LCRO 275/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Otago Standards Committee
BETWEEN	**LG** Applicant
AND	**OTAGO STANDARDS COMMITTEE** Respondent

DECISION

Introduction

[1] In a determination issued on 25 October 2011, the Otago Standards Committee determined to lay charges against LG before the Lawyers and Conveyancers Disciplinary Tribunal in respect of a breach of undertaking given by LG. LG has applied for a review of that determination. The outcome of this review is that the determination of the Standards Committee will be reversed and the matter returned for reconsideration by the Committee pursuant to section 209 of the Lawyers and Conveyancers Act 2006.

Background

[2] LG acted for Mr and Mrs LH. Registered against their property was an easement in favour of the neighbouring property owned by Mr and Mrs LI, pursuant to which various water supply rights were granted to Mr and Mrs LI.

[3] In 2002 Mr and Mrs LH effected a subdivision of their property and entered into agreements to sell the resultant lots. To enable the sales to proceed free of the

easement Mr and Mrs LH entered into an agreement with Mr and Mrs LI whereby it was agreed that Mr and Mrs LI would surrender the existing easement in return for Mr and Mrs LH granting them a new water supply easement over land being retained by them.

[4] The new easement plan could not be prepared until [construction] had been completed on the LH property, and until that plan had been deposited, the replacement easement could not be registered.

[5] Mr and Mrs LH wished to proceed with a sale of one of the lots and to enable this to occur, it was necessary for the existing easement to be surrendered.

[6] To achieve this, LG wrote to Mr and Mrs LI's lawyer on 20 August 2002 and requested that the surrender of the existing easement be made available to him in return for the following undertaking provided by him:-

> "We undertake to complete the transfer creating the replacement easements as soon as the surveyor's plan is available and to register it on our client's title without delay."

[7] On 18 February 2003 LG wrote to Mr and Mrs LI's lawyer, Mr LJ of ADZ, enclosing an easement instrument for approval by him, and if approved, execution by Mr and Mrs LI. He also wrote to a solicitor who had lodged a caveat against the title to the property over which the easement was to be registered, requesting that the caveat be removed to enable registration to take place.

[8] Neither Mr LJ nor the caveator's solicitor responded and the matter was overlooked by both LG and Mr LJ.

[9] It was not until some years later, in 2010, when Mr and Mrs LI wished to effect a subdivision themselves, that it became apparent the replacement easement had not been registered.

[10] LG, Mr LJ, Mr and Mrs LH and Mr and Mrs LI all co-operated to execute the various documents and effect registration. The only additional work necessary in 2010 that would not have been necessary in 2003 was that registration of the easement was effected by electronic means rather than the paper system in place in 2003.

[11] On 31 May 2010, LK of ADZ wrote to LG in the following terms:-

> "Earlier this year, it was brought to our clients' attention that their old easements were surrendered but the new easements had not been registered. As a result of this failure we have been obliged to drive the process to have the new easements registered and their future water rights protected. Therefore our clients now

> require that you pay their remaining costs for this firm undertaking this work on their behalf.
>
> We enclose herewith copies of our account for $1,227.49 and $587.49 and look forward to your immediate payment of the full amount. If you have any questions, please contact the writer."

[12] LG was at that time on sabbatical leave and LM of the firm responded. She did not accept that it was the responsibility of LG to complete the registration and pointed out that their client had already contributed $1,200 towards Mr and Mrs LI's costs pursuant to a term of the agreement.

[13] Following further correspondence between Mr LJ and LN of AEA (the firm in which LG was a partner), it was acknowledged by LN that LG had not fulfilled his obligations in terms of the undertaking, but suggested that both firms were at fault given that LJ had not followed the matter up with LG and specifically had not responded to LG's letter of 18 February 2003. LN also observed that he thought the quantum of the bills was excessive given the minimal additional work required to effect registration by e-dealing. He also objected to the perceived "threat" to lodge a complaint with the Law Society if the bills were not paid.

[14] In due course, as the matter had not been resolved, Mr and Mrs LI did lodge a complaint with the New Zealand Law Society.

[15] The Standards Committee directed the parties to mediate and under protest the bills were ultimately paid by AEA. However, the Standards Committee considered that as the complaint related to a breach of an undertaking, payment of the accounts did not necessarily result in a determination of the matter.

[16] The Committee proceeded with a hearing on the papers and ultimately issued its determination on 25 October 2011 to lay charges before the Lawyers and Conveyancers Disciplinary Tribunal in respect of the breach of undertaking.

