

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [City] Standards Committee

BETWEEN

GBA

Applicant

AND

HCB

Respondent

DECISION

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

Introduction

[1] Mr GBA has applied for a review of a decision by the [City] Standards Committee which made a finding of unsatisfactory conduct against him in respect of Mr HCB's complaint concerning his conduct.

[2] Mr GBA acted for the vendor of a residential property. Mr HCB acted for the purchaser.

[3] The agreed settlement date for the transaction was 5 March 2015. The mode of settlement was by "remote settlement" in respect of which Mr GBA and Mr HCB had exchanged undertakings early in the afternoon. Mr GBA undertook to Mr HCB that he would release the transfer upon receipt of Mr HCB's undertaking that he had paid the settlement moneys into Mr GBA's trust account.

[4] Because Mr GBA was attending to other client work that afternoon he did not, following receipt of Mr HCB's undertaking, release the transfer to Mr HCB until the following morning, 6 March 2015.

The complaint

[5] Mr HCB lodged a complaint with the New Zealand Law Society Complaints Service (the Complaints Service) on 6 March 2015. He alleges that Mr GBA breached his settlement undertaking by not releasing the transfer on the settlement date, 5 March 2015.

Standards Committee decision

[6] The Standards Committee determined, pursuant to s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act) that Mr GBA had breached his undertaking which constituted unsatisfactory conduct under sections 12(a) and (b) of the Act.¹ In reaching that decision the Committee determined that:

- (a) Mr GBA had contravened rule 10.3 of the Lawyers: Conduct and Client Care Rules 2008 (the rules).²
- (b) It was Mr GBA's responsibility to ensure that his undertaking "could and would be fulfilled, regardless of the circumstances".
- (c) Lawyers' undertakings "are an integral part of conveyancing transactions, with most dealings now being registered electronically through Landonline".
- (d) Purchasers' lawyers must be able to "have confidence that they could rely on an undertaking given by the vendor's lawyer".

Application for review

[7] Mr GBA filed an application for review on 24 June 2015. The outcome he seeks is a reversal of the Standards Committee's decision, and that the orders made by the Committee, namely, a fine and costs, be quashed.

[8] In support of his application he submits that:

- (a) The Committee was mistaken in stating that he had admitted that he had made a technical breach of his undertaking.
- (b) On the afternoon of the settlement date, 5 March 2015, his attention was on other client work from "2.00pm until around 4.45pm".

¹ Standards Committee decision (3 June 2015 – not 2014 as stated in the decision).

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

- (c) He is the only “conveyancing professional” in his firm “who has the authority to release e-dealings”.
- (d) As soon as “it was practicable” he instructed his Landonline agents “to release the e-dealing”. Because “the working day was coming to an end” they could not release the e-dealing that day and did so at 9.06am the next day.
- (e) Although it was not common practice to do so, his undertaking omitted the word “immediately” before the words “release the transfer”.
- (f) Mr HCB had not queried the wording of Mr GBA’s undertaking before he paid the settlement moneys into Mr GBA’s trust account.
- (g) His apology to Mr HCB was not an “admission of guilt” but a “professional courtesy”.
- (h) Since then he has implemented “better processes and ... polices that will ensure that [he is] available to attend to matters in relation to property settlement[s]”.

Mr HCB’s response

[9] Mr HCB was invited to comment on Mr GBA’s review application. He submits that:

- (a) Lawyers who practice conveyancing must honour their undertakings “without delay”.
- (b) A meeting with a client is not a sufficient reason to excuse the lawyer from fulfilling his or her obligations as stated in the undertaking provided.
- (c) Confidence by lawyers in the settlement and completion of conveyancing transactions was dependent on lawyers honouring their undertakings.
- (d) The Committee’s finding served as a deterrent to lawyers who practice conveyancing.

Review on the papers

[10] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[11] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[12] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:³

... 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.

[13] More recently, the High Court has described a review by this Office in the following way:⁴

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

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[14] 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.

Analysis

[15] The issue is whether by not releasing the transfer to Mr HCB on the settlement date of 5 March 2015, but the next morning on 6 March, that Mr GBA breached his undertaking to Mr HCB. If so, whether this constitutes unsatisfactory conduct.

Agreement for sale and purchase

[16] The agreement for sale and purchase document adopted by Mr GBA's vendor client and Mr HCB's purchaser client was the Real Estate Institute of New Zealand Auckland District Law Society form.

[17] The mode of settlement provided for under that agreement was "remote settlement", namely:⁵

the purchaser's lawyer paying the moneys due and payable on the settlement date directly into the trust account of the vendor's lawyer, in consideration of the vendor agreeing to meet the vendor's obligations under subclause 3.8(2), pursuant to the protocol for remote settlement recommended in the PLS Guidelines.

