LEGAL PROFESSION BOARD OF TASMANIA

No. 36 / 2016

COMPLAINANT **Complainant**

-AND-

A PRACTITIONER **Legal Practitioner**

DECISION AND REASONS FOR DECISION

Decision

The complaint is dismissed pursuant to s.451 (a) of the *Legal Profession Act* 2007 (the Act) as there is no reasonable likelihood that the Practitioner will be found guilty of either unsatisfactory professional conduct or professional misconduct.

Summary of the Complaint

1. Between 2014 and 2016 the Practitioner acted for the Complainant in relation to:
   - the removal of a caveat registered on the title to the Property; and
   - family law proceedings relating to a property division between the Complainant and Mr N.
2. The allegations, in summary, are that the Practitioner:
   A. Failed to achieve a standard of competence and diligence the Complainant was entitled to expect by:
      a. during the Family Court Conciliation Conference regarding distribution of property between the Complainant and Mr N (Conciliation Conference), ignoring the Complainant's instructions as to the date of the Complainant's relationship with Mr N;
      b. failing to properly advise the Complainant about Mr N's potential claim against the Complainant's property during the parties' relationship;
      c. speaking over the top of the Complainant during the Conciliation Conference so that the Complainant could not correct incorrect information which the Practitioner provided during the Conciliation Conference;

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d. trying to intimidate and bully the Complainant into signing a consent agreement as part of the Conciliation Conference.

B. Failed to provide the Complainant with a costs disclosure pursuant to section 291 of the Act.

Desired outcomes

3. The Complainant's stated hope was to achieve the following outcomes:

   1. resolve the dispute about fees;

   2. improve the service provided by the Practitioner; and

   3. resolve the dispute with the Practitioner.

Background

4. The Complainant alleged that she was in a de-facto relationship with Mr N. The Complainant and Mr N continued to live at the Property, after the relationship broke down. Title to the Property is in the sole name of the Complainant.

5. The Complainant moved out. Mr N continued to occupy the Property and a caveat in Mr N's name was registered on the title.

6. At all material times Mr N was represented. On 8 October 2014 Mr N's practitioner emailed the Complainant advising he had been instructed by Mr N to "advance property settlement negotiations resulting from the breakdown of his de-facto relationship … our client wishes to negotiate a property settlement under the *Family Law Act* 1975". He also advised that his office had secured a caveat over the property to protect Mr N's equitable interest.

7. The Complainant filed an Originating Application and affidavit material in the Supreme Court of Tasmania (the Supreme Court proceedings). The Application sought the removal of the caveat secured over the Property. By email Mr N's solicitor emailed the Complainant (at that time he understood she was unrepresented) advising he was instructed to:

   - oppose the Application; and

   - commence immediate proceedings in the Federal Circuit Court (including urgent interim orders) regarding property adjustment and settlement under the *Family Law Act 1975*.

8. The Practitioner's file indicates that his first attendance on the Complainant was November 2014.

9. By 14 November 2014 the Practitioner had formally advised the other solicitor that he was instructed to act and would file a Notice of Change of Solicitor shortly.

10. The Supreme Court proceedings were adjourned sine die by consent memorandum. Thereafter, the Practitioner's file is concerned with the property settlement pursuant to the Family Law Act.

11. In March 2015 Mr N filed an Initiating Application with his Financial Statement in the Family Court.

12. The Family Court matter ultimately proceeded to the Conciliation Conference. A property settlement was reached by negotiation at the Conciliation Conference (the Agreement).

13. Shortly afterwards in a telephone attendance the Complainant indicated to the Practitioner she was refinancing the Property on 6 January 2016. The next attendance was on 12 January 2016 when the Complainant advised she was "applying for a loan".

14. Draft Terms of Settlement reflecting the Agreement were prepared and forwarded to the Practitioner by email on 14 January 2016. In that email the other practitioner noted his office had been contacted by the Complainant seeking to have the caveat withdrawn. He did not return the call.

