

NOTICE OF DETERMINATION

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

Complainant: [REDACTED]
Respondent Lawyer/Law Practice: Mr Thomas Flitner/Flitner & Company
Ref: [REDACTED]

ORDERS

Pursuant to section 299(1) of the *Legal Profession Uniform Law* (Victoria) ("the Uniform Law"), I have decided that Mr Thomas Flitner has engaged in unsatisfactory professional conduct and I make the following order –

- a) Mr Flitner is reprimanded pursuant to section 299(1)(b) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. The complaint of [REDACTED] (the Complainant) was received on 25 September 2015 about Mr Thomas Flitner of Flitner & Company ("the complaint").
2. The Complainant engaged Flitner & Company on 30 July 2012 to file an application on her behalf for assistance before the Victims of Crime Assistance Tribunal ("VOCAT") ("the application") and to act for her in the application. Mr Flitner acted for the Complainant, filing the Statement of Claim for the application on 12 March 2013. He acted for the Complainant until a locum lawyer took over the file from 7 November 2014 until 17 January 2015.
3. On 23 January 2015, VOCAT ordered the Complainant to be represented by a new firm due to conflict of interest having arisen from Mr Flitner's representation of both the Complainant and her mother, the co-applicant in the application. A new Statement of Claim was also ordered to be filed on or before 3 April 2015.
4. The Complainant terminated the retainer of Flitner & Company on 13 February 2015 and engaged a new solicitor to take over conduct of the application. The new solicitor advised Mr Flitner in writing on 19 February 2015 that she was acting for the Complainant.
5. The new solicitor filed the Amended Statement of Claim on 2 June 2015. VOCAT made final Orders with respect to the application on 18 September 2015.

ISSUES UNDER INVESTIGATION

6. The concerns the Complainant raised in the complaint and which have been investigated are:

- a. She believes Mr Flitner handled her case poorly. In particular:
 - i. On occasion it appeared that Mr Flitner did not know what was going on in relation to the Complainant's case, including on 2 October 2014 when Mr Flitner met the Complainant with her then support worker, and deferred to the support worker for updates and information, which the Complainant believed was Mr Flitner's job;
 - ii. Mr Flitner went on leave without notice and the locum lawyer was not provided with adequate information or file handover to enable her to effectively take over carriage of the Complainant's case; and
 - iii. The Complainant's barrister was not adequately briefed prior to the directions hearing of the application on 23 January 2015 in that she received the brief only on 22 January 2015 and a number of relevant documents, including the Complainant's police statement, were not provided to the barrister;

- b. She believes Mr Flitner breached her confidentiality by:
 - i. Sending correspondence dated 19 January 2015 to her mother's address despite her clear instructions around May 2014 not to send further correspondence to that address; and
 - ii. A staff member of Flitner & Company called her mother's telephone number requesting to speak to the Complainant in circumstances where Mr Flitner had been instructed not to make contact at her mother's home;

- c. In filing the Statement of Claim for the application, Mr Flitner included claims which were not relevant to the injury she suffered as a result of the act of violence, such as costs for the Complainant's medication including her oral contraceptive pill ("the pill"), antibiotics, anti-seizure, steroid and pain killers, health insurance premiums, gym membership, book 'Beginning to Heal', Freedom of Information ("FOI") request and toll invoices resulting in an order requiring an Amended Statement of Claim to be filed.

INVESTIGATION

7. Mr Flitner was given notice of the complaint and invited to provide a submission in response to the complaint in a letter dated 5 November 2015 which he did by his letter dated 27 November 2015.
8. Upon request, the Complainant's file was received from the new solicitor on 14 December 2015.
9. Upon request, the Complainant's barrister provided information on 1 February 2016.
10. Upon request the Complainant's current support worker provided a file note of a previous support worker for the Complainant dated 23 January 2015.
11. Upon request, Mr Flitner provided a further submission on 19 March 2016.
12. On 22 April 2016 the parties were given written notice of my proposed determination offering both an opportunity to provide any final submissions.

