

Disciplinary Committee Hearing Date: 30 March 2022
Law Council Disciplinary Committee: G.A. Andrée Wiltens, Chairman
F. Gilu, Member
T. Cullwick, Member
F. William Reur, Secretary
Date of Decision: 30 March 2021

Complaint by Mr Iau James against Ms Christina Thyna

A. Background

1. In late 2017-early 2018, Mr Iau James instructed Ms Christina Thyna to represent him in a claim for damages against the Republic of Vanuatu for assault and battery by several police officers. The Claim became Civil Case No. 18/586 in the Supreme Court.
2. The case was heard on 30 September 2019 and 1 October 2019. On the morning of the second day, during the evidence by one of the police officers against whom the allegations were made, there were damaging admissions made which resulted in a short adjournment for further instructions to be taken. At 10am, the hearing having resumed at 9.05am, there was a formal admission of liability entered by counsel acting for the Republic of Vanuatu.
3. The matter was adjourned for 28 days for counsel to provide better evidence as to the appropriate level of damages due.
4. Evidently, during the adjournment period, the Solicitor General wrote to Ms Thyna on 22 October 2019, with a settlement offer. The letter contained an explanation as to how the offer amount was arrived at. The offer was promptly accepted by Ms Thyna by letter of 23 October 2019.
5. Consent orders were duly made dated 31 October 2019, which concluded the litigation.

B. The Complaint

6. Mr James made complaint to the Disciplinary Committee of the Law Council ("the Committee") on 20 May 2020. The complaint was that at the end of November 2019, Ms Thyna telephoned Mr James indicating that the Government had agreed to pay him VT 1 million in damages. Mr James was asked to meet Ms Thyna at the Hotel Rossi on or about 8 December 2019. It was a short meeting, he said. There having been no previous discussions about legal fees, Mr James said that at the meeting, Ms Thyna had suggested they share the money awarded equally. Mr James stated that he agreed, rather reluctantly. Ms Thyna had with her at the meeting an agreement for Mr James to sign, and once that was completed, she gave him VT 500,000 cash.

7. The agreement, in the preamble, recorded that the Government had agreed to pay VT 1 million compensation "...excluding legal fees". The agreement went on to record that 50% of the compensation would cover Ms Thyna's legal fees. Further, Mr James was barred from any claims against Cornerstone Lawyers, Ms Thyna's legal firm. Both Mr James and Ms Thyna signed the agreement.
8. Mr James subsequently learnt that the Government had in fact paid Ms Thyna VT 1.4 million on his behalf. He produced evidence to validate that contention in the form of a Local Purchase Order.
9. He was further dissatisfied that VT 115,000, which he contended he had paid Ms Thyna on account of her legal fees, had not been taken into account in the division of the settlement amount.
10. Mr James stated that he had asked on several occasions for an itemized bill of account from Ms Thyna, without any result. However, he alleged, no sooner had he complained about the funds not accounted for than Ms Thyna presented him with a statement, which he described as a bill of costs. He produced that in evidence. It was his evidence that he had confronted Ms Thyna in relation to the additional funds paid by the Government at her office; and that in response she immediately provided him with the statement.
11. The document is undated. It is unsigned. It is not on letterhead. The only indication of what legal work was undertaken is at the top heading, where it is stated: Claimant's Costs for two years of work (2017 – 2018). None of the itemized work is dated.
12. Under the first separate heading, it is set out that for "Instructions from client" a sum of VT 60,000 is charged; half being attributed to "obtaining instructions", and half to "advising client". The second heading is "Disbursements", for which VT 50,000 is globally charged. The third heading is "Pleadings", for which VT 245,000 is charged, although the individual items listed comes to VT 500 more than the total charge.
13. The fourth heading is "Court Conferences", for which a total of VT 550,000 is charged. It is noted that part of this amount is VT 100,000 for each of the two days the trial ran, which ignores that the second day was extremely truncated. Further, a figure of VT 150,000 is attributed to negotiation with State Law to settle the matter out of Court and work towards the release of the funds. That figure is said to include letters, emails, phone calls, meetings and attendance with Finance. Further, it appears to the Committee to be excessive, given the ease with which agreement as to the sum due was reached and the relative promptness of payment being made.
14. When the various amounts attributed to the four headings are added up, they come to VT 885,000; yet what is recorded in the statement is a total of VT 900,000. At the foot of the document there is recorded a payment(s) made by Mr James of VT 40,000.
15. When Mr James appeared before the Committee he produced a receipt from Ms Thyna evidencing payment by him to her of VT 30,000. He alleged that he had actually paid her a total of VT 115,000

