LCRO 32/2014

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**TH**
	Applicant
AND	**CY**
	Respondent

The names and identifying details of the parties in this decision have been changed.

DECISION

Introduction

[1] Mr and Mrs TH seek a review of a decision by the [Area] Standards Committee to take no further action in respect of their conduct complaints against Mr CY.

[2] There has been a regrettable delay in having this decision made available to the parties. I apologise to the parties for that delay.

Background

[3] Mr and Mrs TH, through the vehicle of a family trust, were the owners of a residential property in [Area].

[4] They placed the property on the market for sale. Mr CY acted for the purchasers. A LIM report was requisitioned by the purchasers. That report identified

that a log burner at the property did not have the required code compliance certificate. It was not possible to replace the burner before settlement.

[5] Prior to settlement, there were discussions between the parties' solicitors as to how to resolve the issue of the non compliant burner. On the morning of 31 May 2012, Mr CY wrote to the lawyer for Mr and Mrs TH in the following terms:

> Our clients advise that the new log burner has not as yet been installed and the fence on the north-west boundary has not been erected. We would propose to hold the sum of $3,000 (being $2,200 for the log burner and $800 for the fence) in our trust account, and would release the funds to you on the issue of the code-compliance certificate for the log burner $2,200 and $800 on erection of the fence.
>
> We confirm that we are holding sufficient funds to complete settlement, and would undertake to hold the $3,000 in our trust account until the work has been completed.

[6] That same day, the lawyer for the vendor replied to Mr CY, advising that his clients did not agree to funds being retained pending completion of the fencing (it being anticipated that work would be completed by the vendors in the agreed timeframe) but confirming agreement for retention of funds, pending completion of installation of the log burner. That understanding was advised as follows, "we confirm our clients accept the proposal for the sum of $2,200 to be held in your trust account pending completion of installation of the log burner".

[7] Mr CY responded, and provided an undertaking in the following terms: "we undertake to hold $2,200 in our trust account pending completion of the installation and issue of code compliance certificate for the log burner".

[8] The purchasers wished to install a burner that had a wetback facility. That involved additional cost. The purchaser agreed to meet the additional cost involved. The burner the purchasers intended to install at the property could not be located in the position occupied by the original fire, and had to be relocated to another part of the home.

[9] After settlement, Mr and Mrs TH remained in the property as tenants. There was some delay in resolving matters relating to the installation of the log burner. On 17 August 2012 Mr TH made a payment directly to the purchasers in the sum of $2,200. In that correspondence Mr TH states "my cheque for $2,200 my share at this stage is enclosed".

[10] On 17 April 2013, Mr CY wrote to the TH's lawyer. He enclosed with that correspondence an invoice his clients had received from a plumbing company for costs incurred for the installation of the log burner. Mr CY notes that:

> The invoice is the responsibility of your client who had agreed to meet the costs of the new log burner, its installation and a code compliance certificate from the [Area] District Council.

He confirms that the sum of $2,200 had been retained on settlement to "cover this matter". Mr CY raises a second issue in this correspondence. His clients sought recovery of $112 for costs incurred topping trees at the property that were compromising power lines (work completed by Company 1). Mr CY submits that the THs had agreed prior to settlement to meet the cost of tree topping. Mr CY proposes that the plumbing and Company 1 account be settled from funds held, and the balance of proceeds be paid out to Mr and Mrs TH. His correspondence concludes with indication that he would, if he did not hear from Mr and Mrs TH's lawyer within five working days of the date of his correspondence, make the payments in terms as specified in his correspondence.

[11] On 24 April 2013, within the five-day timeframe, Mr and Mrs TH's lawyer responds to Mr CY and advises that his clients did not agree to him paying the accounts in terms as proposed. In further correspondence dated 30 May 2013, the TH's lawyer sets out his clients' objections to funds being disbursed in the manner as proposed by Mr CY.

[12] Mr CY responds further on 30 May 2013. He advises that his clients do not agree with the arguments advanced by Mr and Mrs TH that he does not propose to enter into further correspondence, and confirms that he has settled the plumber's account from the funds held.

The complaint and the Standards Committee decision

[13] Mr and Mrs TH lodged a complaint with the New Zealand Law Society Complaints Service on 22 June 2013. The substance of their complaint was that Mr CY had disbursed funds held pursuant to an undertaking, when he had been put on notice that Mr and Mrs TH objected to him disbursing funds.

