SUPREME COURT OF QUEENSLAND

CITATION:	*Winn v Lynch Morgan Lawyers* [2019] QCA 178
PARTIES:	**JULENE WINN** (appellant) **v** **LYNCH MORGAN LAWYERS** (respondent)
FILE NO/S:	Appeal No 8337 of 2018 QCAT No 221 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2018] QCAT 234 (Carmody J)
DELIVERED ON:	6 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2019
JUDGES:	Fraser and Morrison and Philippides JJA
ORDER:	**Appeal dismissed.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – LIABILITY OF PARTNERS – where the appellant entered a costs agreement with Lynch Morgan Lawyers – where a former partner who was working as a consultant with that firm at the time of the costs agreement later left that firm – where the appellant subsequently applied to the Queensland Civil and Administrative Tribunal to have the costs agreement set aside and sought a refund of money paid to Lynch Morgan Lawyers from the former partner and consultant – where the primary judge dismissed the appellant's application – whether the Queensland Civil and Administrative Tribunal ought to have set aside the costs agreement and required the former partner and consultant to refund money paid by the appellant to Lynch Morgan Lawyers *Legal Profession Act* 2007 (Qld), s 328, s 468 *Partnership Act* 1891 (Qld), s 5, s 17, s 39 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 149 *Lynch v Stiff* (1943) 68 CLR 428; [1943] HCA 38, cited *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19, cited
COUNSEL:	The appellant appeared on her own behalf

No appearance for the respondent

SOLICITORS: The appellant appeared on her own behalf
No appearance for the respondent

[1] **FRASER JA:** The appellant appeals against an order made by Carmody J as a judicial member in the Queensland Civil and Administrative Tribunal ("QCAT") dismissing the appellant's application to set aside a costs agreement pursuant to s 328 of the *Legal Profession Act* 2007 (Qld).

[2] Upon the literal meaning of s 468 of that Act it confers a right of appeal, but that section is in a part of the Act concerning complaints and discipline. Section 149(2) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) confers the right of appeal, with the result that s 149(3)(b) requires the Court's leave to appeal if the appeal is made on a question of fact or of mixed law and fact. The appellant does not seek leave to appeal and contends that the grounds of her appeal raise questions of law.

Background

[3] The appellant's application had a long and complex history in QCAT. The appellant – who represented herself throughout this litigation and was the only party who appeared in this appeal – sought to attribute some responsibility to QCAT for the extraordinary delays in the finalisation of her application. Even the very limited chronology set out in this section of these reasons suggests that factors outside QCAT's control at least contributed to the delay. It is not possible to reach any conclusion about this issue because of the paucity of the material in the Record Book.

[4] So far as the evidence adduced in QCAT is concerned, the Record Book comprises only three affidavits by the appellant and one affidavit by a manager at the Queensland Law Society (which establishes that Mr Morgan held a Queensland principal practising certificate for the practising certificate year 2012 – 2013). Yet the reasons for judgment given by the primary judge make it clear that statements in affidavits by the appellant were contradicted in affidavits by Mr Morgan. The appellant also acknowledged in a ground of her appeal and in her submissions that Mr Morgan gave oral evidence, but if the appellant ordered a transcript of that hearing it was not supplied to the Court.

[5] It is useful to give a brief chronology of some significant events, so far as it can be derived from the material that is in the Record Book.

[6] On 30 January 2013 the appellant entered into a cost agreement with "Lynch Morgan Lawyers". By the costs agreement the appellant retained Lynch Morgan Lawyers to perform specified legal services in connection with litigation in which she was a party. The agreement was in the form of a letter from Lynch Morgan Lawyers to the appellant and standard terms referred to in the letter. The appellant paid Lynch Morgan Lawyers the total amount of $5,000 for legal work. That money was paid into Lynch Morgan Lawyers' trust account. On 18 February 2013 Lynch Morgan Lawyers terminated the retainer and sent the appellant a tax invoice in the total amount of $8,249.18. Lynch Morgan Lawyers applied the money in its trust account in part payment of its invoiced costs. The appellant disputed the entire bill except for photocopying costs. She contended that nothing else had been

achieved that progressed her litigation for which she had retained Lynch Morgan Lawyers and sought a refund of the $5,000 she had paid Lynch Morgan Lawyers. Lynch Morgan Lawyers denied the appellant's allegations and refused to refund any of the money.

