated from a modest $35,000 to $110,000 in estimated legal fees, with no interim discussion in relation to adjustments to the statement of cost which I initially agreed to. I don’t think this is reasonable. Had this information been disclosed during my initial discussions with [Mr De Alwis] I certainly would not have agreed to it.

[Mr De Alwis] was fully briefed and informed on the history of the matter, that this was the third spousal maintenance claim my ex-wife had lodged and the complexities surrounding child custody, inconclusive family reports, ICL and CYMHS involvement and disputes regarding property settlement and school fees. [Mr De Alwis] also had access to existing files on previous applications to the court and unsuccessful mediation attempts. The only unforeseen element in this case was [KUB’s] sudden and unexpected hospitalisation. However, I don’t understand why a statement of costs could not have been prepared by your firm and agreed to, at the time I was advised that an urgent application to the court was necessary in relation to KUB’s treatment. This urgent application was then postponed several times and affidavits re-written on the advice of your firm and not on my instructions.

…………………….

#### Witness statement of Mr Chaplin – Burch dated 15 February 2021

1. At the date of making this statement, Mr Chaplin-Burch was a Senior Associate employed by AP in its family law team. In this statement, he relevantly said:

* initial instructions from AKL were received by Mr De Alwis, and subsequently Mr Chaplin – Burch also began working on the matter;
* at the time AKL engaged AP to represent him, Mr Chaplin – Burch understood that the issue related to the SMA and on 18 October 2018 a Notice of Address for Service was filed and served by AP;
* upon receiving AKL’s file and looking at the proceedings more generally, it became apparent that the proceedings also concerned parenting and property matters and for this reason the 20 November 2018 letter was sent to AKL;
* he does not recall or believe that AKL raised any issues about AP attending to these matters;
* in November 2018 as a result of AKL instructing AP that KUB was admitted to Monash Children’s Hospital by GDJ without the knowledge or consent of AKL, AP advised him to make the urgent application and AP commenced working on it;
* he had read AKL’s witness statement;
* AP initially advised AKL that the urgent application should be made concerning KUB’s hospitalisation because AKL was concerned that he was not being kept informed about KUB’s condition and that the hospitalisation was not necessary. The issues were evolving on a daily basis as more information became available and AP was constantly learning the depth and complexities of the specific issues of KUB and RDY;
* KUB’s condition in hospital was also changing daily and with AKL starting to be able to have more conversations with treating doctors and hospital staff, the urgency of the matter was being alleviated;
* however, AP advised AKL that it had concerns about the making of the application with only limited objective evidence being available and when KUB was released from hospital the urgency issue was essentially removed;
* AP was also able to negotiate a longer period of time for AKL to spend time with KUB and RDY over Christmas and in the new year which would provide better opportunity to see how they behaved with him compared with when they were with GDJ;
* AKL was then grateful about this outcome being achieved without the necessity of issuing the urgent application;
* the majority of the information used in drafting the affidavit to be filed in late December 2018 was used in the affidavit deposed to by AKL on 31 January 2019 which concerned parenting issues in general;
* based upon his knowledge of AKL’s matter, he believed the 20 November 2018 letter accurately set out the position as it then was, and the 15 April 2019 letter accurately set out the anticipated costs in progressing the matter;
* following the 15 April 2019 letter, AKL raised concerns with he and Mr De Alwis. These concerns were raised with Mr Clark as the responsible Principal who responded to AKL by sending a number of letters to him including the 2 May 2019 letter, the 13 May 2019 letter, the 23 May 2019 letter, and the 22 August 2019 letter. He has reviewed these letters and believes they accurately set out the circumstances as they were then based on his knowledge of the file;
* on 17 May 2019 (**17 May 2019 letter**), in response to concerns AKL had raised, he and Mr De Alwis prepared a detailed letter dealing with those concerns which he believes accurately sets out the issues as they existed at the time and the views and advice that AP provided to AKL;
* he referred to the issue raised by AKL in relation to the file numbers allocated to his family law matter;
* when AKL first engaged AP, a personal assistant in the family law team would have created a client file in ‘Affinity’ which is the document management system now used by AP. At the time, Affinity was mainly used for accounting purposes and not document management. A separate system called ‘Worldox’ was used, and the code allocated to each client was the same in each system. Each separate file for a particular client would then be designated a number starting with ‘1’ and, again, those numbers would be used in each system;
* in around August or September 2018, AP experienced an issue with Worldox which ‘crashed’ and resulted in some data being temporarily unavailable, and in some instances being inaccessible, and this continued for some time into late 2019 until it was rectified;
* a second file was opened on the system for AKL’s family law matter and designated the number ‘2’ given the technical issues being experienced by AP. However, at all times, he regarded AKL’s family law matter as being one file given it was the same proceeding. While it is common in family law matters for different issues such as parenting and property to be raised and which require attention at different times, all matters need to be progressed together given the Court’s expectations;
* it is the usual practice of AP in any family law proceeding, save for an exceptional circumstance such as an intervention order which is a separate proceeding, that only one file is opened per client despite the proceedings possibly raising a number of issues;
* at all times that he was involved in AKL’s family law matter, save for when AP was initially engaged and believed only the SMA needed to be dealt with, he regarded all aspects which required attention involving the matter to be one file.

### 2 May 2019 letter

1. This letter was sent by Mr Clark in response to the 24 April 2019 letter. Omitting formal and irrelevant parts, it reads:

When you first attended upon our offices the scope and flavour of your matter were different namely:

1. Your matter was a straightforward parenting matter in which GDJ was, on your instructions, acting irrationally, but the children were largely healthy;
2. The property aspect of your matter was relatively straightforward;
3. There was [the SMA] (as a discrete issue) that needed to be dealt with.

Our estimate at that time, based on your advice, assumed your matter would (if it ran to trial) run for one day with several of the matters having the potential to settle before.

During your matter the following has occurred:

1. Your son KUB became unwell on several occasions and this necessitated us having to be in contact with his treating doctors at the hospital, you and GDJ’s lawyers;
2. GDJ questioned KUB being in your care and this required a variety of attendances on you, GDJ’s lawyers and DHS;
3. There were significant complications (and these are ongoing) with regards to the [investment property] requiring us to have to communicate with you, the other side, Mr Basilone etc.

The above matters have been outside of our control and not foreseeable.

It has now become apparent to the practitioners working on your file and me that the disputes in your matter have increased and not reduced. This is because of:

1. KUB’s health;
2. The delayed sale of [the investment property]and the issues in relation to damages;
3. The fact that the outcome of Mr Papaleo’s report is not known.

In order to properly prepare your matter and put you in the best possible position for a trial significant extra work must be undertaken.

……………….

It is a requirement of a law firm to provide ongoing and updated cost disclosure pursuant to the [LPUL]. I note that this was provided to you on 15 April 2019. I have reviewed this letter and am satisfied that this is the appropriate range and offers you a substantial discount.

………………..

### 13 May 2019 letter

1. This letter was sent by Mr Clark in response to the 7 May 2019 letter (of AKL). Omitting formal and irrelevant parts, it reads:

……………….

I note you first instructed us on 16 October 2018 to deal with your spousal maintenance issue. That was properly dealt with. Since then you have instructed us to act in relation to issues touching upon your children and property matters.

The cost estimate we provided you in relation to children and property matters was based on your instructions in relation to the nature and scope of these disputes. Unfortunately, neither GDJ and you have been able to contain the nature and scope of the matters in dispute in the way you told us and that has led to increased cost.

………………

In respect of how your cost estimate has changed since your initial instructions the following has occurred:

1. The parenting aspect of your matter significantly increased. An Interim hearing was initiated and run, with third party intervention. Voluminous correspondence with [GDJ’s solicitors], the Department of Health and Human Services, various treating doctors and of course with you was required.
2. GDJ now seeks further reports from KUB’s and RDY’s various treating doctors. These doctors will also be required to give evidence at a final hearing.
3. A further Family Report was required to be produced to try and help minimise the issues in dispute and provide recommendations to the Court, GDJ and you as to what is in the children’s best interests.
4. The sale of [the investment property] has become contentious. We note that there was significant correspondence with both [GDJ’s solicitors] and you surrounding the sale of the property.
5. GDJ continues to raise further allegations surrounding inheritance and other financial matters to which you will need to respond and provide ongoing disclosure.

When Mr De Alwis initially took your instructions, none of the above were active and did not need to be addressed. Based on your initial instructions an estimate of a one – day trial was made. Given the issues now, if the matter does run to trial, it will be three to four days. This is because of the scope of your matter and the way GDJ has behaved. After this became apparent, we have provided you with our updated cost estimate - 15 April 2019.

In an endeavour to save costs we have been cautious with how we have responded to matters. We have not responded unless matters have been urgent or necessary. However, most matters in relation to your children have been urgent and required a response. Likewise, matters in relation to the sale of [the investment property] had to be responded to in order to ensure that a sale, which you wanted, off market, could proceed.

……………….

You have been provided with the invoices in your matter…………The balance outstanding is $47,466……………………………

There has been no doubling up of any charges.

To pay the outstanding invoices we have transferred the sum of $47,466 from our trust account (from the part property settlement that you received) pursuant to the authority you furnished us in the Cost agreement, leaving the sum of $2534 in our trust account. I attach Trust Statement as at this date, 13 May 2019.

### 17 May 2019 letter

1. This letter, omitting formal and irrelevant parts and footnotes, reads:

…………….

At the outset, your claim that you were “ill – advised” to obtain an updated Family Report in your matter is refuted. You had (prior to engaging our firm) obtained a Family Report from [another person]. This Family Report was inconclusive. Mr De Alwis of our office expressed to you that it was his experience that [the other report writer’s] reports usually were inconclusive and that the complex issues in your case may have required someone with more skill.