[14] The [Area] Standards Committee considered the complaint. The Committee distilled the complaint to inquiry as to whether Mr CY had breached an undertaking that he had given in relation to a conveyancing transaction.

[15] In its decision delivered on 12 December 2013, the Committee determined to take no further action in respect to the complaint. The Committee concluded that:

- The undertaking provided was relatively simple.
- The parties may have had different views as to what the undertaking actually required.
- The undertaking related to the installation of a log burner and issue of a code compliance certificate.
- As the installation was the responsibility of the vendor, funds were properly deducted from the unpaid amount held by Law Firm 1.
- The terms of the undertaking had been complied with.

Application for review

[16] Mr and Mrs TH filed an application to review the Standards Committee decision on 5 June 2014. They submit that:

- The Committee's decision was flawed and not supported by the evidence.
- The liability imposed by the undertaking was limited to $2,200.
- The plain wording of the undertaking provided that Mr CY was to hold funds in his trust account until such time as the log burner was installed and certificate issued, at which time the funds were to be paid to them.
- Mr CY dispersed funds in the face of objection raised by their lawyer.

[17] In response, Mr CY submits that:

- The undertaking provided was specific.
- The scope of the undertaking was to provide that funds were held to cover the installation and compliance costs, and did not include costs of purchasing a replacement burner.
- He had complied with the undertaking.
- Mr and Mrs TH had misunderstood the terms of the undertaking.

Nature and Scope of Review

[18] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[19] More recently, the High Court has described a review by this Office in the following way:[2]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[20] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Hearing

[21] A hearing was convened on 24 August 2015. Mr and Mrs TH attended in person. Mr CY attended by teleconference.

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[22] Arguments advanced by the parties at hearing in significant part traversed matters raised in the written submissions filed in support of and in response to the initial complaint, and the application for review.

Analysis

[23] Underpinning the complaint is allegation that Mr CY breached the specific terms of an undertaking he had provided.

[24] Undertakings form the basis upon which a multitude of transactions between lawyers and other parties are guided and affected. The duty of compliance with those undertakings, if in any way diminished, will be to the detriment of legal practice, commercial transactions and numerous parties who rely on those undertakings. It goes without saying that their terms must be clear, precise and unambiguous.

[25] The issue of undertakings and alleged breaches thereof has been thoroughly considered by the High Court in *ASC3 of NZLS v W*.[3]

[26] In *Auckland Standards Committee 3 of the New Zealand Law Society v W* Duffy J said:[4]

> … the law has rejected a technical and legalistic approach to undertakings and has instead required them to be honoured *optima fide*. It is also why any ambiguity is to be construed in favour of the recipient, and why defences that are available in contract and other common law disputes are not readily available to resist the enforcement of an undertaking.

[27] The Court was considering an undertaking given by a practitioner that might not have expressed what that practitioner was intending to convey. Duffy J held that "to draft an undertaking … imprecisely constitutes negligence or incompetence".[5] Her Honour considered that:[6]

> … the settled law on undertakings lead me to conclude that a member of the public would expect practitioners to prepare precise, clear undertakings, whose meaning was at least understood by the practitioner responsible for drafting them. Members of the public would not expect practitioners to draft undertakings that did not represent their intent. Such persons would also expect practitioners to honour their undertakings, rather than to dispute their meanings. Furthermore, given the high levels of reliance placed on undertakings, members of the public would not expect that practitioners could

[3] *Auckland Standards Committee 3 of NZLS v W* [2011] 3 NZLR 117 (HC). Upheld by the Court of Appeal in *W v Auckland Standards Committee 3 of New Zealand Law Society* [2012] NZCA 401, [2012] NZAR 1071.
[4] At [60].
[5] At [65].
[6] At [66].

> later avoid honouring their undertakings on the ground that they were issued in haste or under pressure, such that the practitioner has mistakenly expressed himself or herself as to its terms …

[28] And further:[7]

> The trustworthiness, integrity and standing of the profession would be diminished if a practitioner were to be permitted to say, "I should not have to honour this undertaking, because even though I drafted it, it does not say what I intended it to say". This would be no better than permitting practitioners to avoid honouring their undertakings by reliance on fine legal points.

[29] Rule 10.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) provides "A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice".

[30] Attention then turns to the scope of Mr CY's undertaking.