13. At his request, Mr Flitner was provided with the documents considered in coming to the proposed determination on 29 April 2016 and his final submissions were received on 4 May 2016.
14. On 25 May 2016 the Complainant called my office and provided her views as to my proposed determination.

REASONING AND FINDINGS ON ISSUES UNDER INVESTIGATION

(a)(i) Poor case handling

15. In his submission dated 24 November 2015 Mr Flitner requested more detail about this issue in order to be able to respond to it. To this end, my office requested more detail from the Complainant via telephone on 16 February 2016 about her meeting with her former support worker and Mr Flitner on 2 October 2014, including details of conversations, however the Complainant was unable to recall these details.
16. My office spoke with the Complainant's current support worker via telephone on 17 February 2016, where the support worker read aloud the content of the file note by the former support worker from the 2 October 2014 meeting. All that was noted was that Mr Flitner asked the Complainant and the former support worker to fill him in on the case and did not know what was going on – the note contained no detail regarding the conversation itself.
17. In the absence of further information and due to both the Complainant and Mr Flitner's failure to recall details of the meeting held on 2 October 2014, I find there is insufficient evidence before me to prove that a disciplinary breach occurred. Therefore, this part of the complaint must be closed under section 277(1)(c) of the Uniform Law.

(a)(ii) Poor case handling

18. Mr Flitner referred in his submissions to the locum lawyer taking over Flitner & Company from 7 November 2014 for two months, which the records of this office confirm was due to the suspension of Mr Flitner's practising certificate until 17 January 2015. [REDACTED] was appointed as manager of Flitner & Company.
19. No evidence was presented in either the correspondence or the Complainant's file that Mr Flitner gave the Complainant notice of his absence. Although I would have expected Mr Flitner to have notified the Complainant prior to his departure of the duration of his absence and that the locum lawyer was taking over conduct of the Complainant's file as a matter of good practice, I take the events referred to at paragraph 21 as abrupt but over which Mr Flitner had limited control. Further, I would have also expected the locum lawyer to have advised the Complainant of this information as the Complainant's new lawyer.
20. The locum lawyer informed my office in her responses that the handover Mr Flitner provided her of 33 files was very rushed and that she was only able to write down two sparse sentences for each file.
21. Mr Flitner referred to his file note of the handover dated 7 November 2015, as attached to his submission dated 24 November 2015, which was barely legible and only contained a list of file names that were handed over.

22. I am of the view that poor file handover is not good practice but for conduct of this nature to be characterised as a disciplinary breach, the handover must be grossly deficient so as to substantively affect the new file handler's ability to take over carriage of the file. I find the handover that Mr Flitner provided the locum lawyer was not adequate. However, from the locum lawyer's response, she was still able to sufficiently carry on with conduct of the Complainant's file. I am not satisfied that Mr Flitner's conduct as to this issue amounts to a disciplinary breach. Therefore, I have decided to close this part of the complaint under section 277(1)(h) of the Uniform Law.

23. Mr Flitner has fallen short of the reasonable standard expected in handing over files. He is reminded to adhere to good practice principles in this regard. This includes ensuring each file to be handed over is in a state the new file handler is able to follow, taking time to brief the new file handler of matters including the relevant background and nature of each file, upcoming tasks and deadlines and answering questions the new file handler may have.

(a)(iii) Poor case handling

24. Mr Flitner described the brief he provided to the Complainant's barrister as "extensive". Having considered this brief, as contained in the Complainant's file, I agree that it is sufficiently extensive.

25. The Complainant's police statement was not contained in the brief, nor filed with the Statement of Claim. Multiple copies of the Complainant's police statement were found on the Complainant's file and Mr Flitner had filed her police statement with VOCAT on 25 October 2012.