Review

[17] LG lodged an application for review of that determination and submitted the following reasons for his application:

> "6. Reasons for application
>
> (a) The Lawyers Standards Committee failed to address the circumstances in which the breach of undertaking took place and the subsequent circumstances placing the conduct at the very lower end of unsatisfactory conduct and in particular;

> (i) The breach was through oversight through the nature of the transactions
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> (ii) The solicitor for the complainant also failed to pick up the oversight
>
> (iii) Once the oversight was discovered the solicitors between them agreed on how it was to be rectified and with cooperation of both Counsel the easements were registered.
>
> (iv) The argument arose over the invoices forwarded by the complainant's solicitor to the complainant with advice that he should take it to [AEA] for payment.
>
> (v) [AEA] was of the view that such an invoice was excessive for what needed to be done and declined to pay it.
>
> (vi) A complaint was made unfortunately whilst [LG] was out of the country and unable to deal with the matter himself.
>
> (vii) In April 2011 the account was paid and apology given to the complainant to the satisfaction of the complainant. [AEA] remain of the view that the account from [ADZ] was excessive.
>
> (viii) The failure to honour the undertaking was at the very lower end of a conveyancing error in the circumstances and does not justify the determination by the Lawyers Standards Committee that a breach of undertaking could 'constitute misconduct and should be considered by the Disciplinary Tribunal under Section 152(2)(a).'
>
> (ix) There is ample scope within Sections 152 and 156 of the Lawyers and Conveyancers Act 2006 taking into account the circumstances of conduct complained of, to deal with the matter.
>
> (x) The committee was incorrect to state that [LN] had made an allegation of blackmail
>
> (xi) The committee failed to give any assessment or reasoning behind the determination made.
>
> (xii) The committee incorrectly exercised their discretion in determining the matter should be considered by the Disciplinary Tribunal under Section 152(2)(a) of the Act."

[18] As is usual, this Office inquired of the Standards Committee whether it wished to participate in the review. In response to that enquiry, the Standards Committee responded by letter dated 24 February 2011 in which it stated:

> "[LG]'s submissions to the Standards Committee were that his breach was in all the circumstances at the lower end of unsatisfactory conduct. The Standards Committee was of the view that there was an acknowledged breach of an undertaking to register an easement; all parties have overlooked the requirement to register the easement; Mr LI has suffered no loss; [LG] had paid Mr [LI]'s legal fees; Mr [LI] was satisfied that his complaint had been settled.

The Committee would have preferred to make a finding of unsatisfactory conduct. However, it felt constrained by previous decisions of the LCRO and the High Court that a breach of an undertaking was inherently serious and almost invariably amounted to misconduct. A Standards Committee has no jurisdiction to make a finding of misconduct, and the Committee considered that since the breach of an undertaking could constitute misconduct, that decision was one for the Disciplinary Tribunal and not for the Committee.

The Standards Committee would welcome your guidance as to whether it does have jurisdiction to determine that the breach of an undertaking may fall short of misconduct, and may be dealt with as unsatisfactory conduct. If you determine that the Standards Committee does have that jurisdiction, then the appropriate way of dealing with this review may be to refer the complaint back to the Committee under s 209 of the Lawyers and Conveyancers Act 2006."

[19] The Committee subsequently advised that the decisions to which it referred were:

"(1) *Baltasound v Paignton* LCRO 222/2009;

(2) *Glamorgan v Dalbeattie* LCRO 22/2010;

(3) *ET v VL LCRO* 190/2010; and

(4) *Auckland Standards Committee 3 of NZLS v W* (High Court, Duffy J, 11 July 2011)"

[20] The Committee then provided further comments by letter dated 2 April 2012.

"In deciding to refer Mr [LI]'s complaint against [LG] to the Disciplinary Tribunal, the Committee's rationale was, essentially, as follows:

(1) The complaint concerned breach of an undertaking. Breaches of undertakings are inherently serious, and may amount to misconduct;

(2) Only the Disciplinary Tribunal may make a determination of misconduct;

(3) If a Standards Committee may not make a determination that the breach of an undertaking constitutes misconduct, it also may not make a determination that a breach of an undertaking (once established) falls short of misconduct, as that is essentially determining what constitutes misconduct;

(4) Therefore, the breach of the undertaking had to be referred to the Tribunal.

While the Committee considers that it does not have jurisdiction to determine that a breach of an undertaking does not constitute misconduct in a particular case, it would welcome an LCRO decision to the contrary."

[21] All of the correspondence received from the Standards Committee was provided to LG for comment. LO of that firm provided further extensive submissions. She reviewed the provisions of the Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. I do not consider it necessary to reproduce her submissions, but concur with her conclusions that there is nothing in the Act or the Conduct and Client Care Rules which prevents a Standards Committee from determining that a breach of an undertaking constitutes unsatisfactory conduct.

[22] That leads therefore to an examination of the decisions referred to by the Standards Committees. In the first instance, I acknowledge statements made by me in previous LCRO decisions. At [11] and [12] in *E T v VL* LCRO 190/2010 I made the following comments:

> "[11] ... Undertakings form the basis on which a multitude of transactions between lawyers and other parties are effected, and if the duty of compliance with those undertakings is in any way diminished, that will be to the detriment of the legal profession and the numerous parties who rely on those undertakings.
>
> [12] A breach of an undertaking must almost automatically demand consideration by a Standards Committee as to whether charges should be laid before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. In this regard, the aggravating feature is that the failure to comply with the undertaking continued for a period in excess of three years, and it was fortunate that the Respondent did not suffer serious loss."

