

## NOTICE OF DETERMINATION

A notice made under section 318 of the *Legal Profession Uniform Law (Victoria)* ("Uniform Law").

**Complainant:** [REDACTED]  
**Respondent Lawyer:** [REDACTED]  
**Case reference:** [REDACTED]

### Orders

1) Pursuant to section 290(2)(d)(i) of the Uniform Law, I make the following order –

That the Respondent Lawyer undertake a professional development course with a focus on practice management: specifically, appropriate billing and compliance with costs disclosure obligations, to be approved by me **within 6 months** of this date.

2) Pursuant to section 292(2)(e) of the Uniform Law, I make the following order –

Under section 308(3) of the Uniform Law, the Respondent Lawyer must **repay \$750.00 to the Complainant within 28 days.**

I have made this order in relation to legal costs charged by the Respondent Lawyer to the Complainant regarding the following bills –

- Bill dated 14 December 2015, for an amount of \$808.73; and
- Bill dated 21 December 2015, for an amount of \$503.64.

I consider the total amount of legal costs that are fair and reasonable in relation to these bills, pursuant to section 292 of the Uniform Law, to be **\$550.00** (GST Inclusive). The Complainant has already paid a sum of \$1,300.00 to the Respondent Lawyer.

### Statement of Reasons

#### **Background**

1. In October 2015, the Complainant retained the services of the Respondent Lawyer in relation to conveyancing work for the purchase of a property in Elsternwick.
2. The following bills were rendered by the Respondent Lawyer –
  - a. Bill 1: dated 14 December 2015, for an amount of \$808.73; and
  - b. Bill 2: dated 21 December 2015, for an amount of \$503.64.
3. Settlement of the property was initially scheduled for 23 December 2015, but did not occur.

4. On or about 31 December 2015, the Complainant terminated the Respondent Lawyer's retainer due to concerns about a conflict of interest between the Respondent Lawyer and the legal practice representing the lender ('lender's legal practice').
5. On 18 January 2016, the Complainant paid the Respondent Lawyer \$1,300.00 in relation to Bills 1 and 2. The Respondent Lawyer accepted a reduction of \$12.37 in full and final payment of these bills.
6. On 22 February 2016, my office received the Complainant's complaint about the Respondent Lawyer. This complaint was assessed as a consumer matter.

### Issues in Dispute

The issues that remain in dispute are whether –

- (a) The Respondent Lawyer's bills are fair and reasonable;
- (b) There was any conflict of interest in the Respondent Lawyer acting on behalf of the Complainant;
- (c) The Respondent Lawyer should be liable for any further costs incurred due to late settlement of the Complainant's property.
- (d) The Respondent Lawyer should be liable for any further costs incurred by the Complainant engaging a new lawyer;

### Complainant's Case

The Complainant claims that he paid \$1,300.00 to the Respondent Lawyer on 18 January 2016 with an express reservation of his right to dispute both bills.

The Complainant said the following in his complaint –

*a. Legal costs*

The legal fees charged by the Respondent Lawyer were more than the \$500.00 he initially expected. No estimate of costs was provided at the commencement of the matter;

*b. Conflict of interest*

A conflict of interest arose as a result of the Respondent Lawyer's previous interest in the lender's legal practice.

The Respondent Lawyer benefited financially from the lender's legal practice completing legal work on behalf of the lender, which amounted to "double dipping".

c. *Further costs incurred due to late settlement of property*

He incurred penalty interest of \$2,254.29 due to the late settlement of the property caused by the way in which the file was handled by the Respondent Lawyer.

d. *Further costs incurred for engaging a new lawyer*

He incurred further legal costs totaling \$1,277.65 as a result of having to engage another lawyer to complete the purchase of the property.

The Complainant is seeking the following –

- i. A full refund of the \$1,300.00 he paid to the Respondent Lawyer;
- ii. Reimbursement of the additional legal fees he paid to his new lawyer of \$1,277.65; and
- iii. Reimbursement of the penalty interest of \$2,254.29 incurred due to the late settlement.

The Complainant did not make any offers during the informal dispute resolution process and maintains his request for a full refund, together with reimbursement for his additional expenses.