The report from Dr Vincent Papaleo is not inconclusive. We draw your attention to paragraph 125 on page 40 of the report. His recommendation, following what he considers is a detailed analysis of the matters before him has provided the following recommendations:

125.’Notwithstanding all my concerns, it is my view that the most helpful approach is that the children continue to reside in an equal care arrangement, that the family be required, even ordered to comply with the directions of RDY and KUB’s treating health care professionals, and that as a function of the orders, that they attended on an experienced family therapist for treatment. It is also my strong recommendation that failure to comply with Court orders should invite a reconsideration of the parenting arrangement and that the children should reside with one parent, who will then be responsible for all decisions regarding the children’s health and that parent should in my view by given sole parental responsibility for all decisions regarding the children.’

Furthermore, another recommendation is set out at paragraph 127 which says:

127. ‘…although I am strongly of the view that there should be clear expectations around treatment endorsed by the Court orders, with real and measurable sanctions applied for a failure to comply.’

Mr Papaleo is a pre-eminent practitioner in the area of Family Law and writing Court ordered reports. He has earned significant respect in the court system for the way in which he deals with the forensic evidence in a manner that provides for the expert report that a Judge requires.

If your matter proceeds to a Final Hearing and you still disagree with aspects of Mr Papaleo’s report or indeed if GDJ disagrees with aspects of Mr Papaleo’s report, Mr Papaleo can be called for cross – examination where a variety of different propositions and questions can be put to him in relation to your matter.

Analysis

In your various emails, you have made various assumptions about the report. They are not true. The report is not “counterproductive” to your case. Rather, a careful examination of the analysis within the report lends itself to the conclusion that both you and GDJ have parenting flaws. You will note that Mr Papaleo does not place the blame squarely on you. Rather, he says in his report that the problem with KUB and RDY and your family is the ‘process of splitting’. This is again opined by Mr Papaleo when he says…’what is evident from both AKL’s and GDJ’s presentation is that they are absolutely split and divided when it comes to parenting, that they cannot agree on any aspect of their children’s lives, and have a completely diametrically opposed construction of the history…’ Mr Papaleo also provides (unlike the previous report writer) a detailed analysis of why KUB and RDY present the way they do. This is once again not solely a criticism of you but rather a matter that each of you can use in your respective case. Indeed, you will no doubt rely on the children’s relationship with you.

An analysis of paragraph 116 lends itself to the above conclusion. Particularly:

116. ‘What is evident in the behaviour of KUB and RDY is that being able to maintain a meaningful, positive and secure psychological image of both parents, simultaneously in their psychological worlds, is impossible, that they have been unable to accept the simultaneous nurture, care, love, and support from both parents, and that they have come to have understand (sic) that such a middle ground entails conflict, discord, contradiction, and unrelenting dissonance; they have been literally, emotionally starved of a united parental front. Both boys are starting to split their parents into being all good and all bad. The psychological sequelae reflect severe interpersonal functioning and long – term mental health difficulties. Again, this is what is evident in this family and family’s functioning.’

The Court will expect each of you to reflect on the Family Report and work out the best way forward to parenting RDY and KUB and the best proposal to put before the court.

There is no plausible conclusion that can be drawn that the report was ill – advised. Clearly, the issues facing your children and your family dynamic are significant. However, you need to understand that a Judge will not and does not blindly follow the recommendations of a family report writer. Judges need to weigh up the evidence and make findings as to each of you. This is because the family report writer’s job is to quite simply provide an observation, an analysis and a clinical perspective as to your children.

It is a Judge’s duty to consider the matters mandated by Parliament in Part 7 of the Family Law Act. In every matter that runs to trial, a Judge makes this determination. This determination is made from analysing the evidence that each of you give under cross – examination and the expert reports. Given that [the previous family report writer’s] report was old, the Court would have requested that there be an updated report anyway. It is prudent that you obtained one from Mr Papaleo.

The rules of the system require this detailed analysis. There is significant case law in relation to what Judges must take into account and the weight they must give to each piece of evidence. However, this is a time – consuming exercise and something that can only happen (because of the rules of our legal system) at a final hearing before a Judge.

It is therefore not possible for you to draw a conclusion that this report is “counterproductive” to your case.

We also note your criticism that (sic) DHHS and other professionals not being subpoenaed. Only treating medical practitioners are able to have their notes subpoenaed in order to prepare a family report. Therapeutic counsellors are not permitted to be subpoenaed. In fact, there is significant case law and a line of legal authorities that say that therapeutic counsellors cannot be subpoenaed. This is because the court takes (sic) rationale that if children think that anything that they say to therapeutic counsellors will end up in court material that they will not focus on the therapy but rather on “having their views heard.” Clearly, this lends itself to RDY’s own observation which is set out in paragraph 53 of Mr Papaleo’s family report which says:

53.’RDY was particularly critical of the fact that anytime he has a conversation with his mother about matters relating to his father that they end up in a Court document and so there is a violation of trust that for RDY is difficult to overcome, with him feeling that his mother is preoccupied with the need to win, regardless of the cost of so doing’.

Strategy

In terms of strategy moving forward, you have two options. They are:

1. Run an argument that notwithstanding the matters set out in the report the fact of the matter remains that the children are unable to get along with GDJ and that as a result of that they should live with you; or
2. That you follow an equal time regime (as recommended by Mr Papaleo) but ask that the court make orders for a new set of practitioners to treat the children prior to making any order that you both follow the advice of the treating practitioner. This gives the children the chance to have a “new start.”

In all of the circumstances, from both writers’ perspectives and in our recent experience the Family Report is a well prepared, cogent document that provides significant analysis of the evidence.

Conclusion

It is our view that you carefully read the report of Mr Papaleo and that we have a face to face conference at our office to discuss the matters set out in this report……………………………………………………………………

### 23 May 2019 letter

1. This letter from Mr Clark, omitting formal and irrelevant parts, reads:

……………………………..

We draw your attention to paragraph 4 of our costs agreement,…….

By this paragraph, you authorise our firm to withdraw trust monies on your behalf when they are received into our account. We have done exactly that in settlement of our legal fees that were owing as we are entitled to.

For Spousal maintenance you have been charged $9175.46 plus GST as this was a discrete invoice.

In relation to the remainder of our work, we do not record them under individual items. We have recorded all our attendances on your file.

I understand that David and Dylan have responded to you in regard to the Family Report. I agree with their response and I have nothing to add.

### 22 August 2019 letter

1. Omitting formal and irrelevant parts, this letter reads:

We cannot comment on the independent legal advice which you have received but again reiterate that pursuant to paragraph 4 of our costs agreement …… you authorise our firm to withdraw trust monies on your behalf when they are received into our account. This has previously been explained to you.

We note that the firm has spent a significant amount of time reviewing your matter and we confirm that there have been no mischarges or errors made in respect of your matter. We understand this was discussed and ventilated in a conference with Dylan and David in June this year and through previous correspondence on 7, 13, 17 and 23 May 2019.

We will not continue to act for you as you will not provide us with instructions in a reasonable manner. We note that when Dylan spoke to you on Friday, 16 August 2019, to obtain simple instructions from you, you were hostile and abusive. The relationship between you and our firm has broken down and, in this circumstance, it is not in either your or our firm’s interest that we continue to act for you.

We will now file a Notice of Intention to Withdraw as your Lawyer and in seven days a Notice of Ceasing to Act with the Court.

…………………………………..

#### Witness statement of Mr Chaplin – Burch made 16 July 2021

1. This witness statement is made further to his initial statement dated 15 February 2021. In it, Mr Chaplin – Burch relevantly says:

* until 30 June 2021 he was employed by Aitken Partners Pty Ltd as a Senior Associate in the family law team;
* he is now a Principal in the successor practice;
* on 19 November 2018 Mr De Alwis advised AKL that the urgent application should be made in relation to KUB’s hospitalisation and it would include obtaining an order permitting AKL to speak with the treating doctors, putting in place a regime for decisions to be made about KUB’s health where the parties did not agree and for orders that KUB live with AKL pending his discharge;
* following the giving of this advice work was performed by AP which ultimately permitted AKL to speak to KUB’s treating doctors. A meeting was arranged for AKL to attend on the treating doctors on 22 November 2018 at which AKL was informed that KUB would be released on 26 November 2018. AKL advised Mr De Alwis and him about this which was a significant change to the 19 November instructions and it resulted in a dissipation of the urgency for AKL to obtain orders;
* KUB was re-admitted to hospital on 27 November 2018 and was again discharged on 5 December 2019. Detailed instructions were taken by AP about this further hospitalisation and a detailed letter was sent to GDJ’s lawyers on 29 November 2018;
* on 30 November 2018 AP emailed AKL to advise delaying filing the application pending a team meeting that AKL was to attend at the hospital on 3 December 2018;
* on 30 November 2018 it also became clear from a letter of that date from GDJ’s lawyers that the hospital had made a Temporary Treatment Order. This changed the nature of the dispute as it was then clear that it was not GDJ’s decision to keep KUB hospitalised;
* with these additional instructions, he provided a draft affidavit to AKL on 10 December 2018 and the subpoena was issued to the hospital on 14 December 2018 to obtain further information in support of the application;
* after this, there were further communications with GDJ’s lawyers where agreement was reached as to KUB spending significant time with AKL over the Christmas break. AKL was content with the arrangements reached and accordingly there was little point in filing an application prior to Christmas;
* in January 2019, the DHHS became involved. However, once those issues had resolved with KUB living with AKL there was again no urgency for an application to be filed and, at all times, AKL was aware of these matters;
* at the 12 March 2019 hearing, Mr Chaplin – Burch instructed Mr Mort of Counsel at Court and Mr De Alwis was not present;
* a discussion took place between Mr Mort, AKL and Mr Chaplin - Burch surrounding how to progress the family law matters of AKL;
* Mr Mort discussed the previous family report;
* in doing so, Mr Mort noted it was out of date and there had been significant changes with respect to parenting matters and AKL agreed that an updated family report was required;
* Mr Mort advised that AKL engage Mr Papaleo to prepare the family report for AKL’s family;
* it was discussed with AKL that Mr Papaleo was a very experienced family consultant and that he provided in – depth and detailed reports. AKL was advised that Mr Papaleo had the appropriate background to deal with the specific parenting and children matters in AKL’s case;
* Mr Papaleo was appointed as a joint expert to provide a family report for AKL’s family;
* at no stage did Mr Mort say that Mr Papaleo could or would provide a favourable result to AKL. Mr Mort’s advice was that given the complexities, Mr Papaleo was a suitable option;
* he was present at all conversations at Court surrounding this family report issue and at no stage did he or Mr Mort make any statement that Mr Papaleo would favour AKL.