[7] On 28 August 2013 the appellant filed an application in QCAT. The application named only Mr Morgan as the respondent and sought orders pursuant to s 328(1) of the *Legal Profession Act* that the costs agreement be set aside and that Mr Morgan refund $5,000 to the appellant. On 8 October 2013 Mr Morgan filed a response in which he contended that he was not a proper respondent to the orders sought by the appellant. Mr Morgan alleged that: as at 30 January 2013 he was not a principal or partner of the respondent; the appellant knew as much because the costs agreement clearly identified him as a consultant of the respondent; he did not receive the sum of $5,000; Lynch Morgan Lawyers received that sum into its trust account; Mr Morgan was not then a trustee of Lynch Morgan Lawyers' trust account; and he was not a trustee of its trust account when it disbursed the $5,000 from its account in partial payment of its tax invoice rendered on 18 February 2013. Mr Morgan denied criticisms of his conduct which the appellant had made in the grounds of her application.

[8] On 14 November 2013 an order was made in QCAT that Lynch Morgan Lawyers be joined as respondent to the appellant's proceedings, the part of the proceeding against Mr Morgan be struck out, and the appellant must serve an amended application to set aside the costs agreement upon Mr Lynch, the principal of Lynch Morgan Lawyers. On 25 February 2014 Lynch Morgan Lawyers filed a response to the amended application. That document described the respondent as Mr Lynch, referred to "Lynch Morgan Lawyers" as Mr Lynch's business name, addressed the grounds of the appellant's application, and contended that it should be dismissed.

[9] Mr Lynch died in May 2015. In August 2015 an order was made in QCAT that Helene Jane Lynch be joined as a party to the proceedings. Ms Lynch was the personal representative of the estate of Mr Lynch.

[10] By an application in QCAT dated 3 December 2015, the appellant sought an order that Mr Morgan be (re)joined as a respondent to her application. Directions were made for the exchange of affidavits and submissions. In submissions filed by the appellant she stated that by the application she sought a determination of Mr Morgan's position at Lynch Morgan Lawyers when he represented the appellant in January and February 2013.

[11] On 27 November 2017 directions were made that the application to join Mr Morgan as a party would be heard on 28 February 2018 and that the hearing to determine the application to set aside the costs agreement would proceed immediately after the joinder application.

[12] The hearing or hearings may instead have occurred on 2 March 2018,[1] since the appellant submits that Mr Morgan was cross-examined on that date, and directions made on that date refer to a hearing in respect of which the initiating document is identified as the application to set aside the costs agreement. The primary judge directed that the correct respondents to that application were Lynch Morgan Lawyers and

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[1] I note though that the coversheet of the primary judge's reasons refers to a hearing date of 28 February 2018 and the decision of 6 July 2018 refers to a hearing date of 21 May 2018.

Helene Jane Lynch as the personal representative of the estate of Paul Gerard Lynch, and the appellant was given leave to withdraw the application to join Mr Morgan as a respondent.[2] Dates were fixed for the exchange of written submissions and it was directed that the application would be determined by the tribunal not before 25 April 2018, on the papers without an oral hearing.

[13] On 6 July 2018 the primary judge published reasons and made the order dismissing the appellant's application referred to at the outset of these reasons. The appellant's notice of appeal against that order names only Lynch Morgan Lawyers as the respondent.

The claim against Mr Morgan

[14] Whilst the particulars of the respondent in the appellant's notice of appeal identify the respondent's name as Lynch Morgan Lawyers, the address for service, telephone number, and email address of the respondent are those of a law firm of which Mr Morgan appears to have been a member when the notice of appeal was filed.

[15] The appellant does not seek a retrial of her claim. She seeks orders that QCAT's orders of 6 July 2018 be set aside, the costs agreement be set aside, the respondent repay the funds the appellant paid to the respondent's trust account, and "incorrect findings adverse to the appellant be expunged from the record".

[16] Mr Morgan might be affected by such orders and he might have been properly served with the notice of appeal only if he was in a partnership with Mr Lynch under the name Lynch Morgan Lawyers during the period between about 22 January and 18 February 2013 ("the relevant period"), when the appellant retained and otherwise dealt with Lynch Morgan Lawyers.