in varying amounts at different times; but despite having asked three times for receipts from Ms Thyna, she did not provide the same. Accordingly, the only receipt he could produce was that for VT 30,000.

16. Mr James contended that discussion of legal fees occurred only after the case had been completed. He maintained that at no stage prior to that did Ms Thyna advise what she would charge by way of her fees – she simply asked for further funds from time to time.
17. Mr James told the Committee that on 28 January 2022, Ms Thyna and her husband Joseph had come to see Mr James at his house. He said that Ms Thyna offered to give Mr James a piece of land valued at VT 2 million in return for Mr James withdrawing his complaint to the Law Council, and to say sorry for what had occurred. Mr James produced a written note in his handwriting recording what he said had occurred.

C. Procedure

18. The Committee advised Ms Thyna of Mr James' initial complaint by forwarding a copy to her on 27 January 2022, and scheduling 22 February 2022 as the hearing date. The following day, Ms Thyna had a chance meeting in town with the Secretary to the Committee, Ms William-Samuel, and Ms Thyna advised Ms William-Samuel that she had settled the matter with her client. Ms Thyna was told the meeting would proceed, as the complaint had to be considered.
19. The hearing scheduled for 22 February 2022 proved unworkable, and the hearing was adjourned to 1 March 2022.
20. Unfortunately, on 1 March 2022 the Committee could not muster a quorum, and accordingly, with Mr James' and Ms Thyna's agreement they both being present, the hearing was re-scheduled for 5pm on 3 March 2022.
21. A quorum was present on 3 March 2022. Unfortunately, although Mr James was again present, Ms Thyna was not. Attempts to contact Ms Thyna by telephone (mobile and office numbers) proved fruitless. At 5.28pm, the Committee determined, as permissible under Rule 10 of Legal Practitioner (Disciplinary Procedure) Rules, that we should proceed to hear from Mr James in the absence of Ms Thyna. We already had a written submission from Ms Thyna; although the request for her trust account records, and a copy of her file, had not been complied with. Mr James' evidence is set out above.
22. As earlier recorded, the alleged meeting of 28 January 2022 between Mr James and Ms Thyna was new material the Committee was required to consider. At the conclusion of Mr James' evidence before the Committee, with Ms Thyna's position as recorded in her written response being put to Mr James, it was determined appropriate to give Ms Thyna the opportunity to respond to this new allegation. A copy of Mr James' further statement was sent to her, and she was advised the Committee would like her response either in writing or orally at 4pm on 8 March 2022, or both.

23. The Committee subsequently learnt from Ms Thyna, when were finally able to resume our consideration of the complaint by way of a telephone conference on 30 March 2022 (the impact of Covid-19 caused this further delay), that on 3 March 2022 she had been urgently called away to attend to her unwell mother.