[31] The critical issue to determine is the question as to the scope of the undertaking that Mr CY provided, particularly whether the undertaking authorised him to settle the plumber's installation account and pay the balance to Mr and Mrs TH.

[32] Mr and Mrs TH contend that the clear intention of the undertaking was to limit the extent of their liability to the sum of $2,200.

[33] That is not, says Mr CY, what was agreed to or what his undertaking recorded.

[34] Mr CY argues that the undertaking was framed from an understanding that the funds would be held in his account, and available to be released to his client, once the installation and certification had been finalised at the expense of his clients, at which time they would receive reimbursement from funds held.

[35] Mr CY's understanding as to the nature of the undertaking is set out in correspondence to the Complaints Service and to this Office. In correspondence to the Complaints Service dated 1 October 2013, Mr CY advises that:

> The funds were not held on Mr and Mrs TH's behalf but for a very specific purpose in Law Firm 1's trust account for the credit of the purchaser to meet specific costs. They were paid out in reliance of that undertaking.

[36] In correspondence to the LCRO dated 28 February 2014, Mr CY expresses the view that:

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[7] At [67].

> It seems unfortunate that Mr and Mrs THs had misunderstood the terms of the undertaking. The funds were held on behalf of our clients not Mr and Mrs TH. We dealt with those funds strictly in terms of our undertaking.

[37] Mr CY holds firmly to the view that funds were held for the benefit of his clients, and that he was at liberty to release those funds directly to his clients.

[38] It is necessary to consider the context in which the undertaking was provided.

[39] The background circumstances are unremarkable. It is not uncommon for issues with non-compliance to be identified shortly prior to finalising a conveyancing transaction, and to avoid the risk of settlement being frustrated or delayed, agreement to be reached which provides that the vendor is required to remedy the problem on the basis that funds are retained from settlement proceeds, and released to the vendor on confirmation that the agreed work has been completed.

[40] That type of arrangement is quite distinct from that in which an undertaking is provided that the purchaser will retain a portion of settlement funds, remedy the problem, reimburse themselves for costs incurred in remedying the fault from funds retained, and then account to the vendor for any surplus.

[41] When problems with the burner were identified in the LIM report, both vendor and purchaser would have been focussed on giving consideration as to how the settlement could be achieved without delay, whilst ensuring the vendor's obligations to provide a code compliant burner were met.

[42] Mr and Mrs TH's objection to Mr CY's compliance with the undertaking traverses two grounds.

[43] First, they maintain that the undertaking is evidence of an agreement reached that their liability in respect to the burner was capped at $2,200.

[44] Secondly, (and this was the issue that received the focus of the Committee's attention), they complain that Mr CY paid out funds held, when the undertaking specifically directed that he was required to pay those funds to them.

[45] Mr and Mrs TH submit that they had met their obligation to pay an agreed sum to the purchasers, and on meeting that obligation, Mr CY's obligation to pay them the funds held, should have been triggered.

[46] I am not persuaded that the undertaking provided limited their liability in the way they suggest.

[47] Several factors persuade me to the view that settlement was progressed on an understanding that Mr and Mrs TH would contribute to the purchase of the burner, and that those costs would be addressed by agreement between the parties, and they would be responsible for installation and compliance costs:

- The purchasers wished to install a heater which was of superior quality to the burner that was in the property.

- The purchasers agreed to meet the additional costs of securing a burner which had a wetback facility.

- Mr TH directly paid a contribution to the purchase cost of the burner to the purchasers. Whilst Mr TH submits that some pressure was exerted on him to pay the account, it presents as surprising that he would make such a significant outlay if he had not agreed to contribute to the cost of purchasing the burner.

- Mr TH sent a note to the purchasers enclosing a cheque made out to the distributors. He records the payment as "my share at this stage".[8] Whilst he contends that he was confused, particularly in as much as he says he had overlooked the fact that Mr CY was holding funds, his description of the payment as being his share "at this stage" indicates that he was expecting to make further payments.

- Further, he records in his note of 17 August 2012 that he will be obtaining quotes for installing the burner (two locations) and anticipates that there may be a small adjustment required one way or another. This leads to reasonable inference that he was directly engaged in the process, and intending to cover installation costs, with necessary adjustment if additional costs were incurred as a consequence of installing a burner with higher specifications.