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

The Respondent Lawyer said the following in response to the complaint –

a. *Legal costs*

The legal fees charged were originally expected to be no more than \$750.00, which is why costs disclosure was not provided at the commencement of the matter. The legal fees increased due to the extra work involved in liaising with the lender and the limited time to complete settlement.

b. *Conflict of interest*

There was no conflict of interest:

- i. His active involvement as a lawyer with the lender's legal practice ceased on 30 June 2009;
- ii. From 1 July 2009 to 4 April 2014, he continued as a consultant and director of the lender's legal practice;
- iii. On 4 April 2014, he resigned as a director of the lender's legal practice;
- iv. He has a third cousin who works at the lender's legal practice. The presence of this relationship alone does not amount to a conflict of interest.

He did not benefit financially from any work completed by the lender's law practice. They operate independent practices.

c. *Further costs incurred due to late settlement of property*

Settlement was not delayed by the way in which he handled the file, but rather as a result of last minute changes made by the Complainant to the lending arrangements and the lack of instructions provided to him by the Complainant.

In the days leading up to and following the proposed settlement date, the Complainant failed to provide instructions or respond to his attempts to clarify his instructions with attempts to the Complainant made by telephone and email.

d. *Further costs incurred for engaging a new lawyer*

The costs of engaging a new lawyer was only incurred by the Complainant due to his failure to provide proper and timely instructions to allow settlement to take place as had originally scheduled. The additional costs incurred by the Complainant were due to changes he made to the sale and not due to the way in which his file was handled.

The Respondent Lawyer did not make any offers to reduce the legal fees charged. However, he indicated that he was willing to have the bills assessed by the Law Institute of Victoria and would agree to be bound by that assessment.

## Findings on Issues in Dispute

(a) Fair and reasonable legal costs

A costs review of the file has been undertaken and concluded that the total amount of legal fees that are fair and reasonable are \$550.00. This is a reduction of \$750.00 from the total of the Respondent Lawyer's bills.

Due to the absence of costs disclosure, the matter was costed on the applicable scale, being the Practitioner Remuneration Order 2015. This resulted in a reduction of costs.

A further reduction of costs was made due to the poor state of the file. It did not support all of the items charged by the Respondent lawyer. For example –

- Few file notes appeared on the file, and those that were on the file were illegible, undated and without times of the attendances noted.
- A copy of the Contract of Sale was not on the file.
- There were minimal documents on the file supporting the disbursements charged.

(b) Conflict of Interest

There appears to be no evidence that a conflict of interest existed due to the Respondent Lawyer's previous involvement with the lender's legal practice. I accept that the two legal practices are separate and independent and there is no evidence that the Respondent Lawyer benefited financially from their involvement. The Complainant has

confirmed that he does not have any evidence to support his claim that the Respondent Lawyer benefited financially as a result of his previous involvement with the lender's legal practice or that he continues to maintain a financial stake in the legal practice.

There is no basis to consider whether a conflict of interest existed merely because the Respondent Lawyer's third cousin was appointed to act on behalf of the lender. Knowing or being a distant relative of the opposing lawyer does not raise a conflict of interest.

(c) Further costs incurred due to delayed settlement

The delay in settlement does not appear to be due to the failing of the Respondent Lawyer. The material before me suggests that the reasons for delay were caused predominately by the Complainant's own failing to provide timely instructions to the Respondent Lawyer to allow settlement to proceed as scheduled. It also appears that the timing of settlement was problematic, as banks and law practices were likely to be closed over the relevant period.

(d) Further costs incurred for engaging a new lawyer

The Respondent Lawyer is not liable for these costs as they were not incurred as a result of the conduct of the Respondent Lawyer. The Complainant made changes to the way in which the sale was to be funded and failed to provide timely instructions to the Respondent Lawyer to enable the original settlement to proceed.

**Determination & Reasons**

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.

Further, in making a determination as to costs, I have determined that the amount is fair and reasonable in all the circumstances having regard to section 200 of the Uniform Law. I have also considered the principles in section 172.

Further, I am satisfied that the prerequisites for making a compensation order (pursuant to section 309 of the Uniform Law) have been met.

**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  
18 November 2016