

**Note: the content of this Determination has been further abbreviated to remove references to and prevent identification of the parties.**

## NOTICE OF DETERMINATION

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

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

### ORDERS

Pursuant to s299(1) of the *Legal Profession Uniform Law (Victoria)* (**the Uniform Law**), I have decided that the Respondent has engaged in unsatisfactory professional conduct and I make the following orders –

- A. The Respondent is cautioned that he should take measures to ensure that he and his staff strictly adhere to the terms of undertakings in the future (s299(1)(a)).
- B. In addition to his usual continuing professional development requirements, the Respondent is required to complete one extra unit of training in Ethics and Professional Responsibility relating to undertakings, to be completed during the practising year for the period from 1 July 2016 to 30 June 2017 (s299(1)(e)(i)).

### STATEMENT OF REASONS

#### Background

1. The Complainant acted for their client in respect of a dispute with a relative about a property at [REDACTED] (**the property**), in which they each held an interest. The Respondent acted for the relative. At mediation, the parties entered into a Deed of Settlement under which an amount was to be paid to the Complainant's client, who would transfer their interest in the property to the relative.
2. By letter to the Respondent's law practice dated, the Complainant noted that it was likely that the relative's financier would require the transfer to be stamped prior to settlement. The Complainant offered to provide the transfer, signed by their client, to the Respondent for stamping, if the Respondent would provide an undertaking to return of the document.
3. By email to the Complainant dated 17 October 2014, the Respondent gave an undertaking in the following terms:  

*"We refer to your telephone conversation with [name] from our office on [date]. We undertake to return the transfer of land to your office once signed and stamped."*
4. By subsequent letter, the Complainant forwarded the signed transfer to the Respondent, and requested that the transfer of land be stamped.

5. The transfer was not returned to the Complainant and was subsequently lodged for registration at the Titles Office.

#### **Issues under investigation**

6. The Complainant said that the Respondent had acted in breach of the undertaking.

#### **Complainant's Case**

7. The Complainant provided copies of the correspondence referred to above. They also provided title searches showing that the transfer from the Complainant's client to the relative as sole proprietor was registered on a particular date. On the same day, the relative registered a transfer to themselves and their partner as joint proprietors.
8. The Complainant said that neither they nor their client gave authority for the signed transfer to be lodged with the Titles Office.

#### **Respondent Lawyer's Case**

9. The Respondent replied by letter, which included a folder of attachments.
10. The Respondent acknowledged that in the circumstances he gave the undertaking.
11. The Respondent said that the relative informed him that the family had renegotiated the settlement and had entered into a written agreement (**the Agreement**), which expressly sought to resolve the dispute and end the further involvement of lawyers. The relative instructed him that the transfer was to proceed. The Respondent said that he had no reason to doubt these instructions and they seemed consistent with the intention of the Agreement as a whole.
12. In paragraph 20 of his letter later that year, the Respondent said that his instructions thereafter were limited to the lodgement of the signed transfers for stamp duty assessment and registration. It appears that he did not lodge the transfer signed by Complainant's client for stamp duty assessment until 4 months after it had been given to him for that purpose.
13. The Respondent said that the stamp duty was paid by his client and documents were handed to the bank at the settlement. On that basis, he denied the Complainant's claim that he lodged the transfer for stamping and registration.
14. In a later letter, the Respondent said that other information concerning the scope of the Agreement may have been available from the family of the Complainant's client and the relative. However, he believed that it would have been inappropriate to make further enquiries because of the Complainant's clients' poor health.
15. In this same letter, the Respondent conceded that he had breached the undertaking. He acknowledged that he should have reverted to the Complainant to seek a release from his undertaking once the family settlement agreement came to light, particularly where it did not expressly resolve the question of the property transfer.
16. The Respondent also said that he deeply regretted that he had not reverted to the Complainant. He said that his omission was unintentional and he accepted that strict compliance with any undertaking was an essential part of the practice of law.

### Further Information

17. A copy of a later letter from the Respondent replying to the complaint was provided to the Complainant. Initially, the Complainant said that the signature on the Agreement was not that of their client. However, their client subsequently admitted her signature was on the Agreement but said that the Agreement was subject to the payment of an amount into a separate bank account. The Complainant's client also said that the transfer of their interest in the property to the relative was only to have occurred on their death.
18. In a later telephone conversation, the Complainant agreed that it did not appear that the Respondent had deliberately set out to breach the Undertaking. The Complainant postulated that the Respondent had been careless.
19. By later email, the Complainant said that they had no objection to a proposed order finding that the Respondent had engaged in unsatisfactory professional conduct and the orders set out in paragraphs A and B above.