[17] The appellant argues that she entered into the costs agreement and paid the money as a result of Lynch Morgan Lawyers and Mr Morgan holding out Mr Morgan as a partner in Lynch Morgan Lawyers, when he was in truth not a partner during the relevant period. Having regard to all of the appellant's submissions it is not entirely clear to me whether the appellant also wishes to rely upon a second, alternative argument, that Mr Morgan was then in fact in a partnership with Mr Lynch. I will discuss both questions. The first requires proof (at least) that Mr Morgan represented himself or knowingly allowed himself to be represented as a partner in Lynch Morgan Lawyers during the relevant period and the appellant acted to her prejudice upon the representation.[3] The second requires proof that during the relevant period Mr Morgan and Mr Lynch carried on business in common under the name Lynch Morgan Lawyers with a view of profit.[4]

[18] The notice of appeal contends (grounds 1, 2 and 5) that QCAT denied procedural fairness to the applicant in various ways, (ground 3) QCAT failed to apply the relevant principles applicable in an application to set aside a costs agreement and (ground 6) the decision was based on findings that are contrary to the evidence. The remaining ground of appeal touches upon the question whether Mr Morgan was a partner. Ground 4 contends that QCAT:

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2 The appellant submitted in this appeal that she withdrew the application to join Mr Morgan before the primary judge's decision.

3 *Partnership Act* 1891 (Qld); s 17(1), and see *Lynch v Stiff* (1943) 68 CLR 428 at 434 – 435 and *Sidhu v Van Dyke* (2014) 251 CLR 505 at 531 [90] – [92] (Gageler J).

4 *Partnership Act* 1891 (Qld), s 5(1).

> "erred in failing to address the ground of William Morgan's representations when he made the costs agreement and required funds in trust that:
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> (a) he was a partner of Lynch Morgan Lawyers;
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> (b) he was competent and experienced to litigate the applicant's application;
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> (c) he would prepare the application and prepare for and appear at the hearing;
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> in circumstances where he planned to leave the firm before the hearing without notice to the applicant, failed to file and serve documents, to prepare the application, and to prepare for the hearing, and subsequently denied that he was a partner".

[19] It is necessary in the present context to discuss only the appellant's contention in ground 4 that QCAT failed to address the ground of Mr Morgan's representations that he was a partner of Lynch Morgan Lawyers when he made the costs agreement and required funds in trust.

[20] The appellant's amended application in QCAT to set aside the costs agreement includes contentions that (ground 11) "the respondent failed to disclose that Mr Morgan who was to have the conduct of the applicant's matter was leaving Lynch Morgan" and (ground 13) "the respondent misrepresented the position of Bill Morgan in the firm". In the appellant's final submissions in the tribunal she submitted:

> (a) Between 22 January 2013 and 18 February 2013, and specifically on 25 January 2013, Mr Morgan represented to the appellant that he was a partner.[5]
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> (b) On 27 February 2013 Mr Morgan told the appellant that he was not a partner.[6]
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> (c) (Under the heading "Grounds A Costs agreement not fair: Induced by misrepresentation; Misleading conduct Unconscionable conduct; Failure to disclose relevant facts") "The applicant contends that the costs agreement is not fair as Lynch Morgan misrepresented to her in writing, orally and impliedly, to induce her to sign the costs agreement, that Mr Morgan:
>
> (a) was a partner of Lynch Morgan …"[7]
>
> (d) "Mr Morgan misled the applicant that he was a partner …"[8] (Particulars of that alleged misleading conduct are given.)

[21] The primary judge rejected all of the grounds of the appellant's application as "unfounded", holding that there was "no evidence capable of justifying the conclusion that Mr Morgan withheld relevant personal information about his status within the

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5 Applicant's final submissions, 13 April 2018 at paras 9 and 12.
6 Applicant's final submissions, 13 April 2018 at paras 30 and 60.
7 Applicant's final submissions, 13 April 2018 at para 54.
8 Applicant's final submissions, 13 April 2018 at paras 59 and 61.

practice" and that the costs agreement was not affected by any misrepresentation, non-disclosure or misleading conduct.[9] In relation to Mr Lynch's and Mr Morgan's roles in Lynch Morgan Lawyers, those conclusions reflected specific findings of fact by the primary judge to the effect that:

(a) Mr Morgan retired from his partnership with Mr Lynch on 16 January 2013 and continued as a consultant before joining a different firm as a partner on 28 February 2013.[10]

(b) As at 22 January 2013, Lynch Morgan Lawyers was the business name of the legal practice of which Mr Lynch was the sole proprietor and that remained the case until the Lynch Andrews Lawyers partnership commenced practice in about August 2013.[11]

(c) At the times relevant to the appellant's claim Mr Lynch was the principal and Mr Morgan was the consultant of the legal practice.[12]

(d) Mr Lynch died on 2 May 2015 and his interests were thereafter represented in QCAT by his personal representative Ms Lynch, who did not actively participate in the proceedings.[13]