15. By email in January 2016 the Practitioner responded to the Complainant as to her "criticism of both the process and the outcome" with the Practitioner. By email in January 2016 the Complainant advised the Practitioner that she would not sign the consent orders.

16. By letter dated 22 February 2016 to the Practitioner, a different legal firm forwarded an authority signed by the Complainant and dated 18 February 2016, for transfer of carriage of the file to that firm.

17. In February 2016 the Practitioner sent the Complainant a letter enclosing a lump sum bill in the amount of $2,000.00 plus GST, requiring payment before he would transfer the file (the February bill). The Complainant requested an itemised account which was duly provided by the Practitioner on 31 March 2016. The itemised account totalled $3,642.10 including GST.

18. On 15 April 2016 the Complainant paid the February bill and the Practitioner transferred the file to the legal firm without delay.

19. There is no record on the file of the Practitioner providing the Complainant with a retainer agreement or costs disclosure. The Complainant did not seek an assessment of the costs as billed by the Practitioner, pursuant to s 300(1) of the Act.

Consideration of the Complaint

Allegations A.a, A.c and A.d

The Practitioner failed to achieve a standard of competence and diligence the Complainant was entitled to expect by:

- ***ignoring the Complainant's instructions during the Conciliation Conference as to the date of the Complainant's relationship with Mr N;***

- ***speaking over the top of her during the Conciliation Conference so that the Complainant could not correct incorrect information the Practitioner provided during the Conciliation Conference; and***
- ***trying to intimidate and bully the Complainant into signing a consent agreement as part of the Conciliation Conference regarding distribution of property between the Complainant and Mr N.***

20. Allegations A.a, A.c and A.d are considered together as they allege similar behaviour by the Practitioner arising out of the one event.

Allegation: The Complainant's position – talking over the top and ignoring instructions

21. The Complainant says:

> *"…During the hearing, I felt as though I was not even there.*
>
> *…*
>
> *The Practitioner neglected to mention most of these details, but the worst of it was that he didn't give the correct dates, and when I tried to I was ignored and talked over".*

22. The Complainant by telephone to the Board further elaborated on this issue stating that it was as if she were invisible and that it was more that she was disregarded or cut off mid-stream. When talking about the length of the relationship for example, the Complainant said the Practitioner would talk over her and say things like, "that is not the evidence we have here".

The Practitioner's position– talking over the top and ignoring instructions

23. In his initial submissions, the Practitioner did not address this allegation specifically, but commented on his experience in general and submitted:

> *"… I have a huge range of experience in respect of mediation, negotiations, settlement and judicial matters.*
>
> *I have been involved in negotiations involving many millions of dollars in respect of commercial negotiations and have acted for a wide range of clients in relation to commercial and litigation mediations, negotiations and conclusions of and including the compromising of claims on an agreed and negotiated basis."*

24. It is noted that in an email to the Complainant the Practitioner said, "I appreciate that you say the dates of the relationship were incorrect. That was a matter which was raised in argument".

25. The Practitioner, in his submissions stated:

> *"In the course of the proceedings there were separate sessions during which the Registrar, who is most experience in these areas, spoke to each of the parties individually. He was able to and, as usual, did provide advice and information to each of the parties and in particular in my presence provided information to* [the Complainant].

> *It was apparent there were factual disputes … Over the hour and a quarter of the conference my advice was that although she may do better it was likely that the Court would allow the claim to proceed in view of some factual matters that had arisen … There was a lot of haggling about the final settlement figure with parties negotiating through Lawyers or by the Registrar shuttling from room to room while the parties were in separate sessions. … I accept that* [the Complainant] *was reluctant, but eventually to my mind consciously made a decision that she preferred to settle for the amount of $[-] rather than risk incurring far greater expenses and perhaps being ordered to pay a higher amount.*
>
> *The Registrar indicated that he thought the settlement was appropriate."*

26. With respect to whether there was any confusion as to the length of the relationship between the Complainant and Mr N the Practitioner stated:

> *"I was never confused about the dates. What I had in mind was the more flexible attitude of the family law to an extension of time, the initial statement that there had been no relationship for five (5) years which seemed to be more exaggerated and that in reality it was about 2012 when the relationship ended…"*

Registrar

27. The Registrar was contacted during the investigation to ascertain his recollection of the Conciliation Conference. He advised informally that he conducts about 10 such conferences a week and whilst he vaguely recalled the participants he could not recall the specific conference the subject of this complaint.

