

NOTICE OF DETERMINATION

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

Complainant: [REDACTED]
Respondent Lawyer/Law Practice: [REDACTED] of [REDACTED]
Ref: [REDACTED]

ORDERS

Pursuant to section 299(1) of the *Legal Profession Uniform Law (Victoria)* ('the Uniform Law'), I have decided that [REDACTED] has engaged in unsatisfactory professional conduct and I make the following order –

[REDACTED] is cautioned pursuant to section 299(1)(a) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

- [REDACTED] acted on behalf of the purchaser and [REDACTED], a conveyancer from [REDACTED] Pty Ltd ('[REDACTED]'), acted on behalf of the vendor, in relation to the conveyance of [REDACTED] ('the property').
- On 18 March 2015, [REDACTED], on behalf of her client issued a Notice of Default which purported to require that the purchaser remedy its default (a failure to settle on the due date) and pay \$550.00 in costs for the preparation of the Notice of Default.
- On 19 March 2015, [REDACTED] sent a letter to [REDACTED] to confirm which cheques would be required at settlement. The cheque directions included a cheque in the amount of \$1,716.00 in favour of [REDACTED]. The figure of \$1,716.00 included [REDACTED] professional fees as well as costs associated with the Notice of Default, in the amount of \$550.00.
- On 20 March 2015, [REDACTED] settlement agent attended settlement at [REDACTED] office and provided [REDACTED] with the amount she had requested prior to settlement.
- On or about 14 April 2015, [REDACTED] became aware that a cheque in the amount of \$1,716.00 to [REDACTED] was missing from her file.
- On 14 April 2015, [REDACTED] emailed [REDACTED] advising him that she had misplaced the cheque for \$1,716.00 made out to her office. She requested a copy of the missing cheque so that she could organise a replacement cheque to be issued.

7. On 16 April 2015, [REDACTED] received an email from [REDACTED] which raised issue with the cost of \$550.00 for the Notice of Default. [REDACTED] also advised that he would need to 'obtain instructions regarding a cheque issued by the purchaser...' and that it would take him '...some 2 hours to obtain instructions and to investigate the replacement of the cheque in issue'. He stated that his costs were '\$360.00 per hour'.
8. Shortly thereafter, [REDACTED] received confirmation from the ANZ Bank that the cheque for \$1,716.00 was deposited into [REDACTED] trust account on 7 April 2015.
9. On 26 June 2015, [REDACTED] emailed [REDACTED] regarding the misplaced cheque, and requested that he return this amount to her office.
10. On 8 July 2015, [REDACTED] sent a letter to [REDACTED] enclosing a trust cheque payable to [REDACTED], in the amount of \$1,166.00 (the amount of the misplaced cheque, less \$550.00) and explained that the settlement agent had banked the cheque into the law practice's trust account in accordance with standard procedure.

ISSUES UNDER INVESTIGATION

11. [REDACTED] raised the following concerns in her complaint:
 - a) [REDACTED] retained from settlement, and deposited into his law practice's trust account, a cheque in the amount of \$1,716.00, which was made out to [REDACTED].
 - b) [REDACTED] did not notify [REDACTED] that his office had received this cheque nor that it had been deposited into trust.
 - c) [REDACTED] asserted that he would be charging [REDACTED] \$360.00 an hour, for an estimated two hours, to investigate what happened to the cheque and to arrange a replacement cheque, even though the cheque had already been deposited into his law practice's trust account.
 - d) [REDACTED] returned to [REDACTED] the amount of \$1,166.00, but retained the amount of \$550.00 representing the amount [REDACTED] charged for issuing the Notice of Default on behalf of her clients. [REDACTED] has still not returned this amount to her.

INVESTIGATION

12. On or about 24 July 2015, the Victorian Legal Services Commissioner ('the Commissioner') received [REDACTED] complaint.
13. On 10 August 2015, the Commissioner sent a letter to [REDACTED] that gave notice of the complaint, requested a response from him pursuant to section 371(1) of the Uniform Law and invited him to make any written submissions.