(e) Mr Morgan did not decide to leave Lynch Morgan Lawyers until 14 February 2013 and his non-disclosure of an intention to leave the practice had no relevant impact on the work he did for the appellant before the termination of the costs agreement on 18 February 2013 for a breach of the retainer by the appellant.[14]

[22] The primary judge thereby accepted evidence his Honour quoted from Mr Morgan's affidavit of 19 January 2015 (his "first affidavit"),[15] including paragraph 14 of that affidavit:

> "When Ms Winn first contacted me on 22 January 2013 I was no longer a partner of the firm and I never told Ms Winn I was not a partner. I had been a partner since August 2008 until I retired as a partner on 16 January 2013. From this date I worked at Lynch Morgan Lawyers as a consultant. The costs agreement refers to me as a consultant and so does the first substantial written letter of advice I gave Ms Winn on 3 February 2013. I also signed the Costs Agreement at page 9 as a consultant. Ms Winn signed the same page (page 49 of Winn Exhibit Bundle)."

[23] In response to a request by the appellant at the hearing of the appeal for further time to cite evidence in support of the contentions in her outline of argument concerning the partnership issue, the Court granted the appellant leave to file a one page document (the "subsequent submission"). I will discuss the appellant's argument upon this topic under headings which summarise her arguments about Mr Morgan's role.

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9 Primary judge's reasons at [36].
10 Reasons at [6].
11 Reasons at [7].
12 Reasons at [6].
13 Reasons at [6].
14 Reasons at [25].
15 Reasons at [26].

The costs agreement conveyed that Mr Morgan was a partner because it was signed by him for Lynch Morgan,[16] **does not disclose a rate for a consultant,**[17] **and provides that Mr Morgan is the person in the firm responsible for discussing costs disputes and dealing with issues about the costs agreement and costs**[18]

[24] Because Mr Lynch's and Mr Morgan's last names substantially constituted what had been their firm's name, a letter to a third party containing that name without any qualifying text might readily amount to a representation that Mr Morgan was a partner. In this case there are significant qualifications within the letterhead of the letter offering to enter into a costs agreement with the appellant and under Mr Morgan's signature at the end of that letter:

(a) Immediately adjacent to the name Lynch Morgan Lawyers on the letterhead there is (in large type) a vertical list of names and (in equally large type but in this case in bold) positions. Mr Lynch's name is at the top of the list. He is described as "Principal". Immediately below that, Mr Morgan is described as "Consultant". Immediately below that, another person is described as "Senior Associate".

(b) The appellant signed at the end of that letter, which precedes the standard terms. Below the appellant's signature and a reference to the letter and standard terms constituting the costs agreement, Mr Morgan signed immediately above his typed name and the adjacent typed word, "Consultant".

[25] The letterhead describes a hierarchical arrangement of lawyers with Mr Lynch at its apex as the only "principal" and Mr Morgan below him as a "consultant". The common usage within the legal profession of the word "principal" as meaning the owner of a law practice is reflected in s 7(4) of the *Legal Profession Act*. It provides that, in relation to law practices other than incorporated legal practices or multi-disciplinary partnerships, a "principal" is an Australian legal practitioner who is "a sole practitioner if the law practice is constituted by the practitioner" or "a partner in the law practice if the law practice is a law firm".

[26] Ms Winn deposed in an affidavit filed in QCAT that she was admitted to practice as a solicitor and barrister in 2005, she joined the Queensland Bar in 2006, and she became a nationally accredited mediator in 2012.[19] The respondent's letter offering to enter into the costs agreement with the appellant very clearly conveyed to a reasonable person with the appellant's qualifications and experience that Mr Morgan was a consultant to the principal, Mr Lynch, rather than a partner in Lynch Morgan Lawyers. The appellant signed the letter near Mr Morgan's signature above the word "Consultant". Upon no reasonable view could the costs agreement be regarded as conveying a representation to the appellant that Mr Morgan was a partner. The appellant was given notice that Mr Morgan was not a partner.[20]

[27] In light of the letterhead and the additional description of Mr Morgan as a consultant underneath his signature, the fact that Mr Morgan signed the costs

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16 Subsequent submission para 1(b)(iv)(e).
17 Outline paras 55(j), 56(f); subsequent submission para 1(b)(iv)(e).
18 Outline paras 54(c)(xiii), 56(k); subsequent submission para 1(b)(iv)(d).
19 Affidavit of the appellant dated 30 September 2014, para 13.
20 See *Partnership Act* 1891 (Qld), s 39.

agreement on behalf of Lynch Morgan Lawyers conveyed only a representation that Mr Morgan was authorised to sign on behalf of Mr Lynch. The appellant did not refer to any evidence suggesting that such a representation was incorrect. In the same context:

(a) The absence from the scale of costs in the costs agreement of a rate for a consultant and the inclusion of a rate for an employed solicitor conveyed that Mr Morgan's legal work attracted the rate for work done by an employed solicitor.

