

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [South Island] Standards Committee

**BETWEEN**

**OP**

Applicant

**AND**

**QR**

Respondent

**DECISION**

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

**Introduction**

- [1] This review concerns a complaint relating to the performance of an undertaking given in conjunction with the settlement of a conveyancing transaction.
- [2] In this case Mr OP acted for the vendor of a property and declined to release the e-dealing until he had received the balance of the deposit in cleared funds which had been paid to the Public Trust as stakeholder.<sup>1</sup>
- [3] The Committee determined that Mr OP's conduct constituted unsatisfactory conduct, censured him, and ordered him to pay the sum of \$400 by way of costs.
- [4] Mr OP has applied for a review of that determination.

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<sup>1</sup> Mr OP has advised that the balance of the deposit had been sent to the Public Trust (Letter OP to NZLS (17 January 2013) at [3].) Earlier correspondence from Mr OP (Letter OP to Lawyers Complaints Service (30 November 2012)) refers to the deposit having been paid to the agent and the requirement of the agent to hold the deposit for ten working days before it could be released. Mr QR also refers to the deposit being held by the agent in his letter to the LCS dated 13 December 2012. I have not completely resolved why the funds were held by the Public Trust but have determined that this is not critical to the outcome of the review – the essential fact is that the funds were not paid to Mr OP in cleared funds on or before the day of settlement.

## Background

[5] Mr OP acted for the vendor of a property. Mr QR acted for the purchaser. The deposit (or the balance of the deposit after deduction of agent's commission) was held by the Public Trust.

[6] It was agreed that settlement would take place on 14 November 2012 but Mr QR would not authorise release of the funds held by the Public Trust to Mr OP prior to the settlement date. Instead, he authorised release of the funds on the day of settlement.

[7] Mr OP gave the following undertaking:<sup>2</sup>

We undertake we have certified, signed and pre-validated the documents listed below under e-dealing number [XXXXXX]

Immediately upon confirmation of receipt of all funds as cleared funds to settle the transaction into our trust account as per our settlement requirements we further undertake:

- 1 To authorise the release of keys to the property to your client. We note the keys are held by the agent;
- 2 To release the following instruments from the Landonline work space into your control;
- 3 Not to attempt to withdraw such release or attempt any alteration of such instrument following settlement or release:

Discharge Mortgage No. [XXXXXXXX]  
Transfer.

We look forward to receiving your confirmation of payment of settlement funds in due course.

[8] The Public Trust did not have the facility to transfer funds on a "same day cleared funds" basis.

[9] Mr QR confirmed payment of the amount shown in Mr OP's settlement statement as the "[a]mount required to settle as at 14 November 2012" at 3.05 pm on the day of settlement.

[10] Mr OP did not release the documents into the Landonline workspace to enable Mr QR to register the transfer to his client until the funds from the Public Trust were cleared. That occurred at approximately 9.00 am on the following morning and the documents were then released. Mr OP notes that the documents were therefore released within two working hours of payment being made.

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<sup>2</sup> The undertaking was in fact given by Ms ZA a licensed conveyancer employed by Mr OP and it is not disputed that Mr OP is bound by that.

### **The Standards Committee determination**

[11] The Standards Committee set out the facts in some detail. It identified the issues as being:

10. (a) Is Mr OP in breach of Rule 10.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and client Care) Rules 2008 in not honouring an undertaking dated 14 November 2013;
- (b) Given that the purchaser had paid the deposit to the vendor's nominated stakeholder, and had paid the balance to settle the purchase as provided for in the Settlement Statement, whether the purchaser had complied with its obligations under the agreement and was entitled to require the transfer to be released;
- (c) Whether a purchaser who has paid a deposit in accordance with the contract has any legal responsibility for the failure of the vendors' nominated stakeholder to disburse the balance of the deposit in the way required by the vendor.

[12] Having considered all of the material provided and submissions from the parties the Standards Committee determined that there had been unsatisfactory conduct on the part of Mr OP. It recorded its reasons:

19. (a) The rules of conduct and client care for lawyers clearly state that a lawyer must honour all undertakings. Undertakings are a vital part of legal practice without which legal practice would be vastly more complicated and difficult. It follows that lawyers who act in reliance on an undertaking are entitled to expect that the undertaking will be honoured. The Committee finds that Mr OP delayed in honouring his undertaking by one day when it was clear that he should have acted on the undertaking on the day of settlement rather than the day after.

[13] The Committee considered Mr OP's conduct was "at the lower end of the scale"<sup>3</sup> and noted that Mr QR's client had not suffered any loss.

[14] It censured Mr OP and ordered him to pay costs of \$400.

### **The review**

[15] This review has been completed on the material before me with the consent of both parties.

[16] In his review application dated 13 November 2013 Mr OP noted:

There were two elements involved in obtaining confirmation of receipt of all funds as cleared funds to settle the transaction. First was the payment of the balance to settle shown on the settlement statement and the second was receiving confirmation that the balance of the deposit had been paid into our trust account as cleared funds. Those two payments constituted receipt of all funds as cleared funds to settle the transaction into our trust account.

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<sup>3</sup> Standards Committee determination dated 17 October 2013 at [19(b)].

[17] Prior to settlement (on 9 November 2012) there were communications between Ms ZA and Mr QR in which Ms ZA requested Mr QR to authorise the Public Trust to release the balance of the deposit into the firm's trust account. Mr QR advised the funds would be released on the day of settlement. He provided no reason for not agreeing to the funds being released early. I would observe that it is not unusual for a vendor's solicitor to receive and pay out the balance of a deposit before settlement. I also however, observe that Mr QR was not obliged to agree to any early release.

[18] Nevertheless, I am satisfied that Mr QR was aware that receipt of all the funds as cleared funds was an issue for Mr OP and Ms ZA.

[19] The firm's settlement undertaking was provided at 1.10 pm on the day of settlement. In his submissions Mr OP draws attention to the fact that the form of the undertaking provided differed from the usual form of undertaking given by a vendor's solicitor in that it included reference to receipt of "all funds as cleared funds". Mr OP asserts that this clearly meant they required to receive the balance of the deposit in cleared funds before they would settle. Mr QR asserts that this meant nothing more than the usual undertaking to settle upon receipt of the amount shown in Ms ZA's settlement statement.

[20] Having read material provided by both parties it is understandable how each party held their respective understandings of the undertaking. The position of both parties was known to the other before settlement. Following communications with Ms ZA Mr QR knew that she and Mr OP required to receive the balance of the deposit in cleared funds before they would consider settlement had been effected. Ms ZA and Mr OP knew that Mr QR had declined to release the funds prior to settlement and they would not have any cleared funds on the day of settlement.<sup>4</sup>

[21] In the circumstances it was not satisfactory for either solicitor to leave the matter unresolved before settlement and resort to a dispute over the form of the undertaking. It is the lawyers' clients who potentially will be poorly served by the lawyers in these circumstances.

[22] Either party's interpretation of the undertaking can be supported depending on the position adopted. Both parties would have been aware how the other would react to the facts as they unfolded. I do not think that either party should take any satisfaction from the events that occurred or the reference of this matter to the

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<sup>4</sup> Mr OP acknowledges this when he notes that Ms ZA gave the undertaking in the form that she did to deal with the situation which "she anticipated was going to unfold". (Mr OP's submissions 30 July 2013).

Complaints Service. It was incumbent on both lawyers to be proactive in addressing the issue and reach agreement as to how the requirements of each party was going to be satisfied. Standing back and allowing the matter to degenerate into a dispute over the fine wording of an undertaking does not reflect well on either party.

[23] I have acknowledged that Mr OP's understanding of the undertaking provided by him is supportable and consequently I do not agree with the Committee when it determined that Mr OP had "deliberately declined to honour the undertaking".<sup>5</sup> In the circumstances I do not think the adverse finding against Mr OP is warranted.

### **The award of costs**

[24] Section 157(2) of the Lawyers and Conveyancers Act 2006 provides that a Standards Committee may award costs against a party even though there has not been a finding of unsatisfactory conduct against the lawyer if it considers the proceedings were justified and it is just to do so.

[25] A complaint about a perceived breach of undertaking is clearly a matter which is justified. However, I do not think it would be just to allow the award of costs to stand. As I have noted, both Mr OP and Mr QR have played a part in letting this matter develop into a complaint and now this review. In addition, I note that even viewed as Mr QR views the undertaking, it was fulfilled within two working hours of the funds being paid. That compares favourably with the facts in other reviews.

[26] In *FY v UM*<sup>6</sup> the Standards Committee declined to make a finding of unsatisfactory conduct against a lawyer for failing to release the e-dealing until 4.05 pm after the fax confirming payment of funds had been sent at 11.30 am. The lawyer against whom the complaint was made provided reasons for her inability to perform her obligations and whilst I indicated that I would not have been as ready as the Standards Committee to excuse the lawyer's conduct I declined to interfere with the decision of the Standards Committee. In a recent decision<sup>7</sup> the Standards Committee exercised its discretion to take no further action in respect of a complaint that there had been a delay of 80 minutes in releasing the e-dealing. In all of the circumstances it cannot be said that it would be just to allow the award of costs to stand and it too will be set aside.

### **Decision**

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

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<sup>5</sup> Above n 3 at [18].

<sup>6</sup> *FY v UM* LCRO 239/2010.

<sup>7</sup> LCRO 322/12 (not yet published).

Pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 the determination is that there will be no further action with regard to the complaint.

### **Comment**

This decision should not in any way be seen as derogating from the seriousness with which Standards Committees, this Office and the Tribunal view a breach of an undertaking. I endorse absolutely the words of the Committee that “undertakings are a vital part of legal practice without which legal practice would be vastly more complicated and difficult” and to achieve this undertakings must be strictly complied with. The essence of this decision is however that Mr OP considered that he was not in breach of his undertaking, and I consider that his view is supportable. If there was any uncertainty over the form of the wording then that should have been addressed and resolved before settlement.

**DATED** this 28<sup>th</sup> day of August 2014

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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:

Mr OP as the Applicant  
Mr QR as the Respondent  
The [South Island] Standards Committee  
The New Zealand Law Society