LCRO 222/09

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 2
BETWEEN	**MR BALTASOUND** of Auckland Applicant
AND	**MR PAIGNTON** of Auckland Respondent

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

DECISION

[1] Mr Baltasound (the Applicant) and Mr Paignton (the Respondent) are two lawyers who acted on the opposite sides of a conveyancing transaction involving a unit title property. Some time after settlement, and after exchanges of correspondence between the lawyers, the Body Corporate arrears remained unpaid, and the Applicant then filed a complaint to the New Zealand Law Society.

[2] The Applicant alleged that the Respondent breached an undertaking given at settlement to pay all of the body corporate arrears. A portion had been paid but an amount of $4,853.58 remained unpaid.

[3] The Standards Committee did not uphold the complaint largely for the reason that it noted that there was a dispute concerning the accuracy of that arrears figure and that the matter had been referred to the Disputes Tribunal. In these circumstances the Committee formed the view that it was inappropriate for it to get involved and determined that no further

action would be taken pursuant to Section 138(2) of the Lawyers and Conveyancers Act 2006.

[4] The Applicant sought a review of that decision on the basis that no serious attempt had been made to resolve the alleged error through the Disputes Tribunal or by any other means. In his view any resolution of that matter lay with the Respondent and he considered that he was entitled to rely on an undertaking given to him by the Respondent to pay arrears from sale proceeds.

Background

[5] The Applicant had acted for the purchasers of a unit from the Respondent's client. The settlement statement recorded the usual information concerning apportionments and had included an undertaking concerning payment of arrears. That undertaking was in the following terms: *"In consideration of receiving from you in cleared funds the sum of $.....we undertake to pay Body Corporate Administration all levies and arrears."* A copy of the section 36 Certificate issued by the Body Corporate Administration for that unit was included, and showed arrears in the sum of $7, 222.20. This figure appeared in bold in the Certificate.

[6] The Respondent had applied the sum of $2,368.69 towards the Body Corporate fees, leaving an unpaid balance of $4,853.58 which the vendor was properly owing. The Applicant contacted the Respondent on a number of occasions reminding him of his undertaking, and calling on the Respondent to pay the outstanding amount of $4,853.58 pursuant to the settlement undertaking. Several exchanges of correspondence followed, the Applicant calling on the Respondent to honour the undertaking, and the Respondent disputing the accuracy of the arrears figure in the Section 36 Certificate.

[7] The Respondent considered he had discharged his undertaking by payment of what his client vendor considered was the correct amount due. He declined to attend to payment of the remainder of the Body Corporate arrears.

[8] It is understood that the purchasers have been asked by the Body Corporate to pay the arrears. They also are considering selling the unit but are unable to do so because this matter remains unresolved. These circumstances led the Applicant to file a complaint with the Law Society.

Standards Committee inquiry

[9] On being notified of the complaint, the Respondent informed the Standards Committee that the disputed amount related predominantly to water charges which the vendor claimed

belonged to a different unit. The Respondent suggested that it was for the Body Corporate to recover the arrears from the vendor if they genuinely believed him to be liable, noting that no such action had been taken. He concluded his letter by saying that this debt was not a liability to the purchaser and therefore no claim could be made against him for his undertaking which he considered he had met.

[10] The Applicant was sent copies of the Respondent's letters and replied to the Standards Committee that any dispute concerning the accuracy of the amount was between the vendor and the Body Corporate, and was not the concern of his client. In his view the purchaser, as current owners, were left with the vendor's debt.

[11] The Respondent subsequently wrote a further letter to the Standards Committee, as follows:

> *[The vendor] has put the dispute as between himself and Body Corporate Administration Limited to the Disputes Tribunal for resolution.*
>
> *The amount in dispute is $4,978.94 which includes the $4,853.58 which (the Applicant) allege I am to pay pursuant to settlement undertakings.*
>
> *[The vendor] contends that the amount is entirely made up of water and legal charges which relate to a different unit.*

[12] The Complaints service then informed the Applicant of the Respondent's advice that the dispute between the vendor and the Body Corporate had been referred to the Disputes Tribunal.

[13] The Applicant replied that he did not consider this to be a satisfactory approach given the Respondent's undertaking, and was unhappy that his client should await the outcome of the dispute hearing. He concluded that his client was not presently pressing him on the matter and that he would be willing to await the outcome.

[14] Some six weeks later the Standards Committee enquired from the Applicant whether there had been any progress in the resolving the matter, to which the Applicant replied that he had heard nothing further but understood that the dispute remained unresolved. He reiterated his concerns about the delay and that the dispute was not directly relevant to the purchaser, and that the Respondent should honour the undertaking he had given.

