LCRO 131/2017

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	**GR** Applicant
AND	**[AREA] STANDARDS COMMITTEE** Respondent

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

DECISION

Introduction

[1] Mr GR has applied for a review of a decision by the [Area] Standards Committee which determined an own motion enquiry on the basis that there had been unsatisfactory conduct on the part of Mr GR pursuant to s 12(a) and (c) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Mr GR's firm, GR Lawyers (the firm), acted for the five owners of [Address] (the property) on the sale of the property. The owners, were AB and CB (as to ½ share), DH (as to ¼ share), ES (as to $^1/_8$ share) and BN (as to $^1/_8$ share). Conduct of the file was delegated to Mr N (solicitor) and DZ, a legal assistant.

[3] DH's ¼ share was the subject of a notice of claim to an interest pursuant to s 42 of the Property (Relationships) Act 1976 registered in favour of DS. Ms DS was

represented by Mr U at DH Law. The notice of claim presented an obstacle to settlement of the sale of the property.

[4] On behalf of Ms DS, Mr U agreed to allow settlement to proceed on the basis of an exchange of undertakings offered to him by Mr N in the following terms:

> [Mr U's] client will remove the notice of claim on the basis that we undertake to hold DH's share of the sale proceeds in our trust account until an agreement can be reached between the parties (or a Court order is issued).

[5] Mr U removed the notice of claim.

[6] Settlement took place in April 2015, but the five owners were unable to agree on how the proceeds should be divided between them. DZ confirmed to Mr U that the firm held a balance of $372,742.05, that legal fees may be deducted, and that the firm would advise what the value of Mr DH's share was as soon as the five owners reached agreement.

[7] The five owners reached agreement some time later, and, without advising Mr U what the value of Mr DH's share was, on 6 October 2015, Mr GR's firm paid $72,500 to Mr DH.

[8] On 12 October 2015, Mr U wrote to the firm saying he understood the five owners had reached agreement. He requested confirmation of the exact amount of Mr DH's share, and that the firm was still holding that amount. Mr U said Ms DS did not agree to any deduction from Mr DH's share.

[9] After a brief period of confusion because Mr GR was not aware of the undertaking, Mr GR confirmed to Mr U that Mr DH's share had been paid out of his firm's trust account without reference to the undertaking. However, Mr GR immediately told Mr U "you may treat it as if we were holding the funds so that no undertaking has been breached. We will have to recover that from Mr DH later". There followed a discussion about the extent of Mr GR's potential liability to Ms DS.

Own motion enquiry

[10] On 14 October 2016, Mr U wrote to the New Zealand Law Society (NZLS) making a confidential report pursuant to rr 2.8 and 2.9 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). Mr U agreed to the report being disclosed to Mr GR, and the Committee opened an enquiry of its own motion.

[11] The Committee sent Mr U's letter and its attachments to Mr GR, asked him whether a copy of the undertaking had been on the file when the firm had paid money to Mr DH, and invited submissions on whether:

(a) he had failed to honour an undertaking;

(b) his conduct amounted to unsatisfactory conduct pursuant to s 12 of the Act; and

(c) it would be appropriate for the Committee to exercise its discretion to take no further action pursuant to s 138(2) of the Act.

[12] Mr GR indicated he intended to defend the matter, and provided further information. He said that in April and May 2016 respectively, DZ and Mr N had left the firm and gone overseas.

[13] Mr GR says he was informed that the five owners had reached agreement as to their respective shares and that the funds could be released to each of them.

[14] He confirms he did not know there was an undertaking to Ms DS in place. He says he released the entire funds in accordance with the five owners' agreement, and acknowledges that was a mistake.

[15] Mr GR also confirmed that he would pay Ms DS her share in accordance with the undertaking.

[16] Mr GR attached copies of various documents, including correspondence:

(a) from Mr DH's lawyer, dated 6 October 2015, requesting the release of $72,500 from the trust account in accordance with an agreement between the owners; and

(b) to Mr DH's lawyer, in which Mr GR requested repayment of the money paid to Mr DH.

[17] Mr GR confirmed that when Mr U raised the matter with him, he had not been aware of the undertaking or the notice of claim, but he did not deny their existence, and says once he became aware of the mistake he acted appropriately. He explained that he had not reviewed the sale file because he understood that part had been finalised, and he was not dealing with it. His understanding was that the only matter remaining was for the five owners' respective shares to be determined so he could distribute the sale proceeds accordingly, which he did.