26. The response of the Complainant's barrister was unhelpful.

27. I accept that the Statement of Claim filed by Mr Flitner would have been supported by the Complainant's police statement. I would have expected Mr Flitner to have provided the Complainant's barrister with the Complainant's police statement and for it to have been filed with the Statement of Claim. However, I cannot find that there is sufficient evidence before me to be satisfied that Mr Flitner's conduct in this regard was either improper, reckless or an unreasonable exercise of his forensic judgment about the Complainant's case so as to amount to a disciplinary breach. Hence, I have decided to close this part of the complaint under section 277(1)(a) of the Uniform Law.

(b)(i) Breach of confidentiality

28. I found no letter to the Complainant's mother on the Complainant's file – all correspondence to the Complainant from Flitner & Company was addressed to the Victoria Clinic or the refuge where the Complainant resided.

29. In any event, the Complainant's concern is that the correspondence from Flitner & Company was for the attention of the Complainant but was sent to her mother's address. This is not a breach of confidentiality. Therefore, I close this part of the complaint under section 277(1)(a) of the Uniform Law.

(b)(ii) Breach of confidentiality

30. Mr Flitner requested further detail, including the date of the call concerned, as he could not recall any such call. To this end, my office spoke with the Complainant via telephone on 11 December 2015. The Complainant was unable to provide a date regarding the call concerned.
31. In any event, the Complainant's concern is that the caller asked for the Complainant, not that the caller had a substantive conversation with the Complainant's mother about the Complainant's matter. This is not a breach of confidentiality. Therefore, I close this part of the complaint under section 277(1)(a) of the Uniform Law.

(c) Irrelevant claims

32. The purpose of my assessment of this issue was to come to a view about whether, objectively, the Statement of Claim revealed incompetence on Mr Flitner's part, for instance where it appeared obvious that items claimed or evidence attached to the Statement of Claim were irrelevant and/or groundless.
33. Under section 8 of the *Victims of Crime Assistance Act 1996* (Vic), the primary victim may only be awarded relief for items including reasonable counselling services, medical expenses as a direct result of the act of violence and in exceptional circumstances, other expenses to assist the victim's recovery. In applications for assistance to VOCAT, primary reliance is attached to psychological, psychiatric and medical reports, especially for the success of claims for "other expenses". It appears that, at the very least, each "other expenses" claim must be explicitly supported or recommended by a relevant expert as an item that would assist the victim's recovery.
34. In his submissions, Mr Flitner stated that the claim for the Complainant's contraceptive pill was related to her sexual abuse and referred to the reports of a consultant psychiatrist from The Melbourne Clinic dated 5 January 2012 and a clinical psychologist dated 10 July 2014. He maintained the other claims were included on the Complainant's instructions and along with supporting evidence, which he attached to his submission dated 4 May 2016. I note Mr Flitner stated the following of relevance in this submission:
- a. *Private health insurance membership premiums*: He referred to a handwritten note of the Complainant that she had exhausted her Medicare Plan for consultations with another psychologist resulting in HCF Health Fund contributing \$75.00 towards the amount of each consultation. He also referred to the report of another psychiatrist dated 13 May 2015 filed with the Amended Statement of Claim, where that psychiatrist states the Complainant's Group Scheme Therapy Day Program had been covered by the Complainant's private health insurance;
 - b. *Book 'Beginning to Heal'*: He referred to the recommendation of Dr [REDACTED] dated 2 February 2010 that the Complainant "do some reading to understand the genesis of some of her self-harming behavior";
 - c. *Medication including contraceptive pill, antibiotics, anti-seizure, steroid and pain killers*: He referred to the report of a consultant psychiatrist dated 5 January 2012, where the Complainant is prescribed Valdoxan, an antidepressant and other medications including Avanza. He referred to that psychiatrist's recommendation for the Complainant not to continue taking the contraceptive pill due to the increased risk of stroke, or sleeping tablets given

he was prescribing a quite strong medication in the form of Hypnodorm. He stated that [REDACTED] referred to the Complainant's pill in his report dated 19 August 2010 and that the Complainant was prescribed the pill Yasmin by Dr [REDACTED] of the Diamond Valley Clinic on 30 May 2015, along with a list of medication for Post-Traumatic Stress Disorder;

