LCRO 239/2010

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 2
BETWEEN	**FY** of Auckland Applicant
AND	**UM** of Auckland Respondent

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

DECISION

Background

[1] The facts giving rise to this complaint are relatively straight forward.

[2] FY's client entered into an agreement to purchase an apartment. The title to the apartment at the time of signing the agreement included two car parks. The agreement for sale and purchase included only one car park. Consequently, it was necessary for a new title to be obtained prior to settlement.

[3] UM prepared her settlement statement on the basis of the unit entitlements for the new title. FY asked for an explanation of the basis of the apportionments. This was provided by UM on 24 May 2010, the day before settlement.

[4] At 10.15 am on the settlement day, FY advised UM that he was in a position to settle. He requested settlement undertakings which seemingly had not been provided with the settlement statement as would be usual.

[5] UM provided her undertakings which included an undertaking to release the transfer into FY's Landonline workspace immediately following receipt of notification that the settlement funds had been paid into her trust account.

[6] That notification was provided at 11.30 am. Notwithstanding three faxes and a telephone call to UM's office, the transfer was not released until 4.05 pm which was after the cut off time for registration on that day.

[7] FY advises that the settlement date was chosen by his clients as a propitious date for settlement, and the delay in releasing the transfer resulted in registration not occurring until the following day.

The Complaint and Standards Committee Decision

[8] The complaint from FY was two fold:

a) that UM had not notified him that a new title was to, or had, issued; and

b) that UM had not fulfilled her undertaking to release the transfer immediately.

[9] The Standards Committee determined that there was no obligation on UM to notify FY that a new title had issued. It considered that it was FY's obligation to check that all title matters were in order prior to settlement.

[10] The Committee also determined that an undertaking to attend to release of the transfer immediately needed to be interpreted in a reasonable manner and that UM was not in breach of her undertaking in that she had released the dealing as soon as she was in a position to do so.

[11] FY has applied for a review of that decision.

Review

Failure to advise issue of new title

[12] FY had not noted that the agreement provided for only one car park to be sold to the purchaser. If he had, he would have realised that it was necessary for a new title to issue and would have realised the reason for the apportionments in UM's settlement statement differing from what they would have been if the title as it stood was to be transferred.

[13] I note that the standard form agreement for sale and purchase (which I assume was used in this instance) provides that the settlement date is to be five working days

after the vendor has given the purchaser notice that a search copy of the new title is available (clause 3.16 (1) (b)). Consequently, it seems to me, as a matter of conveyancing practice, that until UM notified FY that a new title had issued, the obligation to settle did not arise. Therefore, UM should have notified FY that a new title had issued. However, that is a matter of conveyancing practice - it is not a disciplinary matter.

The settlement undertaking

[14] The Standards Committee was not provided with, nor sought, a copy of UM's undertaking. FY however advises that it was a standard undertaking as provided in e-dealing transactions, in which UM undertook to release the transfer instrument from the Landonline workspace into his control immediately following receipt of confirmation of deposit of settlement funds in UM's trust account.

[15] FY rightly notes that it is necessary for the profession to recognise the importance of honouring undertakings. The settlement process relies heavily on solicitors' undertakings which, if they are not adhered to, will result in the integrity of the process being diminished.

[16] Rule 10.3 of the Conduct and Client Care Rules is quite clear:

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

[17] The undertaking given by UM was to release the dealing into FY's Landonline workspace immediately. "Immediately" is defined in the Oxford English Dictionary as meaning "without any delay or lapse of time; instantly, directly, straight away; at once." I note the Property Law Section e-dealings guidelines themselves note that "release should occur immediately after settlement in accordance with the undertaking given".

[18] UM did not release the dealing "immediately". A breach of any of the Conduct and Client Care Rules constitutes unsatisfactory conduct (section 12(c) Lawyers and Conveyancers Act). The Standards Committee however accepted UM's reasons and exercised its discretion to take no further action.

[19] UM is a sole practitioner. She asserts that she was in meetings all day and that she released the dealing as soon as possible. I note that the Standards Committee did not call for evidence from her to support her contention. Part of a Standards Committee's role in its investigation of complaints should be to ask for evidence to support contentions made by a practitioner, rather than merely accepting statements

made without further enquiry. This may reveal something other than what has been conveyed to the Committee.

[20] In addition, the release of an e-dealing requires minimal time. In all but the most demanding of meetings, it should have been possible for UM to excuse herself to complete the release. It is of course possible that UM was out of her office. However, a sole practitioner does have an obligation not to schedule meetings which will put her in a position of being unable to meet obligations which she has undertaken to another practitioner.

[21] It would seem also, that despite communications with her office FY was not advised that UM was engaged in meetings. Instead, FY says he was told that the release would take place prior to 4.00 pm without being told of the reason for the delays. In the end, the dealing was released at 4.05 pm.

[22] Although the dealing was not therefore registered on the day of settlement, that has little effect on the priority of documents, as they are queued for registration on the following day in the order in which they are released.

[23] FY says 25 May 2010 was a propitious day for his clients. That is not a significant factor with regard to the consideration of this complaint - the issue is what consequences should follow UM's failure to comply with her undertaking.

[24] It must be accepted that a practitioner will not be able for a variety of reasons to attend to some things "immediately". Pragmatism demands recognition of that. Assuming UM's explanations could be verified, I accept that it would be unduly harsh for disciplinary consequences to follow. However, I consider that she could have taken steps to ensure that she did not schedule meetings such that there was no period of time available to her during the course of the afternoon to attend to the release, or alternatively had briefly excused herself to attend to this.

[25] I am mindful of the fact that members of the Standards Committee are also practising solicitors who themselves will give and rely on such undertakings. The Standards Committee accepted the need for a somewhat relaxed application of the obligations imposed by an undertaking to attend to some things "immediately" I would not have been so ready to excuse UM's conduct.

[26] However, in the circumstances I do not intend to vary the finding of the Standards Committee by making a finding of unsatisfactory conduct. Nevertheless, FY 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. This application for review was therefore brought with some merit.

[27] Section 210 (3) of the Lawyers and Conveyancers Act 2006 provides that "...without finding that there has been unsatisfactory conduct on the part of a person (being a practitioner.....) to whom the proceedings relate, the Legal Complaints Review Officer may, if he or she considers that the proceedings were justified and that it is just to do so, order that person to pay to the New Zealand Law Society.....such sums as the Legal Complaints Review Officer thinks fit in respect of the expenses of and incidental to the proceedings .....". I consider that this is a case where such an Order is justified and proposes to make an order for payment of costs in accordance with LCRO costs guidelines.

Decision

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

Costs

[29] Pursuant to section 210 (3) of the Lawyers and Conveyancers Act 2006, UM is ordered to pay the sum of $900.00 to the New Zealand Law Society such sum to be paid within 31 days of the date of this review decision.

Publication

[30] It is important that all conveyancing solicitors are reminded of the importance of settlement undertakings. Pursuant to section 206(4) of the Lawyers and Conveyancers Act 2006 I direct that the facts and the outcome of this decision be published with all identifying details removed.

DATED this 26th day of October 2011

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Owen Vaughan
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:

FY as the Applicant
UM as the Respondent
The Auckland Standards Committee 2
The New Zealand Law Society