#### Witness statement of Mr Clark dated 15 February 2021

1. Mr Clark relevantly stated:

* at the time of making the statement he was a Principal Lawyer and a director of Aitken Partners Pty Ltd and was the head of, and responsible for, the family law team;
* on or about 15 October 2018, AKL contacted AP to discuss his family law matter. Mr De Alwis discussed the matter with him by telephone and email;
* he was the responsible partner supervising the file and Mr De Alwis became the lawyer with the day to day conduct of the file and he was assisted by Mr Chaplin – Burch who was then an Associate;
* AKL initially engaged AP to act for him in the SMA;
* on 16 October 2018, AP sent the costs agreement and disclosure statement to AKL which AKL signed and returned the next day;
* following receipt of the executed documents relating to what he termed ‘the first retainer’, AP commenced acting for AKL;
* upon reviewing the file and commencing work, it became apparent that the family law proceeding also raised issues concerning parenting and property matters. Given that AP had filed a Notice of Address for Service in that proceeding, it was necessary to progress the family law proceeding as a whole that those matters be addressed;
* accordingly, the 20 November 2019 letter was sent with the updated scope of required work and updated costs estimate;
* the final account for work done rendered to AKL was on 30 August 2019 for $2566 plus GST;
* he provided a written response on 1 November 2019 to the VLSC complaint (**AP response to VLSC complaint**);
* the family law proceeding spanned two unique file numbers in the AP document management system but this occurred because of the problems encountered in August /September 2018 when the Worldox system “crashed”;
* otherwise, at all times AP treated the family law proceeding as one matter and one retainer and given that it was one proceeding involving multiple issues there was no reason for multiple files or multiple retainers;

### AP response to VLSC complaint

1. Omitting formal and irrelevant parts, it reads:

………………………….

In response we say as follows:

1. The issues have been discussed with [AKL] personally and confirmed in writing. Please find enclosed copies of all letters regarding the issues raised. [AKL] continued to provide instructions to our firm despite a disagreement involving these issues. I terminated our retainer with [AKL] when he abused, bullied and threatened our people.
2. As with any litigation and including family law matters, strategy must evolve to meet changes in circumstance which arise during the progress of a case. [AKL] was involved with strategy as it evolved throughout his matter. [AKL] had no complaint surrounding strategy, nor any outcomes achieved and was complimentary of results obtained.
3. With the evolution of [AKL’s] matter, we provided him with an updated cost estimate. I enclose a copy. We did not agree to fix [AKL’s] fees, rather we specifically stated to him, personally and confirmed in writing, that as the scope of the matter, its complexity, the attitude of the other party became known, we would provide updated cost estimates. I enclose our initial Cost Agreement which sets this out.
4. We applied trust money provided by [AKL] to secure our costs and disbursements for this purpose as detailed in the Cost Agreement. The accounts were not disputed by [AKL]. The money was applied at the appropriate time. I enclose copy of the trust ledger.

………………………………………….

#### Witness Statement of Andrew Blogg dated 15 February 2021

1. In his statement, Mr Blogg, omitting formal and irrelevant parts, said:
   * at the time of making this statement, he was a Principal Lawyer and a director of Aitken Partners Pty Ltd;

* in or around January 2019, AKL engaged AP to act for him in relation to the Wesley College proceeding;
* he understood that AKL was an existing client of AP and that there was a family law matter that others in the office of AP were conducting;
* he arranged for a lawyer, Reuben Gill to assist him in the conduct of the Wesley College proceeding;
* the Wesley College proceeding was issued against AKL and GDJ seeking $58,031.30 but it was resolved and on 1 April 2019 Mr Gill forwarded to the solicitors for Wesley College signed minutes for the proceeding to be dismissed with no order as to costs;
* on 31 January 2019 Mr Gill forwarded a costs agreement and disclosure statement to AKL. However, he never signed and returned them but continued to provide instructions;
* on the basis of the work anticipated to be undertaken including delivery of a defence and a pre-hearing conference, the costs’ documents contained what he regarded as a reasonable estimate of about $15000;
* he remains of the view that AKL entered the (unsigned) costs agreement by continuing to provide instructions and he is satisfied that the work referred to in the two invoices was performed and the charges were reasonable.

#### The hearing

### 3 June 2021

1. AKL was self – represented. The respondent was represented by Mr Paolo Tatti, Principal Lawyer, employed by AP. Mr Tatti had no involvement with AKL when he was a client of AP.

#### AKL – Evidence in chief

1. At the outset, AKL confirmed that his witness statement was true and correct.
2. GDJ had commenced the SMA in the family law proceeding, which was the third such application she had made. She continued to engage the same law practice who had acted for her throughout. AKL had received a favourable recommendation from a client about Mr De Alwis as a family lawyer. He called Mr De Alwis and engaged AP to act for him in relation to the SMA. The file from the law practice who had previously acted for him in the family law proceeding was sent to AP.
3. At that time, AKL had not regularly been seeing his children. They were living with GDJ. However, from early in the family law proceeding, an order had been made that both AKL and GDJ were to be advised and consulted about any medical interventions involving RDY and KUB. As such, he was therefore surprised to receive a text message from GDJ on or about 11 November 2018 that KUB had been admitted to hospital.
4. AKL was unable to obtain information from the hospital about why KUB had been hospitalised and he called Mr De Alwis requesting that he contact the hospital to try to find out why KUB had been admitted and details of his treatment. AKL was concerned that GDJ had sought KUB’s admission into hospital when he believed other options had been available. Further, AKL was concerned that KUB’s health was deteriorating as he was traumatised by the hospitalisation.
5. AKL decided to proceed with the urgent application as Mr De Alwis believed that if it was proved that GDJ had admitted KUB without regard to previous Court consultation orders and KUB’s safety, AKL would receive a favourable outcome including possibly being awarded interim custody of KUB. AKL also believed that when he was advised to make the urgent application, AP would have already undertaken sufficient preliminary due diligence which established that there were worthwhile grounds to proceed with the urgent application.
6. However, as matters progressed into, and through, December 2018 without the urgent application being filed or the supporting affidavit being finalised, AKL questioned the purpose of making the application, and constantly communicated his frustration to AP. He was concerned, not only about the apparent lack of urgency, but also about changes in advice, lack of proper consideration of the grounds of any application and the efforts at gathering evidence. He maintained that despite his requests and advice to AP as early as late November 2018 that evidence favourable to the urgent application could be obtained from one of the treating doctors and a case officer, AP did not pursue these avenues. According to AKL, the treating doctor was very concerned about the deterioration in KUB’s health in the hospital and the case officer was concerned about the level of discord between the family members, particularly between GDJ and KUB, which ultimately resulted in her reporting her concerns to Child Protection.
7. GDJ and her solicitors were agreeable to AKL having the children live with him between Christmas to around 9 January 2019 because GDJ was travelling to Thailand for a vacation. He also had sole interim custody of KUB from 12 January 2019 due to the Child Protection Officer from DHHS not being happy with GDJ’s conduct with the children and, as a result, speaking with him and requesting that KUB live with him as ‘respite’. Neither of these custody outcomes had anything to do with work of AP or the urgent application.
8. AKL referred to, and detailed, his concerns throughout about the fee estimates, disclosure, and the invoices including overlapping entries. He contacted AP after each invoice about concerns. He also expressed his concerns about withdrawal of trust money to pay accounts rendered.
9. On 12 March 2019, he attended Court with Mr Mort and Mr Chaplin – Burch for the interim hearing of the urgent application. Interim consent orders were made which included shared custody and a recommendation was given by Mr Mort and Mr Chaplin – Burch to AKL to obtain a new family report from Mr Papaleo. As no agreement had been reached on full time custody, Mr Mort said to AKL that he needed to obtain the Papaleo report as he is always in favour of the father and as he is a very influential report writer and that taking such a step would solve his problems.
10. AKL noted to Mr Mort that although the previous family report was inconclusive, it was clear to the author of that report that the children would prefer to live with him. He questioned how it was known that Mr Papaleo’s report would be clear and favourable to him. AKL thought that it was while he was at Court or later that day that Mr De Alwis recommended that he should follow the advice he had been given to obtain the new report and, in doing so, Mr De Alwis referred to the previous family report as being inconclusive. He also essentially suggested to AKL that the previous family report was a ‘cheap’ report when he said that AKL had ‘got what he paid for’, and that although the Papaleo report was more expensive, Mr De Alwis was guaranteeing that it would result in him getting the outcome he wanted. On the basis of the advice he had been given, AKL agreed to obtaining the new report.
11. AKL referred to the two different file numbers on invoices for the family law proceeding. He did not understand how it was due to a computer problem.
12. He referred to the invoices received in the Wesley College proceeding. He did not regard it as a separate matter, although he noted that the invoices had a third file number. AKL regarded the Wesley College fees’ issue as being within the scope of the 20 November 2018 letter relating to the family law proceeding and that it was to be dealt with by Mr De Alwis and Mr Chaplin – Burch. AKL never engaged Mr Blogg or Mr Gill of AP to act in the matter. Rather, they became involved when Mr De Alwis had obviously engaged another department within AP to act. AKL also maintained that the Wesley College proceeding was resolved by his actions and not through the actions of AP.
13. AKL was ‘devastated’ when he received and read the Papaleo report. He believed it was ultimately detrimental to his case. It was not favourable and did not achieve the desired outcome contrary to the advice given to him to obtain it. Its conclusion was shared custody but if there were doubts or concerns then GDJ and not him should have sole custody. He followed up with AP and expressed his disappointment and belief that he had been ill- advised to commission the Papaleo report and to proceed down the path of the urgent application. It ultimately appeared to him from what transpired at the final trial that it was rare for a Court to decide custody in favour of one parent over another, unless one of the parents was completely irresponsible. He was therefore uncertain about the soundness of the advice he had received and whether AP had provided it after exercising due care and skill.
14. In relation to his costs concerns, he sought to discuss them with Mr Clark but never received a response from Mr Clark about this request. AKL also maintained that he did not request AP to undertake work in relation to the investment property as he and GDJ had jointly engaged Basilone Legal to handle the sale.
15. The family law proceeding resolved ‘at the door of the Court’. According to AKL, neither he nor GDJ wanted sole custody. AKL was advised that sole custody would never have been awarded and that to suggest otherwise was incorrect advice.

