

NOTICE OF DETERMINATION

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

Complainant: [REDACTED] (“Complainant”)
Respondent Lawyer/Law Practice: Mr Stanley Kwong/Stn Kwong & Associates
 (“Lawyer”)
Ref: [REDACTED]

ORDERS

Pursuant to s.299(1) of the *Legal Profession Uniform Law (Victoria)* (“the Uniform Law”), I have decided that the Lawyer has engaged in unsatisfactory professional conduct and I make the following orders –

1. The Lawyer complete an additional five (5) CPD points in Ethics and Professional Responsibility, to be approved by the Victorian Legal Services Commissioner (“Commissioner”) prior to commencing, during the period 1 April 2017 – 31 March 2018;
2. The Lawyer is fined \$2,000; and
3. The Lawyer is reprimanded pursuant to s.299(1)(b) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

Files opened

1. In late 2009, the Lawyer opened the following file:

Purchase of Property – Lot 1281

- i) Front cover data sheet details the Complainant as Purchaser (client);
- ii) Correspondence to the Complainant dated 29 November 2009 (sic) states “*We refer to the above matter and advise that we your purchasing Solicitor acting on your behalf*”; and
- iii) Invoice dated 5 February 2010 addressed to the Complainant, care of her Mother, for “*professional services rendered for acting for you as Purchaser*” including:
 - i. taking instructions; and
 - ii. obtaining all necessary rate, title and planning certificates, perusing same and advising you with respect to same.

2. In approximately September 2010 the following file was opened:

Purchase of Property – Lot 78

- i) Front cover data sheet details the Complainant as Nominee (client);
- ii) Correspondence to the Complainant dated 16 September 2010 (sic) states “*We refer to the above matter and advise that we are your purchasing Solicitor acting on your behalf*”;
- iii) Faxes to a bank dated 14 October 2010, 15 October 2010, 18 October 2010 Re: line reads:

Documents required for Lot 78
Client: The Complainant

- iv) Invoice dated 28 October 2010 addressed to the Complainant for “*professional services rendered for acting for you as Purchaser*” including:
 - i. taking instructions; and
 - ii. obtaining all necessary rate, title and planning certificates and perusing same and advising you with respect to same; and
- v) Correspondence to the Complainant dated 15 November 2010 (sic) Re: line reads:

Re: Your Purchase from...

and states “We refer to the above matter and confirm settlement was effected back on Monday, 25 October 2010”.

3. In approximately late 2012 the following file was opened:

Unit 210 (“Townhouse”)

- i) Front cover data sheet details the Complainant as Vendor (client);
- ii) Correspondence to the Complainant dated 28 December 2012 Re: line reads:

Re: Your sale to...

and states “We refer to the above matter and confirm Settlement was effected on Friday, 28 December 2012”.

“We would like to take this opportunity to thank you for your instructions and trust that same have been handled to your satisfaction”.

- iii) Invoices dated 2 December 2012 (x2) addressed to the Complainant for “*professional services rendered for acting for you as Vendor*” including taking instructions.

4. In early 2013 the following file was opened:

Sale of Property – No 13

- i) Front cover data sheet details the Complainant as Vendor (client);
- ii) Bank Discharge/Refinance Authority, undated, requested all deeds and documents be provided to Stan Kwong & Associates;
- iii) Email from Legal Clerk to Real Estate Agent dated 27 March 2013 attached Contract of Sale wherein the Complainant detailed as Vendor and Stan Kwong & Associates as Vendor's Legal Practitioner or Conveyancer; and
- iv) Invoice dated 15 June 2013 (in the amount of \$760.12) addressed to the Complainant for "*professional services rendered for acting for your as Vendor*" including taking instructions.