- In correspondence to the Complaints Service dated 27 September 2013, Mr and Mrs TH note that there were three components to the contribution agreed of $2,200, being cost of purchase, installation and compliance. Significantly, they record in that correspondence, that "these three components were discussed between us and Mr CY's clients". That is consistent with Mr CY's argument that the parties were

[8] TH note to purchasers (17 August 2012).

negotiating matters relating to the purchase of the burner between themselves.

- On 8 May 2012, Mr TH had discussions with an officer from the [Area] Council. A file note of that discussion records that Mr TH was advised that a code compliance certificate could not be issued for the burner and that it would require replacement. On 28 May 2012, Mr TH lodged an application for consent to install a new fire. The cost of installation was estimated at $3,000. Irrespective of argument as to whether the installation costs were increased by need to meet the purchasers' specific requirements, it clearly was the case that it was anticipated that installation costs would be significant.

[48] Mr and Mrs TH contend that it was their understanding that their liability in respect to purchase and installation of the burner was limited to $2,200, and that the undertaking agreed prior to settlement, records that as being the position.

[49] But that is not what Mr CY's undertaking says, nor is it what Mr and Mrs TH's lawyer reports to be his understanding, when he confirms his agreement to funds being held in Mr CY's trust account, pending completion of installation of the log burner.

[50] Neither lawyer refers to the purchase of the burner, and Mr CY's view that the parties had agreed between themselves to make arrangements for the purchase of the burner is consistent with what occurred after settlement. It is also consistent with Mr CY's first correspondence of 31 May 2012, in which he advises that his clients have informed him that the new log burner has not yet been installed. That gives clear indication that efforts were made to have the burner installed prior to settlement. As noted, Mr TH, after settlement, provided the purchasers with a cheque for his contribution to the cost of purchase.

[51] There was some considerable delay before the burner was installed and matters finalised. I accept the parties recollection of what was intended at commencement are at odds, and Mr and Mrs TH conceded that as time moved on, they had overlooked what the initial arrangements were (evidenced by Mr TH's argument that he had failed to recall that funds were being held by Mr CY), but I think it probable that Mr and Mrs TH finalised settlement on the basis that they had agreed to cover both purchase price and installation costs, and it would be reasonable to infer that that would have been the minimum that would have been accepted by the purchasers before they would consent to settle.

[52] Argument that the undertaking was given on the basis of an understanding that Mr and Mrs TH were required to cover the cost of installation and compliance, is consistent with Mr CY's indication to the Complaints Service in his correspondence of 11 July 2013 that the parties had agreed to their respective contributions to the purchase of a new heater, and that Mr TH would meet the installation and compliance costs, and consistent with Mr TH's communication with the purchasers in which he confirms that he is attending to obtaining quotes for costs of installation.

[53] Further evidence that the agreement reached to enable settlement to proceed, was premised on an understanding that the vendors would attend to rectification work, is provided by an examination as to how the parties dealt with the fencing issue.

[54] As a condition of sale, the vendors were required to erect a fence on a boundary to the property. It was proposed that funds be retained by the purchaser, for release to the vendor, once the fence had been erected. Clearly it was contemplated that the vendor would be responsible for the fencing. It would be unlikely, considering the 31 May correspondence dealt with two matters where the vendors had to complete work to ensure the settlement could proceed, that it would have been intended to retain funds for the fencing on the basis of an understanding different to that proposed for the burner.

[55] As it transpired, no funds needed to be held back for the fencing, as the vendors were able to complete the work within the timeframe agreed.

[56] But the matter does not end there. Attention then turns to the issue as to whether the undertaking provided, was one which permitted Mr CY to release funds directly to his client, as opposed to one which required him to release funds held, on the satisfaction of certain conditions, to Mr and Mrs TH.

[57] The distinction between those two options is not insignificant, indeed it would render the point and purpose of an undertaking meaningless, if an undertaking which imposed obligation on a lawyer to disperse funds to a specified party could be subverted by the lawyer electing to pay funds to another party.

[58] In considering whether the undertaking had been complied with, the Committee, in my view, failed to adequately address what the undertaking required of Mr CY. The Committee's conclusion that the undertaking required Mr and Mrs TH to assume responsibility for the costs of installation, led it to conclude that Mr CY had complied with the undertaking by releasing funds directly to his client. In my view, conclusion that the objectives of the undertaking had been achieved, did not sanction

Mr CY releasing the funds directly to his clients, if the undertaking did not permit him to do so.