D. Responses

24. Ms Thyna's first written response is undated, but was received prior to the scheduled hearing on 22 February 2022. She maintained that Mr James had come to see her as he been earlier rejected by other counsel. She said she would charge her fees on the judgment amount. Ms Thyna stated that the work she did was basically pro bono. Subsequently she stated that she was relying on being successful for her fees to be met. This is a clear misunderstanding of pro bono. Ms Thyna's position was that if the case was lost, her legal fees were waived; but if the case were won, she would charge appropriately. She stated that she had clearly explained this to Mr James when first consulted.
25. Ms Thyna denied receiving VT 115,000 on account of her fees from Mr James. She was prepared to accept only receipted amounts.
26. Ms Thyna stated that the "...judgment made it clear that the compensation monies was VT 1,000,000 and VT 400,000 went towards legal fees". There is no judgment. The reference to legal fees was contained in the Solicitor-General's letter of offer, which clearly set out that the offer was VT 1.4 million.
27. Ms Thyna spent some time justifying the fees taken. She maintained further that Mr James had agreed to split the award and freely signed the agreement she had drafted. She continued: "I took extremely high fees because I had taken a risk...".
28. Ms Thyna asserted that Mr James had never complained to her, but his brother had on the basis that he had not received any of the funds. She was unconcerned about any complaints by Mr James' brother.
29. She further recorded: "The only mistake I did not make any conditional fee agreement or pro-bono agreement case." The Committee considers this to be an acknowledgment that prior to agreeing to act, Ms Thyna was obligated to make clear her terms of engagement.
30. Ms Thyna's second written response is also undated. It was sent electronically to the Committee at 8.57am on 30 March 2022 – significantly later than the time allowed by the Committee. This was a response to the further allegation by Mr James of bribery.
31. In this response Ms Thyna confirms having gone to meet Mr James and his wife, in relation to a Church Women's Association. She was concerned about Mr James' complaint. She went to see how she could settle the matter. She asserted she had not promised land, but she had suggested they do gardening work on a plot offered by the Association to the New Methodist Church, which

was worth VT 2 million. She intimated she had gone in good faith, as part of the Association's usual monthly meetings.

32. Ms Thyna participated in the telephone conference on 30 March 2022. She explained it had been her intention to bring her case file to the Committee, but had not had the opportunity to provide it earlier. She advised it would be provided to the Committee in the next few days, and it was. In relation to her trust account records, Ms Thyna advised there was no point in her producing those to the Committee as the funds from the Government and all other funds related to this case were not deposited into her firm's trust account, but into her personal bank account. She had no explanation as to why her second written response was so late.
33. The Committee cannot understand why client funds were deposited into a lawyer's personal bank account as opposed to the firm's trust account. No reason was provided for why this was done, and the Committee is highly critical of this unusual and suspect act.
34. In her evidence, Ms Thyna explained it was her practice to make her clients pay the filing fees, and if the case is won, then her fees are taken from award as calculated after the event. If the case loses, then she claims no legal fees. She considered this to be providing a pro bono service. The Committee has earlier commented on this.
35. When asked where the Committee could find her written accounting to her client of the actual award the Government paid, namely VT 1.4 million, Ms Thyna agreed there was no such document. The Committee sees this as a professional failure.
36. Ms Thyna maintained however, that she had verbally told Mr James the actual position before he signed the agreement as to fees at the Rossi Hotel. The Committee does not accept this contention. It flies in the face of other evidence. Further, even if it were true, it is unsatisfactory.
37. She refuted that her conduct amounted to theft – she maintained that her total fees were reasonable, despite in her earlier written response indicating that she took "...extremely high fees". She agreed the charge of VT 100,000 for the second day of trial was wrong and should not have been so charged.
38. Ms Thyna denied offering Mr James a bribe to make his complaint go away. She did not offer him land worth VT 2 million; and she maintained her Church meeting and gardening explanation as the reason she met up with Mr James.
39. She denied also advising Ms William-Samuel that she had resolved the complaint with her client. The Committee regards this as a bare-faced lie. The possibility that Ms William-Samuel has invented this account is beyond credibility.