14. On 25 September 2015, the Commissioner received a response from [REDACTED]. In his response [REDACTED] explained, amongst other things, that [REDACTED] had purported to serve on his clients an invalid Notice of Default and that unbeknownst to him, while attending to the matter his clerk banked the cheque for \$1,716.00 in trust, in accordance with his office's standard procedure. As soon as he became aware that the funds were in trust, he arranged for the sum of \$1,166.00 to be returned to [REDACTED] and informed [REDACTED] that the balance of \$550.00 was due to his clients.
15. During the course of the investigation, [REDACTED] also explained that once he became aware that the funds were in his law practice's trust account, he contacted his clients and was instructed to 'retain the sum of \$550.00 before sending the balance to the conveyancer'. [REDACTED] said that he 'complied with those instructions'.
16. On 15 July 2016, the Commissioner sent a letter to [REDACTED] and to [REDACTED] which gave notice of the proposed determination and invited written submissions about the proposed order.
17. On 27 July 2016, the Commissioner received a letter from [REDACTED] which, amongst other things, confirmed her acceptance of the Commissioner's proposed determination.
18. On 5 August 2016, the Commissioner received a letter from [REDACTED] which requested that a number of matters be taken into consideration when determining this matter.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

19. On the basis of the admissions made by [REDACTED] and the evidence before me, I find the following proved:

[REDACTED], after becoming aware that his settlement clerk had retained from settlement and deposited into his law practice's trust account, a cheque made out to [REDACTED] in the amount of \$1,716.00, failed to return the amount of \$550.00 to [REDACTED] despite settlement proceeding on the basis that this amount had been paid to her.

20. Based on the evidence before me, I cannot conclude whether or not [REDACTED] knew by 16 April 2015 that the cheque for \$1,716.00 had been retained by his law practice after settlement and banked into trust. I therefore cannot find that [REDACTED] was deliberately misleading when he sent [REDACTED] his email of 16 April 2015.

RELEVANT LAW

21. The Uniform Law and the *Legal Profession Uniform Law Solicitors' Conduct Rules 2015* (Victoria) ("the Conduct Rules") apply to the conduct, the subject of the findings of fact. The conduct occurred on and/or from 8 July 2015, when [REDACTED] sent a letter to [REDACTED]

█████ enclosing a trust cheque in the amount of \$1,166.00 (the amount of the misplaced cheque, less \$550.00) and failed to return \$550.00 to her.

CHARACTERISATION OF THE CONDUCT

22. Rule 30.1 of the Conduct Rules states that:

A solicitor must not take unfair advantage of the obvious error of another solicitor or person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.

23. █████ settlement agent attended settlement at █████ office on 20 March 2015 and provided her with the amount she had requested prior to settlement. This included a cheque in the amount of \$550.00 to cover █████ legal fees in relation to the Notice of Default. As a result, settlement proceeded on the basis that the amount of \$550.00 had been paid.

24. █████ had agreed, and it appears his clients had instructed him to pay █████ \$550.00, in order for settlement to proceed. It is therefore improper for █████ law practice to retain the amount of \$550.00. This amount should have been returned to █████, once █████ became aware that the cheque was retained by his agent and banked into his law practice's trust account.

25. █████ placed a reliance on this agreement and proceeded to settle the matter on the basis that the amount of \$550.00 had been paid. █████ appears to have now reneged on this agreement, by taking advantage of the fact that the cheque was inadvertently and in error, retained by his settlement agent and banked into his firm's trust account. █████ has taken unfair advantage of this error. If the error had not occurred, █████ would hold the amount of \$550.00, as was agreed by the parties at settlement. It would then be up to █████ clients to provide him with instructions to recover this amount from █████, if appropriate to do so.

26. Section 298(b) of the Uniform Law prescribes that, without limitation, conduct capable of constituting unsatisfactory professional conduct includes conduct consisting of a contravention of the Conduct Rules.

27. In light of the above and by reason of the above findings of fact, I find that █████ has breached rule 30.1 of the Conduct Rules. This breach constitutes unsatisfactory professional conduct pursuant to section 298(b) of the Uniform Law.

DETERMINATION

28. In light of the foregoing and having considered all of the evidence and relevant law, I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.

APPEAL

29. Pursuant to Section 314 of the LPUL, 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: 12 October 2016