The law

28. Tasmania has not adopted Rule 8 of the Law Council of Australia Australian Solicitors' Conduct Rules 2011, which provides "A solicitor must follow a client's lawful, proper and competent instructions." Failure to follow or ignoring instructions is however a serious matter which may amount to a professional conduct issue.

<u>Conclusion</u>

29. The objective available evidence is that matters relating to the relationship, including the dates, were raised by the Practitioner at the Conciliation Conference. The Complainant may well have been cut off mid-sentence, but that does not amount to a failure to follow or ignore instructions.

30. The Board considers it is unlikely the Practitioner would be found guilty of unsatisfactory professional conduct or professional misconduct on this allegation.

Allegation: The Complainant's position – bullying and intimidation

31. The Complainant alleged:

> *"I was bullied into agreeing to a settlement there and then by both the Practitioner and the arbitrator, whereas other people I know that have been through the same procedure if they aren't happy with the outcome proposed had been given time to go away and think about it.*
>
> *I was not provided with even 5 minutes in which to agree to what settlement was put to me and I was bullied into agreement"*

32. The Complainant on 1 August 2016 confirmed in a telephone discussion with the Board that she was alleging that she was bullied at the time of the Conciliation Conference by the Practitioner (and the Registrar) on the basis they were both talking about the costs and the risk of going to trial, which was 'news to her'. The Complainant advised she also thought she had two attempts at conciliation and then a trial.

The Practitioner's position – bullying and intimidation

33. The Practitioner submitted:

> *"I dispute that* [Complainant] *was "bullied into agreeing to a settlement". She was advised that if the matter proceeded further the legal costs would rapidly escalate and that the amount in dispute may be overtaken by the legal costs."*

File review

34. The fact that the Registrar was unable to recall anything in particular about the Conciliation Conference lends support to the position that the Practitioner's conduct at the conference was within acceptable standards.

35. In practice, the Agreement reached at the Conciliation Conference required that the terms be drafted into Consent Orders. The draft Consent Orders were received by the Practitioner following which the Complainant advised the Practitioner she would not sign the Orders.

36. The Practitioner submitted that the Conciliation Conference occupied an hour and a quarter and there was a lot of haggling and shuttling from room to room.

37. In correspondence to the Complainant asking her to come and sign the Consent Orders, the Practitioner reiterated his advice that he wished to ensure the Complainant avoid unnecessary escalation of costs. In his letter the Practitioner said:

> *"… despite the misgivings and the criticisms of both the process and the outcome, I maintain that you are at a grave risk of a settlement costing you any further argument not being cost effective as it would greatly increase the costs and still leave you at risk of a payment of a higher amount than agreed at the conference."*

38. In his letter to the Complainant the Practitioner said:

> *"To prepare the matter for and go to Trial could involve expenses of between $10,000 and $15,000 and run the risk of a costs order against you. Mr N was looking for a payment of $[-]. If you succeed and only $[-] is payable to him it may cost as much as $35,000 to achieve that result."*

The law

39. Dal Pont in Lawyers Professional Responsibility (5th Ed), points out that lawyers should, when it is in their client's best interests, try to settle out of court which may, in some cases, legitimately involve placing some pressure on their client to settle (paragraph 4.135):

> *"The dividing line between, on the one hand, legitimate pressure or persuasion and, on the other, coercion, depends on the circumstances of the case, particularly the capacity of the client and the strength of the case."*