[18] The Committee invited Mr GR to address any matters of fact or law he considered should be taken into account, whether charges might be laid to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, publication and consequential orders.

[19] Mr GR confirmed it was a genuine mistake on his part in circumstances where he was not aware of the undertaking and he immediately accepted responsibility for honouring the undertaking.

[20] The Committee considered all of the materials available, and concluded that Mr GR had failed to honour the undertaking, in breach of r 10.3 of the Rules, and his subsequent actions did not cure the breach. The Committee also considered Mr GR's failure to check the file:

> evidenced sloppy basic legal practices and was conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[21] The Committee determined there had been unsatisfactory conduct on the part of Mr GR, pursuant to s 12(a) and (c) of the Act.

[22] The Committee recognised as mitigation that Mr GR had taken steps on discovering the mistake, and ordered him to pay a $4,000 fine and $1,000 costs to the NZLS.

Application for Review

[23] Mr GR has applied for a review. He contends:

(a) The decision is not correct, as it was a genuine mistake and the undertaking will be honoured out of his own funds, so that there was no breach of the undertaking.

(b) Even if there was a breach, in the circumstances the penalty is too severe, and does not appear fair and justifiable.

(c) Even if there was a breach, in the circumstances it does not justify publication of the determination.

[24] Mr GR would like the decision modified or reversed.

Review Hearing

[25] Mr GR attended a review hearing by telephone on 12 September 2017 then filed submissions. The Committee did not wish to participate in the review, and this review has been determined without further input from the Committee.

Nature and Scope of Review

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

> [T]he 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.

[27] More recently, the High Court has described a review by this Office as follows:[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.

[28] Given the High Court's 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.

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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].

Discussion

[29] Mr GR says the Committee's decision is incorrect in two specific respects: first because he has said he will honour the undertaking, and second, because his mistake in paying the money was genuine.

Honouring the undertaking

[30] Rule 10.3 of the Rules says:

> A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice.

[31] An undertaking is a promise to do something, or cause something to be done, or to refrain from doing something. What is being undertaken must be clearly stated and must have a discernible timeframe for its performance. Where there is ambiguity, there is scope for undertakings to be read sensibly and in light of the context in which they are given. A court will not usually imply terms or read down an unqualified undertaking. If an undertaking is ambiguous, any ambiguity would generally be construed in favour of the recipient, in this case Ms DS.[3]

[32] Mr GR's part of the undertaking was:

> … to hold DH's share of the sale proceeds in [the firm's] trust account until an agreement can be reached between the parties (or a Court order is issued).

[33] Mr GR says there is no breach of the undertaking because he will honour it. I accept that Mr GR genuinely holds that belief and fully intends to honour the undertaking. However, his contention that he did not breach the undertaking is not accepted as correct. As neither of the two events that authorise him to release the funds has occurred, Mr GR is bound to a continuing obligation he can no longer fulfil.

[34] Mr GR's argument is that he can substitute his money for Mr DH's share of the sale proceeds thereby honouring the undertaking. While his prompt acknowledgment of the need to provide Ms DS with some security warrants recognition, the substitution argument relies on an incomplete analysis of the benefits the undertaking had for Ms DS. One of the benefits to Ms DS was preservation of the status quo, which Mr U says improved Ms DS's negotiating position with Mr DH. Mr GR upset the status quo. He deprived Ms DS of that benefit, and imposed an added burden on her by allowing Mr DH immediate use of all the money.

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[3] David Webb, Kathryn Dalziel and Kerry Cook Ethics, Professional Responsibility and the Lawyer (3rd ed, LexisNexis, Wellington, 2016) at [15.9].

[35] Providing security is better than nothing, but is not sufficient to honour the undertaking. The apparent disadvantages, both strategically and financially, appear to fall only on Ms DS. Mr GR's failure to honour his undertaking deprived her of at least some of the benefits associated with the undertaking.