5. In approximately October 2013 the following file was opened:

Sale of Property – Lot 1281

- i) Front cover data sheet details the Complainant as Vendor;
- ii) Email from Legal Clerk to the Complainant dated 18 November 2013 requesting all original signed documents be forwarded;
- iii) Invoice dated 20 November 2013 addressed to the Complainant for "*professional services rendered for acting for you as Vendor*" including taking instructions; and
- iv) Email from the Complainant to Legal Clerk dated 21 November 2013 advising she will attend to providing requested documents.

6. In approximately August 2014 the following file was opened:

37 Drive

- i) Front cover data sheet details the Complainant as Vendor;
- ii) Correspondence (unaddressed) dated 18 September 2014 Re: line reads:

Re: The Complainant Discharge of Mortgage...
and states "*We act on behalf of the within named Mortgagor...*";
- iii) Tax Invoice No.349 (in the amount of \$220), dated 9 October 2014 addressed to the Complainant, for the preparation of the s.32 Vendor's Statement;
- iv) Tax Invoice No.350 (in the amount of \$660), dated 9 October 2014 addressed to the Complainant for "*professional services rendered for acting for you as Vendor*" including taking instructions; and

- v) Contract of Sale dated 13 October 2014 details the Complainant as Vendor and Stan Kwong & Associates, lawyer and consultant as Vendor's legal practitioner/conveyancer.

Additional chronology

7. On 27 May 2013 the Complainant sent the Lawyer an email which detailed a contractual agreement between herself and her Mother. This email noted:
- i. her Mother retained all responsibility for payments/fees to real estate agents/lawyers/solicitors;
 - ii. the Complainant had warned her Mother that it is illegal to forge her name on documents; and
 - iii. the remaining assets are to be sold/titles transferred as soon as possible.
8. On 19 February 2015 the Firm emailed the Complainant and enquired if she still intended to sell Store 57S ("Store") and Carspace 75C ("Carspace") to her Mother and enclosed a Transfer of Land for each property.
9. By email dated 1 March 2015 the Complainant responded advising she believed these properties were sold with the Townhouse.
10. The Complainant's Mother provided oral instructions to the Lawyer to lodge a caveat over the Store and Carspace. Although there is no evidence of these instructions, the caveats were filed on 5 March 2015.
11. On 26 March 2015 the Firm advised the Complainant that her Mother had "*no option*" but to lodge caveats and again provided a Transfer of Land documents for the Complainant's execution and return.
12. By email dated 4 May 2015 the Complainant reiterated that the Store and Carspace were to have been sold with the Townhouse.
13. By email dated 14 May 2015 the Firm advised that the Store and Carspace were unsold because they are separately titled.
14. On 25 June 2015 [REDACTED] ("[REDACTED]"), acting on behalf of the Complainant, wrote to the Firm regarding the Store and Carspace and stated it had failed to take any appropriate steps to arrange or facilitate their sale and that there was a conflict of interest by lodging caveats on behalf of the Complainant's Mother.
15. By letter dated 30 June 2015 the Lawyer responded to [REDACTED] asserting:
- i. his client (the Complainant's Mother) had bought a number of properties under the Complainant's name;
 - ii. in approximately March 2013, the Complainant and her Mother made a verbal agreement, later formalised by email dated 20 March 2013 that, among other things, all remaining properties, carparks, et cetera, in the Complainant's name would be sold or transferred as soon as possible;

- iii. the Complainant's Mother subsequently secured a purchaser for the Store and Carspace as part of the sale of the Townhouse however, at settlement the purchaser failed to secure funds, resulting in the Store and Carspace being excluded from the sale;
 - iv. in approximately November 2014, the Complainant's Mother secured a purchaser for the Store and Carspace and two Transfer of Land documents were sent to the Complainant. As they were not returned, the sale did not eventuate; and
 - v. due to the many failed attempts to resolve this issue, the Complainant's Mother lodged caveats over the Store and Carspace.
16. By letter dated 16 September 2015, [REDACTED] advised that as a result of the sale of the Townhouse without the Store and Carspace, the Complainant was in breach of her obligations under the agreement pursuant to s.173 of the *Planning and Environment Act* 1987. As the Firm acted for the Complainant in the sale of the Townhouse, [REDACTED] alleged they should have advised her of the operation and effect of the s.173 Agreement.

ISSUES UNDER INVESTIGATION

17. The following issues have been investigated:
- a) the Lawyer failed to provide the Complainant with advice in relation to the sale of the Townhouse, Store and Carspace;
 - b) the Lawyer did not act in the Complainant's best interests in relation to the sale of the Townhouse as he exposed her to the risks associated with breaching the s.173 Agreement over the titles to the Townhouse, Store and Carspace;
 - c) the Lawyer did not obtain instructions from the Complainant in relation to the purchaser of the Townhouse being unable to continue with the sale due to a lack of funds and proceeding to settlement of the Townhouse only without instructions from the Complainant;
 - d) the Lawyer acted in a conflict of interest by accepting instructions from the Complainant's Mother to act against the Complainant, in particular by lodging caveats in relation to a dispute of ownership of the Store and Carspace;
 - e) the Lawyer improperly withheld documents despite the Complainant's request that they be provided;
 - f) the Lawyer failed to securely retain all documents relating to each matter;
 - g) there was no evidence on any of the files of executed retainers, costs agreements or disclosures;
 - h) the Lawyer did not take appropriate steps to verify the Complainant's identity; and
 - i) the purchase of each property in the name of the Complainant may have been a scheme to avoid the application of the *Foreign Acquisition and Takeovers Act* 1975, namely for the Complainant's Mother to avoid seeking foreign investment approval.

INVESTIGATION

18. After receiving the complaint on 7 October 2015, the Commissioner sought additional documents from the Complainant and [REDACTED].
19. On 25 November 2015 the Commissioner sent a letter to the Firm that gave notice of the complaint, requested a response pursuant to s.371(1) of the Uniform Law and invited written submissions.
20. The Lawyer provided a response dated 24 December 2015 which stated, amongst other things, that he had acted for the Complainant's Mother since 2009 purchasing a number of properties and that the Complainant was aware that her Mother was using her name for all of the purchases. He also claimed to have indicated to the Complainant that she may wish to seek independent legal advice.
21. The Lawyer noted that all instructions and payments for costs were from the Complainant's Mother and he had never been retained or received instructions from the Complainant. With regard to the caveats, the Lawyer alleged he was hesitant to act on the Complainant's Mother's instructions but decided that the presumption of resulting trust was stronger than the presumption of advancement.
22. By email dated 2 March 2016 the Commissioner provided the Lawyer's response to the Complainant and asked for her comments, which were provided by email on 17 March 2016.
23. By letter dated 12 May 2016 the Lawyer was requested to provide all original files relating to the Complainant and her Mother. The Lawyer provided copies of the requested files by letter dated 30 May 2016, advising he was unable to locate the original files in his archives.
24. By letter dated 5 October 2016 the Commissioner advised the Lawyer of additional concerns arising following review of his files, being:
 - i. given the absence of file notes and the advice that the files provided are recreated as the originals cannot be located, he has not securely retained all documents relating to each matter;
 - ii. there is no evidence on any of the files of executed retainers, costs agreements or disclosures;
 - iii. he did not take appropriate steps to verify the Complainant's identity; and
 - iv. the purchase of each property in the name of the Complainant may have been a scheme to avoid the application of the *Foreign Acquisition and Takeovers Act 1975*, namely for the Complainant's Mother to avoid seeking foreign investment approval.
25. A request for a further response pursuant to s.371(1) of the Uniform Law was made and the Lawyer was invited to make further written submissions.
26. The Lawyer provided a response dated 21 November 2016 which noted, amongst other things:

- i. there is no record of instructions from the Complainant's Mother, including for the lodging of the caveats;
 - ii. the Complainant, her Mother and her Father are Australian citizens;
 - iii. the Complainant's Mother was the client; and
 - iv. whilst he would cease acting for the Complainant's Mother or even remove the caveats, the Complainant's Mother had recently passed away and he cannot deal with the matter prior to the finalisation of probate.
27. On 20 December 2016 the Commissioner advised the Lawyer of the findings of its investigation to date, its concerns regarding his conduct and invited written submissions and material to be considered as to whether the conduct amounts to unsatisfactory professional conduct or professional misconduct.
28. By letter dated 25 January 2017 the Lawyer provided a response noting, amongst other things:
 - i. the Complainant's Mother was the client and the Complainant never instructed them;
 - ii. there was a potential conflict of interest by lodging the caveats over the Complainant's property on behalf of her Mother;
 - iii. there are deficiencies in their document retention system and file noting practice and they have subscribed to new legal software since late 2014 to aid with archiving;
 - iv. the Complainant's Mother was aware of their charges and would not ask about costs. The importance of a costs disclosure statement is however, understood; and
 - v. his conduct was unsatisfactory, particularly with document retention, file noting and avoidance of a conflict of interest.
29. On 10 February 2017 the Commissioner gave notice to both the Lawyer and Complainant of the proposed determination and invited written submissions about the proposed orders.
30. By emails dated 10 February 2017 and 14 February 2017, the Complainant and the Lawyer, respectively, provided submissions regarding the proposed orders.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

31. On the basis of the available evidence, including the Lawyer's admissions, I find the following proved:
 - a. in relation to the sale of the Townhouse, the Lawyer did not:
 - i. advise the Complainant that the purchaser was unable to secure funding to purchase the Store and Carspace;

- ii. provide advice that to proceed with the sale of the Townhouse only would be in breach of the s.173 Agreement detailed in the Certificate of Title;
 - iii. obtain instructions from the Complainant to continue with the sale for only the Townhouse; and
 - iv. progress the matter (with regard to the outstanding sale of the Store and Carspace) in a timely manner.
- b. by acting on behalf of the Complainant's Mother, in particular when lodging caveats over the Complainant's property:
- i. the Lawyer lodged caveats in circumstances where there was doubt that the Complainant's Mother had a caveatable interest;
 - ii. the Lawyer did not avoid a conflict of interest;
 - iii. the Lawyer did not obtain the Complainant's consent to act for her Mother or vice versa; and
 - iv. the Lawyer did not advise the Complainant to seek independent legal advice.
- c. the Lawyer failed to securely retain all documents and files;
- d. the Lawyer did not provide Costs Disclosures for the files of 37 Drive or Sale of Property – 13, the costs of each exceeded \$750; and
- e. the Lawyer failed to verify the Complainant's identity.

RELEVANT LAW

32. The *Legal Profession Act 2004* ("LPA") applies to the conduct, the subject of the findings of fact, as it occurred prior to 1 July 2015.
33. On 1 July 2015 the *Legal Profession Uniform Law ("LPUL")* commenced and pursuant to clause 26 of Schedule 4 of Division 7 of the LPUL, I am empowered to continue to deal with a complaint or investigation in accordance with the provisions of the LPA.

CHARACTERISATION OF THE CONDUCT

Poor conduct

34. S.4.4.2 of the LPA states unsatisfactory professional conduct includes conduct 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 practitioner.
35. By reason of the above finding of fact, namely:
- a. in relation to the sale of the Townhouse, the Lawyer did not:
 - i. advise the Complainant that the purchaser was unable to secure funding to purchase the Store and Carspace;

- ii. provide advice that to proceed with the sale of the Townhouse only would be in breach of the s.173 Agreement detailed in the Certificate of Title; and
 - iii. obtain instructions from the Complainant to continue with the sale for only the Townhouse.
- b. by acting on behalf of the Complainant's Mother, in particular when lodging caveats over the Complainant's property:
 - i. the Lawyer lodged caveats in circumstances where there was doubt that the Complainant's Mother had a caveatable interest; and
 - ii. the Lawyer did not advise the Complainant to seek independent legal advice.
- c. the Lawyer failed to securely retain all documents and files; and
- d. the Lawyer failed to verify [REDACTED] identity.

