LCRO 22/10

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 3
BETWEEN	**MR GLAMORGAN** of Auckland Applicant
And	**MR DALBEATTIE** of North Island Respondent

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

DECISION

[1] The Applicant is a lawyer who was found by the Auckland Standards Committee to have had breached rule 10.3 of the Rules of Conduct and Client Care, which breach amounted to unsatisfactory conduct on his part. The Committee imposed a penalty of $10,000 and ordered publication of his name. The Applicant sought a review of the Committee's decision on the substantive complaint and also in respect of the orders.

Background

[2] The Applicant acted for XX, a finance company which had a term loan agreement with H Ltd. The Respondent was a director of H Ltd which, in the course of refinancing its loans with XX, was required to transfer the sum of $45,000 into the Applicant's trust account. H Ltd made the transfer on the basis of the following undertaking given by the Applicant:

> "We undertake to hold the sum of $45,000 in trust pending settlement of repayment of our client's loan and the new loan advanced to G... Trust by 14 February 2009.

> If settlement is not completed by 13 February 2009, the funds held in trust will be released back to your client."

[3] Settlement was not completed by 13 February 2009 and H Ltd's lawyer asked for repayment of the $45,000 pursuant to the undertaking. The Applicant did not return the money immediately, but he informed his client (XX) that the refinancing would not proceed. XX then wrote to H Ltd's lawyer to advise that it intended to exercise its power of attorney and requested the lawyer to obtain the authority of H Ltd to pay the $45,000 to XX. The lawyer acting for H Ltd repeated his demand to the Applicant for the money to be returned pursuant to the undertaking, but this was not done. XX, acting on the authority of its power of attorney, instructed the Applicant to pay to it the $45,000 which the Applicant did.

[4] H Ltd subsequently took proceedings in relation to matter. The Court found the Applicant to be in breach of its undertaking and found in favour of H Ltd. The Applicant intended to lodge an appeal against that finding but meanwhile a settlement agreement was reached between XX and the receivers of H Ltd, making the Applicant's appeal redundant.

[5] The Respondent then filed a complaint with the New Zealand Law Society against the Applicant in respect of the court's finding that the Applicant had breached his professional obligation with regard to the undertaking. The Auckland Standards Committee 3 found that the applicant had breached Rule 10.3 of the Rules of Conduct and Client Care and that this breach amounted to unsatisfactory conduct on his part, and imposed a $10,000 penalty and ordered the publication of the Applicant's name.

[6] The review hearing was attended by the Applicant and his Counsel, Mr YY (Counsel) who made a number of submissions on the decision and also in relation to the orders. Having acknowledged the wide scope of the review powers of this office, he submitted that the review should be confined to those areas sought by the Applicant and not include any matter in respect of which that the Committee had determined to take no further action. Having reviewed the materials I see no reason for extending this review beyond the grounds included in the review application.

The substantive decision

[7] Counsel submitted that the action taken by the Applicant should be viewed in the context of commercial reality. The essence of the submission was that the Applicant

had given the undertaking to H Ltd (and not to the Respondent or his lawyer), that undertakings can be amended by consent of the beneficiary of the undertaking (H Ltd) and that an amendment was made by XX acting under a Power of Attorney granted by H Ltd. Counsel queried whether the Committee had viewed the undertaking as one that had been given to the Respondent rather than to H Ltd

[8] Counsel stated that the circumstances of the case were most unusual and that he was unaware of any previous similar situation. He submitted that the Applicant should have been entitled to treat the instruction from XX, given under an irrevocable power of attorney granted by H Ltd, as if it were an instruction given by H Ltd. He argued that undertakings are able to be withdrawn or modified by agreement, and submitted that the undertaking in this case had been modified pursuant to the power of attorney. He suggested that the Applicant had not acted unreasonably by following a lawful direction by H Ltd through its attorney, XX.

