

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of [North Island Standards Committee ]

**BETWEEN**

**AP**

Applicant

**AND**

**RE**

Respondent

**The names and identifying details of the parties other than the Respondent in this decision have been changed.**

**Introduction**

[1] Mr AP has applied for a review of the determination by [North Island Standards Committee] to take no further action in respect of a complaint by him about Mr RE. The complaint and this review centre on the giving of, and compliance with, an undertaking given by Mr RE in the course of a conveyancing transaction.

**Background**

[2] Mr RE acted for the vendor of properties in a subdivision. Mr AP acted for the purchaser of one of those properties.

[3] Settlement of the sale of three of the properties was scheduled to take place on 27 January 2012. Registered against two of the properties were two separate mortgages to the [ABC Bank].<sup>1</sup>

[4] Mr RE requested discharges of these mortgages but did not request separate repayment figures for each.

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<sup>1</sup> The Standards Committee recorded that there was one mortgage over all three properties to be sold on that day – that is not correct.

[5] Early on the day of settlement Mr AP advised Mr RE that he was ready to settle.<sup>2</sup> Mr RE advised that he was waiting for the bank's discharge of mortgage to arrive. This was received at 1.43 pm. However, the bank only advised Mr RE of the total amount it required to be paid before the discharges of the mortgages could be released. Not only was this more than the vendor expected but it meant that Mr RE had to have the funds from the settlements of all three properties before he had sufficient funds to meet the bank's requirement and be in a position to release any of the discharges of mortgage.

[6] Just prior to 3.30 pm Mr RE rang Mr AP to advise that he was about to send through his settlement undertaking and Mr AP advised that he would settle immediately on receipt of that undertaking. He requested Mr RE to release the e-dealing promptly following settlement which he says Mr RE agreed to do.

[7] Mr RE provided his settlement undertaking to Mr AP at 3.28 pm. The form of the undertaking is reproduced in full here:

**RE: Sale – 00 ABCD St , Suburb , City  
XX to YY**

I undertake that I have prepared, certified and signed the instrument below:

1. DM XXXXXXXX.XX
2. Transfer

Under dealing No XXXXXXXX.

I undertake that immediately following receipt of confirmation of deposit of settlement funds to my trust account in accordance with the settlement statement dated 23 December 2011 and the settlement requirements, to:

- (a) Release the above documents from the Landline workspace into your control.
- (b) Not attempt to withdraw such release or attempt any alteration of such instrument following settlement or release.

Look forward to receive notice of sale and settlement funds.

[8] This undertaking followed the format set out in paragraph 6.6(d) of the Property Law Section Practice Guidelines for property transactions and e-dealing (July 2012). These Guidelines are given contractual force in the ninth edition of the ADLS standard form of Agreement for Sale and Purchase of Real Estate.<sup>3</sup>

[9] Mr AP immediately credited the settlement money to Mr RE's trust account and provided his undertaking to Mr RE. His undertaking is also reproduced in full here:

<sup>2</sup> The difficulties which occurred on the day were exacerbated by the fact that Mr AP was anxious to leave his office before 1.00 pm for the weekend and Mr RE had only that day returned from leave and had six settlements to attend to on that day. These facts do not affect the issues addressed in this review but explain the tension between the two men on the day and the days following.

<sup>3</sup> I have not sighted a copy of the Agreement. However the undertaking given by Mr RE stands regardless of whether it was required by the Agreement or not.

**YY from XX - 00 ABCD St, Suburb , City**

In settlement of the above transaction, I undertake that I have effected payment through The Bank Internet Office to your trust account (RE Legal Solicitor Trust Account YY-YYYY-YYY-YY) of the sum of \$300,221.75 at 3.30 today. I attach a copy of the Bank batch proof sheet for Bank Internet Office confirming the payment and the details as required by you including the reference details. I further undertake and confirm that the payment is of cleared funds and will not be reversed by me.

The payment made to you is to be held to my order until you are in a position to release, and on the basis that you release to the e-dealing workspace prior to 3.30pm, mortgage XXXXXX.XX and the transfer to my client and notify me when that has been completed so that I may submit the dealing.

[10] After the reference to the releasing the e-dealing, Mr AP wrote in handwriting - "Please – urgently".