[15] The Complaints Service informed both parties that the matter would be put on the Standards Committee Agenda regardless of whether the Court had resolved the matter, and invited both to add any further comments. The Applicant wrote to say that his advice from

the Body Corporate was that the arrears remained unpaid and that a query had been received from the vendor but nothing had been heard from the Respondent.

[16] The Standards Committee did not uphold the complaint, referring to what appeared to the Committee to be a genuine dispute that had been referred to the Disputes Tribunal, making it inappropriate for the Committee's involvement.

Review

[17] I observe that the Standards Committee was under the impression that the dispute was before the Disputes Tribunal. It's summary recorded that this had been advised by the Respondent in a 25 May 2009 letter. However, I noted that the Respondent's letters of both 25 May and 31st of August 2009 referred to advice that had been given to him by his client (the vendor). The Committee did not check further but wrote to both parties on 24 September 2009 advising that the matter would be placed on the agenda of the Standards Committee whether or not the court had resolved the dispute. The Committee then resolved to take no further steps for the reason that the matter was before the Disputes Tribunal.

[18] It seemed to me that the Standards Committee reached its determination rather precipitously in the circumstances. The Committee has the obligation of considering the conduct complaints in a disciplinary context which, in the present case required consideration of whether the Respondent had indeed failed to honour an undertaking given at settlement. Instead, the Committee appears to have abrogated this responsibility insofar as it dealt with the complaint on the basis of a dispute between the vendor and purchaser which would be resolved via the Disputes Tribunal, and without taking any steps to confirm that the dispute was being pursed, or had been resolved, through the Disputes Tribunal.

[19] As a result it gave no consideration to the substantive complaint that the Respondent had failed to honour an undertaking.

[20] The Applicant sought a review mainly for the reason that he was unaware of any action being taken to resolve the matter. He wrote: *"Orderly conveyancing practice and our professional obligations to our clients require us to rely on solicitors undertakings in exactly these circumstances. In the current circumstances our clients, who are attempting to sell their property, are exposed to a liability to the Body Corporate of nearly $5,000."*

[21] The Respondent replied that he considered the issue to be whether the Body Corporate Administration charges were correct in amount and correct in unit identity. He explained that his vendor client had owned two units, both having been sold, and that the lawyers who had acted in the sale of the other unit held in their Trust Account sums to meet

any liability once the matter was resolved. He concluded his letter with *"My position in respect of the complaint is that I gave no undertaking to pay BCA monies that were in dispute*".

[22] I arranged for a teleconference between the parties and clarified that the review issue was whether the Respondent had failed to honour an undertaking. I invited the parties to attempt to resolve the dispute between them and to inform me within a stated time frame whether they were able to find a pathway forward. In that discussion I noted that there was no evidence of any application having been made to the Disputes Tribunal. I did not hear further from the Respondent; the Applicant wrote a further letter which essentially reiterated his earlier position.

[23] However, immediately before writing this decision the Respondent's client contacted this office, apparently at the Respondent's request. The Case Manager's file note records his explanation that the arrears related to water charges and there is a dispute concerning which unit those charges properly belonged to. He was unaware of any specific action being taken to resolve the dispute.

Considerations

[24] Given the failure of the parties to resolve the matter themselves, it is my task to make a final determination on the review application. I have now reviewed all the information relating to this complaint. There is no doubt that an undertaking was given by the Respondent to pay Body Corporate arrears from sale proceeds. The undertaking was not qualified in any way and there was nothing that could have alerted the Applicant to a dispute by the vendor, concerning Body Corporate fees, and nothing from the Respondent, as the vendor's lawyer to indicate that the section 36 Certificate information was contested by the vendor.

[25] After settlement was completed the Respondent must have known, when he paid the lesser sum of $2,368.69, that this was significantly less than had been certified by the Body Corporate Certificate as the arrears figure. He did not contact the purchaser's solicitor in relation to the matter, and appeared to have not considered the undertaking he had given on settlement.

[26] There may indeed be a genuine dispute concerning the Body Corporate arrears for the unit in question, but given that there is no evidence, other than a contention by the vendor, that the section 36 Certificate was incorrect. There has been ample opportunity for the Respondent to have contacted the Applicant and to have discussed what steps might be

taken to create a 'holding position' pending resolution of the dispute. This might, for example, have led to the money being held by the purchaser's lawyer as stakeholder for a period of time to allow the vendor the opportunity to obtain resolution. No such steps were taken and instead the Respondent considered it sufficient to raise the claim of his client as a reason for not honouring the undertaking.

[27] I do not accept the Respondent's submission that this is a matter solely between the Body Corporate and the vendor. Clearly this is a matter of concern to an incoming purchaser of a unit title property who will otherwise be liable for an outstanding debt. A Body Corporate Certificate issued pursuant to section 36 of the Unit Titles Act makes such a certificate "conclusive evidence" of the matters certified therein, and no contradictory evidence has been provided.