- d. *Freedom of Information request*: He said reimbursement of the cost of the FOI request was sought, as this request was made to obtain the Complainant's medical files for the purpose of substantiating the application;
- e. *Toll invoices*: He maintained that the costs of the toll invoices were directly related to travel costs between the Complainant's admission and discharge and re-admission to the Albert Road Clinic. He referred to his handwritten notes of the Complainant's travel and Toll invoices; and
- f. *Gym membership*: He said this was claimed as the Complainant advised she was conscious of her weight and was seeing [REDACTED], dietician for this. He referred to a comment from the consultant psychiatrist in his report dated 12 January 2012 that the Complainant presented as overweight. He also attached and referred to a letter dated 14 August 2012 and a psychiatrist's report dated 13 May 2015 referring to the Complainant commencing a program titled 'Vital Energy' to address the Complainant's physical fitness and diet.

35. On the basis on the evidence before me, I will now provide my views and findings as to this issue.

36. *Private health insurance membership premiums*: If I accept that the Complainant's private health insurance covers part of her counselling fees for a period, it does not follow that the costs of the premiums are claimable. My view of this is because first, such premiums are a flat amount that cover and are used for a range of health services – the premium may be used for purposes other than mental health counselling that do not fall within claimable items for the purpose of VOCAT applications. Secondly, the flat fee makes quantifying the portion of the premium used to cover the mental health counselling difficult. I also note that Mr Flitner has referred to a report of a psychiatrist, which was not in existence when Mr Flitner filed the Statement of claim.

37. *Book 'Beginning to Heal'*: A book such as this is plainly an "other expenses" claim that must meet the very high "exceptional circumstances" threshold. In Dr [REDACTED] report, whilst he expresses that he thinks it important for the Complainant to read about Anxiety Disorder and Borderline Personality Disorder to "understand the genesis of some of her self-harming behaviours", he does not specifically recommend this book. For a claim such as this, a specific recommendation and reasoning connecting any recommendation to the Complainant's recovery would be expected to be included in Dr [REDACTED] report in order for Mr Flitner to have even an arguable case.

38. *Medication*: Given the Complainant's background, I cannot form the view that, on the face of it, the pill, anti-biotics, anti-seizure, steroid and pain killer medication are reasonably relevant to assist in the Complainant's recovery. Then, in considering the evidence before me, there is also nothing to support such a causal connection. I note that the report of Dr [REDACTED], Neurologist prescribed pain killers for a migraine the Complainant experienced on 6 May 2010 but there appears to be no link expressed between this migraine to the abuse experienced by the Complainant. I also note that Mr Flitner made reference to a report of Dr [REDACTED] dated 30 May 2015, which

was not in existence when Mr Flitner filed the Statement of Claim. Further, there is no issue with the consultant psychiatrist's report insofar as he recommended mental health medication, however on Mr Flitner's own acknowledgement, the consultant psychiatrist recommended that the Complainant cease taking the contraceptive pill.

39. *FOI request*: Mr Flitner's explanation and the advice I received supports that this is a reasonable claim given that the purpose for the FOI request was to obtain the evidence needed to prepare the Statement of Claim.

40. *Toll invoices*: Given Mr Flitner's explanation and the evidence attached, I am unable to be satisfied that this constitutes an unreasonable claim.

41. *Gym membership*: This is plainly an "other expenses" claim. The consultant psychiatrist makes one comment in his report about the Complainant's weight. However, he does not make any recommendation that she attend the gym, nor does he proffer any connection between the Complainant's weight and her experience or any recommended treatment to assist her recovery. Again, I note Mr Flitner has referred to a report of a psychiatrist, which was not in existence when Mr Flitner filed the Statement of claim.