[23] What was stated, was that a Standards Committee must give consideration whether to lay charges or not. However, that does not mean that every breach of an undertaking must result in charges being laid. In *ET v VL*, I confirmed the determination of the Standards Committee that the breach of an undertaking in that instance constituted unsatisfactory conduct and confirmed the various penalties imposed by the Standards Committee.

[24] The Lawyers and Conveyancers Act 2006 provides a Standards Committee with a significant range of powers and penalties which it may be appropriate to exercise where there has been a breach of an undertaking, rather than laying charges before the Lawyers and Conveyancers Disciplinary Tribunal. A Standards Committee must exercise its discretion as to the seriousness of the breach and whether the breach is such as could be considered to be misconduct as defined in section 7 of the Act. If that is the conclusion of the Committee, then it must refer the matter to the Tribunal, being careful not to draw the conclusion that the conduct does constitute misconduct. As the Committee has correctly noted, that is a finding that only the Tribunal can make.

[25] However, if the Committee forms the view that the conduct could not be considered to be misconduct, then unless there are other reasons for referring the matter to the Tribunal, it is open to the Committee to make a finding of unsatisfactory conduct.

[26] In *Glamorgan v Dalbeattie,* although the LCRO viewed the breach of an undertaking as serious, she confirmed the finding of the Standards Committee of unsatisfactory conduct and varied the penalties imposed. Similarly, in *Baltasound v*

Paignton LCRO 222/2009 the LCRO again confirmed a finding of unsatisfactory conduct by the Standards Committee.

[27] In *Auckland Standards Committee 3 of New Zealand Law Society v W* (CIV 2010-404-005509) Duffy J reiterated the importance of undertakings for the legal profession. At [41] she refers to commentary by Duncan Webb in his text *Ethics, Professional Responsibility and the Lawyer* at 15.6. She confirms at [44] of her judgment that "there is no doubt that strict adherence to undertakings has always been required". However, I can find no statement that would lead to a conclusion that a breach of an undertaking must automatically result in charges being laid before the Tribunal.

[28] It would even be incorrect to postulate that there is a presumption that a breach of an undertaking will lead to a charge before the Tribunal. A Standards Committee must consider all of the facts of the case and properly exercise its discretion to determine whether to lay charges or not.

[29] The Committee correctly noted that only the Tribunal can make a finding of misconduct (section 152(2) Lawyers and Conveyancers Act). However, from the correspondence provided to me by the Standards Committee following the application for review, it is clear that the Committee has proceeded under a mistaken impression that it could not make a finding of unsatisfactory conduct where the complaint related to a breach of an undertaking.

[30] In previous decisions relating to applications to review a determination to lay charges before the Tribunal, this Office has adopted a cautious approach to any interference with the discretion which resides in the Standards Committee. See for example *Poole v Yorkshire* LCRO 133/2009, *Rugby v Auckland Standards Committee* LCRO 67/2010.

[31] In *Poole v Yorkshire* the LCRO noted at [18] that 'it must be stated at the outset that it will only be in exceptional cases that a decision to prosecute will be reversed on review'. The LCRO then identified 4 situations in which a decision to prosecute may be revisited. These situations were identified in *Kumar v Immigration Department* [1979] 2 NZLR 553 and in *Polynesian Spa Limited v Osborne* [2005] NZAR 408.

[32] At [21] in *Poole v Yorkshire*, the LCRO noted that:

> "The cases cited... indicate the kinds of basis upon which a decision to prosecute might be revisited. They include situations in which the decision to prosecute was:

a) Significantly influenced by irrelevant considerations,

b) Exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process),

c) Exercised in a discriminatory manner,

d) Exercised capriciously in bad faith or with malice."

[33] The present situation is somewhat unusual in that the Standards Committee has advised it came to its decision on the basis that it considered it did not have jurisdiction to determine that a breach of an undertaking could constitute unsatisfactory conduct.

[34] In *Poole v Yorkshire*, the LCRO did not assert that the circumstances in which a decision to prosecute would be set aside was exhaustive. In any event, I do not propose to interfere in a final way with the decision to lay charges. However, in coming to its decision, it is important that the Committee should not proceed under a misapprehension as to its jurisdiction, which in this instance has resulted in the Committee not exercising its discretion in a proper and informed manner. It is appropriate therefore that the present decision to lay charges should be reversed, and the matter returned to the Standards Committee for it to consider the matter afresh with the benefit of the comments made in this decision.

Decision

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

2. Pursuant to section 209 of the Act the Committee is directed to reconsider its determination in the light of this decision for the reasons set out above.

DATED this 29th day of May 2012

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O W J 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:

LG as the Applicant
LO as the Representative of the Applicant
The Otago Standards Committee as the Respondent
The New Zealand Law Society