

## NOTICE OF DETERMINATION

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

Complainant: [REDACTED]

Respondent Lawyer: [REDACTED] of [REDACTED]

Ref: [REDACTED]

### ORDERS

Pursuant to s290(2)(a) and s292 of the *Legal Profession Uniform Law (Victoria)* ("the Uniform Law"), I have decided to make an order, and a binding determination about costs, as follows:

- That the Respondent Lawyer be cautioned regarding his substantial failure to provide the Complainant with full written disclosure as to his legal costs in breach of his obligations set out in sections 3.4.9 and 3.4.16 of the *Legal Profession Act 2004* ("the LPA").
- The complainant is to pay \$1,068.38 as legal costs, less \$500.00 she has already paid; being a total amount due and payable to the Respondent Lawyer in the sum of \$568.38.

### STATEMENT OF REASONS

#### Background

1. The background to this matter is set out in paragraphs 1 to 7 of the [REDACTED] assessment report of the Costs Lawyer and Accredited Costs Law Specialist.

#### Issues in dispute

2. Whether the lump sum bill dated 25 July 2015 in the sum of \$1,497.38, or the itemised bill in the sum of \$2,358.18, was due and payable by the Complainant for her legal matter.
3. Whether the written estimate for the work in the sum of \$1,320.00 given on 8 October 2013 was exceeded without ongoing disclosure.
4. Whether the legal costs charged are fair and reasonable in light of the estimate given and the amount of work completed pursuant to the retainer.
5. Whether the Respondent Lawyer met his costs disclosure obligations to the complainant as set out in sections 3.4.9 and 3.4.16 of the LPA.

#### Complaint's case

6. The Complainant requested an itemised bill within 30 days of receipt of the lump sum bill from the Respondent Lawyer. She was given an itemised bill which came to a higher amount than the lump sum bill, and the Respondent Lawyer demanded payment of that higher amount, having already deducted \$500.00 previously paid into trust by the Complainant.
7. The Complainant maintained that the legal work the Respondent Lawyer had been instructed to undertake was incomplete and she was still instructing another lawyer with respect to the remainder of the work.

8. The Complainant maintained that the estimate given in a letter dated 8 October 2013 of \$1,320.00 was exceeded by the lump sum account without revision, and without completion of the legal work included in that estimate.
9. The Complainant objected to the charge for preparation of the itemised bill.

#### **Respondent Lawyer's case**

10. The Respondent Lawyer sought to rely on his itemised bill and maintained he had been advised that this was permitted under the LPA.
11. The Respondent Lawyer maintained he warned the complainant she may be liable to pay a higher itemised amount.
12. The Respondent Lawyer maintained that negotiation between he and the Complainant as to the amount of the lump sum bill meant the Complainant could no longer insist on an itemised bill and that he was then permitted to rely on the itemised bill once negotiations broke down.
13. With respect to the issue of the estimate, the Respondent Lawyer maintains he completed 90% of the work and that other work outside the scope of the estimate was included in the itemised bill. He maintained he was instructed to complete the work outside the scope of the retainer.
14. The Respondent Lawyer maintains the costs are fair and reasonable being the exact item amounts permitted by the Practitioner Remuneration Order.
15. The Respondent Lawyer maintains that another party to the legal matter was liable to reimburse the Complainant in the sum of \$900.00 for her legal costs and disbursements and that this factor should bear on his costs.
16. The Respondent Lawyer conceded the he could not charge for the preparation of the itemised bill and this issue was resolved in the complainant's favour.

#### **Findings on issues in dispute**

17. I obtained an independent assessment of costs from the Costs Lawyer as mentioned above. I agree with the conclusions expressed in the Costs Lawyer's report.
18. The relevant law concerning itemised accounts at the relevant time is referenced in paragraph 10 of the report of the Costs Lawyer.
19. The Respondent Lawyer was also informed about the applicable law during the course of the investigation of the complaint, specifically in correspondence with him dated 4 December 2015, setting out that under the LPA the position was as follows;  
*"Generally speaking with respect to your query concerning an ability to charge the amount of the itemised account where a request is made within time, please be aware that the relevant case law, specifically Re Thompson (1885) 30 Ch. D. 441, Re Edwin Sutherland & Co's Bill of Costs (1971) Qd.R. 318 and Redfern v. Mineral Engineers Pty Ltd [1987] VR 518, suggests a bill of costs cannot be altered after delivery to a client unless:*
  - o *consent has been received from the client;*
  - o *the Supreme Court grants leave;*
  - o *the bills are under review by the Costs Court; or*
  - o *the bill has a lawful condition of alteration which was fully and clearly stated to the client."*

20. I find the Complainant did not consent to pay the higher amount. The Complainant properly exercised her right to request an itemised bill as set out in section 3.4.36 of the LPA: that is, within 30 days of receipt of the lump sum bill. The Complainant's ability to seek an itemised account was not diminished by the Respondent Lawyer's offer to reduce the account in negotiations between them. The Respondent Lawyer did not demonstrate that any of the exceptions expressed in the law applied to this matter. The Costs Lawyer's assessment report is based properly therefore on the Respondent Lawyer's lump sum bill in the amount of \$1,497.38.
21. The file of the Respondent Lawyer was inspected and a costs assessment undertaken with respect to the work undertaken. I agree with the conclusions reached in the Costs Lawyer's assessment report concerning the amount of work undertaken to complete the retainer. The bill has been reduced on this basis.
22. I find the lump sum bill exceeded the estimate given in circumstances where the work included in that estimate was incomplete. Further, I found no evidence updated estimates were given to the Complainant. Ongoing disclosure was required by section 3.4.16 of the LPA in this matter. The estimate was not exceeded by a large amount if a simple comparison of the bill and the estimate are made, however the work was incomplete and the Respondent Lawyer should have notified the Complainant. He notes other work was done, which is so, but this does not lessen the obligation to give an updated estimate. With respect to the issue of the costs being paid by a third party, this does not affect in any way the Respondent Lawyer's obligations to his own client to charge a fair and reasonable amount and to provide proper disclosure.
23. I find that the Respondent Lawyer has not met his obligations to make disclosure to the Complainant in accordance with section 3.4.9 of the LPA. Of particular note is a failure to provide any information about the basis of charging for the work.

#### **Determination & Reasons**

24. 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.
25. 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 s200 of the Uniform Law. I have also considered the principles in s172.

#### **Non – Compliance with Orders**

26. A failure to comply with a determination made under s290 is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of –
- (a) any principal of a respondent law practice; and
  - (b) any lawyer involved in the contravention.

Michael McGarvie  
**Victorian Legal Services Commissioner**

Date: 8 April 2016