[11] Despite a number of telephone calls from Mr AP the e-dealing was not released until 4.50 pm when Mr RE had received sufficient funds from the settlements of the other two sales to enable the bank to be repaid.

**Mr AP's complaints**

[12] Mr AP complained that Mr RE had breached his undertaking. He said:<sup>4</sup>

Whilst Mr RE's inability, for whatever reason, to give his undertakings was preventing my leaving the office when planned, as a sole practitioner of over 40 years of experience, I am quite used to plans for a Friday afternoon not always working out. I can have no complaint about that. I am though very concerned at Mr RE's cavalier attitude to compliance with his undertaking.

[13] Mr AP also advised that he had communicated with Mr RE during the week following the settlement thinking that if he made his concerns known Mr RE might recognise the seriousness of his failure to comply strictly with his undertaking. In response to Mr AP's query as to why Mr RE was unable to release the e-dealing immediately Mr RE responded:<sup>5</sup>

Thank you for your e-mail.

Mortgages on each section were independent to each other but bank rather than giving me separate amounts for DM gave me one single amount to pay for discharge of mortgages which included the section being purchased by your client. I requested bank to give a breakdown which did not come forth.

To pay entire amount to the bank as per bank instructions I had to wait for a short while to receive funds from other purchasers. Other than that I had six settlements on Friday, 27th January 2012 and it was my first day of work after vacation due to which there was substantial work to be taken care off. In saying so it is not conveyed that your client's settlement was neglected in anyway.

I hope above is to your satisfaction.

<sup>4</sup> Letter AP to Lawyers Complaints Service (7 February 2012) at [8].

<sup>5</sup> Email RE to AP (31 January 2012).

[14] That correspondence added to Mr AP's concerns that Mr RE did not appreciate the issue being raised by Mr AP, namely, that Mr RE was not in a position to fulfil his undertaking when it was given.

[15] The Standards Committee recorded the issue to be considered as being whether Mr RE had breached his undertaking and was therefore in breach of Rule 10.3 of the Conduct and Client Care Rules.<sup>6</sup> That led the Committee into a consideration of whether or not Mr RE had released the e-dealing "immediately following receipt of confirmation of deposit of settlement funds" into his account.

[16] The Committee's recorded its considerations and outcome:<sup>7</sup>

The Committee carefully considered the circumstances of the complaint and the decision of the Legal Complaints Review Officer (LCRO) on the analogous matter (LCRO 239/2010). The Committee considered the LCRO's decision to be relevant, and noted that Mr RE settled the transaction some 80 minutes after receiving Mr AP's facsimile, which the Committee considered to be reasonable in the circumstances. The Committee also noted the issues that Mr RE had with the bank's failure to provide appropriate information and documentation.

Accordingly, the Committee decided to take no further action pursuant to section 138(2) of the LCAct. (sic.)

## **Review**

[17] Mr AP has applied for a review of that determination and provided the following supporting reasons:<sup>8</sup>

I complained that Mr RE failed to honour an undertaking (set out in para 6 Decision).

The Committee considered that, as Mr RE "settled the transaction some 80 minutes" after receiving a fax from me that was "reasonable in the circumstances". (Para 24 Decision)

I believe the Committee miss the point (and am supported in this belief by two other senior practitioners consulted by me, who have advised me to lodge this application to establish a point of principle) in that at the time Mr RE gave his undertaking he was not able and not willing to comply strictly with its terms; and that he complied with it after he had dealt with other interdependent settlements (para 7 Decision) the existence of which was not made known to me before I acted on his undertaking.

[18] A review hearing was held in Auckland on 14 August 2014 attended by Mr AP and Mr RE who was accompanied by Mr Cox.

## **The issues**

[19] As noted by Mr AP in his review application, there are two issues to be addressed in this review. The first is whether or not Mr RE breached his undertaking to "immediately" release the documents from the Landonline workspace to enable Mr AP to effect registration. This is the issue considered by the Standards Committee.

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<sup>6</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

<sup>7</sup> Standards Committee determination dated 20 November 2012 at [24]-[25].

<sup>8</sup> Application for Review dated 12 December 2012 at [3].