40. Professor Dal Pont advises that it is not easy to find that putting a client under pressure to settle is unprofessional and deserving of disciplinary sanction[1] even if a court later decides that a more favourable outcome might have been achieved.[2] He notes that courts "have traditionally been reluctant to find lawyers negligent in reasonably giving advice as to settlement of a dispute or in exercising that pressure".[3]

41. See *Anderson and Anderson* (1982) FLC 91-251, per Lindenmayer J:

> *"Counsel and solicitors representing clients involved in litigation in the Courts frequently subject their clients to considerable pressure to compromise that litigation. That is a necessary and proper part of the function of such legal representatives in the proper discharge of their duties to their clients and the Court."*

Board matters involving allegations of coercion / bullying to accept settlement offers

42. In *B v. G* (45/2012) the allegation was that the Practitioner coerced the Complainant into accepting an offer of settlement contrary to the Complainant's wishes.

43. In its Reasons the Board stated:

> *"The Complainant alleges that the Legal Practitioner stated that if he did not settle he would lose his house. The Legal Practitioner denies making any such threat, although he accepts that he strongly urged the Complainant to accept the settlement offer and explained the possible financial consequences if he did not do so and failed to recover more. Acting*

[1] *NSW Bar Association v Bland* [2010] NSWADT 34.
[2] *Karpenko v Paroian, Courey, Cohen and Housten* (1981) 117 DLR (3rd) 383.
[3] See para 5.195, referring to Warne, "Compromise of Litigation and Lawyers' Liability: Forensic Immunity, Litigation Estoppels, the Rule Against Collateral Attack, Confidentiality and the Modified Duty of Care" (2002) 10 Tort LJ 167 at 189 – 203.

professionally he was obliged to do that, and it may be that the Complainant has taken that advice as involving that he might lose his home, although the Board is not satisfied that this outcome was suggested by the Legal Practitioner or that the Legal Practitioners caution about costs was in any way unprofessional."

44. The allegation was dismissed.

45. In *B v H* (08/2014) the allegation was:

> *"That the Practitioner on 18 October 2012, bullied him into accepting a settlement sum which was significantly less than the amount he wished to obtain."*

46. In its Reasons the Board found, dismissing the allegation:

> *"In considering these allegations it is neither necessary, nor the function of the Board, to review the Practitioner's advice, which, on the face of it, appears to be reasonable, considered and appropriate. The specific matters of complaint are allegations of bullying conduct, taking advantage of the Complainant's illiteracy and failing to fully explain the consequences of signing the Deed of Release.*
>
> *In the light of the undisputed facts listed above, the documentary evidence referred to and the Practitioner's submissions, which are consistent with the facts and documents, the Board is satisfied that there is no reasonable likelihood that the Practitioner will be found guilty of either unsatisfactory professional conduct or professional misconduct in respect of these matters of complaint."*

Conclusion

47. The Practitioner says he conveyed his concerns about the potential cost of a hearing when urging the complainant to accept the settlement offer. The Practitioner had a professional obligation to do so. The advice as to potential costs should the matter not be settled, in the circumstances of this matter, is not considered to amount to intimidation and bullying as alleged.

48. Risks associated with the potential cost of taking the matter to a hearing were clearly set out in correspondence sent by the Practitioner to the complainant following the Conference. Further, the Agreement appears to have remained available for acceptance until at least 15 February 2016.

49. The allegations that the Practitioner:

- ignored the Complainant's instructions during the Family Court Conciliation Conference as to the date of the Complainant's relationship with Mr N;
- spoke over the top of the Complainant during the Conciliation Conference so that the Complainant could not correct wrong information the practitioner provided during the Conciliation conference; and

- tried to intimidate and bully the Complainant into signing a consent agreement as part of the Conciliation Conference regarding distribution of property between the Complaint and Mr N

are not substantiated by a review of the available evidence.