#### AKL – under cross – examination

1. AKL understood the scope of work set out in the costs agreement which he regarded as clear in nature. He also agreed charges were to be calculated on an hourly basis and there was no fixed fee. He read clause 4 but regarded it as relating to the SMA. Although advised to do so under clause 8 of the costs agreement, he did not obtain legal advice prior to signing and returning it. Although he did sign and return the costs agreement, he agreed that under clause 9, it was stated that if he did not sign and return it, but continued to provide instructions, he was agreeing to be bound by its terms.
2. In the disclosure statement, AKL agreed under the table of lawyers who might act in his matter and their hourly rates, that it is stated that it may be necessary to incur other fees and charges. He also agreed that under the estimate of total legal costs, it is stated that the estimate is not binding and as work required may change the advised estimate is the best that can be provided at the time. Mr Tatti put to AKL that the SMA was one application in the context of a broader proceeding with other issues. AKL could not say whether he discussed other issues such as parenting when he first spoke with Mr De Alwis. AKL also agreed that under the estimate of total legal costs it is further stated that if the scope changes significantly then the estimate will be reviewed and if necessary the estimate will be revised. However, if this occurred, AKL regarded it as a new matter requiring a fresh costs agreement and disclosure statement.
3. AKL agreed that clause 3 of the disclosure statement noted he had a right to request an itemised bill and clause 6 noted that he had a right to request a written report on legal costs. Despite this, AKL maintained that he could not ascertain any difference between them and the rights they provided. AKL also did not regard the revised estimate in the 20 November 2018 letter as arising from the disclosure statement. He agreed that the items in the 20 November 2018 letter under parenting and property matters clearly set out the work to be performed by AP. He saw the estimate of $35,000 plus GST but had thought that included fees for the SMA. He was then confused as the SMA was not referred to in the two lists of items of work to be undertaken in the 20 November 2018 letter. He also regarded the issues arising under the subsequent Wesley College proceeding as being an item included under the parenting list in the 20 November 2018 letter.
4. AKL agreed that AP filed a Notice of Address for Service with the Family Court but neither agreed nor disagreed when Mr Tatti put to him that the notice could only be filed in a proceeding and the SMA was an application within the proceeding.
5. As to whether he continued to provide instructions to AP after the letter of 20 November 2018, AKL conceded only that if sending updates about KUB’s condition and seeking updates about the urgent application constituted providing instructions, then he did continue to do so. He regarded any discussions about the sale of the investment property as being part of the SMA as orders made in the SMA included the sale of the investment property.

### 4 June 2021

1. AKL agreed that the letter of 15 April 2019 referred to the costs agreement, the disclosure statement, and the 20 November 2018 letter. However, he did not see any difference in the scope of work set out in the 20 November 2018 letter and in the 15 April 2019 letter. He agreed that the letters gave reasons for the increase in costs estimates but he did not agree with the reasons given.
2. AKL was not happy with the costs and outcomes of the legal services provided. He disagreed with Mr Tatti’s propositions that no lawyer can guarantee an outcome in any sort of litigation, that at all stages AP made him aware of the fees to be incurred, and that disclosure by AP was appropriate. He agreed that each invoice contained a notification of rights including the ability to request an itemised bill within 30 days and to have a bill of costs assessed by the Costs Court and that each invoice contained a notice about withdrawal of trust money. He also agreed that prior to making his decision to proceed at VCAT under the ACL he had received each of the costs agreement and the disclosure statement which set out options to challenge fees, the invoices which contained the notification of rights, the letter from the VLSC setting out options, and he had obtained independent legal advice.
3. AKL was given the advice on 19 November 2018 to make the urgent application and he thought a reasonable time to have made that application would be within a week, even though he had not spoken to KUB’s treating doctor and team members until 21 and 22 November 2018. He also did not agree that there had been significant changes in circumstances relating to KUB between 19 and 30 November 2018 or between 19 November and 10 December 2018. He regarded the only outcome as being KUB released back into GDJ’s care and hospital re-admission. However, as a general proposition he accepted that it is important for a lawyer to be aware of, and to consider, all information before giving advice to a client.
4. In relation to obtaining the Papaleo report, AKL regarded the advice as being given by Mr Mort or AP. He was told the report would be favourable. Mr Tatti put to him that he was told that it would be a detailed report which would reach a conclusion, unlike the previous family report. AKL specifically disagreed with Mr Tatti and said the advice to obtain the report was put in much different terms. AKL generally agreed, however, with Mr Tatti when Mr Tatti noted that the previous family report was dated 8 June 2018 and a number of significant changes and events had taken place since that report. AKL agreed that a lawyer does not have control over what a family report writer says in a report.
5. Mr Tatti then suggested to AKL that it was reasonable, given the evidence they knew, that Mr Mort, Mr De Alwis, and Mr Chaplin – Burch believed that the new report could be favourable. AKL did not agree with Mr Tatti. AKL maintained that the advice given to him was based on the previous dealings of the practitioners with Mr Papaleo and their advice was a guarantee that his report would be favourable and he was ridiculed and told that the previous family report was so poor and inconclusive that he ‘got what he paid for and that is how cocky and confident they were’.
6. AKL also disagreed with Mr Tatti’s suggestion that none of the practitioners provided a guarantee that the report would be favourable and he further disagreed ‘on his experience’ with Mr Tatti’s suggestion that no lawyer would advise their client that a family report would be favourable to their client. Additionally, AKL disagreed with Mr Tatti’s suggestion that his disappointment with the outcome of the Papaleo report caused him to retrospectively express dissatisfaction about AP’s legal services. He maintained that he had been frustrated and unhappy with them for a long time.
7. In relation to the explanation about the AP computer system malfunction leading to the two different matter numbers for AKL for the family law proceeding, he agreed that he did not know the internal systems of AP but he did not believe that the two matter numbers relate to the same matter. This was also despite Mr Chaplin – Burch’s witness statement that separate files are not opened for discrete matters in a family law proceeding and that the usual practice of AP is one file per client.
8. AKL did not resile from his evidence that he regarded the Wesley College proceeding as being part of the family law retainer from the 20 November 2018 letter even though he was not served with court documents until 17 December 2018 and that it was handed to the AP commercial litigation department and he was sent a separate costs agreement and disclosure statement headed in that matter. He was also taken by Mr Tatti to a bundle of correspondence including between GDJ’s lawyers and AP about disputed issues relevant to the sale of the investment property, subsequent to the SMA, about which he provided instructions to AP. He did not disagree that Basilone Legal could not have appropriately dealt with the issues.

### 19 July 2021

#### Mr Chaplin – Burch – Evidence in chief

1. Save for a typographical error relating to the date of the first witness statement, which he corrected in his oral evidence, Mr Chaplin – Burch confirmed that both of his witness statements are true and correct.

#### Mr Chaplin – Burch – under cross - examination

1. Mr Chaplin – Burch was an Associate of AP in 2018 and was promoted to a Senior Associate in June 2019. He was not involved in the preparation of the costs agreement. However, he was aware of its contents. As to its scope and the five items referred to, he did not understand it to include legal services for the overall matter. He was not certain of the date AP received AKL’s file. He first became personally involved in AKL’s matter on or about 20 November 2018. He was not a signatory to the 20 November 2018 letter but he was aware of its contents. It would have been prepared after a review of AKL’s file had been undertaken and all the issues considered and it was written to provide an updated estimate of costs and scope in the family law proceeding which was ongoing. Parenting and property matters had been before the Court and AP were the solicitors on record.
2. When he became personally involved, he conducted the file with Mr De Alwis. Given the complexity of the matter, the costs estimate to final trial in the 20 November 2018 letter was realistic. However, as the matter progressed, it became apparent that the legal services could not be delivered within that estimate as then set out in the 15April 2019 letter.
3. After advising about the urgent application, matters changed regularly and rapidly on a daily basis and, on occasions, on an hourly basis. In these circumstances, as the matter evolved, AP’s views about the urgent application changed including about the availability and strength of objective evidence.
4. Mr Chaplin – Burch agreed with the advice given by Mr Mort about obtaining the new report from Mr Papaleo. Mr Chaplin – Burch had previously himself worked and engaged with Mr Papaleo whom he regarded as highly respected and revered with significant experience in a matter of the nature of AKL’s. The parties jointly agreed with the appointment. In providing the advice to AKL to obtain the report, no indication was given that it would be in any way favourable to AKL’s case. AKL was not ill – advised to obtain the report. The advice was appropriate to obtain an update report about what was in the interests of the children.

#### Mr Blogg – Evidence in chief

1. Mr Blogg confirmed that his witness statement was true and correct.

#### Mr Blogg – under cross - examination

1. He received instructions about the Wesley College proceeding from Mr De Alwis who explained the matter to him. He took over conduct of the matter in November or December 2018. Wesley College issued its fee recovery proceeding on 12 December 2018. It involved both children. Mr Blogg sent a costs agreement and disclosure statement to AKL on 31 January 2019. He also had email communications with AKL about the matter. In those circumstances with AKL continuing to provide instructions, one of the conditions contained in the costs documents for AP to continue acting had been met, despite AKL not signing and returning the documents.
2. The Wesley College proceeding eventually resolved. On 1 April 2019, AP sent a letter to the solicitors for Wesley College with signed minutes of consent orders and the proceeding was dismissed. The proceeding was issued against both AKL and GDJ. The statement of claim was not sufficiently particularised. AP requested further and better particulars which were provided and AP emailed AKL about them. AKL spoke with the school and reached an ‘in principle’ resolution for each of the children. Wesley College sought costs which were disputed by AP. Wesley College then withdrew its claim for costs.

### 20 July 2021

#### Mr Clark – Evidence in chief

1. Mr Clark confirmed that his witness statement was true and correct.

#### Mr Clark – under cross - examination

1. Mr Clark did not agree that the costs agreement did not include the overall matter of the family law proceeding. Similarly, he did not agree that clause 4 of the costs agreement relating to trust money did not relate to the overall matter. He agreed that at the time the costs agreement was entered into, the SMA was contemplated. However, shortly after, it became clear that AKL’s matter was much broader and the costs agreement evolved to relate to the overall matter.
2. In relation to the estimate in the 20 November 2018 letter, he had conversations with Mr De Alwis about the overall matter, including the parenting and property matters and, given the available information from Mr De Alwis, he regarded the costs estimate to preparation for trial to be reasonable.

### Submissions of AKL

1. These relevantly state:

* on 19 November 2018, he agreed in principle to the urgent application on the advice of Mr De Alwis that it would be a quick process (approximately one week to prepare) with an interim custody decision by the Judge in his favour ‘highly likely’ while KUB remained hospitalised;
* on or around 12 January 2019, he was able to negotiate interim full-time custody of KUB through a Child Protection Officer, independently of AP or the urgent application;
* on 12 March 2019, he was advised by both Mr Mort and Mr Chaplin – Burch at the interim hearing and subsequently by Mr De Alwis by telephone that the previous family report was not favourable enough and that a new report, if prepared by Mr Papaleo, would certainly favour ‘the father’ as this was ‘usually the case’ and it was on the basis of this advice that he agreed to obtain the new report;

### Summary of claim

* the legal services provided by AP were not delivered to the standard expected of an accredited, knowledgeable, experienced and skilful legal expert in terms of both quality and speed;
* AP was unable to provide informed and accurate legal advice in relation to the urgent application, including as to its necessity and appropriateness and how long it would take to be reasonably prepared. This is a claim under s 60 of *Australian Consumer Law* (**ACL**) as the services were not provided with the due care and skill expected;
* the legal services provided by AP were not carried out in accordance with his initial advice or specific instructions. In relation to the urgent application, AP did not act on his instructions to only contact the hospital to obtain information about KUB’s admission but instead AP escalated the matter by initiating an unnecessary and lengthy application which was not urgent. AP’s advice to initiate the urgent application did not result in interim custody of KUB and according to Mark Parker, the solicitor who assumed control of his family law matter at LR, the Family Court would never have considered such an application favourably and this was proven to be correct as final parenting orders resulted in shared parental responsibility and not sole custody to either parent. Accordingly, AP’s legal services were not fit for purpose under s 61 of the ACL;
* legal services were carried out unnecessarily in relation to a second affidavit prepared by Mr Chaplin – Burch between the filing of the urgent application and the 12 March 2019 hearing as it was not deposed to by AKL or filed, rendering it not fit for purpose under s 61 of the ACL;
* the legal services provided by AP were neither delivered with due skill and care under s 60 of the ACL nor were they fit for purpose under s 61 in relation to their advice to obtain the Papaleo report as it was not ‘favourable to his case’;
* AP provided unnecessary legal services, not in accordance with AKL’s instructions, in relation to the sale of the investment property as Basilone Legal was engaged by he and GDJ to provide conveyancing services and this is also a claim under s 61 of the ACL;

### Fitness of services for purpose

* the two guarantees in relation to services under s 61 of the ACL are that they will be ‘reasonably fit’ for the purpose that the consumer expressly or impliedly makes known, and that the services will be of such a nature and quality that they might ‘reasonably be expected to achieve’ the result the consumer wishes the services to achieve;
* his evidence establishes that AP initiated the urgent application through their written advice, in response to his instructions that they simply contact the hospital on behalf of AKL to seek information on KUB’s admission, and that the application would be prepared quickly;
* during cross – examination, Mr Chaplin – Burch said that while he understood the advice about the urgent application was that it would be prepared quickly and filed while KUB remained hospitalised, it needed to be delayed due to KUB’s changing circumstances, the development of a treatment plan, AKL’s ability to speak to KUB’s treating doctors, and the lack of evidence in support of the application which gave rise to the need to subpoena hospital records in late December 2018. In this regard, by failing to follow instructions and not having sufficient evidence to warrant the commencement of the urgent application, AP’s legal advice and subsequent services were not fit for purpose under s 61, and were not provided with due care and skill under s 60;
* the urgent application did not ultimately achieve the intended result as it failed to secure interim custody of KUB at the interim hearing. While he accepts that failure to achieve the intended result or desired outcome does not necessarily mean there has been a breach of the consumer guarantee under s 61, the legal services were not ‘reasonably fit’ for achieving, or ‘reasonably expected’ to achieve the desired result and his exposure to unnecessary legal fees was not thereby minimised;
* final custody orders in the proceeding provided for shared parental responsibility on a week on/week off basis and did not award sole custody to one parent alone, despite the written advice from AP in relation to the urgent application.
* under cross-examination, Mr Clark stated it was unclear to him what was the scope of legal services which were the subject of the 20 November 2018 letter, despite also stating the fee estimated in the letter was accurate and reasonable at the time it was prepared. In these circumstances, Mr Clark did not comply with s 61 as he failed in his duty to guarantee that the fee estimate provided was in accordance with the nominated scope as he was unclear on the scope and therefore unclear on whether the nominated scope was fit for purpose. On the same basis, he claims under s 60 that Mr Clark did not act with due care and skill when overseeing the legal services provided.
* further, under sections 236 and 237 (4) of the ACL, he has suffered financial loss or damage in the incurring of the excessive legal fees that he did as the fee estimate in the 20 November 2018 letter may have been reasonable and achievable in terms of taking his matter to final trial if the urgent application had not been grossly mismanaged. He also makes the same claim for the unnecessary legal fees incurred by AP in relation to overall management of the Papaleo report and for unnecessary legal services not in accordance with his instructions in relation to the investment property;

### Due care and skill

* under s 60 of the ACL, there is a guarantee that a person who supplies services to a consumer in trade or commerce will render those services with due care and skill;
* at the time he entered into the costs agreement he understood it was only for legal services for the SMA and was limited in scope and fees and he was not informed that by signing it he was also agreeing to AP providing legal services in relation to his overall matter. If this was the intention, the scope of legal services in the costs agreement should have included parenting and property related matters and estimated fees for these matters, thereby allowing him to make an informed decision prior to engaging AP and, as such, AP failed in their duty to provide legal services relating to their costs agreement with due care and skill. In this regard, under cross examination, Mr Clark said that the costs agreement included his overall matter when signed but Mr Chaplin – Burch stated, when cross examined, that it was limited to the SMA;
* Mr Clark failed to exercise due care and skill when he incorrectly relied on clause 4 of the costs agreement relating to the SMA to pay for legal fees relating to his overall matter;
* AP failed to provide legal services with due care and skill in their reconciliation of fees billed compared with the estimates in the 20 November 2018 letter and the 15 April 2019 letter;

### Conclusion

* he seeks reimbursement of legal fees unlawfully withdrawn from the AP trust account of $41,227.50, being the difference between what he regards as the relevant fee estimate, being the 20 November 2018 letter of $35,000 plus GST and the total funds withdrawn of $79,727.50; and
* additionally, he seeks reimbursement of the VCAT application fee of $1,500, the sum of $10,000 plus GST for lost income in preparing for, and attending, the four day hearing, and penalty interest of $10,306.88 on the $41,227.50 withdrawn from the AP trust account on 13 May, 2019 (calculated at 10% of $41,227.50 over 2.5 years).

#### Submissions of the respondent

1. These relevantly state:

* In summary:

1. the *Legal Profession Uniform Law Application Act 2014* (Vic) (**LPULA Act**) does not apply to these proceedings which concern the costs AKL incurred whilst AP acted for him from October 2018 to August 2019;
2. insofar as there is any allegation of a breach of one or more of the guarantees contained in the ACLFTA, those are not made out; and
3. even if there is a breach of one or more of the consumer guarantees provided for in the ACLFTA, AKL has failed to establish any loss or damage;

### Application of the LPULA Act to these proceedings

#### Costs disputes

* Section 99 (1) of the LPULA Act provides that an application may be made to VCAT to determine a costs dispute if:

1. the total amount of legal costs in dispute is not more than $25000 (indexed); and
2. the parties have been informed by the VLSC under section 291 (2) or 293 (1) of the LPUL of their right to apply to VCAT under this section;

* it is uncontentious that

1. the legal costs rendered to AKL were $79,727.56; and
2. the costs in dispute exceed $29,160 which is the indexed amount;

* as such, s 99 (1) (b) has been met but not s 99 (1) (a) and therefore no relief as set out in s 99 (4) can be made unless similar relief is independently available under the ACL;

#### Disclosure issues

* as this is a claim under the ACLFTA, the Tribunal cannot make findings about the adequacy of the costs agreement or the disclosure statement;
* even if it were a relevant issue, AP complied with its obligations as follows:

1. the costs agreement and disclosure statement were in standard form and compliant with the LPULA Act;
2. clear updates about the family law proceedings were provided at regular intervals detailing scope, reasons for change to the estimate, and the amount being estimated; and
3. AKL conceded under cross – examination that the costs agreements and disclosure statement and subsequent updates were clear in their scope and contained easily understandable estimates;

#### Retainers

* any contentions of AKL that there were multiple retainers relating to the family law proceeding cannot be determined in this proceeding given the Tribunal lacks jurisdiction under the LPUL;
* it is sufficient for these proceedings that AP was engaged to provide services to AKL and with those services the implied consumer guarantees applied;
* however, even if the Tribunal was required to consider the retainer issue, AKL cannot establish that there ought to have been two retainers in the family law proceeding;
* in *DLA Piper Australia v Triclops Technologies Pty Ltd* (**DLA**)[[1]](#footnote-1), Wood AsJ dealt with the reverse scenario where there had been two retainer agreements but DLA Piper Australia sought to contend that there was one retainer. His Honour’s analysis in rejecting that argument has relevance in rejecting AKL’s contention in this proceeding, particularly where the Court (footnotes and citations omitted) said: [[2]](#footnote-2)

The primary reason for the Second Engagement Letter was said to be the applicant’s obligations under the Uniform Law. However, if the applicant was of the view that there was one retainer there would have been no need for this Second Engagement Letter (ie, a new Costs Agreement). If there was only one retainer the obligation would have been merely to update estimates of total legal costs if there has been a significant change in previous disclosure and written confirmation that Mr Davies was also liable for the applicant’s costs from that point onward.

