

NOTICE OF DETERMINATION

A notice made under s318 of the *Legal Profession Uniform Law (Victoria)*.

Complainant: [REDACTED]
Respondent Lawyer/Law Practice: [REDACTED] trading
as [REDACTED]
Ref: [REDACTED]

ORDERS

Pursuant to section 299(1) of the *Legal Profession Uniform Law (Victoria)* ("the Uniform Law"), I have decided that the Respondent Lawyer has engaged in unsatisfactory professional conduct and I make the following orders –

The Respondent Lawyer is cautioned pursuant to section 299(1)(a) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. The Lawyer acted for the purchaser and the Complainant acted for the vendor, as a conveyancer, on the sale of a property in [REDACTED], Victoria.
2. On 16 June 2016 the Lawyer wrote to the Complainant setting out the terms of a proposed agreement to deal with works that had not yet been completed by the vendor and which were required to be completed in accordance with the Special Condition contained in the contract of sale between the parties (**the Special Condition**). In the letter the Lawyer proposed that an amount of \$2500 be held back at settlement, that these funds be placed in her law practice's trust account, that the vendor undertake the works within 5 days of settlement, failing which those funds be released to her client. In that letter the lawyer stated:

"We confirm that the funds will be held in our trust account pending completion of the works by your client within the agreed timeframe."

3. An email sent on 16 June 2016 at 10.32am by a conveyancer at the Complainant's office responded to the Lawyer's letter. In the email, the conveyancer confirmed that her client (the vendor) was agreeable to the amount of \$2500 being held back at settlement and that those funds be placed into the Lawyer's trust account. However, the email proposed that the purchaser install a new stove first, and then her client (the vendor) would complete the works or alternatively, the purchaser employ a tradesperson to undertake the works and then the purchaser use the funds held in trust to reimburse himself for those costs.

4. In response to the above email, the Lawyer's personal assistant sent an email on 16 June 2016 at 10.50am confirming that the purchaser would employ their own tradesperson to undertake the works and the funds held back could be used to reimburse the purchaser for this work.
5. On 1 August 2016 the Lawyer sent a letter to the Complainant advising that she had released the amount of \$2500 to her client (the purchaser) as the vendor had failed to comply with the Special Condition.
6. On 3 August 2016 the Complainant sent to the Lawyer an email in which she:
 - a. set out the previous communications between her office and the Lawyer;
 - b. stated that an agreement had been reached that the Lawyer's client (the purchaser) would employ their own tradesperson to complete the relevant works and would be reimbursed for the works;
 - c. immediately required the Lawyer to provide evidence of the works being completed together with an invoice from the tradesperson and a refund to her client for the amount due to him;
7. By letter dated 8 August 2016, the Lawyer relied on the Special Condition contained in the contract of sale between the parties as the basis for releasing the funds to her client.

ISSUE UNDER INVESTIGATION

8. The issue under investigation has been the Lawyer's handling of money held in her law practice's trust account, on behalf of her client and the Complainant's client, and the release of this money by the Lawyer to her client without first seeking the Complainant's consent.

INVESTIGATION

9. On 9 September 2016 the Victorian Legal Services Commissioner ("the Commissioner") received the complaint.
10. On 11 October 2016 the Commissioner sent a letter to the Lawyer that gave notice of complaint and of the Commissioner's decision to investigate the complaint under section 282 of the Uniform Law. The letter sought the Lawyer's written explanation under section 371(1) of the Uniform Law and/or submission about the complaint or the decision to investigate.
11. By letter dated 27 October 2016 the Lawyer provided her response. In her response the Lawyer stated, amongst other things, that she appreciated that it would have been prudent to advise the Complainant that she was proposing to release the funds to her client and that in the circumstances she was prepared to deposit the amount of \$2500 into her law practice's trust account.
12. By letter dated 31 October 2016 a copy of the Lawyer's letter was provided to the Complainant.

13. On 20 December 2016 the Commissioner sent a letter to the Lawyer which set out the Commissioner's assessment of the material forming part of the investigation and invited the Lawyer to provide any further written submissions or material which the Lawyer wished to have taken into consideration before a decision was made.
14. On 11 January 2017 the Lawyer provided a response to the Commissioner's letter. In the letter the Lawyer acknowledged:
 - a. that it was inappropriate to release the funds to her client without consulting the Complainant as the vendor's representative; and
 - b. that she was mistaken as to the belief that her clients were entitled to the funds as the vendor had not completed the works in the timeframe agreed.

The Lawyer also confirmed that she reinstated the amount of \$2500 to her law practice's trust account.

15. On 18 January 2017 the Commissioner sent a letter to the Lawyer and the Complainant in accordance with section 299(2) of the Uniform Law which gave notice of the proposed determination and invited written submissions about the proposed order.

In the letter to the Lawyer the Commissioner confirmed that the Lawyer's letter of 11 January 2017 contained a number of submissions and that these would be considered before the determination was made.

16. By email sent on 20 January 2017 the Lawyer noted the proposed order to be made to caution her.
17. No further written submissions were received from the Lawyer and no written submissions were received from the Complainant.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

18. On the basis of the available evidence, including the Lawyer's admissions, I find the following proved:
 - A. That by the communications between the Lawyer (and/or other members of staff at her office) and the Complainant (and/or other members of staff at her office) the parties agreed that:
 - i. an amount of \$2500 be held back at settlement;
 - ii. that these funds be placed in the Lawyer's law practice trust account;
 - iii. the purchaser would employ their own tradesperson to undertake the works; and
 - iv. the funds held back could be used to reimburse the purchaser for this work.
 - B. That the parties therefore agreed to depart from compliance with the Special Condition.
 - C. The Lawyer's reliance on the vendor's non-compliance with the Special Condition as the basis for releasing the funds was not a proper basis.

- D. By the terms of the agreement reached by the parties in their communication on 16 June 2016, the Lawyer held the amount of \$2500 in her trust account on behalf of her client, the vendor, and the Complainant's client, the purchaser.
- E. That the Lawyer did not seek the Complainant's consent before releasing the amount of \$2500 to her client.

RELEVANT LAW

- 19. The Uniform Law applies to the conduct, the subject of the findings of fact.
- 20. The conduct the subject of investigation occurred during the period June – August 2016.

CHARACTERISATION OF THE CONDUCT

- 21. Section 129 of the Uniform Law states that trust money is money entrusted to a law practice in the course of or in connection with the provision of legal services by the law practice.
- 22. The amount of \$2500 falls within the definition of trust money.
- 23. Section 138 of the Uniform Law states that a law practice must hold trust money deposited in the law practice's general trust account exclusively for the person on whose behalf it is received and disburse the trust money only in accordance with a direction given by the person.
- 24. The Lawyer held the trust money in her law practice's trust account on behalf of her client, the purchaser, and the Complainant's client, the vendor.
- 25. By reason of the Lawyer permitting her law practice to release the amount of \$2500 to her client without seeking the consent of the Complainant, I find that the law practice has breached section 138 of the Uniform Law.
- 26. By the reason of the operation of section 35(1)(b) of the Uniform Law, I find the Lawyer is taken to have contravened section 138 of the Uniform Law.
- 27. Section 35(2) of the Uniform Law prescribes that a contravention by a principal arising under subsection (1) is capable of constituting unsatisfactory professional conduct.
- 28. Further or alternatively section 298(a) of the Uniform law prescribes that, without limitation, conduct capable of constituting unsatisfactory professional conduct includes conduct consisting of a contravention of the Uniform Law.
- 29. Accordingly, the Lawyer's conduct constitutes unsatisfactory professional conduct pursuant to section 35(2) and/or section 298(a) of the Uniform Law.

DETERMINATION & REASONS

- 30. Having considered all of the evidence and relevant law, and having made the above findings on the issues under investigation, I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.

APPEAL

31. Pursuant to Section 314 of the Uniform Law, a respondent lawyer or a legal practitioner associate of a respondent law practice may, in accordance with the applicable legislation appeal to the Victorian Civil and Administrative Tribunal, or seek a review by the VCAT, of this determination made under s299 of the Uniform Law.



Michael McGarvie
Victorian Legal Services Commissioner

Date: 7 April 2017