[9] Counsel referred to the 'two stepped approach' taken in disciplinary cases, the first step being an enquiry into whether there had been a departure from acceptable standards, and second whether the departure was significant enough to warrant sanction. He objected to what he saw as the Standards Committee having proceeded directly from the first step (finding a breach of Rule 10.3) to the second (an adverse disciplinary finding leading to sanctions) without considering whether the conduct reached the threshold for sanctions to follow. Counsel directed me to several cases where courts agreed that the issue of conduct was a separate matter to that of threshold, and that a finding of 'conduct unbecoming' was not required in every case where error is shown.

[10] Counsel was particularly concerned that the Committee may not have considered steps taken by the Applicant to obtain collegial advice (which he had relied on) before acting on the 'amended' undertaking. Counsel submitted that the Applicant's conduct did not show a deliberate departure from acceptable standards and that the overall circumstances did not warrant an adverse finding by the Committee. He further submitted that the Committee had been influenced by what it had understood was the Applicant's personal interest in XX, and he was critical of the Committee's failure to have informed the Applicant that this was a relevant factor, thus denying him an opportunity to clarify any such concerns.

[11] The conduct in issue occurred under the Lawyers and Conveyancers Act 2006 which sets a significantly lower threshold for an adverse finding against a lawyer than did the former Law Practitioners Act 1982. However, both Acts treated the breach by a lawyer of an undertaking as a serious matter. The standards applicable to the conduct tin this case are contained in the Lawyers and Conveyancers Act 2006, in particular in section 7 (which defines 'misconduct') and section 12 (which defines 'unsatisfactory conduct'), and also in the Lawyers; Rules of Conduct and Client Care. Rule 10.3 of the Rules provide that *"A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice.*"

[12] Any breach of an 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 a disciplinary response*. Bently* v Gaisford [1997] QB 627 (CA) at p 648; *Commissioner of Inland Revenue v Bhanabhai* [2007]2 NZLR 478.

[13] In considering the complaint the Committee supported the view taken by the Court which had concluded that the whole purpose of the undertaking would be defeated if the $45,000 was to be applied in reduction of the advance from XX, which would be the practical result of XX's use of the power of attorney. The Committee recorded that it had given 'due consideration' to the judgment of Associate Judge R as well as the material before it, and that it was of the view that there had been a clear breach of undertaking by the Applicant.

[14] It was not unreasonable in my view that the Standards Committee should have given consideration to the comments of Associate Judge R. Furthermore, there is nothing to suggest that the Committee did not give due consideration to the Applicant's submissions concerning the Power of Attorney, or that it did not independently consider the conduct in the context of disciplinary proceedings. Neither the Court nor the Standards Committee accepted that the undertaking could be altered in the way that the Applicant suggested and the reasons given, which recognised that *"undertaking were the cornerstone of legal practice*" concluded that any alternative view would undermine the integrity of the legal profession.

[15] In my view the Standards Committee was entitled, on the basis of the information before it, to conclude that the Applicant was in breach of his undertaking in breach of rule 10.3. In considering Counsel's submission concerning whether an adverse disciplinary finding should then automatically follow, I note that section 138(2) of the

Lawyers and Conveyancers Act confers a discretion upon a Standards Committee to take no further action on a complaint if it appears to the Committee, having regard to all of the circumstances, that further actions is unnecessary or inappropriate. Clearly in the present case the Committee decided that it was not appropriate to exercise that discretion and in the circumstances this cannot be considered unreasonable. Moreover, a breach of any of the Rules contained in the Code is, by definition, unsatisfactory conduct. Section 12 of the Lawyers and Conveyancers Act 2006 defines 'unsatisfactory conduct' (at subsection (c)) as *"conduct consisting of a contravention of this Act, or of any regulation will practice rules made under this act that apply to the lawyer or incorporation law firms, ..."*. Given the conclusion that there had been a breach of Rule 10.3, it was open to the Committee to making the adverse finding and given the seriousness of the conduct the Standards Committee was correct to find that there had been unsatisfactory conduct on the part of the Applicant. The application is declined on this point.

