LCRO 55 /09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee
BETWEEN	**MR WORKINGTON** of Auckland Applicant
AND	**MR SHEFFIELD** of Auckland Respondent

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

DECISION

Application for review

[1] An application was made by Mr and Mrs Workington for review of a decision by the Standards Committee in respect of his complaints against lawyers from Cardiff Sheffield. The complaints arise in relation to Mr Workington's purchase of a commercial building in Auckland. The lawyers mainly involved in the transaction were Mr X and Ms Sheffield, but Mr Sheffield, also a partner, was named by the Workingtons for the purposes of the complaints. He provided the Standards Committee with a response to the complaints, informing the Committee that both of the other lawyers had left the firm by the time of the complaints.

[2] The complaints relate to legal charges (fees being higher than quoted), legal services (failure to notify Council of change of ownership) and costs resulting from lawyer's failure to apply retention money to clean up costs.

[3] The Standards Committee, having considered the complaints, decided that the fees were reasonable, and that in the circumstances Mr X and Mr Sheffield had acted appropriately throughout. The Committee determined, pursuant to section 138(3) of the Lawyers and Conveyancers Act 2006, to take no further action. Mr and Mrs Workington sought a review on the basis that they considered the Committee had not properly understood the complaints.

Background

[4] In mid 2007 the law firm of Sheffield Cardiff acted for Mr Workington in the purchase of a commercial property. Mr X, a partner in the firm, was responsible for the file and assisted by staff solicitor Ms Sheffield. Mr Sheffield became involved with the file during Mr X's temporary absence, and ultimately had numerous conversations with Mr Workington.

[5] Mr Workington was given an estimate of the costs for the transaction which is undated but appears to have been issued around 20 July 2007. About two months later he received a revised estimate with a letter explaining the reasons the earlier estimate being revised. A further letter sent to him in September 2007 advised Mr Workington of further increase in the estimated fees.

[6] At the time of settlement there was an outstanding issue concerning rubbish at the property. By agreement the sum of $20,000 was withheld from settlement for the purpose of paying costs relating to the clean up, with any remaining monies to be paid to the vendors. It was agreed that this sum be held in the trust account of Sheffield Cardiff as stakeholder, to be applied to payment of costs for cleaning and removal of rubbish from the premises. The vendors approved some cleanup accounts and these were paid from the fund.

[7] There was a cleanup account from Metrowaste that remained unpaid at the time it was invoiced due to delays in obtaining the consents of each of the two vendors for its payment. In July 2008 the lawyers for each of the vendors emailed their clients' consent to the balance of trust fund being applied to the Metrowaste account. However, the firm took no steps to pay the Metrowaste account, but wrote to Mr Workington concerning his overdue accounts. When he still did not pay Mr Sheffield eventually informed him that the firm would not act for him any further. The Metrowaste account remained unpaid. In November 2008 Metrowaste issued proceedings against Mr Workington to recover the debt. He is defending the claim.

[8] The lawyers wrote to Mr Workington on 2 October 2008 to inform him that his continued failure to pay their fees would result in the debt being referred to Baycorp. The evidence shows that the matter was registered with Baycorp on 29 October 2008.

[9] In December 2008 Mr and Mrs Workington filed a complaint against the lawyers with the New Zealand Law Society raising a number of complaints in relation to the legal services that had been provided, which they considered justified the refusal to pay the balance of any fees claimed by the firm.

The complaints

[10] The complaints may be summaries as follows:

- that the fees were in excess of amount quoted by the firm, and that there had not been any information concerning any increase
- that the lawyer failed to inform the local authority of the change of ownership leading to a failure to pay rates which have since attracted penalties
- that the lawyer wrongfully refused to apply monies held in its trust account towards the payment of the Metrowaste account

New complaint

[11] Mr Workington also raised a new complaint in relation to the Sale and Purchase agreement. This is not a matter he has raised with the Standards Committee and I have no power to review a complaint that has not first been considered by the Committee.

Review of evidence

[12] For the purposes of this review a request was made for the file relating to the transaction that gave rise to the complaints, and two large files were forwarded by Sheffield Cardiff. I note that the file had not been sought by the Standards Committee. Each of these complaints is addressed below.

Excessive fees / advice of increase of fees

[13] Mr Workington claimed he had been given a fixed quote, and that he had not been informed of any increase.

