

## NOTICE OF DETERMINATION

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

Complainant: [REDACTED] of [REDACTED]  
Respondent Lawyer: [REDACTED] of [REDACTED]  
Ref: [REDACTED]

### ORDERS

Pursuant to s292 of the Legal Profession Uniform Law (Victoria) ("the Uniform Law"), I have decided to make a binding determination about costs as follows: –

- The purchaser is not liable for the payment of the respondent's bill relating to the preparation and service of a Rescission Notice ("the Notice") dated 17 August 2015.
- The Respondent is to reimburse the purchaser the sum of \$770.00.

### STATEMENT OF REASONS

#### Background

1. On 14 August 2015 settlement for the sale of [REDACTED], [REDACTED] was unable to proceed due to the failure of the purchaser's solicitors to provide the Commonwealth Bank with the Duties Form 62.
2. On 14 August 2015 a number of emails were exchanged between the Complainant (the purchaser's solicitor) and the conveyancer, re-scheduling the settlement date to 18 August 2015.
3. On 14 August 2015, in emails exchanged between the Complainant and the conveyancer, additional costs payable by the purchaser to the vendor for re-scheduling the settlement date to 18 August 2015 were estimated by the conveyancer as follows:
  - \$100 for settlement re-scheduling fee.
  - \$110 for settlement re-attendance.
  - \$165 for legal costs
  - Penalty interest of 16% per annum.
4. The Complainant, on behalf of the purchaser, agreed to payment of the above costs.
5. On 17 August 2015, under the instructions of the conveyancer, acting on behalf of the vendor, the Notice was prepared and served by the Respondent Lawyer's firm on the Complainant.
6. On 18 August 2015 settlement was effected on the property.
7. The Respondent Lawyer's firm was paid the sum of \$770 by the purchaser for the preparation and service of the Notice.

### Issues in dispute

8. Whether the Respondent Lawyer's firm is entitled to charge the purchaser for the preparation and service of the Notice in the given circumstances.
9. If the Respondent Lawyer's firm is entitled to charge the purchaser for the Notice, whether the fees charged are fair and reasonable in all the circumstances.

### Complainant's case

10. The Complainant objected to her client being charged the sum of \$770 in circumstances where:
  - Settlement was rescheduled from the 14 August 2015 to 18 August 2015 on the day settlement was due to occur in the first instance.
  - That the delay in settlement was due to their error and was not the fault of the purchaser.
  - The vendor's fees, outlined in the conveyancer's email dated 14 August 2015, for the rescheduling of the settlement were accepted and agreed to. The fee for the Notice was not included in this email and was therefore not agreed to.
11. It should be noted that the complaint relates only to the imposition of a fee for the preparation and service of the Rescission Notice. The purchaser has agreed to payment of costs involved in re-scheduling settlement, penalty interest and "legal costs".

### Respondent Lawyer's case

12. The Respondent Lawyer has made written submissions, dated 10 November 2015 and 21 January 2016. In his response the Respondent Lawyer makes the following comment:
  - a. The Respondent Lawyer's firm issued the Notice on the instructions of the conveyancer, who were acting on behalf of the vendor. The Respondent Lawyer asserts that his law firm was bound to follow their instructions particularly given the following circumstances:-
    - No guarantee could be provided that the sale would proceed on 18 August 2015.
    - They would be failing to act in the vendor's best interests if a Notice was not issued.
    - If settlement was further delayed and additional expenses incurred as a result the Respondent Lawyer's firm would be negligent if the vendor's interests were not secured.
    - They would be negligent and the vendor would incur further costs and expenses by vendor if settlement was further deferred.
    - The Notice issued was due to the Complainant's failure to provide the required documentation to the Bank.
    - Neither the vendor nor the conveyancer had any part in the deferral of settlement. It was therefore the vendor's right to issue the Notice to secure their interests.
  - b. That there are no established practice standards on when it is an appropriate time to issue a Notice. Each case must be considered on its own unique circumstances.
  - c. If they had not issued the Notice and settlement had not proceeded there would have been serious consequences.