Penalty

[16] The Committee imposed a penalty of $10,000. The Committee was of the view that the Applicant's breach was at the high end of offending and exacerbated by the fact that he had a personal interest in XX. It is clear that this penalty reflected what was, in the Committee's view, a high degree of culpability, particularly with regard to the personal interest factor.

[17] Counsel for the Applicant expressed concerns about factors that had been taken into account and also factors that had not been taken into account by the Committee. As to the former, Counsel noted that the Committee had been influenced by a perception that the Applicant was personally advantaged in complying with the instructions given by XX, having noted that he was a director of XX and that he held shares in two other companies which together held a 48% shareholding in XX. Counsel further noted that the Applicant was not afforded an opportunity to provide information or clarification about these matters. He submitted that the Committee had acted on an erroneous understanding and information was provided which explained the nature of the Applicant's directorship of XX and of his shareholder interests, which showed that his Directorship was nominal, and that he held shares as a trustee and obtained no personal advantage of any kind by means of holding any of these positions.

[18] As to the latter, Counsel was also concerned that the Committee had overlooked or failed to consider that the Applicant had sought legal advice or direction from two colleagues as to how he should treat the undertaking in the circumstances confronting him, and that it was not been unreasonable that the Applicant had acted on advice he was given. In his view this was material to the question of culpability. The essence of the submission is that the conduct involved an error of judgment and accordingly should not be punished as if it were a major wrongdoing. It is not apparent whether, and if so, how, the Committee viewed these steps that were taken by the Applicant. In any event the committee did not seek any further comment from the applicant about this action.

[19] I accept that mitigating factors should be relevant to questions of penalty and I have therefore given close consideration to the evidence provided by the Applicant and the submissions of Counsel. Having considered the evidence concerning the Applicant's interest in XX I am willing to accept that his involvement was not such that would have impacted on or influenced his decision making with regard to the undertaking. This clarification justifies some reconsideration of the penalty imposed in this case.

[20] I also considered whether the advice sought by the Applicant prior to transferring the money to XX was a factor that should be taken into account in mitigation. I accept his evidence that he contacted two colleagues with whom, he said, he discussed the situation he confronted and explained the circumstances of the matter. In both cases he claimed to have been advised that he could properly act on the instructions given under the Power of Attorney. The Applicant did not take notes of the conversations and that they appeared to have been reasonably brief (one discussion was 15 minutes). No record was made of those discussions, and there is no record other than the Applicant's recollection about the information he gave to each of the other lawyers. In these circumstances it is difficult to ascertain whether the total circumstances of the matter were fully comprehended by the two colleagues with whom he spoke. There is no analysis of relevant factors that explain the opinions he had received that the terms of undertaking had been amended by the power of attorney such that the Applicant should rely on the instructions of XX. The Applicant appears to have considered it was sufficient to have relied on the advice he was given and on that basis he acted on the XX instruction instead of complying with the original undertaking.

[21] The Applicant submitted that he views undertakings very seriously. However, I question the adequacy of those steps in the circumstances of the matter and I have doubts that they sufficiently reflect the seriousness of the situation. I particularly noted the absence of a written record of the Applicant's interactions with his colleagues (including the information he imparted on which the advice was based) which may be considered surprising given the seriousness of the consequences of failing to honour an undertaking. This must be seen as a significant oversight given that the Applicant was about to act in contra-indication of an explicit undertaking that he had given. In my view the Applicant took a risk in deciding that he could pay the money to XX on the reliance of two colleagues. He may have considered that to have been a calculated risk, but it was nevertheless a risk that he took.

[22] Nor am I sufficiently convinced that the Applicant's description of the relevant circumstances (when seeking the advice of colleagues) would necessarily have been unaffected by the fact that he was representing the interests of XX. In saying that I do not challenge his motives in taking that step or that he believed that he was setting out a fully unbiased description of the circumstances. Rather, there is no evidence that he was unaffected by his obligation to advance the interests of his client, XX. That the advice he received coincidently accorded with the interests of his client may have been a factor in his willingness to accept it and act on it. In any event, the fact that he sought advice shows that he was uncertain about what steps he could or should take, and also reflects an awareness that this was a most unusual situation, and one involving professional judgment. Ultimately it was the Applicant's decision to pay the money to XX. It may be said that he abrogated his own professional responsibility by relying on the opinion of others. Taking into account all of these matters, I do not accept the steps that the Applicant took reasonably amount to a mitigating factor.