[14] Information on the file shows that he had initially been provided with a costs estimate of $3,733.00 in written form that was undated but appears to have been prepared in July 2007. It was explicitly state to be an ‘estimate’, this fact being made clear under the bold heading of ‘**Important Notes’.** The following information is

included: *"The above estimate is base upon the anticipation of a straightforward, uncomplicated transaction as described in the attached Job Description and, where applicable, finance arrangements documented by one loan agreement and mortgage alone; any departure from this may involve additional attendance and thus additional costs. If appropriate a revised costs estimate will be provided."*

[15] He received a revised estimate in writing on 27 August with the following explanation; *"Due to the uniqueness of the above transaction, and considering the fact that this matter has been more complex than a normal commercial purchase, I have prepared a new costs estimate for your information."* The new figure was stated to be $5,500 excluding GST, recoveries and disbursements.

[16] On 5 September 2007 Mr Workington was sent a further letter which included the following paragraph: *'I am aware that our costs have been revised since our original estimate. It is clear that with the ongoing complications our costs will increase further. Once an outcome has been reached from our current negotiations, I will be in a better position to set a fee."*

[17] It is clear from the above that the original fee was an estimate and that Mr Workington was informed about an increase in fees and the reasons for it. My perusal of the file leaves me in no doubt that the increases were genuinely related to a considerable amount of additional work that was involved in addition to what was contemplated by the initial estimate. On this evidence there is no ground for upholding this complaint.

quantum of fees

[18] A further complaint was that the fees were excessive. Mr Workington refuted that the original instructions had varied, and he contended that any communication issues were the fault of the lawyers. The lawyer explained the variations to the original instructions, and referred to the additional work involved in the transaction which was not apparent from the original instructions.

[19] Having perused the two large files it is clear to me that the transaction involved a substantial volume of work, considerably greater than that normally involved in the straightforward purchase of a commercial building and of greater complexity, and which could not have been foreseen at the time that instructions were originally given. It is not necessary to describe this in detail since the attendances are included in the accounts sent to Mr Workington. The evidence of the files reasonably supports Mr Sheffield's explanations

[20] The Standards Committee were of the view that the fees charged were appropriate in the circumstances. I agree. The evidence on the file does not support the allegation. There is no basis for upholding this complaint.

Rates

[21] Mr Workington further complained that there were rates arrears when he purchased the property that had not been paid. He also alleged that the lawyer had failed to notify the Council of a change of ownership of the property, and that this failure led to an accumulation of rates arrears which have attracted substantial penalties. His view is that the lawyers failed to discharge their professional obligations to protect his interest which justifies his refusal to pay the balance of legal fees.

[22] A copy of the vendors' settlement statement on the file shows an undertaking that the first instalment was (or would be) paid, and apportionments were made on that basis. The calculations correctly reflect the number of days occupied by the vendor in relation to the paid instalment. The evidence provided by Mr Workington in relation to the rates arrears indicated that the arrears covered three rates instalments, and which were shown to be overdue by the time the new rating year commenced. This evidence suggests that the first instalment was indeed paid, and that the second, third and fourth instalments were not. The second instalment was due on 20 November 2007, just over two months following the purchase date.

[23] In the normal course of events the Council would have sent the next instalment to the new owner after receiving advice of sale from the vendor's solicitor. Mr Workington says that he did not receive a rates demand for the property. He said that he had contacted the Council several times, referring to his *'...many phone calls, between September 2007 and November 2008 to the Rodney Council, we both finally realised that the postal address had not been changed from the old vendors to me.*' He considered the lawyers to be at fault for the penalties.

[24] Mr Sheffield replied that it is the responsibility of the vendor's lawyer to send notices of sale to the local authorities. He was unable to locate a copy of the change of ownership sent to the vendor's lawyer but was confident that one had been sent in accordance with usual practice. He also referred to Mr Workington's contacts with the Council in September 2007 and thereafter, and that he had not returned to the lawyers with regard to any rates concerns.

[25] Mr Sheffield rightly says that it is normal practice for the vendor's lawyer to inform a local authority of a change of ownership. Such notices are usually forwarded in the

first instance by the purchaser's lawyer to the vendor's lawyer, who on-forwards it to the Council immediately following settlement. There is nothing to suggest that such a notice was not sent to the vendor's solicitor in this case, notwithstanding that a copy is not on the file.

[26] In considering this complaint I have taken into account that Mr Workington owned other property and must have been fully aware of a property owner's obligation to pay rates, and knew that he had responsibility to pay rates for the property he had purchased. It is not unreasonable to suggest that he had some responsibility for making enquiries having received no rates demand. Mr Workington does not explain the reason for contacting the Council in September 2007 and thereafter, but admitted having had regular contact with the Council for fourteen months. I consider it highly unlikely that it would have taken this length of time for Mr Workington and the Council to have 'realised' that no change of ownership details had been recorded had a rates enquiry been made regarding the property. If Mr Workington took no steps within a reasonable time to enquire into the rates situation then he must assume responsibility for what followed. In any event there is no information to support a complaint of error or wrongful action or omission by the lawyers. I see no basis for making the lawyers answerable for the penalties that accrued in respect of unpaid rates. There is no basis for upholding this complaint.