50. The Board considers that allegations A.a, A.c and A.d should be dismissed pursuant to section 451 (a) of the Act as there is no reasonable likelihood that the Practitioner will be found guilty of either unsatisfactory professional conduct or professional misconduct.

Allegation A.b

The Practitioner failed to achieve a standard of competence and diligence the Complainant was entitled to expect by failing to properly advise the Complainant about Mr N's potential claim against the Complainant's property during the relationship.

The Complainant's position

51. The Complainant alleged:

> *"I gave the Practitioner dates of when my relationship with Mr N commenced and ended. I have verified these dates as when we commenced a relationship we lodged a combined tax return. These dates however weren't discussed in any way shape or form on the day of reconciliation with the Family Law Court arbiter, so this has led to me being made responsible for giving Mr N what I believe to be a much larger sum of money than he would normally be entitled.*
>
> *…*
>
> *Furthermore the Practitioner had not put a case together it was dictated by the opposing lawyer and the arbiter. He put no case forward that represented the true circumstances of the relationship by omitting dates and evidence provided by me to him. Mr N is also in possession of a large quantity of [-] which weren't divulged by him, the Practitioner had been advised that this [-] collection was in existence.*[4]
>
> *…*
>
> *When I enlisted his help, he repeatedly told me that Mr N would as a settlement be entitled to very little or in fact nothing, and this advice was given at almost every meeting…. This proved to be very wrong advice. My meetings with the Practitioner were very brief, lasting approximately 10 minutes each time I went there. He would hurriedly shoo me off even though I would be asking questions, I felt dismissed by him most of the time even though I had questions that went unanswered, but unfortunately I have no evidence of this.*
>
> *…*

[4] The practitioner wrote to the complainant on 29 January 2016, after the conference, and noted that in his experience [-] collections were of little value.

I provided bank statements with the evidence of my banking ingoing and outgoing expenses, and as can clearly be seen on those statements, all commitments for the household were met by my income.

As we had not been in a relationship for quite some time, I believe that this was supposed to be an equity matter, rather than a family court matter. I do not believe I received the appropriate advice for my matter."

The Practitioner's position

52. The Practitioner submitted:

> *"In a letter … which I wrote to Lawyers I included details that* [the Complainant] *had offered Mr N initially an amount of $*[-] *which was refused and then $[-] which had also been refused. Pursuant to her instructions I said that the $*[-] *offer was withdrawn and that an offer of $*[-] *was made in an effort to conclude the proceedings.*[5]
>
> *…*
>
> *Mr N contended that he had made payments of over $80,000.00 towards the retention of the home even though it was only in the name of* [the Complainant]*.*
>
> *…*
>
> *I have always contended on behalf of* [the Complainant] *that Mr N should be entitled to little or nothing from the sale of the property. This was a negotiating position only but particularly the Registrar's advice was that Mr N would most likely succeed in obtaining a substantial payment from her. It appeared that* [the Complainant] *accepted those contentions which I made on her behalf in her interests of adopting a strong stance in opposition to the Application as being true and correct although I had indicated that there were risks to her."*

The Complainant's response

53. The Complainant provided a general response rejecting the Practitioner's submissions and further said:

> *"Also it was never disclosed to me that Mr N had claimed he paid $80,000 towards my home. Mr N has a significant drinking, drug and gambling problem, and there were many years he didn't work. Payment of this amount of money is utter rubbish."*

File review

54. The Practitioner's file confirms that offers of $[-] and $[-] had previously been made by the Complainant and rejected by Mr N. A fresh offer of $[-] was made in that letter which was also rejected.

[5] Letter Practitioner to other solicitor.

55. A letter to the Practitioner referred to a consistent level of contribution towards the property of between $500 - $800 per fortnight. That letter was forwarded to the Complainant and was the subject of an attendance with the Practitioner on 13 February 2015. At that attendance, the Practitioner's handwritten file note records "He contributes $600 into bank last 2 fn Prev $550/fn His "rent"".

