LCRO 334/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Standards Committee
BETWEEN	**AR** Applicant
AND	**VE** Respondent

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

DECISION

Introduction

[1] Mr AR, a practitioner, complained about the conduct of Mr VE as follows:

(a) He breached an undertaking.[1]

(b) He breached a duty of fidelity to the court.[2]

[2] On 19 November 2012 the Standards Committee determined to take no further action in relation to both of the two grounds of complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).[3]

[3] Mr AR has sought a review of the determination submitting that the Standards Committee's determination in relation to the alleged breach of undertaking was wrong in fact and law. The factual error asserted by Mr AR is that Mr VE had in fact apologised for any inadvertent breach of an undertaking; the legal error is that the decision is at odds with settled jurisprudence in connection with undertakings and the consequences of breaching them.

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[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.3.
[2] Rule 13.1.
[3] As read with s 152(3) of the Act.

[4] Mr AR's review is restricted to his complaint concerning the alleged breach of undertaking; no challenge is mounted to the Standards Committee's decision to take no further action on the ground of complaint relating to rule 13.1.

Background

[5] The facts can be simply stated. In contested bankruptcy proceedings in which Mr VE was retained to represent the debtor at very late notice, Mr VE said the following in an email to Mr AR's firm (acting for the creditor):[4]

> You have my undertaking that if that adjournment is not then granted, there will be no opposition from me or any other person to adjudication as bankrupt and so I cannot see the hearing lasting more than half an hour, maybe 45 minutes.

[6] Mr VE's instructions had been to secure an adjournment of the bankruptcy proceedings so that his client could put a statutory compromise proposal to his creditors.

[7] During the course of applying for the adjournment, Mr VE "signalled [to the Judge] that in the event of adjudication [by the Judge] [the debtor] would seek a stay in order that [the debtor] could pursue an appeal".[5]

[8] The Judge dealing with the proceedings refused to grant an adjournment and adjudicated Mr VE's client bankrupt. She did however grant an interim stay as sought by Mr VE.[6]

Complaint and response

[9] The complaint is simple: by pursuing an application for a stay in order to bring an appeal after the Judge had indicated she would not adjourn the bankruptcy proceedings, Mr VE was in breach of his undertaking to Mr AR's firm; that being that if the adjournment was not granted, "there will be no opposition … to adjudication as bankrupt".[7]

[10] Through counsel, Mr DS, Mr VE's response to the complaint was that the only option for his client to avoid bankruptcy was the successful promulgation of a statutory creditor's proposal. He submitted that a credible and real creditor's proposal was on foot, and so his last-minute instructions were to apply for an adjournment of the bankruptcy proceedings to allow that proposal to be put to creditors. Mr VE considered

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[4] Email VE to [Law Firm](30 August 2011).
[5] Citation Redacted.
[6] Citation Redacted.
[7] Above n 4.

that the petitioning creditor might view an adjournment with equanimity as it stood to receive funds under the intended proposal.

[11] Mr DS noted that Mr AR did not attend the bankruptcy hearing, and that another lawyer from his firm appeared. Mr DS submitted that when Mr VE made his application for a stay (the Judge having indicated that she would not grant the adjournment sought by Mr VE), the opposing lawyer from Mr AR's firm did not indicate that by applying for the stay Mr VE was breaching the earlier undertaking that he had given.

[12] It was further submitted on Mr VE's behalf that he gave the undertaking to avoid unnecessary costs to the creditor and that, most importantly, it was never given as or intended to be an undertaking that prevented Mr VE from pursuing an application to adjourn bankruptcy proceedings as far as that might need to be taken – including applying for a stay should the adjournment not be granted.

Standards Committee decision

[13] In relation to the alleged breach of undertaking, the Standards Committee considered Mr VE's response to the complaint and accepted his explanation saying that his conduct:[8]

> … was to seek an adjournment of the bankruptcy proceedings, not to have [them] dismissed. Never at any stage (including when the appeal was taken) did Mr VE … attempt to have the bankruptcy proceedings dismissed. [The] efforts were focussed on having the bankruptcy proceedings adjourned to allow time for the compromise proposal to creditors to run its course. On this basis, the Committee accepted that there was no breach of the undertaking not to oppose the bankruptcy proceedings.