Clean up costs

[27] Mr Workington's further complaint related to the firm's failure to apply funds it held in trust for the cleanup towards the payment of the Metrowaste account. He said that the account related to services provided by Metrowaste in cleaning of the premises he had purchased, and that money had been retained at settlement for that purpose. Metrowaste is presently suing him for the debt which is still unpaid, proceedings that he advised he intends to defend on the basis that it was Mr Y (the vendor) who had contracted Metrowaste. The complaint is that Sheffield Cardiff has not applied the retention money to payment of the debt.

[28] The information on the file concerning the withholding of $20,000 from settlement confirms that the sum was retained from settlement by the purchaser's firm as stakeholder, for the explicit purpose of meeting the vendor's obligation in relation to clearing rubbish from the premises. The lawyers undertook to apply the monies towards cleanup costs with any surplus to be forwarded to the vendors.

[29] Some of this money was paid to Mr Workington and others as reimbursement for some of these costs after invoices had first been approved by the vendors. The file

shows that $6239.02 remains of this sum in the firm's trust account. The only outstanding clean up account is that of Metrowaste which is in the sum of $10,433.42.

[30] A copy of the Metrowaste invoices are on the conveyancing file and show that Metrowaste had originally prepared its invoices in the name of Sheffield Cardiff and sent them directly to the firm in mid-October 2007, who had then forwarded a copy to the vendors for payment approval. The invoices were re-issued on 28 November in the name of Mr Workington's company, Workington Properties Limited, apparently on the advice of Sheffield Cardiff.

[31] In responding to this complaint Mr Sheffield informed the Standards Committee that the vendors' consent had been requested but that the lawyers had been unable to get authority of one of the vendors who would not agree to payment of the account, and that this still remains unresolved.

[32] This is contrary to the evidence on the file. In the course of this review both of the vendors' consents were discovered in the form of two emails sent to the firm on 4 July 2008 by the solicitors acting for each of them.

[33] Copies of the vendor's consents were forwarded from this office to the parties on 6 July 2009. They were informed that the review would be postponed pursuant to section 201 of the Lawyers and Conveyancers Act to see if this particular complaint might be resolved by agreement. A teleconference was arranged for that purpose.

[34] At the teleconference it was put to Mr Sheffield that the balance held in trust by the firm should be applied to the Metrowaste invoices in accordance with the firm's undertaking, given that these had been approved by the vendors. Mr Sheffield was unwilling to apply the money to the invoice, stating that the firm was entitled to claim a lien over the monies because the complainant, who would benefit from the payment, was indebted to the firm. However, after some discussion the parties reached the following agreement, that Mr Sheffield would immediately apply the balance of the trust fund towards the Metrowaste debt and Mr Workington agreed to abide by the LCRO's ruling in the review on the matter of payment of fees. They agreed that these terms be recorded in an agreement to be signed by them. A Minute was issued attaching an Agreement in those terms. The document was signed and returned by Mr Workington.

[35] Mr Sheffield subsequently forwarded correspondence setting out his reasons for refusing to sign it. I have considered these, and observe that most matters he raised were covered in the course of the teleconference discussion and none had been raised as a condition to his agreement to promptly apply the trust fund to the Metrowaste debt. He indicated that he had felt pressed into the agreement and noted that the

complainant intended to defend the Metrowaste claim. A further opportunity was subsequently afforded him to reconsider his position with reference to applicable law, but Mr Sheffield continued to assert a right of lien over the trust money.

[36] I include this background because I consider it appropriate to record that Mr Sheffield was given the opportunity to resolve this particular complaint, it having been signalled that withholding trust monies in these circumstances could lead to an adverse outcome in the review. In the context of this review application, and given that the complaint is not resolved, I am now required to consider this complaint in a disciplinary context.

Considerations

[37] I have already outlined the background to the complaint. There is a letter on the file dated 11 October 2007 sent by Sheffield Cardiff to the solicitor of one of the vendors acknowledging that the firm holds the money as stakeholder. It is clear from the surrounding correspondence that the agreement between the parties was that the retention related to the vendors' obligation to deliver vacant (rubbish free) premises, and that the money was to be applied to reimburse costs paid for the clean up, with any surplus to be returned to the vendors. The file shows that parts of this fund were applied to reimbursing costs paid by Mr Workington and others after vendors' approval of the invoices.