- d. The Respondent Lawyer maintains that the cost of the Notice was appropriately contained in the Notice. It was not, in his view, necessary or relevant that it was not disclosed in the conveyancer's email to the Complainant on 14 August 2015.
- e. That the costs billed, he believes, are proportionate and reasonable in the circumstances for the above reasons and considering:
- the urgency of the matter;
  - the importance for the vendor in obtaining funds for further dealings;
  - the possibility of further delay and the disadvantage this would cause to the vendor;
  - the legal knowledge required to prepare and serve a Notice to protect the vendor's interests.

### Findings on issues in dispute

*Whether the Respondent Lawyer's firm is entitled to charge the purchaser for the preparation and service of the Notice in the circumstances.*

13. Where a party defaults on an agreement, the question of liability is one of contract. In this case the Contract of Sale sets out each party's duties and obligations.
14. Condition 25 of the Contract of Sale provides for circumstances where a party is in breach: a party who breaches this contract must pay to the other party on demand:
- i. Compensation for any reasonably foreseeable loss to the other party resulting from the breach; and
  - ii. Any interest due under this contract as a result of the breach.
15. A defaulting party is responsible for payment of compensation for any reasonably foreseeable costs incurred as a result of the default.
16. Where there is a breach of contract the issuing of a Notice as in this case by the innocent party needs to have been in the contemplation of both the parties as a likely result of any breach<sup>1</sup>. In this case the service of the Notice is an action open to the vendor and is a decision for them, but the facts reveal a settled and apparently complete set of terms for the breach.
17. The purpose of including a provision that the loss be compensatory is to ensure that the wronged party is placed in the same position as if the contract had been performed<sup>2</sup>, while ensuring that the defaulting party is not penalised<sup>3</sup>.
18. The decision to issue the Notice was one that was made by the vendor in circumstances where:
- The time between the original settlement date and final settlement date was two (2) business days.
  - The Notice was issued on 17 August 2015, one day before the second settlement date of 18 August 2015.

<sup>1</sup> The loss must be "reasonably supposed to have been in the contemplation of both the parties as a not unlikely result of the breach." *Koufos v C Zarnikow Ltd* [1969] 1 AC 350 at 388.

<sup>2</sup> *Robinson v Harman* (1848) 154 ER 363 at 365.

<sup>3</sup> *Butler v Fairclough* (1917) 23 CLR 78 at 89.

- Settlement was unable to proceed on 14 August 2015 due to the purchaser's solicitor failure to provide the Commonwealth Bank with the required documents and was not due to any fault of the purchaser.
- The issuing of the Notice had no real impact on the vendor's rights particularly given it was issued one day before settlement was due to occur.
- The cost of the Notice was not included in the estimate of costs payable by the purchaser in the email exchange between the conveyancer and the Complainant on 14 August 2015.

19. I find that, in the combination of these circumstances, the cost of the Notice to be one that should not be borne by the purchaser. The fact that legal costs have been incurred does not mean that those costs are fully payable by the defaulting party. It is not the purpose of condition 25 of the Contract of Sale to aid in the recovery of costs by encouraging the commencement of fresh proceedings or pursuing other possible avenues of relief<sup>4</sup> in the absence of further defaulting conduct by the other party that would justify a new step. The principles for recovery of costs are not the same as those governing damages for breach of contract<sup>5</sup>. The purchaser is therefore not liable to pay for the cost of the Notice issued at the discretion of the vendor.

*Whether the fees charged by the Respondent Lawyer's firm for the drafting and service of the Notice are fair and reasonable in all the circumstances.*

20. It is not necessary to determine this issue given the decision made is that the purchaser is not liable to pay the vendor's fees for issuing the Notice.

### **Determination & Reasons**

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

### **Non-compliance**

Please be aware that a failure to comply with a determination in a consumer matter may amount to conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

Michael McGarvie  
**Victorian Legal Services Commissioner**

Date: 8 April 2016

<sup>4</sup> *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358 at 365.

<sup>5</sup> *Robinson v Harman* (1848) 1 Exch 850 at 855.