[23] A further example that caused me to question the Applicant's insight related to the summary judgment proceedings issued against his firm for breach of undertaking. Referring to documents that had been prepared by a barrister he had instructed, the Applicant commented that his barrister had submitted very little information to the court about the legal advice he had sought about his predicament, and was 'shocked' by the decision of the Court. When asked whether he had himself examined the court documents, the Applicant said that he left that to the barrister. This again appears to me to be a distancing of himself from responsibility.

[24] I also take into account that the Applicant did not communicate with H Ltd or its solicitor before acting on the advice from his colleagues that he should yield to the demand made under the power of attorney by XX. In considering factors that impact on culpability this was, in my view, a significant omission given that H Ltd was directly affected by the actions he was about to take. As a result of the Applicant's decision the money was put out of the reach of the person to whom the undertaking had originally been given. In my view this was more culpable than if he had withheld the money from both parties pending a resolution of the matter.

[25] Notwithstanding the above observations, and that I am less than certain that his willingness to act on the advice he was given was not to some extent influenced by the fact that the advice coincided with the interests of his client, the fact that the Applicant took steps to resolve the matter does not indicate a reckless disregard on his part, and to the extent warranted I also have factored this into my review of the penalty imposed by the Committee.

[26] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 as being:

a. to punish the practitioner;

b. as a deterrent to other practitioners; and

c. to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[27] It is clear that the Committee's imposition of a $10,000 penalty in this case reflected the degree of culpability perceived by the Committee and for reasons above I accept that the penalty was harsher than justified by the circumstances. Nevertheless, the seriousness of the breach justifies a penalty. It is important that professional sanctions are sufficiently serious to ensure that they are adhered to. A penalty is intended to reflect the degree of seriousness of the conduct in question. I observe that my jurisdiction to impose a fine is limited to $15 000. Obviously only the most serious possible finding of unsatisfactory conduct would incur a fine at that level. I take into account that in this case I am considering a single wrongdoing and not a series of infringements; that the breach, while serious, appears to have been a misjudgement; that there was no apparent self interest motivating the conduct, and that the consequences have in the event not been catastrophic. These are factors that weigh

in favour of a review of the penalty. However that the Applicant had demonstrated a lack of personal responsibility for his actions is of some concern. Having taken into account all of the factors that appear to me to be relevant in terms of the above principles and have decided an appropriate penalty to be $6,500.

Publication

[28] The Applicant sought a review of a publication order made by the Standards Committee. He considered he had been prejudiced by the fact that the Committee had not sought any submissions form him prior to making that order.

[29] The Applicant's Counsel referred to the cases that had guided the Standards Committee in its decision to order publication of the Applicant's name, and submitted that these involved matters heard in Disciplinary Tribunals or equivalent, and where there is a statutory presumption of openness. He further submitted that such a presumption does not exist in the proceedings of the Standards Committee. I considered the cases to which Counsel referred me and I accept that a different approach may apply where there is no such presumption. However section 142(2) of the Act confers a wide discretionary power on a Standards Committee to publish where the Committee considers it necessary or desirable to do so in the public interest.

[30] In this case the Committee had perceived that the Applicant's conduct was at the '*higher end'* of offending and was "*exacerbated by the fact that he had a personal interest in XX*." It is clear that these were the significant factors that informed the Committee in its decision that the Applicant's name should be made public.

[31] I have concluded from my investigation that the Applicant was not motivated by any personal advantage in this matter. Furthermore, in terms of the Committee having judged that the offending was at the 'higher end', I noted that no mention was made by the Committee as to the steps that the Applicant had taken to obtain guidance from colleagues, and there is nothing to indicate that the Committee considered the advice he had received from two colleagues. The Committee's determination stated, *"He* [The Applicant] *alleged the instructions* [from XX] *overrode the undertaking he had provided."*

[32] My investigation and review of the evidence does not suggest to me that this was a case where the Applicant took the actions he did with total disregard of the situation. I accept that he sought the advice and direction of two senior counsel, one of whom

provided a letter for the purposes of this review. I noted that Counsel wrote that he had understood that the Power of Attorney had been given *'in connection with the same transaction in respect of which the undertaking was given'*, although it appeared from the evidence that the power related to the existing term Loan Agreement rather than to the subsequent refinancing. Whether this was due to some misunderstanding cannot be known and I have already noted with some concern the absence of evidence as to what information was provided to both colleagues.

[33] This office has issued guidelines on publication. Those guidelines set out the following factors as be relevant to publication:

a. the extent to which publication would provide protection to the public including consumers of legal and conveyancing services;

b. the extent to which publication will enhance public confidence in the provision of legal and conveyancing services;

c. the impact of publication on the interests and privacy of the complainant the practitioner or any other person;

d. the seriousness of any professional breaches; and

e. whether the practitioner has previously been found to have breached professional standards.

[34] At the reviewing hearing the Applicant described the adverse impact that would result from the publication of his name, given that he is in a small suburban practice mostly involved in commercial and finance-related work. He noted that while a finding of unsatisfactory conduct had been made, this was the first time he had been found guilty of a professional breach. He has an otherwise unblemished record. The Applicant accepts that with the benefit of hindsight he would act differently in the future.

[35] Counsel noted that publication was not mandatory and submitted that the Committee's consideration concerning maintaining the reputation of the legal professional and deterring others failed to consider that these objectives could be met without the necessity of identifying the Applicant.

[36] I have considered the basis of the Committee's decision and also all of the factors that arise in this matter, as well as the applicable guidelines. The purpose of publication of a practitioner's name is not to punish the practitioner but rather to provide protection to the public, reflecting that there is a consumer protection interest in

members of the public knowing which practitioners have fallen short of professional standards. I am also of the view that where an adverse finding has been made against a lawyer publication enhances confidence in the legal profession generally. In particular it reduces the impression of the profession "looking after its own".

[37] The above needs to be balanced with other factors which include consideration of the impact of publication on the Applicant. I accept that publication will very likely have an adverse impact on the Applicant personally and on his practice. I also accept that the circumstances leading to the complaint were somewhat exceptional, and that the Applicant found himself confronted by an unusual legal situation which he did not know how to resolve. I take into account that he took steps to obtain advice from senior colleagues, and notwithstanding the inadequacies I have noted, the fact of such action having been taken may be taken into account in the context of professional culpability. I am reasonably confident that there is little risk of a repeat of the situation that is presently under review.

[38] Taking into account all of the relevant factors, including that I have not found the degree of culpability that is indicated by the Committee's decision that the Applicant's name should be published, I am of the view that the over-riding public interest factor can be adequately protected without publication of the Applicant's name. Instead, this decision will be published on the LCRO website after removal of identifying details.

Costs of review

[39] The review was relatively straight forward and I also take into account that the Standards Committee imposed a costs order against the Applicant. Although the Applicant has been partially successful in his review, and this should be reflected in the costs order made, it remains appropriate that he should bear some of the costs of the review rather than them falling on the wider legal profession. In this light an order of costs of $450 seems appropriate.

Decision

Pursuant to section 211(1) of the Lawyers and Conveyancers Act the decision of the Standards Committee is confirmed as to the substantive complaint, amended as to the penalty order and reversed as to publication order.

Orders

The following orders are made:

a. The Applicant is fined $6,500 pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act 2006. (This substitutes the penalty decision of the Standards Committee) That fine is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

b. The Applicant is to pay $450 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. These costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 10th day of May 2010

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Hanneke Bouchier
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 Glamorgan as the Applicant
Mr Dalbeattie as the Respondent
Mr YY QC as the Applicants representative
The Auckland Standards Committee 3
The New Zealand Law Society