[38] Mr Sheffield does not dispute that the money was held in trust on behalf of the vendors for the express purpose of cleaning up the premises, nor the evidence that the vendors have approved these invoices for payment. His refusal to honour the undertaking relates to Mr Workington's failure to have paid fees owed to the firm. In these circumstances he considers that the firm is entitled to exercise a lien over the balance of the fund in his firm's trust account. He has indicated his willingness to disburse the funds to Metrowaste only to the extent of the balance remaining after deduction of the amount owing by Mr Workington. The outstanding fee owed by Mr Workington is understood to be $2,712.38.

[39] Mr Sheffield's reasoning is as follows: that the money was withheld at settlement to meet the vendor's contractual obligation to clean the premises, (with balance to be returned to vendors), that an undertaking was given by the firm to the vendor to apply the money to that purpose, that the vendor failed to clean up, that this resulted in the money now being held for the benefit of the purchaser (Mr Workington), that the undertaking to the vendor has lapsed and the vendors' consent to release the funds is

irrelevant and unnecessary, that the fund is now held for the benefit of the purchaser and is subject to a lien claimed by the firm to whom the purchaser owes money.

[40] Before discussing the legal obstacles to such an approach it may be observed that Mr Sheffield's submission does not reflect the arrangements surrounding the retention and undertaking which contemplated that others, and not the vendors, would attend to the clean up and be reimbursed from the fund.

[41] The evidence shows that the retention fund has been in the trust account of Sheffield Cardiff firm since September 2007, that on 4 July 2008 both vendors specifically approved the Metrowaste accounts for payment from that fund, and that no payment has yet been made as required by an undertaking given by the firm.

[42] The evidence also indicates that when the vendors' consents arrived on 4 July 2008 the file was still being largely handled by Mr X and Ms Sheffield. On that day, after receiving the vendor's consent, Mr X replied to the solicitor for one of the vendors with, "*A is back on Monday. He will handle the file*." This was a reference to Mr Sheffield. On 7 July 2008 Mr Sheffield sent an invoice to Mr Workington showing current and overdue debt, with the covering letter stating, *"We are not prepared to review or verify the accounts paid to finalise this matter until you respond and meet all our outstanding accounts."* The evidence also shows that an invoice sent to the client the previous month was also signed out by Mr Sheffield as partner of the firm, whose covering letter informed the client of the consequences of non payment. This evidence suggests that within a few days of the vendors consenting to the retention monies being applied to the Metrowaste account, Mr Sheffield had decided that no action would be taken in respect of the file due to non-payment by Mr Workington of his bills. Notwithstanding that there may be some lack of clarity about who was 'in charge' of the file, the evidence strongly indicates that Mr Sheffield was largely in control of the application of the retention monies, and that it was his decision that blocked the payment to Metrowaste.

[43] Recent events make it clear that it is Mr Sheffield's decision to continue withholding the money and to claim a lien over it in respect of the debt owed by Mr Workington. Mr Sheffield has had ample opportunity to resolve the complaint, but he has remained doggedly determined to maintain his position.

Standards for disciplinary intervention.

[44] This review concerns conduct which occurred prior to 1 August 2008, and which has continued after that date. New legislation came into force in respect of the regulation of the legal profession on I August 2008 and consequently the standards

that apply differ between conduct which occurred before, and conduct which occurred after, that date.

[45] S. 351of the Lawyers ands Conveyancers Act governs complaints made after 1 August 2008 about conduct that occurred prior to that date. In respect of such conduct a Standards Committee has jurisdiction to consider the complaint only if the conduct complained of could have led to disciplinary proceedings under the Law Practitioners Act. By s 352 of the Lawyers and Conveyancers Act 2006 a Standards Committee may only impose penalties in respect of conduct which could have been imposed for that conduct at the time the conduct occurred.

[46] The relevant standards in respect of such conduct are set out in ss 106 and 112 of the Law Practitioners Act 1982 and provide that disciplinary sanctions may be imposed where a practitioner is found guilty of:

- misconduct in his professional capacity, or
- conduct unbecoming a barrister or a solicitor,
- or negligence or incompetence in his professional capacity, of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[47] The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high. Misconduct is generally considered to be conduct which is ‘reprehensible’ ‘inexcusable’, ‘disgraceful’, ‘deplorable’ or ‘dishonourable’. (See for example *Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming is perhaps a slightly lower threshold. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811.

[48] The threshold for disciplinary intervention under the Lawyers and Conveyancers Act 2006 is somewhat lower. