

Disciplinary Committee Hearing Date: 2nd December 2021
Law Council Disciplinary Committee: G.A. Andrée Wiltens, Chairman
F. Gilu, Member
T. Cullwick, Member
F. William Reur, Secretary
Date of Decision: 18th March 2021

Complaint by Mrs Samantha Therese Clark against Ms Christina Thyna

A. Introduction

1. Pursuant to *the Legal Practitioners Act [CAP 119]* and the *Legal Practitioners Disciplinary Procedure Rules*, Mrs Samantha Clark lodged a complaint dated 17 June 2020 against Mrs Christina Thyna of Cornerstone Lawyers, along with an affidavit dated 19 June 2020.

B. Background

2. Mrs Samantha Clark is an Australian citizen from Mittagong, New South Wales. On or about 6 June 2018, Mrs Clark searched for properties for sale here in Vanuatu and had attended Alliance Real Estate in Port Vila by whom she was shown the property of one Annette Tims. On 6 June 2018, Mrs Clark entered into an agreement for the sale and purchase of Mrs Tims' property comprising leasehold title 12/0913/542 ('the property').
3. Mrs Clark opted to not utilise legal assistance from a solicitor in relation to the transaction. It was Mrs Clark's contention that, despite signing the sale and purchase agreement, the transaction did not settle.
4. In late September/early October 2019, Mrs Clark was introduced to Mrs Christina Thyna by one George Soalo with the intention that Mrs Thyna render her services to institute civil proceedings on behalf of Mrs Clark in relation to the property sale dispute. Mrs Thyna agreed to accept Mrs Clark's instructions in the matter, and acted for her in the dispute until 19 June 2020.
5. Mrs Clark contended that she had made several payments to Mrs Thyna towards her legal fees, namely:
 - on 7 October 2019, a sum of VT 650,000;
 - on 8 October 2019, a sum of VT 375,000 and a second amount of VT 30,000;
 - on 11 October 2019, a sum of VT 200,000; and
 - on 19 December 2019, a sum of VT 130,000.

6. The Disciplinary Committee ("the Committee") requested records of these payments from Mrs Clark, and also from Mrs Thyna.
7. The gist of Mrs. Clark's complaints against Mrs Thyna are:
 - (a) There was no up to date information provided by Mrs Thyna about the status of her case in the Supreme Court and she had to make enquiries with the Court herself;
 - (b) She was asked to make payments to Mrs Thyna for a car issue;
 - (c) Some of her money was used to pay for Mrs Thyna's legal fees in another matter between George Soalo and Annette Tims;
 - (d) Payment was made for services that were not prompt;
 - (e) Her interests in the litigation were not handled properly.
8. Mrs Thyna provided a written response dated 30 September 2021. She asserted that she had filed a number of documents and made attendances in relation to the litigation. She refuted that there was in any delay in her dealings with this litigation.
9. Mrs Thyna refuted receiving the amount of VT 650,000 from the complainant. She acknowledged that she had received only payments of VT 375,000, and VT 200,000. Mrs Thyna further explained that part of the money paid by Mrs Clark went to pay for her legal fees in another civil matter between George Soalo and Mrs Tims.
10. At the hearing there was incontrovertible evidence that as from 11 October 2019, Mrs Clark had paid Mrs Thyna an amount of VT 705,000. Mrs Thyna did not initially concur with this assessment. However, when her own receipt for VT 30,000 of 8 October 2019 was shown, she accepted she must also have received that from Mrs Clark. She disputed the further VT 100,000 as being received.
11. Mrs Thyna asserted that any request by her for money from Mrs Clark, related to the outstanding balance Mrs Clark owes. On one occasion, in trying to get a final payment, Ms Thyna referred to requiring the funds to deal with an issue with her motor vehicle.
12. Mrs Thyna was adamant that the service she provided were prompt and appropriate.

C. Discussion

13. Section 8 of the *Legal Practitioners Act* [CAP 119] ("the Act") provides that any person who wishes to complain concerning the conduct of a legal practitioner or an employee shall do so by lodging a complaint in writing to the Secretary containing specific allegations of misconduct which may consist of acts or omissions.
14. Relative to matters brought pursuant to section 8 of the Act, the Committee reminded itself of what powers it has upon determining Mrs Clark's complaint; and it is relevant to state that pursuant to subsection 9(3) of the Act, if the Committee finds Mrs Thyna to have committed misconduct it may:

- (a) order that she be struck off the Register of Legal Practitioners;
- (b) suspend her from practice for such period as it shall consider fit;
- (c) impose a fine of not more than VT 150,000 on her which shall be payable into the Revenue Fund;
- (d) order her in addition to any other penalty to pay compensation to a complainant of not more than VT 150,000;
- (e) reprimand her.

15. The Committee had deferred the hearing on several occasions to afford Mrs Thyna the opportunity to provide account records to assist the Committee in its deliberation, and had also deferred the hearing to avail Mrs Thyna the opportunity to state her defence in response to further information received.