E. Credibility

40. The Committee's determination required assessments of credibility.
41. The credibility and accuracy of a witness' account is not to be assessed solely by how a witness appears to the Committee. The clues that might be relied on to gauge such matters are not readily gleaned simply based on appearance or conduct. Such observations can only be a small part of the process, and in the case of the telephone conference, involved consideration only of vocal responses.
42. What is of more significance is to look for consistency of accounts - consistency within a witness' account, when comparing that account with the accounts of other witnesses, and also when comparing the accounts of witnesses with relevant exhibits. Not only was the Committee considering the material presented by Mr James and Ms Thyna, but we also had the Court file relating to Civil Case No.18/586, and Ms Thyna's case file.
43. On that basis certain views as to the reliability and veracity of each of the witnesses was agreed by the members. We also had regard to the inherent likelihoods of the various situations then prevailing.
44. The Committee was unanimously of the view that Mr James was a truthful and accurate witness. The view we formed of Ms Thyna was quite the opposite.

F. Sanction

45. The Committee pointed to subsection 9(3) of the Legal Practitioners Act and asked Ms Thyna which of the following she considered the appropriate response if the complaint were found to have been made out:
- (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.
46. Ms Thyna responded that the Committee should take into account that she had done the work in completing and winning the case within a reasonable time frame. She thought it fair that she be reprimanded or made to refund some of her bill.

G. Discussion

47. The *Rules of Etiquette and Conduct of Legal Practitioners* Order No.106 of 2011 ("the Rules") are relevant to this case. In particular the Committee points to the following as having been breached in this case:

15. Provision of information

(1) A lawyer must, in advance, provide a client with information in writing on the principal aspects of client service including the following:

- (a) the basis on which the fees will be charged; and
- (b) when payment of fees is to be made; and
- (c) whether the fee may be deducted from funds held in trust on behalf of the client.

39. Claims against lawyer

(1) When a lawyer becomes aware that a client has or may have a claim against him or her, the lawyer must immediately do the following:

- (a) advise the client to seek independent advice; and
- (b) inform the client that he or she may no longer act unless the client, after receiving independent advice, gives informed consent.

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.

(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

50 General

A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in clause 51.

51 Reasonable fee factors

The factors that are to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:

- (a) the time and labour expended;
- (b) the skill, specialised knowledge, and responsibility required to perform the services properly;
- (c) the importance of the matter to the client and the results achieved;
- (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client;
- (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved;
- (f) the complexity of the matter and the difficulty or novelty of the questions involved;
- (g) the experience, reputation, and ability of the lawyer;
- (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients;
- (i) whether the fee is fixed or conditional (whether in litigation or otherwise);
- (j) any quote or estimate of fees given by the lawyer;
- (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client;
- (l) the reasonable costs of running a practice;
- (m) the fee customarily charged in the market and locality for similar legal services.

55 Final account

- (1) A lawyer must render a final account to the client or person charged within a reasonable time of concluding a matter or the retainer being otherwise terminated.
- (2) The lawyer must provide with the account sufficient information to identify the matter, the period to which it relates, and the work undertaken.

56 Conditional fee agreements

- (1) A lawyer may enter into a conditional fee agreement with a client.
- (2) If a lawyer enters into a conditional fee agreement with a client, the lawyer must ensure that:
 - (a) before entering into the conditional fee agreement, the lawyer has informed the client of any other appropriate arrangements that may be available; and

(b) the total fee charged at the conclusion of the matter is fair and reasonable in accordance with this Part.

(2) A conditional fee agreement (including an amendment or variation to a conditional fee agreement) must be in writing and must provide:

(a) the method by which the fee is to be determined; and

(b) the condition or conditions that will amount to success and upon the occurrence of which the fees or any part of them will become payable; and

(c) whether there are any fees or expenses for which the client will be liable whether or not the client succeeds; and

(d) the basis upon which either party may terminate the agreement and what the liability for fees on termination will be; and

(e) the method by which the fee is to be determined in the event that an offer of settlement or compromise is made in respect of the matter, which the client declines to accept against the advice of the lawyer; and

(f) the circumstances in which the client may be liable to pay the costs of any other party to the proceedings; and

(g) that the client may give notice cancelling the conditional fee agreement within 5 working days after it has been entered into by the client on the basis that the lawyer may charge a normal fee for any work done during that period.