56. The Initiating Application in the Family Court filed by Mr N was accompanied by a Financial Statement. The Final Orders sought were for a sale of the Property and, following application of the proceeds to the mortgage, fees and commissions, that the balance be "divided equally between the Parties". Similarly, that the balance of non-superannuation assets be divided equally, as with the adjusted combined superannuation entitlements. Further, the Application made it clear that Mr N claimed to have made substantial contributions. The Application and Financial Statement were forwarded to the Complainant by the Practitioner on 14 April 2015.

57. The Practitioner's file indicates there were several attempts to list the matter for a Conciliation Conference in 2015:

- a Case Assessment Conference was scheduled on 1 June 2015, and then adjourned to 27 August 2015 by consent, the Practitioner being unavailable.
- the Case Assessment Conference on 27 August 2015 was not attended by either the Complainant or the Practitioner, and the other solicitor obtained an order that the matter proceed to an undefended hearing on 21 September 2015 before Justice and obtained an order for costs "thrown away" for the attendance on 27 August 2015. By consent on 18 September 2015, there was an order vacating the undefended hearing on 21 September 2015, and setting the matter down for a Registrar's Directions Hearing on 7 October 2015.
- by agreement the other practitioner appeared at the Directions Hearing on 7 October 2015 and the matter was referred to a Conciliation Conference, set down for 11 December 2015.

58. The Practitioner's file indicates the Complainant attended with the Practitioner on 2 October 2015 for what appears to be a review of her financial disclosure.[6]

59. The Practitioner's submissions of 23 August 2016 state:

> *"No written advice of the strengths and weaknesses of* [the Complainant's] *position on the property application was provided to her, but on a number of occasions she was verbally advised of the problems she faced in opposing the claim.*
>
> *Property matters always involve a mediation before an experienced Registrar in the Family Court who is able to provide guidance to the party beyond that which is provided by the respective Lawyers.*
>
> *As there can be considerable variation in factual matters arising at a conference, I have found in my practice in the Family Law area, since* 1975*,*

[6] Note the Itemised Bill does not refer to an attendance until 12 October 2015 and the charge is $23.00, indicating a short attendance.

> *that it is almost impossible to frame written advice but that clients are able to be informed of relevant legal and factual considerations during attendances for instructions and advice. This includes detail for the purposes of correspondence between Lawyers.*
>
> *There were a number of attendances on* [the Complainant]. *Those attendances were to obtain instructions from her in respect of matters raised in extensive correspondence from Mr N's Solicitor and to frame suitable responses on her behalf. Letters in response to those received from Mr N's Lawyers were discussed in detail and advice was given. There was a pre-mediation discussion for preparation and advice."*

60. Consistent with the Practitioner's submissions, there is no letter of advice contained on the file about potential settlement, the merits or otherwise of Mr N's claim or the risks associated with taking the matter to a trial.

The law

61. Halsbury's at paragraph 250-535 provides under the heading "General duties to clients":

> *"The duties of a lawyer to his or her client may arise from contract law, tort law or the lawyer's fiduciary relationship with the client. A lawyer has a duty to exercise skill and care in acting for a client7 and must act in good faith and with absolute fairness and openness towards the client.8 The client must be informed of everything which the lawyer knows will be of assistance to the client in relation to matters within the lawyer's retainer.9 …"*

62. In *Masters v Dobson Mitchell & Allport* [2014] TASSC 31, Mrs Masters claimed that her instruction to settle the claim was not informed by any legal advice about the merits of her claim against the CBA and that Mr Bugg pressured her to settle on terms that it was not in her best interests. The court held that the allegations made by Mrs Masters against Mr Bugg fell into two broad categories. "First that he should not have recommended settlement at all. Second that he failed to properly advise Mrs Masters and pressured her into a settlement."[10]

63. The court held at [61] that "the failure of a legal practitioner to give competent advice as to the strength of a client's case can give rise to liability in negligence…" but that the courts are "reluctant to find negligence if the settlement advice could reasonably and properly have been given".