[59] In determining what the words of an undertaking mean an undertaking should be read sensibly and in light of the commercial context in which it is given.[9]

[60] On settlement day, Mr CY's legal secretary wrote to Mr and Mrs TH's lawyer in the following terms:

> We would propose to hold the sum of $3,000 (being $2,200 for the log burner and $800 for the fence) in our trust account and would release the funds to you on the issue of the code compliance certificate for the log burner $2,200 and $800 on erection of the fence.

[61] The intention of that representation seems clear. Funds are to be retained for "**release to you**", [emphasis added] when the specified work is completed. It would seem to stretch any reasonable construction to be placed on that representation to suggest that it envisaged anything other than imposing obligation on the vendors to fix the problem, following which the balance of settlement funds would be released to the vendors.

[62] That correspondence received the following response, "we confirm our clients accept the proposal for the sum of $2,200 to be held in your trust account pending completion of installation of the log burner".

[63] Shortly after, Mr CY confirmed deposit of settlement funds, and his undertaking to "hold $2,200 in our trust account pending completion of the installation and issue of code compliance certificate for the log burner".

[64] Agreement had been reached that after settlement, Mr and Mrs TH would remain in the property as tenants.

[65] Matters were muddied by the fact that the purchasers wished to install a burner with a wetback facility at the property. It was acknowledged that the TH's obligations in regard to the purchase price of a replacement burner, extended only to meeting the cost of an equivalent burner to that which was in the home at the time of sale. Further issues arose as to whether the costs of installing the type of heater required by the purchasers, engaged additional expense as the heater needed to be relocated.

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[9] *Bhanabhai v Commissioner of Inland Revenue* [2007] 2 NZLR 478 at [42].

[66] Disagreement over those issues may have contributed to the delay in finalising the installation. Mr CY, when concluding the matter, advised that the plumbing bill rendered to Mr and Mrs TH, reflected the cost of installing a heater of similar specifications to that which had been in the property, and that no additional costs had been incurred. I accept his evidence on that point.

[67] But the undertaking provided by Mr CY was not an undertaking that allowed opportunity for him to release funds directly to his clients. The undertaking did not say that, and nor was that the intention expressed in the initial correspondence from Mr CY's office which laid the foundation for settlement being able to proceed on the basis of an undertaking being provided.

[68] That correspondence makes it clear that funds were held for the future release to Mr and Mrs TH. That is a quite different proposition from an undertaking that funds were held for the benefit of Mr CY's clients, and able to be released to them, once they had completed the necessary work.

[69] Mr CY makes complaint that Mr and Mrs TH were obstructive and failed to promptly attend to their obligations. That may or may not have been the case. It is evident that there was significant delay before the burner was installed and certified. It is also clear that the purchasers attended to that work, and understandable that they sought to be reimbursed from the funds held. Frustration with the delay in having the work completed may well have prompted the purchasers to attend to the work themselves after Mr and Mrs TH vacated the property.

[70] Ethics, Professional Responsibility and the Lawyer states:[10]

> That the duty to honour undertakings is strict means even when a lawyer erred or made an oversight, circumstances have changed radically, or for the lawyer to adhere to the undertaking will cause hardship, the lawyer must still adhere to the promise made.

It was not open to Mr CY to directly release funds to his clients, in the face of an undertaking provided to retain funds for purpose of eventual release to Mr and Mrs TH.

[71] That is not to say that Mr and Mrs TH were not required to promptly attend to their obligations to install and certify, but if they were remiss in attending to those obligations, Mr CY's clients had remedies available.

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[10] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [15.9.1].

[72] There was no evidence before the Committee, or before this Office to suggest that there had been an agreement reached to vary the undertaking to allow direct distribution to Mr CY's clients, and Mr CY does not advance that to be the case. He submits that the undertaking was an undertaking that was drafted with intention that he was free to release funds directly to his clients.

[73] Mr CY submits that his clients found Mr and Mrs TH difficult to deal with, but if the position was that his clients were able to install the burner and then receive reimbursement for costs incurred from funds held by their own lawyer, there would have been no impediment to them promptly attending to the installation. I accept that Mr CY advances as explanation for the delay in being able to finalise the installation, that Mr and Mrs TH remained in the property for a period of time as tenants, and the relationship between his clients and the THs deteriorated. That may have made it difficult to organise for the work to be done.

[74] Mr TH provided contribution to the purchase of the burner in August 2012. Mr CY advises that he intends to settle the plumber's account in April 2013.

[75] It is my view, having given careful consideration to the evidence, that:

(a) Vendor and purchaser reached agreement that the vendors would contribute to the cost of a replacement burner.

(b) An ability to reach early agreement on a replacement cost was complicated by the purchasers wish to replace the existing burner with a superior model.

(c) That left vendor and purchaser in a "negotiating mode" without certainty as to the amount to be paid by the vendor in compensation.

(d) The vendor and purchaser, independent of their lawyers, finalised an arrangement that the vendor would meet the cost of a replacement burner.

(e) It was at all times, recognised that the vendor would be required to meet the installation and compliance costs.

(f) Ascertaining an agreed figure for installation and compliance was complicated by the fact that council requirements prohibited the installation of a new burner in the existing site, and further complicated

by the purchaser's requirement to install a burner which had a wetback facility which required more comprehensive specifications for installation.

(g) It was intended that the vendors would meet the cost of installation and obtaining code compliance, and when having done so, would receive the balance of the settlement funds that had been retained by the purchaser's lawyer.

[76] Whilst it is to a degree speculative, I think it probable that uncertainty between the parties as to the extent of their respective obligations led to disagreement and delay, and an eventual decision taken by the purchasers to attend to the installation themselves rather than continue to wait on Mr and Mrs TH. I think it probable that Mr and Mrs TH placed reliance on their understanding that their obligation was limited to $2,200.

[77] This was an unsatisfactory situation.

[78] It would have been preferable at the outset if the obligations of the respective parties had been recorded in a more comprehensive agreed record of the arrangements. That could helpfully have recorded the arrangement in respect to the purchase of the burner, and imposed a time frame on the vendors for completion of the installation. The Committee noted that it was unfortunate that the undertaking did not detail a time frame for completing the installation, given that it was the responsibility of the vendor and "what might happen to those funds if the date were not achieved".

[79] Whilst there may have been disagreement between the parties as to the extent of their obligations, I do not consider that there was uncertainty as to who Mr CY was able to release funds held to.

[80] Mr CY elected to release despite having been put on notice that the TH's did not agree to him releasing funds in the manner as proposed. Despite being advised that Mr and Mrs TH did not agree to him paying the plumber's account, he proceeded to do so. He justified this approach by argument that he was doing no more than that which was contemplated by the undertaking, and taking steps entirely consistent with the undertaking.

[81] I consider that response to be unhelpful. When funds are being held pursuant to an undertaking, and objection is taken to releasing funds, presenting an ultimatum, which is what happened here, seems to be an unhelpful approach.

[82] Mr CY argues that payment of the plumber's account, and return of the balance of funds to the TH's achieved precisely the outcome that was intended, and I agree with him. But that was not what was contemplated by the undertaking, and was not what was intended. Mr CY's undertaking on settlement, and the TH's agreement to accept the undertaking, cannot be distanced from the context in which the undertaking was provided, and that was that the undertaking followed hard on the heels of representation from Mr CY's office that funds would be held on the basis of release to Mr and Mrs TH, once Mr and Mrs TH fulfilled their obligations.

[83] The consequence of Mr CY releasing funds to his clients in the face of opposition from Mr and Mrs TH, was that Mr and Mrs TH had their ability to challenge Mr CY's view of the undertaking compromised, at least to the extent that the funds which were being held were no longer available.

[84] Continuing disagreement between the parties over the question as to whether Mr CY was able to settle the plumber's account may likely have involved both parties in further inconvenience and expense, and prolonged wrangling over a relatively modest sum, but the desirability of achieving an end to the dispute, does not override Mr CY's obligation to abide by the undertaking he had provided.

[85] I do not consider that the undertaking allowed opportunity to Mr CY to release funds held directly to his clients, and that interpretation does not accord with the correspondence from Mr CY's office which laid the foundation for the undertaking. That correspondence clearly states that funds were to be held by Mr CY, "for release to you on issue of the code compliance certificate". That does not contemplate, as Mr CY suggests, that he was authorised to release funds directly to his client.

[86] Mr CY's decision to release funds to his clients breached the undertaking provided.