16. In reference to the allegation that Mrs Thyna did not provide up-to-date information to Mrs Clark, rule 43 of the *Rules of Etiquette and Conduct of Legal Practitioners Order No.106 of 2011* ("the Rules") sets out that:

43. Disclosure and Communication of Information

- (1) A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.*
- (2) A lawyer must take reasonable steps to ensure that a client understands the nature of the retainer and must keep the client informed about the progress on the retainer. A lawyer must also consult the client (not being another lawyer acting in a professional capacity) about the steps to be taken to implement the client's instructions.*
- (3) A lawyer must promptly answer requests for information or other inquiries from the client...*
- (6) When a matter is completed, the lawyer must advise the client accordingly, provide a brief summary of the work undertaken (to the extent that this has not previously been provided) and, where appropriate, identify any future action by the client or the lawyer*

17. In the course of the hearing, the Committee questioned Mrs Thyna whether there was a retainer executed between Mrs Clark and her that would set out the terms and conditions of her representation. Mrs Thyna stated that there was no written agreement and that all the arrangements were made verbally.

18. Although by definition under the Rules, retainer means an agreement by which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is expressed or implied, whether recorded in writing or not, it would have been to the benefit of Mrs Thyna that the terms of her engagement had been made in writing as a backdrop for enquiries that might be made in relation to her conduct. Mrs Thyna, in hindsight, accepted the wisdom of this at the hearing.

19. In light of the complaints made that money was expended on services that was not promptly provided and that funds were used on another matter, Mrs Thyna was unable to provide any bills of account to substantiate the services she had rendered, save for a belated statement of costs which attempts to outline the work attended to. The Committee do not consider that the statement of costs is a bill of account, or that the statement of costs depicts a true reflection of what work was done.
20. It was noted that the statement of costs does not articulate the actual time spent on each item charged; and in her own words, Mrs Thyna confirmed that the amounts raised in her statement of costs were estimates. The Committee concluded that Mrs Thyna had inflated her legal costs in the statement of costs as much of the costs itemised could not be justified for the work involved. An example is the charge of VT 10,000 for drafting, filing and serving a Notice of Discontinuing to Act.
21. The Committee had also requested from Mrs Thyna, records of her bank accounts into which funds have been deposited. Mrs Thyna provided two bank accounts, one being her personal account and the other the firm's trust account. The perplexed reasoning for receiving clients' funds into her personal account is unconvincing given that her firm's trust account had already been opened on 1 October 2019, prior to receiving VT 605,000 from Mrs Clark. We noted that neither account makes reference to the receipt of VT 30,000 or VT 100,000, which is inexplicable given there is Mrs Thyna own receipt for the VT 30,000 and a NAB records showing transfer of such funds from Mrs Clark's account to Mrs Thyna.
22. The circumstance in which Mrs Thyna had availed her client's funds without proper record of accounts of how the client's funds had been expended, was unorthodox. The best explanation offered by Mrs Thyna was that she would normally ask for a deposit and would work against such deposit. The Committee considered it unsatisfactory for Mrs Thyna to suggest that it was inappropriate for her to request deposits and then work against such deposits, as it is a requirement (as well as good practice) that as clients' funds are withdrawn from the trust account a prior accounting is mandatory.
23. Rule 53 of the of the Rules states:

"A lawyer who wishes to debit fees held in trust or to receive funds to cover fees in advance must inform the client in writing."
24. Mrs Thyna conceded that she had not properly accounted to Mrs Clark's for the funds received which would encourage the complaints raised by Mrs Clark in paragraph 7(b), (c) and(d) above for the good reason that she may have not known what work was not yet done or what work was done and for what cost. The Committee concluded the evidence support those allegations was insufficient to support a clear finding of unsatisfactory professional conduct.
25. The allegation that further funds (than the VT 605,000 initially acknowledged by Mrs Thyna as having been received) had been paid by Mrs Clark which have not been accounted for has been made out. Mrs Thyna in fact received VT 130,000 more than she set out in the belated statement of costs.

26. The Committee also deliberated on Mrs Thyna's response where she stated that a certain part of the funds paid by Mrs Clark and held on account of her legal expenses was used in a separate matter involving George Soalo and Annette Tims.
27. It was put to her whether she had written to Mrs Clark seeking her approval for the use of Mrs Clark's funds in respect of the George Soalo/Annette Tims case and whether written consent was given by Mrs Clark for her funds to be so used in settling Mrs Thyna's legal fees in the George Soalo case. Mrs Thyna's response was an unequivocal admission that she had used about VT 75,000 of Mrs Clark's money to settle her fees for the George Soalo case, and that she did so without any authority from Mrs Clark or even asking for such. That was dishonest, and equates to theft of a client's funds. She stated: "I had no authority to deduct George Soalo's legal fees from Sam's account".

D. Considerations

28. The Committee is required to consider whether Mrs Thyna's conduct was: (i) professional misconduct, or (ii) unsatisfactory professional conduct; the latter being less serious than the former.
29. An Australian Law Reform Commission paper dealing with "*Disciplinary Structures and Court Imposed Sanctions*" of 14 November 2010 sets out what each standard includes.
30. That paper suggested that: "*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 reasonable competent Australian legal practitioner; and conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
31. The paper went on to suggest that: "*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 reasonable competent Australian legal practitioner.
32. The Committee is content to accept those definitions as applying to legal practitioners in Vanuatu, and to look at Mrs Thyna's conduct having those principles in mind.
33. The Committee also took into account the various legal pronouncements largely following the same principles in *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; *Re: A Solicitor* [1975] 1 QB 475; and *Re Hodgekiss* (1962) 62 SR (NSW) 340; and *A Barrister and Solicitor: In re* [1999] FJ Law Rp 11.
34. The Committee considered that Section 55 of the Rules of Etiquette and Conduct of Legal Practitioners [Cap 119] were apposite to Mrs Thyna's case. Section 55 requires the practitioner to

render a final account to her client within a reasonable time which sets out the work undertaken, and this was not done in our view.

35. The Committee took on board the test to be applied when deciding dishonesty in disciplinary proceedings as set out in the authority of *Law Society v Bultitude* [2004] EWCA Civ 1853 as being a 2-step test involving:
- Did the solicitor act dishonestly by the ordinary standards of reasonable and honest people, and if so
 - Was she aware that by those standards she was acting dishonestly?
36. The Committee finds this aspect of the complaint made out. We are unanimous that this conduct was dishonest as well as breaching the Rules of Etiquette.

E. Sanction

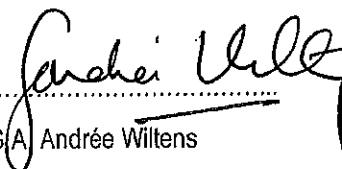
37. Mrs Thyna has been in practice for a significant number of years, and has taught at the University of the South Pacific Law School as well as holding other positions such as Chair of the Civil Service Complaints Tribunal.
38. She has not been the subject of previous complaints.
39. However, she acknowledged, in her words: "I realise there a lot of things to change." She suggested that the shortfall of VT 300,000 as shown in her statement of costs could be waived in order to appease Mrs Clark. The Committee noted with concern that there was no offer to return the VT 75,000 used to settle her legal fees in the Soalo/Tims case to Mrs Clark.
40. The Committee went on to consider sanctions.
41. In *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103, dealing with the principles applicable to the consideration of the appropriate sanction following a finding of misconduct, the Court applied with approval the principles set out in *Devine v New Zealand Law Society* [2012] NZLR 481 which include:
- "Wilful and calculated dishonesty normally justifies striking off."
42. That is consistent with the approach taken in England and Wales. In *Bultitude* it was stated:

"I accept of course that he is not shown to have intended permanently to deprive his clients of their funds. The proof of dishonesty in this context is not dependent upon proving that intention.... Mr Bultitude signed a cheque for 50,000 [pounds] transferring his clients' funds and thus, it must be inferred, without knowing or caring whether his firm was entitled to be paid those funds. That, to my mind, satisfies both legs of the Twinsectra test...it must have been clear to him what had been done to clear the credit balances but he did nothing to backtrack. As the Tribunal found, he was guilty of conscious impropriety amounting to dishonestly endorsing what had been done."

43. Mr Bultitude was suspended from practice initially. The Law Society appealed. In the course of that hearing, the Court was advised that there was only one known instance of dishonesty in connection with client funds that had not resulted in a striking off.
44. In *New South Wales Bar Association v Evatt* (1968) 117 CLR 177, a two-year suspension of a barrister who had engaged in a scheme of charging "extortionate and grossly excessive" fees was overturned. The High Court ordered that he be disbarred, notwithstanding his youth and his lack of understanding, stating that "his failure to understand the error of his ways of itself demonstrates his unfitness".
45. In *Mellifont v The Queensland Law Society Inc* [1981] Qd R 17, the Court cited with approval statements of the New South Wales Court of Appeal that a disciplinary tribunal must not impose a suspension unless confident that, at the end of the suspension, the practitioner would be fit to practise. It would be unlikely that the tribunal could often be confident of this if the practitioner before it was presently unfit. The tribunal would need to be sure that a transformation of character would occur before the suspension ended. The Court went on to say that, given the deceit, dishonesty and dishonour of Mellifont's conduct, a fine was not appropriate and nor was a suspension, given that the court could not be satisfied that Mellifont would be fit to practise at the end of any period of suspension. The court ordered that he be struck from the roll.
46. The Committee felt a need to balance the all-important factor of protecting members of the public from dishonest practices with the personal consequences flowing to the practitioner and possibly her staff. There is further an obvious need to maintain the reputation of the legal profession in Vanuatu. We were concerned that the main aspect of the case highlighted dishonesty; but the other aspect of Mrs Thyna's established misconduct was also of note.
47. Given that dishonesty was at the forefront of Mrs Thyna's misconduct, the only proportionate response must be that she be struck off.

C. Result

48. The Committee determined unanimously that Mrs Thyna should be struck from the Roll of Practising Lawyers forthwith. The Secretary is to advise the Law Council, the Chief Justice, the Solicitor General and the Chief Registrar of the Supreme Court of this outcome.
49. Mrs Thyna has 15 days from the date this decision is made known to him to appeal this decision.



 GA Andrée Wiltens
 DC Chair