### Relevant Law

20. At the relevant time, the *Legal Profession Act 2004 (the Act)* and the *Professional Conduct and Practice Rules 2005 (the Rules)* were in force.
  - (a) Section 4.4.2 of the Act provided relevantly:

“**unsatisfactory professional conduct** includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.”
  - (b) Rule 22.1 of the Rules provided relevantly:

“A practitioner who, in the course of the practitioner’s practice, communicates with another practitioner ... in terms which expressly, or by necessary implication, constitute an undertaking on the part of the practitioner personally to ensure the performance of some action or obligation, must honour the undertaking so given strictly in accordance with its terms, and within the time promised, or, if no precise time limit is specified, within a reasonable time.”
  - (c) Rule 22.2A of the Rules provided relevantly:

“For the purposes of rule 22.1 an undertaking given by an employee of a practitioner...shall be deemed to be a personal undertaking given by the employer practitioner...”
21. Pursuant to section 4.4.4(a) of the Act, conduct consisting of a contravention of the Rules is capable of constituting unsatisfactory professional conduct or professional misconduct.
22. In *Legal Services Commissioner v McColm* [2006] QLPT 14, the Queensland Legal Practice Tribunal in 2006 found a practitioner guilty of unsatisfactory professional

conduct in respect of an unintentional failure to comply with an undertaking to another practitioner where there were mitigating circumstances, evidence of remorse and no allegation of dishonesty. The practitioner was reprimanded and fined \$3,000.

23. In *Legal Services Commissioner v Johnston* (Legal Practice) [2011] VCAT 1366, there was a dispute over the beneficial ownership of estate property. The practitioner undertook not to part with the proceeds of sale of the property except to pay mortgages. The executor withdrew the practitioner's instructions and at the executor's request, the sale proceeds were transferred to another law firm that was not bound by the undertaking. The practitioner was found guilty of professional misconduct. There was also a finding of unsatisfactory professional conduct in relation to another unrelated charge and a global penalty of a reprimand and a \$2,000 fine.

### **Findings of Fact on Issues under Investigation**

24. The email from the Respondent to the Complainant contained an express undertaking, the terms of which were clear. Pursuant to rule 22.2A of the Rules, the undertaking was deemed to be a personal undertaking given by the Respondent.
25. The terms of the Complainant's original letter show that the transfer was sent in reliance on the undertaking.
26. The transfer signed by the Complainant's client was released by the Respondent to the bank for the purposes of a settlement.
27. The Complainant's client has admitted to signing the Agreement. The Agreement provided, in particular, that the parties wished to resolve their dispute and to end the further involvement of lawyers.
28. The Agreement did not specify the amount to be paid into a separate bank account referred to by the Complainant's client (see paragraph 17 above). The Agreement stated that money was to be generated from Government Family Tax or personal accounts to top up projected amount shortfalls that may have been paid by Government Family Tax. Further, the Agreement did not expressly provide for the transfer of the property. Accordingly, the terms of the Agreement do not appear to be entirely consistent with either the relative's instructions or with the Complainant's client's claims referred to in paragraphs 11 and 17 respectively.
29. The material available shows that the Respondent did not inform the Complainant about the Agreement and did not ask them to release him from the undertaking. Accordingly, his conduct in failing to return the transfer to the Complainant after stamp duty was assessed, and in placing the document beyond his power by providing it to the bank on settlement, was in breach of the undertaking and in contravention of Rule 22.1.
30. The Respondent's reply to the complaint indicates that he had considered whether it was appropriate for him to act in accordance with the instructions received, and that he had formed the view that his instructions were consistent with the intentions of the parties as set out in the Agreement. For this reason, the breach of the undertaking was careless but not wilful.
31. The Respondent has acknowledged that he breached the undertaking and that he should have reverted to the Complainant to seek a release from the undertaking when

the circumstances appeared to change. He has also stated that he accepts that strict compliance with any undertaking is essential. Such acknowledgements reduce the need for specific deterrence in this matter.

32. As noted in paragraph 18, the Complainant has agreed that the Respondent's conduct was not deliberate, but careless.
33. The Respondent was admitted in early 1978 and has been in practice for about 38 years. There have been no disciplinary findings against him in that time.

### **DETERMINATION & REASONS**

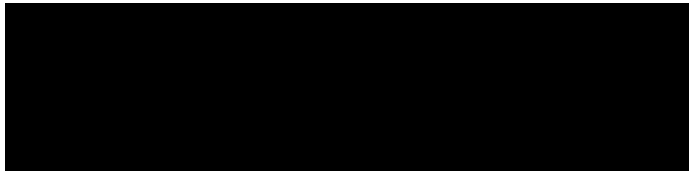
34. Having considered all of the evidence and relevant law, and having made the above findings on the issues under investigation, I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.

### **APPEAL**

1. 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.

### **NON-COMPLIANCE**

35. A failure to comply with a determination made under s299 is capable of constituting unsatisfactory professional conduct or professional misconduct pursuant to Section 298 (h) of the Uniform Law.



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Michael McGarvie  
**Victorian Legal Services Commissioner**  
Date: 17 June 2016