[28] The question for the review is whether the Respondent should be held to his undertaking in the circumstances surrounding the matter. His objections to meeting the undertaking arise from factors that were made explicit after settlement was concluded. The undertaking was not qualified in any way, and in my view the Respondent gave an unequivocal undertaking to make a payment on the basis of information he had provided and which was relied upon by the Applicant. In my view the undertaking could only have related to an undertaking to pay the amount that was stated in that Certificate. I see no basis for qualifying the undertaking to one that undertook to pay such amount as the vendor considered to be correct.

[29] Had evidence been produced that the arrears, as certified, were incorrect no doubt a replacement Certificate prepared by the Body Corporate would have satisfied the Applicant and the purchaser. This was not the case, however, and I see no basis for qualifying the undertaking that was given by the Respondent.

Applicable standards

[30] The conduct in issue occurred prior to the commencement of the Lawyers and Conveyancers Act. By virtue of section 351(1) of the Act a Standards Committee has jurisdiction to consider a complaint made after the commencement of the Act (1 August 2008) about conduct that occurred prior to the commencement of the Act, in respect of conduct which, if found guilty, would have led to disciplinary proceedings being taken against the lawyer.

[31] The standards applicable to the complaint are those found in the Law Practitioners Act 1982 and the Rules of Professional Conduct for Barristers and Solicitors, both of which have

since been replaced. The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct: of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise. (*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105).

[32] Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811). For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act 1982 must be breached. That standard is that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to bring the profession into disrepute.

[33] 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 a disciplinary response: *Bentley v Gaisford* [1997] QB 627 (CA) at p 648 per Henry LJ); *Commissioner of Inland Revenue v Bhanabhai* [2007] 2 NZLR 478 para [50] per William Young P. That there may not have been "dishonourable conduct" does not change this: *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296. Indeed if a breach of undertaking included some genuinely disgraceful or dishonourable conduct, that would take the breach beyond unsatisfactory conduct and into the realms of misconduct as defined by s 7(1)(a)(i) of the Act.

[34] The important and personal nature of undertakings was emphasised by the Legal Services Tribunal in *Vincent Cofini* [1994] NSWLST 25 when it said:

> *The undertakings are personal to the legal practitioner and bind that practitioner, not as a matter of contract but as a matter of professional conduct and comity, and will be enforced by the Courts because legal practitioners are officers of the Court and because without enforcement undertakings would be worthless, persons and Courts would be unable to rely on the word of the legal practitioner and this aspect of legal practice, that demands compliance for legal efficiency, would collapse*.

[35] I conclude that the Respondent's failure to have honoured his undertaking is a failure of a professional obligation, one that could have led to disciplinary proceedings against him under the Law Practitioner Act, and therefore overcomes the jurisdictional threshold of section 351(1). I find that this is a failure that amounts to unsatisfactory conduct as defined by section 12 of the Lawyers and Conveyancers Act, insofar as it is conduct that would be regarded by lawyers of good standing as being unacceptable, and also amounts to a breach of Rule 10.3 which requires a lawyer to honour all undertakings that he or she gives in the course of practice.

Penalty

[36] It is proper that the Respondent should be censured for this professional breach. The purpose of a censure is to set out the conduct as unacceptable and to reflect the condemnation of the conduct by the public and the profession. However, I consider that in the circumstances a censure alone does not go far enough in that it does not satisfy the function of punishing the Respondent for the conduct and (more importantly in this case) deterring other lawyers from engaging in similar conduct.

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

- to punish the practitioner;
- as a deterrent to other practitioners; and
- to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[38] To that list might perhaps be added the purpose of maintaining public confidence in the provision of legal services (which is also one of the overriding purposes found in s 3 of the Lawyers and Conveyancers Act 2006). I also note that various other orders which are not of a penal nature may be made by a Standards Committee under s 156 of the Lawyers and Conveyancers Act 2006. Those orders have the functions of improving the competence of practitioners, ensuring ongoing compliance with regulation, and providing redress to wronged parties.

[39] I consider it important to indicate to the wider profession that unless very special circumstances exist it is never acceptable to breach an undertaking. A lawyer who falls short in this regard should properly expect to have professional sanctions visited upon him or her. It is also important to signal to the wider public that an undertaking from a lawyer can be

depended upon absolutely and that a lawyer who fails in this regard will be subject to professional discipline.