64. The court also confirmed at [61] that settlements in litigation are encouraged, "and as early as possible*."* The court held that Mrs Masters had not made out her claim of negligence against Mr Bugg.

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[7] *Nocton v Lord Ashburton* [1914] AC 932 at 956.
[8] *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 587, 588.
[9] *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 at 213.
[10] *Masters v Dobson Mitchell & Allport* [2014] TASSC 31 at 58.

65. In *Masters,* at [83], the court found it "surprising, to say the least, that despite many years during which Mr Bugg acted for Mrs Masters, there is no evidence of any written advice to her about the strengths and weaknesses of her claim" but found that there is no absolute duty to give or confirm advice in writing citing *Fortune v Bevan* [2001] QCA 378.[11]

66. The court held that Mrs Masters was aware of her entitlements citing numerous conferences with her husband and Mr Bugg during which the claim had been discussed and two settlement conferences during which the issues of the action were again discussed in detail.

Conclusion

67. The Complainant has alleged she was completely taken by surprise by events on the day of the conference. That Mr N was entitled to more than "little or nothing" was news to her as was information about potential hearing costs should she refuse to settle.

68. As previously stated, there was no written advice given to the Complainant prior to the conference about the merits of Mr N's claim or the risks associated with a hearing.

69. The Practitioner's file does indicate that the Complainant was aware that:

- Mr N wanted $[-];[12]
- Mr N was claiming contribution by him towards the property of $500-$800 per fortnight;[13]
- Mr N contributed to repayment of the $[-] loan from his brother for the purchase of the Property;[14] and
- Mr N was seeking an equal division of all assets including the Property.[15]

70. It is the Practitioner's position that the Complainant received advice on the claims made by Mr N during attendances to discuss responses to letters received.

71. The allegation that the Practitioner failed to properly advise the Complainant about Mr N's potential claims against the Complainant's property during the parties' relationship is not substantiated by a review of the available evidence.

72. The Board considers that allegation A.b should be dismissed pursuant to section 451 (a) as there is no reasonable likelihood that the Practitioner will be found guilty of either unsatisfactory professional conduct or professional misconduct.

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[11] It should be noted that in *Fortune v Bevan* the court found that by failing to advise the appellant that her case was hopeless, her legal advisors were derelict in their duty to her.
[12] File note dated 16 December 2014
[13] Letter to the Practitioner,.
[14] Letter to the Practitioner.

Allegation B

The Practitioner failed to provide the Complainant with a costs disclosure pursuant to section 291 of the Act.

File review

73. The Practitioner conceded that he did not make a cost disclosure pursuant to s.291 of the Act to the Complainant. He stated in his submissions:

> *"At no stage was any individual commission of such a nature where costs of more than $1500.00 for that component were likely to arise. Had the matter not concluded at the Conciliation Conference a disclosure statement concerning future costs would have been required and provided."*

74. The Practitioner issued one bill relating to the period the file was open. The bill was for a lump sum of $2,000.00 plus GST. The Complainant then sought an itemised bill which totalled $3,311 (excluding GST). Once the Complainant had paid the lump sum bill of $2,000.00, the Practitioner transferred the file without delay.

75. The Practitioner opened a sole file named "Re: Property Settlement". The file contains an email dated 11 November 2014 from the Complainant forwarding an email from the other solicitor referencing the Family Law Act; the Practitioner should then have been aware that the matter involving the Complainant included both the withdrawal of the caveat and the division of property pursuant to the Family Law Act.

76. The work undertaken by the Practitioner principally related to the overarching property settlement dispute under the Family Law Act. During 2015, leading up to the December 2015 Conciliation Conference, there were several attempts to have the matter listed earlier. The Practitioner had some difficulty obtaining instructions, to the extent that in August 2015 he indicated he was without instructions, prompting the other solicitor to contact the Complainant direct.