(b) The inclusion in the letter of statements that if the appellant wished to discuss legal costs or the costs agreement she should contact Mr Morgan, and she would not be charged for any discussion concerning legal costs or the terms of the costs agreement, conveyed only that Mr Morgan was authorised to discuss legal costs and the costs agreement, for which she would not be charged.

[28] The costs agreement therefore corroborates evidence apparently given by Mr Morgan that before he was contacted by the appellant he had ceased to be a partner and was working as a consultant for Mr Lynch, who was the principal of Lynch Morgan Lawyers. The evidence also does not support a conclusion that the appellant formed or acted upon the faith of a belief derived from the costs agreement that Mr Morgan was a partner.

Lynch Morgan Lawyers' website advertised the firm as having two partners, Mr Lynch and Mr Morgan, the firm was registered on the Australian Business Register under the entity name of Mr Lynch and Mr Morgan and the trading name of Lynch Morgan Lawyers from 1 July 2008, and the type of entity was recorded as "Other Partnership"[21]

[29] These submissions refer to two pages of an affidavit of the appellant dated 30 September 2014[22] and two Australian Business Names ("ABN") records[23] described in an affidavit of the appellant dated 20 July 2016. The records were extracted on 17 August 2015 and identify "Lynch Morgan Lawyers" as the trading name of Mr Lynch and Mr Morgan from 1 July 2008. Each record states that the ABN was last updated on 2 July 2008. The records do not refer to either of the apparently uncontroversial facts that during 2013 Mr Morgan moved to a different practice and Mr Lynch ceased to practise under the name Lynch Morgan Lawyers. The affidavit in which those records are identified does not include any other statement about them. The affidavit of 30 September 2014 contains no reference to them. The appellant did not refer to any evidence that before 17 August 2015 she was aware of the content of the records. If Mr Morgan had been asked any questions about the records he might have been able to reconcile his evidence that he ceased to be a partner on 16 January 2013 with the absence from the records of a reference to that retirement. An obvious example of a possible explanation is that Mr Lynch overlooked the requirement to amend the records at that time, just as he seems to have overlooked it when he ceased to practice under the name.

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21 Outline paras 10, 54(a) and (b), 56(a) and (b); subsequent submission para 1(b)(i) and (iii).
22 Record Book at 105, 106.
23 Record Book at 260, 261.

[30] At one of the cited pages of the appellant's affidavit of 30 September 2014, paragraph 29 states that "Lynch Morgan's website listed two partners, Mr Paul Lynch and Mr Bill Morgan and an Associate, Mr Anthony Andrews, as the firm". The affidavit does not specify the period during which the website contained those details or when the appellant first read them. It appears from the primary judge's reasons that Mr Morgan deposed in his first affidavit that he could not recall whether the firm's website referred to him as a partner at 22 January 2013 and during the time he acted for the appellant, that it changed and no longer referred to him as a partner at some point, but he could not recall the date of the change.[24]

[31] The appellant did not cite any evidence, and I have found none, that she saw the ABN records or the website entry at any time before she ceased to retain Lynch Morgan Lawyers. The appellant did depose to the content of the website and it is not an implausible idea that the appellant looked at the website before she entered into the costs agreement and paid money with reference to it, but she did not state as much in her affidavit. If the appellant did look at the website before she entered into the costs agreement, that would not necessarily justify a conclusion that Mr Morgan was a partner by holding out. The appellant did not cite any evidence that she entered into the costs agreement, paid any money with reference to it, or otherwise acted upon the faith of statements in the Australian Business Register records or the website. If she had become aware of such statements, it is far from being obvious that she would have acted in reliance upon them after she was presented with the costs agreement which made it clear that, inconsistently with those statements, Mr Lynch was the sole principal and Mr Morgan was a consultant to Mr Lynch.

[32] These arguments do not justify a conclusion that Mr Morgan was a partner or a partner by holding out during the relevant period.