[18] The agreement provides that on payment of the balance of the purchase price by the purchaser that:

[t]he vendor's lawyer shall immediately thereafter: (a) release or procure the release of the transfer instrument ... so that the purchaser's lawyer can then submit them as soon as possible for registration.

Property Law Section Guidelines

[19] The Property Law Section (the guidelines) "reflect recommended practice for residential property transactions and for e-dealings", and are subject to the Lawyers: Conduct and Client Care Rules.⁶

⁵ Clause 1.0(18).

[20] The guidelines recommend the form of the undertakings to be provided by the vendor's lawyer and the purchaser's lawyer respectively. The vendor's lawyer's undertaking includes the obligation that "on receipt of confirmation of payment of the settlement funds" the vendor's lawyer will "immediately release the instruments (subject only to the qualification in paragraph (iv))", namely, "where circumstances beyond your control result in a delay".

[21] The e-dealing section of the guidelines stress that "lawyers need to have in place protocols governing their staff relating to authorisation to release instruments and to submit e-dealings", and re-emphasise that the "release should occur immediately after settlement in accordance with the undertaking given" without qualification unless "delay through circumstances entirely beyond the control of the vendor's lawyer".

Lawyers: Conduct and Client Care Rules 2008

[22] The guidelines also refer to rule 10.3 which provides that a lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice.

[23] Where, as in this case, an undertaking has been provided by an employee member of the firm, rule 10.3.1 states that:

This rule applies whether the undertaking is given by the lawyer personally or by any other member of the lawyer's practice. This rule applies unless the lawyer giving the undertaking makes it clear that the undertaking is given on behalf of a client and that the lawyer is not personally responsible for its performance.

Lawyers' undertakings

[24] The Courts have an inherent jurisdiction in respect of the conduct of lawyers who are officers of the Court.⁷ Because undertakings are held out by the legal profession "as having an elevated and special status, it is necessary for the profession to scrupulously honour them".⁸

⁶ New Zealand Law Society Property Transactions and E-dealings Practice Guidelines (July 2012).

⁷ Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibility and the Lawyer* 3rd edition, LexisNexis, Wellington, 2016) at 410.

⁸ *Auckland Standards Committee 3 of New Zealand Law Society v W* [2011] 3 NZLR 117 at [67].

[25] Importantly:

- (a) Care is required before providing an undertaking.⁹ So too a lawyer proposing to rely on an undertaking is required to ensure that the undertaking is capable of performance by the lawyer giving it.¹⁰
- (b) An undertaking will be construed according to its “substance and intention” and not in a “technical legal manner”.¹¹
- (c) Any “ambiguity” will generally be construed in favour of the recipient.¹²
- (d) Strict adherence is required.
- (e) The context in which the undertaking has been given must be considered objectively.¹³

Mr GBA’s undertaking

[26] The events which took place on 5 March, and the following day concerning settlement were:

- (a) At 12.13pm on 5 March Mr GBA’s law clerk, Mr IFC, sent Mr GBA’s undertaking to Mr HCB:¹⁴

We undertake that we have certified and signed the Transfer in the Landonline Workspace for e-dealing number []

On receipt of your confirmation that the settlement moneys have been lodged to the credit of our Trust Account in accordance with our settlement requirements we undertake that we will:

- 1. Release the Transfer from Landonline workspace into your control;
- 2. Not to attempt to withdraw the release of the Transfer or attempt any alteration of such instrument following settlement or release; and
- 3. [To] instruct the agent to release the keys to the purchaser.

- (b) Mr HCB provided his undertaking at 2.22pm that he had paid the settlement moneys by electronic transfer by same day cleared funds which he would not reverse.¹⁵

⁹ *Auckland Standards Committee v Stirling* [2010] NZLCDT 4.

¹⁰ GE Dal Pont *Lawyers’ Professional Responsibility* (6th ed, 2017, Thomson Reuters) at [22.70].

¹¹ *Auckland Standards Committee 3 of New Zealand Law Society v W (supra)* at [41], and at [60].

¹² At [42] and [60].

¹³ At [63].

¹⁴ Email from IFC (for GBA) to HCB (5 March 2015 at 12.13pm).

- (c) At 5.01pm Mr IFC authorised Mr GBA's Landonline agents to release the transfer to Mr HCB.¹⁶ He informed Mr HCB at 5.16pm and invited Mr HCB to phone Mr GBA.¹⁷
- (d) Mr HCB responded at 5.19pm pointing out that the transfer had not been released, and requested Mr IFC to "follow up to honour your undertakings".¹⁸
- (e) Eight minutes later at 5.27pm Mr HCB requested the "immediate release" of the transfer.¹⁹
- (f) The next day, on 6 March 2015 at 9.44am, Mr IFC informed Mr HCB that Mr GBA's agents had released the transfer to Mr HCB "in accordance with our instructions the previous day".²⁰

[27] Circumstances similar to those in this review were considered in a previous decision of this Office. In that matter, the vendor's lawyer, also a sole practitioner, undertook to release the transfer "immediately" following receipt of the settlement moneys from the purchaser's lawyer. Because the vendor's lawyer had been in meetings on the settlement date, the transfer had not been released until 4.05pm, where the cut off time for registration was 4.00pm.²¹ The Standards Committee determined that "an undertaking to attend to release of the transfer immediately needed to be interpreted in a reasonable manner" and that because the lawyer had released the dealing "as soon as she was in a position to do so" there was no breach of the undertaking.²²

[28] On review, the LCRO observed that the guidelines require the immediate release of the dealing following settlement, and found that the lawyer had not done so. The LCRO stated that the lawyer ought to have organised her day to ensure that obligations such as this are fulfilled. Whilst confirming the exercise by the Standards Committee of its discretion to take no further action in those particular circumstances, the LCRO acknowledged that the applicant's lawyer "was right to express concern that the settlement process could be compromised by lawyers who do not take care to organise matters to enable them to attend to their obligations".²³

¹⁵ Email HCB to IFC (for GBA) (5 March 2015 at 2.22pm).

¹⁶ Email IFC (for GBA) to Landfonet (5 March 2015 at 5.01pm).

¹⁷ Email IFC (for GBA) to HCB (5 March 2015 at 5.16pm).

¹⁸ Email HCB to IFC (for GBA) (5 March 2015 at 5.19pm).

¹⁹ Email HCB to IFC (for GBA) (5 March 2015 at 5.27pm).

²⁰ Email IFC (for GBA) to HCB (6 March 2015 at 9.44am).

²¹ *FY v UM* LCRO 239/2010 (October 2011).

²² At [8].

²³ At [26].

[29] Mr GBA undertook to Mr HCB that he would release the transfer on receipt of confirmation from Mr HCB that he had paid the settlement moneys into Mr GBA's trust account. Mr GBA's undertaking does not strictly follow the recommended form of undertaking in the guidelines. He omitted to state that he would release the transfer "immediately". He did not include the qualification that provides for delay resulting from "circumstances beyond [his] control".²⁴

[30] Mr GBA submits that the omission of the word "immediately" affords him some flexibility or leeway in complying with his undertaking. He argues that he did not include a "specific stipulation of when this will take place".

[31] I am not persuaded by that approach for the following reasons:

- (a) The Agreement for Sale and Purchase, which incorporates the settlement protocols set out in the Guidelines, states that on the payment of the balance of the purchase price the vendor's lawyer "shall immediately thereafter: (a) release or procure the release of the transfer instrument so that the purchaser's lawyer can then submit them for registration".²⁵
- (b) Lawyers who practise conveyancing must be able to rely on the obligations contained in settlement undertakings being promptly carried out. They depend on each other to do so.
- (c) To that end the Guidelines place a high value on the importance of undertakings being strictly observed.
- (d) Failure to do so could lead to disruption particularly where there is a chain of transactions with settlement of each transaction dependent on others.
- (e) The undertaking must be construed according to its substance and intention, and not in a technical legal manner such as that argued by Mr GBA. Any ambiguity will be construed in favour of the recipient of the undertaking, Mr HCB.
- (f) Mr GBA's unavailability on the afternoon of 5 March to ensure that the transfer was released that day would not qualify as "circumstances

²⁴ Guidelines at 6.6(d)(iv).

²⁵ Clause 3.8(2)(a).

beyond his control” that resulted in his unavailability to attend to that obligation.

Conclusion

[32] For these reasons I am not minded to overturn the Standards Committee’s finding that Mr GBA breached his undertaking and contravened rule 10.3.

[33] The members of the Standards Committee include practising lawyers who in a practical sense are well aware of the importance of lawyers honouring their undertakings in the context of remote settlements and e-dealings. The Committee decided that Mr GBA’s inattention to his obligations contained in his undertaking warranted a disciplinary response albeit at the lower end of the scale.

[34] The Committee found that Mr GBA’s conduct constituted unsatisfactory conduct under sections 12(a) and (b). In my view section 12(c), which includes a contravention of the practice rules, is also applicable.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 29th day of June 2017

B A Galloway
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 GBA as the Applicant
Mr HCB as the Respondent
[City] Standards Committee
The New Zealand Law Society