66 Proper practice

A lawyer's practice must be administered in a manner that ensures that the duties to the court and existing, prospective, and former clients are adhered to, and that the reputation of the legal profession is preserved.

67 Misleading and deceptive conduct

A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice.

48. What was most concerning for the Committee was the obvious dishonesty in Ms Thyna not advising Mr James the true amount of damages he was receiving; the further dishonesty in drafting and getting Mr James to sign the agreement which compounded the earlier inaccuracy as to the true amount; the clear indication of wrong-doing evidenced by the statement (bill of costs) which was only tendered upon complaint being made despite having been previously prepared and which sought to justify the extent of the amount taken by Ms Thyna as her legal fees; and the final compounding dishonesty displayed in attempting to get Mr James to withdraw his valid complaint in return for a VT 2 million bribe.

H. Consideration

49. 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.
50. An Australian Law Reform Commission paper dealing with "*Disciplinary Structures and Court Imposed Sanctions*" of 14 November 2010 sets out what each standard includes. The paper suggested that: "*unsatisfactory professional conduct*" includes: Conduct of a ... 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 ... legal practitioner; and conduct of a ... 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.
51. The paper went on to suggest that: "*unsatisfactory professional conduct*" includes: Conduct of a ... 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 ... legal practitioner.
52. The Committee accepts those definitions as applying to legal practitioners in Vanuatu.
53. The Committee also took into account various legal pronouncements largely following the same principles: *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; *Re: A Solicitor* [1975] 1 QB 475; *Re Hodgekiss* (1962) 62 SR (NSW) 340; and *A Barrister and Solicitor: In re* [1999] FJ Law Rp 11.
54. The Committee adopts the test to be applied when deciding dishonesty in disciplinary proceedings as set out in *Law Society v Bultitude* [2004] EWCA Civ 1853. This is 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?
55. The Committee finds this aspect of the complaint made out. We are unanimous that Ms Thyna's conduct was dishonest, as well as breaching the Rules of Etiquette.
56. 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 Judicial Services Complaints Tribunal.
49. This is the second complaint considered by the Committee against Ms Thyna. The result of the first complaint was that she should be struck from the rolls of practitioners in Vanuatu.
50. 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

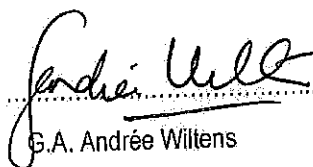
finding of misconduct, the Court applied with approval the principles set out in *Devine v New Zealand Law Society* [2012] NZLR 481 which include:

"Wilful and calculated dishonesty normally justifies striking off."

51. That is consistent with the approach taken in England and Wales and the Australian cases of *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 and *Mellifont v The Queensland Law Society Inc* [1981] Qd R 17.
52. The Committee felt a need to balance protection for members of the public from dishonest practices with the personal consequences flowing to the practitioner, and possibly her staff. There is further a need to maintain the reputation of the legal profession in Vanuatu.
53. We were concerned that the main aspect of the case highlighted dishonesty; but other aspects of Mrs Thyna's established misconduct were also of note. Given that dishonesty was at the forefront of Mrs Thyna's misconduct, the only proportionate response must be that she be struck off. We consider that appropriate in relation to this complaint, without that decision being impacted by her earlier striking off.

I. Result

54. 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 this outcome.
55. Further, the Committee considers that Ms Thyna's engagement was in fact on the basis of pro bono. Accordingly, she is required to disgorge VT 150,000 (the maximum of the Committee's jurisdiction) of the fees she took. She is to pay that to Mr James within 21 days. Were we able to, we would have ordered her to pay all VT 900,000 to Mr James.
56. Mrs Thyna has 15 days from the date this decision is made known to her to appeal this decision.


G.A. Andrée Wiltens

DC Chair

26 April 2022