I find that this conduct constitutes unsatisfactory professional conduct pursuant to s.4.4.2 of the LPA.

Failure to Progress matter

- 36. Rule 1.2 of the *Professional Conduct and Practice Rules 2005* ("the Rules") states that a practitioner must, in the course of engaging in legal practice, use the practitioner's best endeavours to complete legal work as soon as reasonably possible.
- 37. By reason of the above finding of fact, I find that the Lawyer has breached Rule 1.2 of the Rules in relation to the outstanding sale of the Store and Carspace.
- 38. S.4.4.4(a) of the LPA prescribes that, without limitation, conduct capable of constituting unsatisfactory professional conduct includes conduct consisting of a contravention of the Rules.
- 39. Accordingly, this breach constitutes unsatisfactory professional conduct pursuant to s.4.4.4(a) of the LPA.

Conflict of Interest

- 40. Rule 8.2 of the Rules states that a practitioner must avoid conflict of interest between two or more clients of the practitioner.
- 41. The Lawyer has submitted that whilst only the Complainant's Mother was his client, he admits there may have been a conflict of interest with regard to lodging the caveats.
- 42. I am satisfied that the Complainant was also a client of the Lawyer's therefore, by reason of the above finding of fact, I find that the Lawyer has breached Rule 8.2 of the Rules.
- 43. Further, Rule 8.3 of the Rules states that a practitioner who intends to act for a party to any matter where the practitioner is also intending to accept instructions to act for another party to the matter must be satisfied, before accepting an engagement to act,

that each party is aware that the practitioner is intending to act for the others and consents to the practitioner so acting.

44. In this matter, the Lawyer did not obtain the Complainant's consent to act for her Mother or vice versa.
45. By reason of the above finding of fact, I find that the Lawyer has also breached Rule 8.3 of the Rules.
46. S.4.4.4(a) of the LPA prescribes that, without limitation, conduct capable of constituting unsatisfactory professional conduct includes conduct consisting of a contravention of the Rules.
47. Accordingly, these breaches constitute unsatisfactory professional conduct pursuant to s4.4.4(a) of the LPA.

Costs Disclosure

48. S.3.4.9(1) of the LPA states that a law practice must disclose to a client, amongst other things:
 - a. the basis on which legal costs will be calculated;
 - b. the client's rights;
 - c. an estimate of the total legal costs or if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs; and
 - d. the avenues that are open to the client in the event of a dispute in relation to legal costs.
49. S.3.4.12(1)(a) of the LPA states that disclosure under s.3.4.9 is not required if the total legal costs, excluding disbursements, are not likely to exceed \$750. Further, s.3.4.12(2) states that despite subsection (1)(a), if a law practice becomes aware that the total legal costs are likely to exceed \$750, the law practice must disclose the matters pursuant to s.3.4.9.
50. The Lawyer did not provide Costs Disclosures for the files of 37 Drive or Sale of Property – 13 and the costs of both exceeded \$750.
51. By reason of the above finding of fact, I find that the Lawyer has breached s.3.4.9(1) of the LPA.
52. S.4.4.4(a) of the LPA prescribes that, without limitation, conduct capable of constituting unsatisfactory professional conduct includes conduct consisting of a contravention of the LPA.
53. Accordingly, this breach constitutes unsatisfactory professional conduct pursuant to s4.4.4(a) of the LPA.

DETERMINATION

54. In light of the above 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 order detailed above.

APPEAL

55. Pursuant to s.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 s.299 of the Uniform Law.



Michael McGarvie
Victorian Legal Services Commissioner

Date: 21 March 2017