On 25 January 2013 the appellant told Mr Morgan that she did not want a junior solicitor handling her matter and Mr Morgan said that he was a partner[25]

[33] Most of the appellant's submissions in her outline to the effect that Mr Morgan told the appellant that he was a partner do not contain any reference to supporting evidence. Evidence is cited only for the submissions in paragraphs 45(a) and 54 of that outline. The citation for paragraph 45(a) refers to a paragraph of an affidavit by the appellant, which itself refers to Mr Morgan's statement in an email dated 27 November 2013 that "I am not a partner or a trustee to the trust account so I have no authority to refund your money".[26] The citation for paragraph 54 refers to paragraphs 26, 28 and 29 of the same affidavit. Paragraphs 26 and 28 contain details of a conversation between the appellant and Mr Morgan on 22 January 2013. There is no reference to any statement by Mr Morgan that he was a partner. Paragraph 29 also does not refer to any such statement. It refers to the website already discussed. I note that paragraph 30 refers to a conversation between the appellant and Mr Morgan which appears to have occupied more than an hour. There is again no reference to any such statement by Mr Morgan. In the appellant's

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24 Reasons at [26], quoting from paragraph 15 of Mr Morgan's first affidavit.

25 Outline paras 11, 45(a), 54 (introductory text, first line), 54(c)(i), 56(c); subsequent submission paras 1(a)(i)(a), 2(i) and (ii)(a) – (f), 1(b)(iv)(a) ("he said he was a partner").

26 Appellant's affidavit dated 30 September 2013, para 80, cited in footnote 62 at para 45 of the outline; email is exhibit 22, cited in the same footnote.

subsequent submission some paragraphs refer to submissions made by the appellant in QCAT about this topic. Those submissions do not cite any evidence of the alleged statement.

[34] However, the first paragraph of the appellant's subsequent submission states that Mr Morgan gave evidence in cross-examination on 2 March 2018 "about the request for a partner as advertised on Lynch Morgan's website to take the matter and not an inexperienced solicitor as her case was the result of poor work by a former solicitor". The expression "about the request" suggests that the appellant may not intend to convey that Mr Morgan admitted that he represented that he was a partner. In any case, the Court cannot act upon the submission because the appellant has not supplied the Court with a transcript of Mr Morgan's oral evidence.

Mr Morgan signed correspondence as a partner[27]

[35] The evidence to which the appellant referred in support of this submission is an email dated 13 February 2013:

> "Please see attached letter.
>
> Please do not attend the office today. The meeting is cancelled. Please respond to this letter and the email I sent yesterday before contacting me again."[28]

The word "Partner" does appear, in very small type, underneath Mr Morgan's name, which is printed in large type at the foot of the email. The appellant evidently received that email after the costs agreement had been signed and she had paid the money which she claims should be refunded. The appellant did not cite any evidence that she then noticed the word "Partner" or relied upon it in any way. Her affidavits exhibit emails from Mr Morgan to the appellant in the weeks preceding the email of 13 February 2013, none of which identify Mr Morgan as a partner. The appellant's submissions do not mention whether or not Mr Morgan was cross-examined upon this topic. If the word "Partner" in the email was drawn to Mr Morgan's attention in cross-examination, he might have offered an explanation for why it appeared in that email notwithstanding his evidence that he was not then a partner.

[36] Furthermore, the Record Book does not include the email of 12 February 2013 or the "attached letter" referred to in the email of 13 February 2013. The letter presumably included the letterhead which made it plain that Mr Morgan was not a partner.

[37] This submission is not a persuasive basis for overturning the primary judge's finding that Mr Morgan was not a partner. It provides no support for a conclusion that he was a partner by holding out.

Mr Morgan concurred with the appellant's references to two partners[29]

[38] The evidence cited in support of this submission comprises an email from the appellant to Mr Morgan dated 18 February 2013 (4.43 pm) and the first sentence of paragraph 14 of Mr Morgan's first affidavit. That affidavit is not in the appeal book

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27 Outline para 56(d).

28 Exhibit (i) to the affidavit of the appellant dated 20 July 2016, cited at para 56(d) of the outline.

29 Outline para 56(g); subsequent submission para 1(a)(iii)(i) and (ii).

but paragraph 14, which is said to be quoted in [26] of the primary judge's reasons, is reproduced in [22] of these reasons. In the email the appellant disputed the entirety of the respondent's bill except for the photocopying, contended that nothing else achieved had progressed her case, and made other criticisms of Mr Morgan's work. The email concludes with a statement that it was "disappointing that Paul Lynch has not replied. I would have thought that partners might have been willing to work together."