[20] The second and perhaps more important issue, which was not considered by the Standards Committee, is that Mr RE provided an undertaking which could not be performed until and unless two other sales were settled. That issue was clearly included in Mr AP's complaint when he noted:<sup>9</sup>

...[Mr RE] clearly believes it acceptable to deliberately fail to comply with an undertaking until he had received "funds from other purchasers" (and goodness only knows what he thought he would do if some of those funds did not arrive); and presumably his receipt of those funds only arose as a result of him giving similar undertakings to other solicitors, with which "for a short while" he was also not able to comply.

[21] The issue was clearly raised by Mr AP and is therefore within the scope of this review.

### **Has there been a breach of the undertaking?**

[22] Mr RE released the documents into Mr AP's control 80 minutes after Mr AP had confirmed payment to Mr RE. In his response<sup>10</sup> to the complaint Mr RE referred to *FY v UM*<sup>11</sup> and Mr AP also referred to the same review subsequently. In that case the purchaser's solicitor had sent a fax confirming payment at 11.30 am. The vendor's solicitor was engaged in meetings for a large part of the day and was not able to release the e-dealing until 4.05 pm. The Standards Committee determined that the undertaking to release the e-dealing "immediately" needed to be interpreted in a reasonable manner. On review, I declined to interfere with that determination given that members of the Standards Committee are themselves conveyancers who give and rely on such undertakings. I did however express the view that I would not have been so ready to excuse the lawyers' conduct<sup>12</sup> and considered there was merit in the review application.

[23] I do not therefore endorse Mr RE's contention that such conduct is "satisfactory" as submitted by him in his letter to the Committee of 4 April 2012. The outcome of that review is more accurately expressed as being that I exercised a discretion to find that there had not been unsatisfactory conduct.

[24] Nevertheless, I confirm my view that there does need to be some pragmatism when considering such issues and in the circumstances I concur with the view of the Standards Committee in the present instance that there should be no adverse finding against Mr RE in this regard.

### **Was Mr RE able to perform the undertaking?**

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<sup>9</sup> Above n 4 at [10].

<sup>10</sup> Letter RE to Lawyers Complaints Service (27 February 2011) (sic).

<sup>11</sup> *FY v UM* LCRO 239/2010.

<sup>12</sup> Above n 11 at [25].

[25] The facts that set this matter apart from the situation in *FY v UM* are that the lawyer in that case was at all times able to perform the undertaking. In the present instance Mr RE was not able to perform the undertaking until two other sales had settled. One solicitor had confirmed in an e-mail that he had funds and was ready, willing and able to settle, while the other solicitor had confirmed by telephone on the previous day that his client would be in a position to settle. Neither assurance was in the form of an undertaking.

[26] Mr RE provided his undertaking to Mr AP based on these assurances. He did not however inform Mr AP of what needed to occur before he would be in a position to comply with his undertaking. Mr AP therefore proceeded on the basis that Mr RE would be able to fulfil his undertaking immediately following receipt of the fax confirming payment.

[27] Mr AP says that if he had been aware of the facts he would have required Mr RE to provide copies of the settlement undertakings from the other two solicitors, and required Mr RE to himself undertake to Mr AP that he would enforce those undertakings. Mr AP was not provided with the information to enable him to make his own assessment of the facts.

[28] Mr AP had himself given an undertaking to his client's bank not to release funds without ensuring that he was in a position to register the bank's security. He also of course had a duty to his client not to release funds without ensuring that title was transferred to his client. Because of Mr RE's omissions, Mr AP was potentially exposed to breaches of both of these obligations without his knowledge.

[29] Instead, Mr RE made his assessment that there would be no problem with settlement of the other two sales and provided his undertaking to Mr AP based on this.

[30] In his text *Lawyers' Professional Responsibility* (5<sup>th</sup> Edition) Professor dal Pont says:<sup>13</sup>

Lawyers should only give personal undertakings, if at all, where the means of fulfilment are within their complete control, as opposed to being partly dependent upon the acts or omissions of a third party outside the lawyer's control. For example, a lawyer should not give an undertaking regarding the filing of documents in a court or the swearing of an affidavit by the client unless the documents are in the lawyer's possession or the affidavit was being sworn at the time of giving the undertaking. Any such undertaking should be made subject to conditions; for example, on condition that a third person does something. It is for these reasons that the *Australian Solicitors' Conduct Rules* proscribe a solicitor from seeking from another solicitor (or that solicitor's employee, associate, or agent) undertakings in respect of a matter "that would require the co-operation of a third party who is not party to the undertaking".