* in this proceeding the costs agreement and disclosure statement were provided to AKL for the SMA and thereafter a Notice of Address for Service was filed and served which put AP on the court record as acting for him in the family law proceeding. AP thereafter issued interim invoices under that retainer and updated costs letters. It only issued a further costs agreement and disclosure statement for the additional Wesley College proceeding as it was a new retainer. This is consistent with the Court’s analysis in DLA;
* another matter raised in DLA which supports the contentions of the respondent in this proceeding, is where Wood AsJ, in referring to Dal Pont’s *Law of Costs* (footnotes and citations omitted) said[[3]](#footnote-3):

Dal Pont – Law of Costs provides authority for the proposition that ‘implied into every retainer is the lawyer’s duty to protect the client’s interest and to carry out by all proper means his or her instructions in the matters to which the retainer relates. Aside from express terms to the contrary, this dictates that, within the confines of the retainer, the lawyer – client relationship carries with it the implied authority to do all such things incidental to the object of the representation.’

* as AP was on the Court record for AKL in the family law proceeding it had the duty to protect his interests on all aspects of that matter and, as such, it raised the additional matters it believed required attention in compliance with this duty. There was no evidence (except given under cross – examination) that AKL ever asked about why any such work was being undertaken by it;
* DLA further supports the respondent’s contentions in this proceeding when the Court (footnotes and citations omitted) said:[[4]](#footnote-4)

At the hearing the applicant referred to a passage in Dort Mining NL v Foster Nicholson Jones where it was stated that a ‘Costs Agreement and the terms of a retainer do not have to be contained in the one document.’ It is not unusual for the scope of a retainer to alter. The applicant submitted at the hearing that a costs agreement is not the retainer but it might provide some evidence of a retainer and its scope.

* in this proceeding, the scope of the retainer changed, about which AP advised AKL in writing.
* AKL contends that the two file numbers allocated by AP to the family law proceeding supported the existence of multiple retainers. However, he neither cross-examined Mr Chaplin – Burch about this nor did he give any evidence in rebuttal;
* if the retainers’ issue is to be determined by the Tribunal, it must be so in favour of the respondent, that is, at all times, one retainer dealing with the family law proceedings and, from January 2019, one retainer in the Wesley College proceeding;
* AKL’s submission that the Wesley College proceeding fell within the scope of the family law proceeding and was therefore part of the same retainer cannot be maintained;
* the Wesley College proceeding related to recovery of school fees and was dealt with in a different jurisdiction and by lawyers in the litigation department of AP.

#### Authority to deduct monies from trust

* the respondent disputes that this issue is properly before the Tribunal and, if it is, it disputes the contention of AKL that AP was not entitled to utilise trust monies to pay rendered invoices;
* there was only one family law retainer, clause 4 of the costs agreement is in the approved standard form, each invoice is compliant with the LPUL by providing notification of rights and notice of withdrawal of trust money and each invoice in the family law proceeding contained a trust statement;

#### Request for costs report

* on 16 May 2019, AKL emailed a request for a cost report itemising legal fees under four sub – headings of spousal maintenance, application to the court relating to child custody (including preparation of an affidavit that was not filed), sale of the investment property, and property settlement including inheritance related issues. This request cannot be found as constituting a request for an itemised account;
* in the 23 May 2019 letter, Mr Clark noted that AP did not record work under individual items such as the four categories in AKL’s cost report request and he was not cross -examined about it;
* AKL conceded under cross – examination that he would have been aware of his right to request an itemised account from the costs agreement and the notification of rights in each invoice.

#### Right to request taxation of the respondent’s costs

* this proceeding cannot be used as a de facto taxation of costs;
* AKL knew of his rights to have his costs taxed and conceded as much in cross examination;
* each invoice notified him of this right as did the 11 December 2019 letter from the office of the VLSC.

### Consumer guarantees in the ACLFTA

* AKL bears the onus to set out the case he seeks to put;
* the only allegations which are capable of being determined by the Tribunal appear to be breaches of guarantees relating to the supply of services;

#### Section 60 of the ACL– Guarantee as to due care and skill

* s 60 relevantly provides:

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

* in *UMI v Carew Counsel Pty Ltd (Legal Practice)* (**UMI**)*[[5]](#footnote-5)* the Member summarised the guarantee (footnotes and citations omitted) as follows[[6]](#footnote-6):

That said, it is easier to identify things that could have been done better in hindsight. Further, the guarantee in section 60 of the ACL is not a guarantee of perfection, only an ‘acceptable level of skill.’

* hence, what is being considered is the actual work performed for AKL by AP and its quality;

#### Section 61 of the ACL - Guarantee as to services being reasonably fit for the purpose.

* s 61 relevantly provides:

(1) If

(a) a person (the supplier) supplies, in trade or commerce, services to a consumer; and

(b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for the purpose.

* in UMI, the Member summarised the guarantee (footnotes and citations omitted) as follows[[7]](#footnote-7):

Section 61 of the ACL is not expressed in absolute terms. That is, the failure to achieve the result that the consumer wants does not mean that there has been a breach of that consumer guarantee. Rather, the services must be ‘reasonably fit’ for achieving, or ‘reasonably expected’ to achieve, the desired purpose and result.

* much like the guarantee provided for in s 60 of the ACL, the question is whether the services were capable of achieving the desired purpose.

### Submissions on Consumer Guarantees

#### Overall Objection

* at the outset, the respondent objects to the manner in which AKL has conducted his case, particularly with respect to his written submissions which extend beyond his application for order and the evidence at hearing;
* this conduct has led to significant time and costs being incurred where numerous issues ought to have been apparent to AKL when raised during the hearing;

#### The urgent application

* AKL complains about the urgent application he was advised to make but it remains unclear how this is said to be a breach of any of the consumer guarantees;
* of relevance, before examining evidence in this proceeding is the finding by the Member in UMI expressed as follows:[[8]](#footnote-8)

UMI has not produced any evidence from another accredited specialist family lawyer to suggest that the services provided by Mr Johns were not reasonable in the circumstances that then existed. On balance, in my view, the explanations that Mr Johns provided are credible and ought to be accepted.

* no such evidence was provided by AKL in this proceeding putting the Tribunal in the position of dealing only with hypotheticals without any evidence;
* AKL has introduced in his written submissions some advice he received from Mr Parker which has not been made on the basis of any evidence presented during the hearing nor which has been put to any of the witnesses;
* Mr Parker was not called to give evidence and the respondent was not given the opportunity to cross – examine on the purported ‘advice’ given;
* otherwise, reasonable minds may differ on advice, strategy and other matters;
* when turning to the evidence as presented, it is apparent that in framing his contentions, AKL has failed to appreciate the chronology of the matter and the way in which events unfolded. In this regard:

1. on 19 November 2018, following instructions being provided, AP advised to make the urgent application seeking the following three orders:
2. that AKL be permitted to speak to KUB’s treating doctors;
3. for a regime to be established for decisions to be made about KUB’s treatment; and
4. for KUB to live with AKL following his discharge;
5. it is uncontentious both that the hospital staff were then not providing AKL with the information to which he was entitled but that on 21 November 2018 he did attend and speak to the treating doctors. Any denial by AKL that AP had anything to do with this change in communication should be rejected as in his affidavit affirmed on 31 January 2019 in the family law proceeding, AKL deposed: ‘My solicitors advocated for me and ultimately [KUB’s] treating team and I could speak.’ Under cross – examination, he was not able to dispute this statement;
6. AKL further spoke to the treating doctors on 22 November 2018 and was told that KUB’s anticipated discharge date was 26 November 2018, which occurred.

* between 19 – 26 November 2018, circumstances significantly changed while AP was continuing to undertake work;
* KUB was re-admitted to hospital on 27 November 2018 which was again a significant change requiring investigation and involved:

1. AP sending a detailed letter to GDJ’s solicitors on Friday, 30 November 2018 after approval of it by AKL;
2. AP sending a letter on the same day to AKL advising that the urgent application should be delayed pending AKL obtaining further information and pending a team meeting on Monday, 3 December 2018;
3. a letter from GDJ’s solicitors being received by AP at 7.26 pm on 30 November 2018 which provided a significant amount of information which was relevant and critical to any consideration of issuing the urgent application including most relevantly the disclosure that KUB was the subject of a Temporary Treatment Order; and
4. KUB was eventually discharged from hospital on 5 December 2018.