[39] The statement in the first sentence of paragraph 14 of Mr Morgan's first affidavit ("I never told Ms Winn I was not a partner") appears in the context of a reference to the appellant's first contact with Mr Morgan on 22 January 2013. It was not responsive to the email sent on 18 February 2013. That was the date when the respondent terminated the retainer. On 27 February 2013 Mr Morgan sent an email in which he stated, "I am not a partner or a trustee to the trust account so I have no authority to refund your money". It is not possible that the appellant entered into the costs agreement or paid money in reliance upon Mr Morgan's omission to respond to the email of 18 February before 27 February, and the appellant did not cite any evidence suggesting that she took any action at all in reliance upon that email.

[40] The evidence cited by the appellant supplies no support for her contention that Mr Morgan was a partner by holding out and is manifestly incapable of justifying appellate interference with the primary judge's finding Mr Morgan was not in fact a partner.

Mr Morgan solicited and personally received trust funds and he handled billing[30]

[41] The appellant did not refer to any evidence that Mr Morgan operated the respondent's trust account at any relevant time. This submission does not suggest error in the primary judge's finding that Mr Morgan was not a partner and it does not justify a conclusion that he was a partner by holding out.

Mr Morgan did not have a supervising solicitor[31]

[42] Mr Morgan stated in an email dated 22 June 2015 (which is referred to again below) that he had been admitted for 15 years, he held a principal's practising certificate, and he was entitled to run matters unsupervised. There is no evidence to the contrary. This submission does not advance the appellant's case against Mr Morgan in any respect.

Mr Morgan billed at the partner's rate[32]

[43] The invoice of 18 February 2013, cited in support of this submission, includes charges at the rates stated for a partner in the scale of costs in the costs agreement for work done by Mr Morgan. The primary judge referred to concessions by Mr Morgan that his time was charged at the rate for a partner, it should instead have been charged at the rate for an employed solicitor, and that the balance of the bill should be reduced accordingly.[33]

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30 Outline paras 56(h) and (i).

31 Outline para 56(j); subsequent submission para 1(b)(iv)(b).

32 Outline para 56(e).

33 Reasons at [24], referring to an affidavit by Mr Morgan of 27 January 2015 at [4] (which is not in the record book).

[44] The appellant does not submit that at any time before 18 February 2013 Mr Lynch or Mr Morgan indicated that Mr Morgan's time would be billed at the rate of a partner. She does not submit that she relied upon any such statement in forming a belief that Mr Morgan was a partner. The appellant's submissions do not reveal whether or not Mr Morgan was cross-examined upon this point. If he had been asked a question about it he might have been able to explain why it was reconcilable with his not being a partner. An obvious example of an explanation of that kind would be that the person responsible for preparing the invoice mistakenly adopted the rate for a partner which had been used in invoices up to a month before this invoice was sent.

[45] This submission supplies no support for a conclusion that Mr Morgan was a partner by holding out and it does not justify appellate interference in the primary judge's finding that Mr Morgan was not a partner at the relevant time.

Mr Morgan held a Principal Practising Certificate from 2008 to 2016 and he drew income from Lynch Morgan Lawyer's earnings in January and February 2013[34]

[46] The appellant acknowledged that she first became aware of the matters the subject of the present submission during the QCAT proceeding, so they have no bearing upon the question whether Mr Morgan was a partner by holding out.

[47] It is consistent with the primary judge's findings that Mr Morgan retained his principal practising certificate during the relatively brief period whilst he practised as an employed solicitor instead of as a partner between 16 January and 28 February 2013. Notwithstanding the emphasis the appellant placed upon this point in her submissions, it does not justify her contention that Mr Morgan was a partner of Lynch Morgan Lawyers in that period.

[48] In relation to Mr Morgan's drawings from the earnings of the partnership, the appellant relied upon statements by Mr Morgan in an email of 22 June 2015. Relevantly, Mr Morgan stated that when his retirement from partnership took effect he was employed as a consultant as stated on the letterhead, the arrangements for his employment were never formalised, and he was never paid for the six weeks whilst he was a consultant but "lived on some drawings from partnership income for **invoices rendered before 16.1.13**". The words which I have emphasised reveal that this aspect of the email is entirely consistent with the primary judge's conclusion that Mr Morgan was not a partner at any time after 16 January 2013.

The claim against Mr Morgan: conclusion

[49] The appellant's submissions and such evidence relating to them which is in the Record Book, considered separately and in combination, fall far short of establishing a case that the primary judge erred in accepting Mr Morgan's evidence that he did not carry on practice in partnership with Mr Lynch under the name Lynch Morgan Lawyers at any time after 16 January 2013. I am also wholly unpersuaded that it would be open to the Court to hold that for the purposes of any issue in this litigation Mr Morgan should be regarded as a partner by holding out.