42. Further, having reviewed the Amended Statement of Claim that the Complainant's new solicitor prepared, the difference is marked. She only included claims for counselling and medical expenses. She did not include any "other expenses" claims. The Complainant commented on the neatness of the Amended Statement of Claim via email to the new solicitor on 23 September 2015, which I agree with in comparison to Mr Flitner's drafting. I also note that the Amended Statement of Claim was accepted by VOCAT without issue and the final award amount exceeded that applied for in the Amended Statement of Claim.

43. In light of the above, I find it quite obvious that the claims for the costs of the Complainant's private health insurance premiums, the book 'Beginning to Heal', the oral contraceptive pill, anti-biotics, anti-seizure, steroid and pain killer medication and the Complainant's gym membership are all claims that have been made in the Statement of Claim without reasonable grounds and/or relevance. I also find that Mr Flitner's conduct in this regard constitutes a lack of competence on his part and that he has not provided reasonably adequate legal services to the Complainant.

CHARACTERISATION OF CONDUCT

44. The complaint is about conduct that occurred from 30 July 2012 to 13 February 2015.

45. Section 27, Schedule 4 of the *Legal Profession Uniform Law Application Act 2014* (Vic) prescribes that complaints are able to be initiated on or after 1 July 2015, the commencement date of the Uniform Law, about conduct that occurred before 1 July 2015. A complaint of this type is handled under the Uniform Law. However, the conduct is measured against the applicable law that existed at the time to determine the relevant disciplinary breach. Further, any order that I make under the Uniform Law cannot be more onerous than an order that was available at the time of the conduct.

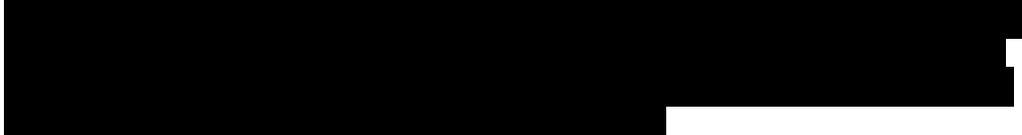
46. I find that Mr Flitner's conduct at paragraph 43 is capable of constituting unsatisfactory professional conduct or professional misconduct within the definition of section 4.4.4(a) of the *Legal Profession Act 2004* (Vic) ("the Act"), as in my view his

conduct breaches rule 2.1 of the *Professional Conduct and Practice Rules 2005* (Vic) (“the Rules”), being a failure to serve his client, the Complainant with competence.

47. I also note that the common law authorities of *CT Bowring v Corsi Partners* (1994) 2 Lloyd’s Rep 567, 580 and *Saragas v Martinis* [1976] 1 NSWLR 172 support that making groundless claims to a judicial body may be treated as a disciplinary issue.
48. I find that Mr Flitner’s conduct is properly characterised as unsatisfactory professional conduct because it occurred in connection with legal practice and, like rule 2.1 of the Rules, falls short of the standard of competence that a member of the public is entitled to expect of a reasonably competent lawyer, which fits within the definition of section 4.4.2 of the Act.
49. I am of the view that his conduct does not fit within the characterisation of professional misconduct within definition of section 4.4.3, as Mr Flitner’s conduct is not a consistent failure to reach or maintain a reasonable standard of competence and diligence, nor would it justify a finding that Mr Flitner is not a fit and proper person to engage in legal practice.

REASONS FOR ORDER

50. Mr Flitner has a lengthy list of previous complaints against his name, including a number that were substantiated, which should be taken as an aggravating factor. These include the following:

- a. A finding of unsatisfactory professional conduct in 2008 where compensation was paid to the client; and
- b. 

51. Mr Flitner’s disciplinary history provides me proper grounds to impose a reprimand under section 299(1)(b) of the Uniform Law.
52. 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

53. 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 or seek a review by VCAT of this determination.

NON-COMPLIANCE

54. A failure to comply with a determination made under section 299 is capable of constituting unsatisfactory professional conduct or professional misconduct pursuant to section 298(h) of the Uniform Law.



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