* after KUB’s discharge from hospital:
  + - * 1. AP provided a draft affidavit to AKL on 10 December 2018;
        2. AP prepared and issued the hospital subpoena on 14 December 2018;
        3. between 17 – 19 December 2018, AP agreed, with AKL’s approval, to arrangements for the Christmas period;
        4. between 28 December 2018 and 8 January 2019, RDY and KUB lived and holidayed with AKL;
        5. on 8 January 2019, DHHS intervened following an altercation between KUB and GDJ, and KUB was placed in the care of AKL which continued until the matter returned to Court following the issue of the urgent application; and
        6. the urgent application was issued on 1 February 2019 following the affidavit being updated and then affirmed on 31 January 2019.
  + the above comprehensively deals with AKL’s complaints about the urgent application, as it cannot be said that:
    - * 1. AP did not act with due care and skill. It gave unimpeached advice to make an application, which advice was constantly re-evaluated based on the changing circumstances and was communicated to, and confirmed with, AKL;

1. AP did not provide services which were reasonably fit for purpose. This contention of the respondent is essentially made on the same basis as a. immediately above;
2. AP delayed in the supply of services. It has explained why the urgent application was not made within ‘about a week’ which was the time AKL gave in evidence as being ‘reasonable’ to him. It was correct to defer filing the application, given the constantly changing circumstances, until further information and evidence was available;

* further, AKL has not provided an independent opinion from another lawyer and there is no evidence from LR which might suggest any issue with AP’s services;

#### The updated family report

* there are numerous obstacles to AKL succeeding in either contention that he was ‘ill-advised’ to obtain an updated family report or, as alleged in evidence, there was a ‘guarantee’ given that the report would be favourable;
* there is no evidence from an expert or LR to enable a finding about the quality of AP’s advice;
* there is no evidence that any ‘guarantee’ was given and such a contention is inconsistent with the documentary evidence before the Tribunal, in that:

1. when the Papaleo report was sent to AKL, he was requested to call Mr Chaplin – Burch to discuss the matter;
2. AKL responded: ‘I think the report is counter – productive to my case and I would like you to explain the reason Vince Papaleo was highly recommended by you and [Mr De Alwis] and what your intended outcome was with this family report?’[[9]](#footnote-9); and
3. a further email from AKL also uses the language ‘strongly recommended’[[10]](#footnote-10);

* there is no reference to the ‘guarantee’ in these detailed written communications of AKL contemporaneous with the report’s release to the parties. Any reference to the ‘guarantee’ is not made until AKL’s witness statement;
* like the urgent application, the evidence about the updated family report contrasts with the allegations of AKL, in particular:
  + - * 1. the previous family report had been prepared almost 12 months earlier;
        2. after the previous family report, circumstances, especially about KUB, had significantly changed such as his hospitalisations, the involvement of Child Protection, and AKL’s position that KUB should live with him and that this all occurred constituted a significant change in matters about which the Family Court would need an updated report;

1. the uncontradicted evidence is that Mr De Alwis, to whom AKL attributed as providing the purported guarantee, was not at Court when AKL consented to orders for the report to be prepared. Only Mr Chaplin – Burch and Mr Mort of Counsel were at Court;

* the only matter put to Mr Chaplin – Burch in cross – examination was whether or not any thought had been given to the selection of Mr Papaleo as the report writer and, in this regard, he confirmed the advice given by Mr Mort during negotiations of the interim orders;
* Mr Chaplin – Burch’s evidence during cross – examination was limited but clear:

whether the advice was given by Mr Mort, to which he agreed;

whether he agreed with the advice of Mr Mort, to which he agreed;

that Mr Papaleo was a ‘highly respected and revered Family Consultant’ who was appropriately selected in his matter, was agreed to by GDJ’s representatives, and was appointed as a joint expert; and

in denying that any advice was given that the report would be favourable;

* the evidence in the witness statement of Mr Chaplin – Burch was not challenged and should be accepted;
* family report writers are fiercely independent and must be so, Mr Papaleo was appointed as a single expert witness, and his obligation was to the Court and not to the parties engaging him;
* in these circumstances, it is improbable that a guarantee could have been given that the report would be favourable to AKL;

#### The Wesley College proceeding

* AKL has not raised any allegation about this proceeding capable of being made under the ACL;

#### Invoices

* issues raised by AKL about invoices, arithmetical concerns, the costs updates, costs disclosure, whether scope of services was performed, and inappropriate management of legal fees by AP have no substantive evidentiary basis as to validity, are matters at best to be considered under the LPUL, and do not fit within ACL statutory guarantees;

### Submissions on loss and damage

* while the respondent denies that AKL is entitled to any relief, each of the heads of damages sought in his submissions cannot be properly maintained;

#### Relief available under the ACL

* Section 267 (3) provides that a consumer, if the failure to comply with the guarantee cannot be remedied (which the respondent concedes would be the case in this proceeding), may terminate the contract (which is what occurred) or by action, recover compensation for any *reduction in the value of the services below the price paid or payable by the consumer for the services*;
* Section 267 (4) provides that by action against the supplier, a consumer may recover any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure;
* Section 269 (3) provides that a consumer is entitled to recover refund of money paid by the consumer for the services *to the extent that the consumer has not already consumed the services at the time the termination takes effect.* In this proceeding, the services had been consumed and so the refund cannot be awarded under this provision. Additionally, the application fee, compensation, and interest cannot be claimed under this section;
* the Tribunal could also award compensation under s 236 of the ACL which is the general provision to award damages for breaches made under Chapter 3 where the statutory guarantees are provided;
* relief of the nature provided for in the LPUL does not fall into any of these categories. If an applicant cannot, or does not, meet the statutory criteria or follow statutory procedure under the LPUL, it would be dangerous for the Tribunal to grant like relief under the guise of the ACL as relief under the ACL is not a ‘back door’ attempt to obtain relief otherwise available if an applicant brings a claim under the LPUL;
* however, even if the Tribunal was minded to grant relief to AKL, there are hurdles which he cannot overcome.

#### No evidence

* AKL has not provided any evidence upon which the Tribunal can rely in assessing any damage he has suffered;
* the Tribunal cannot simply assess damage as being a function of what AKL thought he agreed to pay and what he should pay as that is how the refund (under s 269 (3)) is calculated which is a LPUL issue;
* work was performed on AKL’s instructions. There is no evidence of what part, if any, of the work related to the guarantees if there were a breach and no independent expert evidence to value the services provided. Even if there was an issue with the urgent application or the family report, there is no evidence on which the Tribunal could even begin to assess damages without engaging in a quasi – taxation of costs;
* as to the compensation for attending the hearing, there is no evidence of any employment or business disruption. No expert accounting evidence is provided and no statement in evidence in chief about lost income was made by AKL;

#### Causal issues

* AKL has serious causation issues;
* the ACL requires that AKL suffers loss because of AP’s conduct. In this regard, the urgent application was affected by extraneous factors, being the constantly changing circumstances and the family report was outside AP’s control;

#### Conclusion

* -AKL’s application should be dismissed and in the event this order is made, the respondent reserves the right to apply for costs noting that it became separately represented on the third and fourth days of the hearing and for the preparation of submissions.

### Submissions of AKL in reply

1. AKL’s reply submissions essentially adopted the same formatting as his initial submissions with the following relevant additions:

#### Fitness of services for purpose

* he reiterates, among other matters, that AP does not deny that it was its advice to action the urgent application quickly to increase the likelihood of him securing interim custody of KUB while KUB remained hospitalised. As the client, he simply followed AP’s advice. However, in providing the advice AP failed in its duty to determine whether there was sufficient evidence and therefore grounds to initiate the urgent application and whether such an application could reasonably be successful in accordance with the consumer guarantee under s 61 of the ACL;
* therefore, the breach of the consumer guarantee lies in AP’s advice itself. The Tribunal does not have to assess the ‘reasonableness’ of the services provided but simply has to determine whether the advice provided by AP and the recommendation that it initiate the urgent application was carried out in accordance with the consumer guarantees under s 60 and s 61 of the ACL considering its subsequent advice for delaying the filing of the application was due to the need for ‘further evidence’;
* the urgent application as it was explained to him by AP at the outset consisted of an initiating application seeking orders and an evidence based supporting affidavit but in its final submission the respondent has sought to broaden the scope of the work performed under the ‘umbrella’ of the urgent application by referring to email correspondence between AP and him and AP and GDJ’s lawyers relating, for example, to holiday arrangements. He contends that such work does not directly relate to work performed within the scope of the urgent application and is therefore misleading;
* the respondent’s use of the ‘chronology’ of the matter in its submissions, relating to the urgent application, is intentionally misleading as it has been provided in an effort, albeit unsuccessfully, to justify AP’s failure to file the urgent application in a timely manner, while KUB remained hospitalised, consistent with AP’s initial advice. However, all of the events and the ‘ever changing landscape’ occurred prior to KUB’s release from hospital on 5 December 2018 and it was not until later in December that AP realised it required ‘further evidence’ and postponed filing the urgent application;
* with his initial submissions he had also filed a copy of his Amended Response to the Initiating Application dated 8 October 2019. The Amended Response was prepared by Mr Parker. He followed Mr Parker’s advice in agreeing to the Amended Response which, among other matters, sought that the Family Court order shared parental responsibility, rather than sole custody, contrary to AP’s advice in relation to the urgent application. The final parenting orders as to custody were made in line with his Amended Response;
* this is not a case of ‘reasonable minds providing differing advice, strategy or other matters’ but a case of legal advice in accordance with the consumer guarantee and what he, as a consumer, might expect Mr Parker’s advice to reasonably achieve. In this regard, Mr Parker provided advice that managed his expectations on what Mr Parker believed the Court was likely to decide on the basis of the evidence and Mr Parker’s extensive knowledge, experience and skill whereas AP’s advice unreasonably set and elevated the expectation that sole custody (even on an interim basis) could be reasonably achieved in a case in which this was unlikely to be achieved from the outset;
* AP has not provided any evidence that AKL’s ability to speak to KUB’s treating doctors on 21 or 22 November 2018 was directly attributable to AP’s involvement;
* AP did not play any active role in the holiday arrangements or the Child Protection Services’ intervention that resulted in KUB coming into AKL’s full time care. The holiday arrangements were made because GDJ was absent on a trip overseas and she insisted that he have care of RDY and KUB limited to approximately one week;
* he maintains the claims for loss and damage set out in his initial submissions and has also added a claim for reimbursement of the Papaleo family report fee of $12,000. He has also noted that his claim for income loss of $10,000 plus GST in preparing for, and attending, a four day hearing during which he was unable to provide architectural services to his clients has been calculated at the rate of $320 per hour for 32 hours;
* he disputes the respondent’s contention that there is no evidence to establish that any ‘guarantee’ was given in relation to AP’s recommendation for a new family report. In this regard, he contends that the evidence of it ‘lies in the exclusivity of the recommendation and that the new family report should be prepared by Mr Papaleo to the exclusion of all other report writers’. This connotes a bias and therefore a ‘guarantee’ which relates to AP’s assertion that the family report, if prepared by Mr Papaleo himself, would assist his sole custody claim based on the extensive previous experience of AP or of Mr Mort with Mr Papaleo and Mr Papaleo’s propensity to ‘favour the father over the mother’ in his report recommendations;
* he referred to his witness statement and maintained that he had raised the ‘guarantee’ as a major issue with AP on multiple occasions in his written communications; and
* although Mr De Alwis was not at Court when AKL consented to the new family report, he did have a telephone conversation with Mr De Alwis prior to consenting to the new report during which Mr De Alwis made the statement ‘you got what you paid for’ in relation to the previous family report which was favourable but inconclusive and, in so doing, this once again provided a ‘guarantee’ that Mr Papaleo’s report would be both ‘conclusive and favourable’ and that consequently the report fee of $12,000 was justifiable.