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34 Outline, paras 64(a) and (c).

[50] Consistently with the primary judge's findings of fact, the name of the respondent to this appeal is merely the name under which Mr Lynch carried on practise as a solicitor on his own account during the period in which the appellant dealt with Mr Morgan in his capacity as a solicitor employed by Mr Lynch. It follows that Mr Morgan is not a party to this appeal and he could not be affected by any judgment in it. The appellant's appeal fails in so far as it is advanced against Mr Morgan.

The position of Ms Lynch as personal representative of the estate of Mr Lynch, deceased, as a respondent to the appeal

[51] The appellant made a submission at the hearing of the appeal, with reference to her application in QCAT to (re)join Mr Morgan as a respondent to her application, that when Lynch Morgan Lawyers ceased to practise in June 2013 Mr Lynch "had massive debt".[35] That may explain the appellant's focus upon Mr Morgan in this appeal and why his contact details are given as the particulars of the named respondent Lynch Morgan Lawyers.

[52] Rule 749(1) of the *Uniform Civil Procedure Rules* requires an appellant to join as a respondent to the appeal every party to a proceeding "who is directly affected by the relief sought in the notice of appeal or who is interested in maintaining the decision under appeal". The appellant did not join Ms Lynch, in her capacity as the personal representative of the estate of Mr Lynch, deceased, as a respondent to the appeal, even though she was a successful respondent in the proceedings in QCAT. Consistently with her evident intention to pursue the appeal only against Mr Morgan, the appellant submitted that Ms Lynch did not consider that she had an interest in the outcome.[36] As the appellant explained,[37] this point was raised at a callover when the appeal was set down for hearing. The appellant then informed the President that she had served the notice of appeal on Mr Morgan and Ms Lynch but she did not wish to proceed against Ms Lynch.[38] In response to the appellant's enquiry whether an order that the appeal was not proceeding against Ms Lynch was required, the President observed that he would not make orders that day because they could be dealt with later and the appellant had "made your position plain to me".[39]

[53] After the Court referred to the omission to join Ms Lynch as a respondent and the absence of Mr Morgan's evidence from the Record Book as potential obstacles for the appeal proceeding, the appellant did not apply for an adjournment but asked the Court to proceed.[40] In these circumstances the Court should proceed upon the footing that no judgment should be given in the appeal which might adversely affect the interests of Ms Lynch as the personal representative of the estate of Mr Lynch, deceased. It therefore follows that the appeal must be dismissed.

[54] It is, therefore, unnecessary to adjudicate upon the grounds of the appeal. I note, however, that the absence from the Record Book of an apparently substantial body of evidence, at least some of which is revealed by the primary judge's reasons to be inconsistent with significant aspects of the appellant's evidence, would in any case preclude the Court from adjudicating upon many, if not all, of the grounds of

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35 Transcript 6 February 2019 at 1 – 10, l 20.
36 Transcript 6 June 2019 at 1 – 15.
37 Transcript 6 June 2019 at 1 – 14 and 15.
38 Transcript 3 October 2018 at 1 – 3, l 10.
39 Transcript 3 October 2018 at 1 – 5, l 30.
40 Transcript 6 June 2019 at 1 – 34.

appeal. Furthermore, if the appellant established an error of law justifying the Court in setting aside the primary judge's decision, the absence of that evidence would also preclude the Court from itself exercising the discretion under s 328 of the *Legal Profession Act* 2007 (Qld) and making the orders sought by the appellant in the notice of appeal.

Redaction of the primary judge's reasons

[55] The appellant submitted that "adverse material" in the primary judge's reasons for judgment should be redacted by this Court upon the grounds, principally, that the material was "a breach of natural justice; the material is irrelevant to the issues to be decided; it is factually incorrect and contrary to evidence that the Tribunal failed to consider".[41] The appellant elaborated upon that submission, including by some quite severe criticisms of the primary judge's reasons. Upon the face of the primary judge's reasons they address apparently relevant issues and do not include any intemperate or irrelevant criticism of the appellant. The deficiencies in the Record Book and the generality of the terms in which the appellant's argument upon this point was developed preclude the Court from concluding that it is appropriate to make any of the redactions sought by the appellant. I would not accede to the appellant's submission that the primary judge's reasons should be redacted in any respect.

Order

[56] The appeal should be dismissed.

[57] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order his Honour proposes.

[58] **PHILIPPIDES JA:** For the reasons given by Fraser JA, I agree with the order proposed by his Honour.

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41 Outline, para 40.