[14] The Standards Committee nevertheless "recommended that all undertakings should only be given after careful consideration and with a clear understanding of their consequences".[9]

Hearing on the papers

[15] Both parties have consented to this review being undertaken on the papers pursuant to s 206(2) of the Act, and each filed written submissions. The on-the-papers hearing process allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

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[8] Standards Committee determination (19 November 2012) at [27].
[9] At [29].

[16] In *Deliu v Hong* Winkelmann J provided helpful guidance on the nature and scope of an LCRO review. She observed that the review framework in the Act "create[s] a very particular statutory process".[10]

[17] Her Honour noted that:[11]

> The power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence …. Nevertheless …. where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

Discussion

[18] There is no doubt that Mr VE gave an undertaking. In his email to Mr AR's firm, Mr VE expressly uses the word "undertaking". The only issue on review is whether there is any basis for Mr AR's submission that Mr VE breached the undertaking when he applied for a stay of execution of the bankruptcy adjudication.

[19] Mr AR's position is that the undertaking did not extend to allowing Mr VE to make an application to the Court for a stay. He submits that Mr VE undertook not to take any steps to oppose adjudication if the adjournment was refused. It was refused. Mr AR's complaint is that Mr VE then took distinct and further procedural steps by applying for a stay of execution of the adjudication. Mr AR argues that Mr VE's undertaking precluded him from pursuing any further steps to oppose adjudication once the Judge had indicated that she was going to refuse the application for an adjournment. The steps that Mr VE took, namely to apply for a stay of the Judge's adjudication order, amounted to a breach of his undertaking.

[20] On the other hand Mr VE argues through his counsel that all he was ever asking for was an adjournment, and that his undertaking enabled him to pursue that application so far as that was procedurally possible – including to apply for a stay pending an appeal of the Judge's decision not to grant the adjournment.

[21] Undertakings form the basis upon which a multitude of transactions between lawyers and other parties are guided and affected. The duty of compliance with those undertakings, if in any way diminished, will be to the detriment of legal practice, commercial transactions and the numerous parties who rely on those undertakings. It goes without saying that their terms must be clear, precise and unambiguous.

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[10] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39].

[22] The issue of undertakings and alleged breaches thereof has been thoroughly considered by the High Court in *ASC3 of NZLS v W*.[12]

[23] In *ASC3 of NZLS v W* Duffy J said:[13]

> … the law has rejected a technical and legalistic approach to undertakings and has instead required them to be honoured *optima fide*. It is also why any ambiguity is to be construed in favour of the recipient, and why defences that are available in contract and other common law disputes are not readily available to resist the enforcement of an undertaking.

[24] The Court was considering an undertaking given by a practitioner that might not have expressed what that practitioner was intending to convey. Duffy J held that "to draft an undertaking … imprecisely constitutes negligence or incompetence".[14] Her Honour considered that:[15]

> … the settled law on undertakings lead me to conclude that members of the public would expect practitioners to prepare precise, clear undertakings, whose meaning was at least understood by the practitioner responsible for drafting them. Members of the public would not expect practitioners to draft undertakings that did not represent their intent. Such persons would also expect practitioners to honour their undertakings, rather than to dispute their meanings. Furthermore, given the high levels of reliance placed on undertakings, members of the public would not expect that practitioners could later avoid honouring their undertakings on the ground that they were issued in haste or under pressure, such that the practitioner has mistakenly expressed himself or herself at to its terms.

[25] And further:[16]

> The trustworthiness, integrity and standing of the profession would be diminished if a practitioner were to be permitted to say, "I should not have to honour this undertaking, because even though I drafted it, it does not say what I intended it to say". This would be no better than permitting practitioners to avoid honouring their undertakings by reliance on fine legal points.

[26] Mr DS conceded on behalf of Mr VE that the terms of the undertaking were incautious, and that it was unwise for Mr VE to give an undertaking in terms that he could not ultimately control. As the Court of Appeal noted in *W v ASC3 of NZLS* the need for certainty of meaning is always important, no matter what the circumstances are of the drafting of an undertaking.[17]

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[11] At [41].
[12] *Auckland Standards Committee 3of NZLS v W* [2011] 3 NZLR 117 (HC). Upheld by the Court of Appeal in *W v Auckland Standards Committee 3 of NZLS* [2012] NZCA 401, [2012] NZAR 1071.
[13] At [60].
[14] At [65].
[15] At [66].
[16] At [67].
[17] Above n 13, at [28].