### Findings

1. Mr De Alwis did not give evidence. It is uncontentious that he was no longer working for AP. Mr Tatti indicated to the Tribunal at the conclusion of evidence on the second day of the hearing that, subject to further enquiries about his availability and situation, he may give evidence and if this was the case, a witness statement by him would be filed and served. However, this did not occur. I do not draw any adverse inference from this outcome. I am satisfied that all evidence necessary and relevant to the proper determination of this proceeding is available for my consideration.
2. The application for order is made under the ACLFTA. Although AKL is self – represented, it is apparent from the documentary evidence before the Tribunal and the oral evidence of AKL, particularly under cross – examination, that he was well informed from a variety of sources of his rights and options before he filed the application for order.
3. As such, the issue is not whether the fees charged by AP were fair and reasonable which would have been the issue if the claim had been made under s 99 of the LPULA Act. However, other considerations aside, I accept the respondent’s submissions, for the reasons stated, that due to s 99 (1) (a) not being met, the Tribunal had no jurisdiction, in any event, to consider the application of the LPULA Act.
4. In the application for order and in his documentary and oral evidence, in addition to his expressed concerns about the composition and level of fees charged by AP, AKL also made considerable references to the nature and extent of costs disclosure, to the terms, sufficiency, and adequacy of costs documents, to the application of trust money, and to the content, timing and accuracy of invoices and entries therein. These matters relate to issues of compliance with requirements under the LPUL and also do not fall for my determination.
5. It is necessary for me in this proceeding to assess whether AKL has on the evidence before me established on the balance of probabilities that the quality of legal service of AP breached the guarantees in s 60 and s 61 of the ACL.
6. It is appropriate to reiterate s 60 and s 61 and the observations made about them in UMI. Although I am not bound by UMI, I accept the Member’s summaries of the guarantees.
7. Section 60 relevantly provides that if a supplier supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill. In UMI, the Member, after having made the appropriate observation that it is easier to identify things that could have been done better in hindsight, noted that the guarantee in s 60 is not one of perfection but only one of an ‘acceptable level of skill’.
8. Section 61 relevantly provides that if a supplier supplies, in trade or commerce, services to a consumer and the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for the purpose. In UMI, the Member noted that the section is not expressed in absolute terms. As such, the failure to achieve the result that the consumer wants does not mean that there has been a breach of that consumer guarantee but, rather, the services must be ‘reasonably fit’ for achieving, or ‘reasonably expected’ to achieve, the desired purpose and result.
9. As with UMI, so in this proceeding, AKL has not produced any evidence from another accredited specialist family lawyer, or further from LR, to suggest that the services provided by AP were not reasonable or not of an acceptable level of skill in the circumstances that then existed.
10. The reference by AKL to advice from Mr Parker that any application for sole custody would have been unsuccessful was not given as evidence and I am not required to consider it. Not only was no such evidence given by Mr Parker himself or by any expert witness, no allegation or detail about such advice or in what context it was provided was given in evidence by AKL or put by AKL to any witness for the respondent. Additionally, there was no opportunity for the respondent to cross – examine AKL about it or for the respondent to cross – examine Mr Parker or any other expert witness.
11. As AKL put his case, the matters that form the basis for my consideration of the consumer guarantees are the advice about, and the making of, the urgent application and the advice about, and the obtaining of, the new family report from Mr Papaleo.
12. From the evidence of AKL, he was greatly concerned especially from around 11 November 2018, about the safety and welfare of KUB because of his hospitalisation, the paucity of information available to him from hospital staff, the circumstances including the role of GDJ surrounding KUB’s admission, and the lack of prior consultation with him given subsisting parenting orders and these concerns were relevant factors leading to the advice given to him on 19 November 2018 by Mr De Alwis to make the urgent application.
13. AKL’s expectation for the urgent application to be filed by 26 November 2018 may not have been unreasonable when the advice was initially given by AP. However, Mr Chaplin – Burch’s evidence about changing circumstances and evolving parenting matters after 19 November 2018 was credible and comprehensive about why the application was not filed until 1 February 2019, at which time KUB was living with AKL.
14. AKL continued to provide instructions for the urgent application up to the hearing on 12 March 2019. This included details about the IVO application made against KUB by GDJ between the filing of the application and the hearing.
15. Included among the interim orders made at the 12 March 2019 hearing were shared parental responsibility for the children and the adjournment of the further hearing to May.
16. AKL has also given evidence about the advice then provided to him by Mr Mort and AP to engage Mr Papaleo to provide a new family report. He also cross – examined Mr Chaplin – Burch, albeit to a somewhat limited extent, in relation to that advice.
17. However, I cannot find, on the balance of probabilities, that the advice given to AKL by his legal representatives to obtain Mr Papaleo’s report was given with any guarantee or assurance that it would be favourable to him. AKL’s later evidence about a guarantee contrasted from his earlier correspondence about Mr Papaleo having been highly recommended. I find on the evidence that AKL’s legal representatives for a number of appropriate reasons advised AKL to obtain the further report. Such reasons included them having previously worked with Mr Papaleo, that from their experiences working with him they respected him greatly as a family report writer, and that he was extremely experienced and generally highly regarded in the Family Court. I also find that they did not give any suggestion of Mr Papaleo undertaking and providing anything other than an impartial and conclusive report following thorough investigation and that given the time that had passed since the previous family report and the changes in circumstances and developments since that report, he would provide a comprehensive report which would appropriately and necessarily update the Court about what was in the interests of the children. It is uncontentious that he was also appointed as a joint expert.
18. A strong recommendation about engaging Mr Papaleo is not a guarantee of a favourable report from him. The criticisms referred to in AKL’s evidence that Mr De Alwis allegedly made about the previous family report likewise do not give rise to an inference of a guarantee by him about Mr Papaleo’s report being favourable.
19. During his evidence AKL, when expressing his disappointment about Mr Papaleo’s report, focussed on his view that it was not favourable to him and did not agree with what he regarded as the ‘finding’ of the previous report writer that the children wished to live with him. This evidence raises a clear inference that AKL had continued after the 12 March 2019 hearing to be supportive of the application proceeding on issues of custody and parental responsibility.
20. AKL has referred in his submissions to the final orders being for shared custody and that this was an outcome with which he was comfortable and was in accordance with Mr Parker’s advice.
21. These orders were made some five months after Mr Papaleo’s report. There is no evidence about what had occurred in relation to the children and the parents in that time. Indeed, there was no evidence surrounding the making of any of the final orders on parenting and property issues. Other than a reference in the VLSC complaint to AP ceasing to act (only) three weeks prior to the case management hearing for the family law proceeding, there was no evidence about the nature of the work undertaken by AP.
22. In relation to the consumer guarantees, no claim has been formalised by AKL about the Wesley College proceeding. AKL’s application for order insofar as it pertains to that aspect is dismissed.
23. I cannot find on the balance of probabilities on the evidence with reference to s 61 of the ACL that the services provided by AP were not reasonably fit for achieving or could not be reasonably expected to achieve the desired purpose and result. This includes the advice initially given to make the urgent application in the circumstances that then existed including the concerns held by AKL, to the advice given to defer the filing of the urgent application having regard to the then changed circumstances, and to the subsequent filing of the urgent application in the circumstances that then existed and on the instructions that had continued to be provided by AKL.
24. My findings about s 61 further apply to the advice given to commission a family report from Mr Papaleo and the obtaining of that report.
25. Not only did AKL not produce any expert evidence to suggest that the services provided by AP were not reasonable at the various times and in the evolving circumstances but the credible and detailed evidence of Mr Chaplin – Burch for the respondent ought be accepted in relation to s 61 as also should the more limited evidence of Mr Clark.
26. On similar bases, I cannot find a breach by AP of s 60. I am satisfied that AP rendered its services with an acceptable level of skill and in making this determination I also particularly regarded documentary evidence in the form of written communications by AP with AKL to be pertinent, considered, thorough, and comprehensive.
27. Even if I had found that the conduct of AP had contravened either or both of the guarantees, I could not find on the evidence generally or with specific reference to sections 236, 267, and 269 of the ACL, that AKL suffered loss or damage because of that conduct.
28. Other considerations aside, I also accept the respondent’s submission that what is effectively a refund of fees claimed by AKL is not a loss or damage falling within relief contemplated, or provided for, under the ACL. Claims for compensation for AKL’s absence from work due to the hearing (which on any view had no evidentiary support in any event as to quantification), along with reimbursement of the application fee and Mr Papaleo’s report fee, and an award of interest also thereby fall away.
29. I have therefore made orders dismissing the proceeding and, within a confined time – frame, reserving costs.

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| **B. Josephs**  **Member** |  |  |

1. [2020] VSC 93 [↑](#footnote-ref-1)
2. DLA at [20] [↑](#footnote-ref-2)
3. DLA at [30] [↑](#footnote-ref-3)
4. DLA at [31] [↑](#footnote-ref-4)
5. (2019) VCAT 2052 [↑](#footnote-ref-5)
6. UMI at [75] [↑](#footnote-ref-6)
7. UMI at [61] [↑](#footnote-ref-7)
8. UMI at [62] [↑](#footnote-ref-8)
9. the 16 May 2019 letter to Mr Chaplin - Burch [↑](#footnote-ref-9)
10. the 16 May 2019 letter to Mr Clark [↑](#footnote-ref-10)