[36] Mr GR's conduct in not checking the sale file was, as the Committee put it, "sloppy". It was conduct which occurred at a time Mr GR was providing regulated services. It fell short of the standard of diligence that a member of the public is entitled to expect of a reasonably competent lawyer. While it is accepted that Mr GR's mistake in paying out the money was genuine, Mr GR could easily have implemented a system which would have prevented the undertaking from being overlooked. Mr GR's failure to honour the undertaking constitutes a contravention of rule 10.3. Mr GR's conduct was therefore unsatisfactory within the definitions set out in s 12(a) and (c) of the Act.

[37] The Committee's decision is therefore confirmed.

Consequential Orders – s 156

[38] Mr GR protests the imposition of a fine of $4,000 saying it is too severe, and does not appear fair and justifiable. His protest is based on his offer to ensure Ms DS receives whatever her relationship property entitlement turns out to be.

[39] The uncertain consequences of the failure to honour the undertaking make the extent of Mr GR's potential liability hard to predict. Compensation is therefore not appropriate, although some kind of penalty is warranted.

[40] The functions of penalty in the disciplinary context are referred to in *Wislang v Medical Council of New Zealand*[4] as:

(a) Punishing the practitioner;

(b) A deterrent to other practitioners;

(c) To reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[41] The starting points for penalty are the gravity of the misconduct and culpability of the practitioner, with the various mitigating and aggravating features being taken into account when fixing penalty. Acknowledgement of error and acceptance of responsibility are matters for mitigation.

[4] *Wislang v Medical Council of New Zealand* [2002] NZCA 39; [2002] NZAR 573 (CA).

[42] A fine is a penalty. The maximum fine available under the Act is $15,000. The Committee ordered Mr GR to pay a fine of $4,000 which is well short of the maximum, but still a substantial sum of money.

[43] Mr GR's failure to check the file was not deliberate, but was a readily avoidable error. Mr GR accepts only he is culpable, and places no responsibility on either Mr N or DZ. Mr GR responded appropriately by acknowledging the error, accepting responsibility for it and undertaking to pay Ms DS her share. However, as Mr U observed, Mr GR cannot restore Ms DS to the position she would have been in if he had honoured the undertaking.

[44] The fine of $4,000 adequately fulfils the three functions identified in *Wislang*; punishment, deterrence and the reflection of public and professional opprobrium. It is well short of the maximum. It is a justifiable and justified amount. Aside from costs, there is no other financial consequence to Mr GR that results from the disciplinary process. The amount of the fine is not unfair. There is no good reason to reduce or increase it. It is therefore confirmed, as is the order that Mr GR pay costs of $1,000 to the Standards Committee. There is no compelling reason to impose any other orders pursuant to s 156.

[45] The penalty aspect of the Committee's decision is confirmed.

Costs on review – s 210

[46] Section 210 of the Act allows a LCRO discretion to order costs on review. The LCRO's Costs Orders Guidelines recommend that where a practitioner applies for a review, and the application for review is unsuccessful, the practitioner should contribute to the costs of the review.

[47] Mr GR's application for review did not succeed. At his request, he attended a hearing in person. There is no reason not to make a costs order. As this was a straight forward review, the Guidelines provide for costs of $1,200. Mr GR is ordered to pay costs on review of $1,200.

Publication

[48] The Committee decided to publish its decision for educative purposes, having removed any details that identify any of the parties involved. There was no suggestion that Mr GR or any of the other parties involved should be identified.

[49] This Office also has the power to direct publication of any decision pursuant to s 206(4) of the Act, if publication is necessary or desirable in the public interest.

[50] I agree with the Committee. There is educative value in publishing a decision such as this, although there is no public protection purpose to be served by identifying Mr GR.

[51] Undertakings are fundamental to the practice of law. There are excellent reasons for principals to limit who can give undertakings, to closely monitor undertakings that are given, and to be able to ensure they are honoured.

[52] In the circumstances, publication is directed pursuant to s 206(4) of the Act with all identifying features removed.

Decision

[53] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision and orders of the Standards Committee are confirmed.

[54] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006, Mr GR is ordered to pay costs of $1,200 on review by 3 November 2017.

[55] Pursuant to s 215 of the Lawyers and Conveyancers Act 2006, the costs orders may be enforced in the District Court.

[56] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, this decision is to be published with all features identifying any party removed.

DATED this 6th day of October 2017

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D Thresher
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 GR as the Applicant
[Area] Standards Committee as the Respondent
New Zealand Law Society