The legislation

77. Section 291 of the Act requires cost disclosure to client. Section 295 provides an exemption to the disclosure requirements if the total legal costs in the matter, excluding disbursements, are not likely to exceed $1,500 (exclusive of GST).

78. A failure to comply with s.291 entitles the client not to pay until the legal costs have been assessed: s 300(1) of the Act.

79. Section 300(7) of the Act provides that failure by a law practice to comply with Division 3 (Costs Disclosure) is capable of constituting unsatisfactory professional conduct or professional misconduct.

80. Further, Rule 19.04 of the Family Law Rules 2004 provides that a conciliation conference is a court event for which a lawyer for a party must give the party a written notice of the actual costs, up to and including the court event and the estimated future costs of the party up to and including each future court event.

Conclusion

81. The statutory obligation to provide costs disclosure is strict. Many consumers of legal services are caught by surprise when they receive a bill from their lawyer. The intention of the Parliament was to ensure clients received fair treatment. Section 291 allows clients to enter into a contract with their lawyer about how and when fees may be charged, the scale of fees and the like. Without disclosure the client is at a disadvantage, a disadvantage which the legislation is intended to remove.

82. The Practitioner should prior to 11 December 2015 have turned his mind to the level of fees incurred in preparation for the Conciliation Conference. In addition, the attempts by the other solicitor to have the matter listed were events which should have prompted the practitioner to consider the issue of costs. Had the Practitioner done so, it is likely he would have noted that fees were likely to be in excess of $1,500.00.

83. The failure to issue a written costs disclosure is a breach of the Act which may amount to unsatisfactory professional conduct.

84. However, it is noted that in this instance the fees in the itemised account appear to be fair and reasonable having regard to the work undertaken. Had the Complainant exercised her rights to have the legal fees assessed, it is considered they would have been in excess of the initial $2,000 lump sum bill rendered by the Practitioner. The lump sum bill was significantly less than the total of the itemised account. The Practitioner required that his lump sum bill be paid before the file was transferred to the Complainant's new lawyers.

85. The Board considers that while the Practitioner's failure to provide the Complainant with a costs disclosure pursuant to s 291 of the Act is capable of amounting to unsatisfactory professional conduct, it is in the present circumstances a technical breach at the lowest end of the scale, where the breach

has been conceded but explained, and is unlikely to result in a finding of unsatisfactory professional conduct. Accordingly, the Board considers that this aspect of the complaint should be dismissed pursuant to s 451(a) of the Act.

Overall conclusion

86. The Board considers that each allegation of the complaint should be dismissed pursuant to s.451 (a) of the Act, as there is no reasonable likelihood that the Practitioner will be found guilty of either unsatisfactory professional conduct or professional misconduct.

Decision dated the 30th day of September 2016.

Legal Profession Board of Tasmania

Per: 

Chairperson

Please note that within 21 days after the date of this determination the complainant or the legal practitioner, the subject of the complaint may apply to the Disciplinary Tribunal or Supreme Court to have this matter heard by the Disciplinary Tribunal or Supreme Court and may make an application to the Disciplinary Tribunal or Supreme Court to stay the determination pending the finalisation of such an application.

Please be aware that an application made to either the Disciplinary Tribunal or Supreme Court may, in the event that application is unsuccessful, result in a costs order against you. Accordingly, it is recommended that independent legal advice is sought prior to making such an application.

Any application to the Disciplinary Tribunal must be in accordance with the form prescribed under the* Legal Profession (Disciplinary Tribunal) Rules 2010 *(see http://www.lpbt.com.au/policy-and-guidelines/).

The contact details of the relevant bodies are as follows:

Disciplinary Tribunal Secretary Mrs Maria Dwyer, Ogilvie Jennings: 6272 6860

Supreme Court, General Enquiries: 1300 664 608