[27] Mr VE's undertaking did not explicitly refer to further attempts to ask the Court to reconsider any decision to refuse an adjournment. To the extent that Mr VE argues that his undertaking extended to an appeal of the Court's refusal to grant an adjournment including applying for a stay, then this was not precisely drafted in the undertaking. If Mr VE had intended his undertaking to extend to an application for a stay pending an appeal against the refusal to grant an adjournment, then he should have made that clear in the undertaking itself. It would have been a simple matter to draft the undertaking more precisely to encompass the right to an application for a stay and an appeal.

[28] In my view, it is unhelpful to read into the undertaking provided, a more expansive meaning than is conveyed on the face of the words themselves. Mr VE had taken instructions at last minute. Those instructions were to endeavour to buy further time for the creditor, to enable a proposal for payment to be put together. It is common for parties labouring under imminent risk of adjudication proceedings, to seek to persuade the court that a workable proposal can be structured which will provide some comfort to the creditor. It is a common backdrop to these negotiations that a debtor will seek time to marshal the necessary resources to enable a realistic proposal to be put before the court.

[29] Underpinning the court and the creditors concerns when considering the viability of proposals on offer, is concern to ensure that offers of settlement are not being deployed as a means of delay.

[30] The undertaking provided is, in my view, clear in its purpose and intent. Mr VE intends to apply for an adjournment. If the adjournment is not granted, he will not oppose the bankruptcy application. The undertaking as expressed, gives clear indication that it is anticipated that the adjournment application will be dealt with promptly. I do not consider that it would reasonably have been within the contemplation of the party receiving the undertaking, that Mr VE would, if his application for adjournment was declined, pursue avenues to challenge the decision to decline the adjournment application. Mr VE may have thought that the undertaking provided allowed opportunity for further steps but the undertaking as drafted does not carry that sense.

[31] Rule 10.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) provides "A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice".

[32] I am satisfied after reviewing all of the material, that the complaint has been made out and that Mr VE has breached rule 10.3. He may have intended his undertaking to allow him to apply for a stay of proceedings pending an appeal, but his written words did not express that intention.

[33] The conclusion warrants a finding of unsatisfactory conduct under s 12 of the Act.

[34] I now turn to consider the issue of penalty. I am mindful of the Court of Appeal's comments in *W v ASC3 of NZLS* to the effect that there may be rare cases where a breach of an undertaking may not warrant some form of disciplinary action, but that usually disciplinary action will be justified at a level appropriate to the circumstances.[18]

[35] The Standards Committee formed a favourable view of Mr VE's motives in moving to apply for a stay of the bankruptcy adjudication. It clearly came to the conclusion that this was not a situation of a deliberate breach of an undertaking. I agree. At worst, this was similar to the position in *ASC3 of NZLS v W* – namely a poorly drafted undertaking that did not fully reflect that which the practitioner intended to convey. Both the High Court and the Court of Appeal agreed that this nonetheless amounted to conduct justifying a disciplinary response.

[36] I note that when Mr VE learned of the allegation that he had breached his undertaking, he took it seriously, apologised to the creditor's lawyers and withdrew from acting for the debtor. He engaged counsel to assist him to respond to the complaint, and acknowledged that the wording of his undertaking was "incautious".

[37] I conclude that this conduct is at the lower end of the scale of seriousness and that the finding of unsatisfactory conduct is, in itself, a sufficient disciplinary response.

[38] There has been a regrettable delay in having this review application concluded. It is appreciated and understood that the delay has been of concern to both parties.

Costs

[39] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

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[18] At [48].

[40] Taking into account the Costs Orders Guidelines of this Office, Mr VE is ordered to contribute the sum of $1,200 to the costs of the review.

Decision

[41] The application for review is upheld. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed.

[42] A determination is made that there has been unsatisfactory conduct on the part of Mr VE pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006.

[43] Mr VE is to pay $1,200 in respect of 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 10th day of August 2015

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R Maidment
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 AR as the Applicant
Mr VE as the Respondent
Mr DS as the Representative for the Respondent
The Standards Committee
The New Zealand Law Society