[40] In this case little or no effort has been made by the Respondent to reasonably respond to the numerous requests made by the Applicant concerning the undertaking. He has remained unconcerned about the arrears being sought against the purchasers, has continued to justify his failure to meet his undertaking by reference to the arrears being in dispute, and considered it appropriate to remove himself from any involvement by referring to his client taking the matter to the Disputes Tribunal, without taking any steps to confirm this. Nor when it was clear that no action had been taken to resolve the dispute did the Respondent consider himself to have any responsibility for his undertaking. I am left unconvinced that the Respondent recognised that any breach of an undertaking was a serious matter.

[41] The conduct in issue occurred prior to the commencement of the Lawyers and Conveyancers Act and by virtue of section 352 of this Act penalties for such conduct are limited to those that could have been imposed under the former Law Practitioners Act. However, the fact that the wrongful conduct has continued for almost three years also brings it into the regime of the Lawyers and Conveyancers Act.

[42] By s 156(1)(i) of the Lawyers and Conveyancers Act a fine of up to $15 000 may be imposed when unsatisfactory conduct is found. For a fine of that magnitude to be imposed it is clear that some serious wrongdoing must have occurred and it is unlikely that a large fine would properly be imposed for conduct which was due to inadvertence or a failure to appreciate the proper legal position. However, in allowing for a possible fine of $15 000 the legislature has indicated that breaches of professional standards are to be taken seriously and instances of unsatisfactory conduct should not pass unmarked. This is a radical departure from the position under the Law Practitioners Act 1982 by which a District Disciplinary Tribunal could only impose a much more modest fine of up to $2000 (s 106(4)(a)).

[43] In previous decisions of this office (e.g. LCRO 29 / 2009) where unsatisfactory conduct was found as a result of a breach of applicable rules and a fine is appropriate, a fine of $1000 would be a proper starting place in the absence of other factors. I took that as my starting place in this matter, and taking into account the matters traversed above I consider that there are no mitigating factors that would justify a lesser penalty. Rather, I am of the view that the Respondent's attitude towards his obligation, which might reasonably be described as casual, should be factored in when setting an appropriate penalty. I am also

somewhat concerned that the Respondent appears to have made little effort to ensure the Standards Committee was provided with accurate information. Furthermore, I have also taken into account that the Respondent appears to have had little regard for the impact that the delays in resolving the matters of the undertaking have had on the vendor or the Applicant .Taking into account all of the above matters I consider an appropriate penalty to be $1,800.

Remedial Order

[44] An order should also be made pursuant to 156 of the Lawyers and Conveyancers Act (1)(h) to remedy the failure. The undertaking remains current and although the Respondent is unlikely to be holding any funds of the vendor (although it is understood that a sum sufficient to cover this amount is held in the trust account of another law firm), by his failure he has placed himself at risk of having to nevertheless meet the undertaking. I shall make an order accordingly which make some allowance for an opportunity for the Respondent to pursue with the vendor a resolution to the matter. However, this has being ongoing for a considerable time, and I see no reason to prolong such an opportunity in the circumstances. No doubt the Respondent will explore what remedies may be available to recover any payment from the vendor but that is not a matter that should concern either the Applicant or his client purchaser.

Costs

[45] It is also appropriate that an order of costs be made against the Respondent in light of the fact that he has been found to fall short of the applicable professional standards. This matter was relatively straightforward. I take account of the Costs Orders Guidelines of this office.

Decision

The application for review is upheld pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Auckland Standards Committee 2 is reversed.

Orders

In particular I find that the Respondent has engaged in unsatisfactory conduct and impose the following orders pursuant to section 156 of the Lawyers and Conveyancers Act 2006.:

- The Respondent is censured.

- The Respondent is to rectify his omission by making a payment to the Applicant of $4,853.58 which represents the balance of his undertaking to the Applicant. The Respondent shall pay this sum to the Applicant within 20 days of the date of this decision. The Applicant's firm shall hold this sum in trust as stakeholder for a period of at least eight weeks (or such longer period as the Applicant may consider appropriate having regard to the interests of his client purchaser) to provide an opportunity for the Respondent to take such action as he considers appropriate to resolve the matter of the disputed sum. Should the matter not be resolved within eight weeks the Applicant shall be at liberty to forward the money to the Body Corporate in satisfaction of the arrears.
- The Respondent shall pay to the Applicant any further sum which may be imposed by the Body Corporate as interest on the unpaid arrears. Any such payment shall be made on the same terms as above.
- The Respondent is to pay a fine of $1,800 pursuant to s156(1)(i) of the Lawyers and Conveyancers Act 2006. That fine is to be paid to the New Zealand Law Society within 30 days of the date of this decision.
- The Respondent is to pay $900.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 19th 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 Baltasound as the Applicant
Mr Paignton as the Respondent
XX as a related party
The Auckland Standards Committee 2
The New Zealand Law Society