[87] Mr and Mrs TH seek by way of remedy, reimbursement of funds held by Mr CY. I do not propose to make that order. To do so would create potential for an unsatisfactory outcome for Mr CY's clients. I am satisfied that agreement was reached prior to settlement that Mr and Mrs TH would meet the cost of purchase of a new woodburner, and that they were to be responsible for costs of installation and certification.

[88] I do not accept their submission that it was intended that their liability would be limited to $2,200. They had contracted to sell a property with a working burner. On discovery that they were unable to meet that obligation, they were required to put the

matter right. That necessarily involved meeting the cost of purchase and installation of a replacement burner. Nor was it the case that they were unaware as to the likely costs involved in replacing the defective burner.

[89] Whilst I am not prepared to make an order in the nature as proposed by Mr and Mrs TH (that would present as an unsatisfactory response to what I have concluded was the extent of the obligations imposed by the undertaking) I have given consideration as to whether it would be appropriate to make an order directing that Mr CY be required to restore funds paid out to his trust account, I have determined that it is not appropriate to do so. I am satisfied that the payment made satisfied an obligation that Mr and Mrs TH were required to meet.

[90] But the focus of this review is sharply on the undertaking provided, and assessment as to whether Mr CY breached his undertaking. For reasons outlined I consider that he did. The conclusion warrants a finding of unsatisfactory conduct under s 12(c) of the Lawyers and Conveyancers Act 2006.

[91] Any breach of any undertaking is a very serious matter. In general where an undertaking is unconditional and the lawyer has simply failed to honour it, that factor in itself is enough to warrant (although it does not necessarily require) a disciplinary response.[11]

[92] I am satisfied after reviewing all of the material, that the complaint has been made out and that Mr CY has breached rule 10.3. He may have intended his undertaking to allow him opportunity to disperse funds held directly to his clients, but his written words did not express that intention.

[93] Unsatisfactory conduct, as defined in s 12 of the Act, includes conduct consisting of a contravention of any practice rules made under the Act (s 12(c)).

[94] I now turn to consider the issue of penalty. I am mindful of the Court of Appeal's comments in *W v Auckland Standards Committee 3 of NZLS* to the effect that there may be rare cases where a breach of an undertaking may not warrant some form of disciplinary action, but that usually disciplinary action will be justified at a level appropriate to the circumstances.[12]

[95] In considering the issue of appropriate penalty I take into account the following considerations:

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[11] Above n 5, at [50].
[12] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401, [2012] NZAR 1071 at [48].

(a) The importance of undertakings for the profession and members of the public.

(b) The context in which the undertaking was provided.

(c) The placing of Mr CY on notice that objection was taken to him releasing funds in the manner proposed.

(d) The achievement, through release of the funds, of the objective agreed at commencement.

[96] I am not, when considering the question of penalty, oblivious to the fact that the circumstances which prompted Mr CY to pay the funds directly to his clients were likely driven by his clients' frustration at the delay in having the installation and compliance issues resolved as a result of the apparent confusion between the vendor and purchaser as to their post settlement obligations, and complicated by the arrangements that the vendors and purchasers had entered into independently of their lawyers.

[97] That being said, a breach of an undertaking is a serious matter. The context in which the undertaking was provided made clear that funds were held for release to Mr and Mrs TH. Argument that Mr and Mrs TH had not kept to their side of the bargain did not provide Mr CY with opportunity to place an interpretation on the undertaking which was not intended when the undertaking was given.

[98] I consider that a finding of unsatisfactory conduct without imposition of further penalty, presents as an adequate and appropriate disciplinary response in the circumstances.

Costs

[99] In the light of an adverse finding having been made. It is appropriate the practitioner contribute to the costs of this review. Taking into account the Costs Orders Guidelines of this Office, the practitioner is ordered to contribute the sum of $1,200 towards the costs of the review.

Decision

[100] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed. The practitioner is found to be guilty of unsatisfactory conduct pursuant to s 12(c) of the Act.

Orders

[101] The practitioner is ordered to pay $1,200 costs, this sum is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 14th day of October 2016

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R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr and Mrs TH as the Applicants
Mr CY as the Respondent
Mr WS as a related person as per s 213
Mr ZA as a related person as per s 213
Mr QL as a related person as per s 213
Ms DN as a related person as per s 213
[Area] Standards Committee
The New Zealand Law Society