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<sup>13</sup> G E dal Pont *Lawyers' Professional Responsibility* (5<sup>th</sup> Edition, Thomson Reuters, Prymont 2013) at [22.65].

[31] Although not directly related to the undertaking given to Mr AP, it would appear that before one of the other sales could be effected Mr RE had to settle the purchase of the property from another party.<sup>14</sup>

[32] Mr AP also referred me to paragraph 5.5 of the Property Law Section Guidelines<sup>15</sup> which states:

Lawyers must always make sure they have the client's authority before giving an undertaking and *must ensure performance of the undertaking is and will remain within their control.* (Emphasis added)

[33] A disturbing feature of this matter is that Mr RE did not appear to accept or recognise that he should have done things differently when AP raised the issue with him and it is his failure to recognise the issues that led Mr AP to lodge his complaint.

[34] At the review hearing Mr RE argued that Mr AP's settlement undertaking (that the funds were to be held to Mr AP's order until Mr RE was in a position to release the e-dealing) gave him adequate protection. That submission does not affect in any way the fact that Mr RE was not in a position to fulfil his undertaking until the other two sales settled. Mr AP may have prudently protected himself, but it is Mr RE's undertaking which is under scrutiny.

[35] To give such an undertaking without advising Mr AP of the facts potentially constitutes unsatisfactory conduct by reason of s 12(b)(ii) of the Lawyers and Conveyancers Act 2006 (unprofessional conduct) or s 12(c) by reason of a breach of 11.1 of the Conduct and Client Care Rules (misleading or deceptive conduct).

[36] Mr AP advised that he was not being vindictive in any way in lodging his complaint and this application for review, and does not seek any adverse outcome against Mr RE personally. He expressed the desire that an article be published to highlight the importance of not giving an undertaking unless satisfaction of the undertaking is at all times within the lawyer's control. He apologised for any rudeness perceived by Mr RE in the communications from Mr AP on the day of settlement and subsequently.

[37] For his part, Mr RE did acknowledge at the review hearing that he should have done things differently and thanked Mr AP for the benefit of his advice.

[38] Overall there is no need for any finding or orders against Mr RE. I am sure that Mr RE will have learned that he needs to ensure that he is able to perform any undertaking at the time he gives it and the publication order at the end of this decision will provide the outcome Mr AP seeks.

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<sup>14</sup> Email RE to The Bank (27 January 2012).

<sup>15</sup> Property Law Section Property Transactions and E-Dealing Practice Guidelines dated July 2012.

[39] I acknowledge that Mr RE sincerely believed that he had not been in breach of his professional obligations and in the circumstances I do not consider that I should exercise my discretion to award costs against him in accordance with s 210(3) of the Lawyers and Conveyancers Act 2006.

### **Comment**

[40] Conveyancing practice in New Zealand relies heavily on solicitors' undertakings and as Duncan Webb says in his text, "...the continued efficient working of legal practice requires that...undertakings be honoured regardless of other supervening circumstances".<sup>16</sup> Rule 10.3 of the Conduct and Client Care Rules requires a solicitor to "honour all undertakings" and Standards Committees, this Office, the Tribunal and the Courts all view a breach of an undertaking seriously.

[41] It follows therefore that a solicitor must take particular care before providing an undertaking and ensure that compliance with the undertaking is, and remains at all times, within the lawyer's direct control.

### **Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed but modified by this decision.

### **Publication**

To achieve Mr AP's objective to bring the issues raised by this complaint to the attention of the profession, I direct pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006 that the facts of this decision should be published in LawTalk by the New Zealand Law Society with all identifying details and the names of the parties anonymised.

In accordance with the usual practice of this Office the decision in an anonymised form will also be published on the website of the LCRO.

**DATED** this 22<sup>nd</sup> day of August 2014

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OWJ 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:

Mr AP as the Applicant  
Mr RE as the Respondent  
The [North Island Standards Committee]  
The New Zealand Law Society

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<sup>16</sup> Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2<sup>nd</sup> Edition, LexisNexis NZ, Wellington 2006) at [15.9.1].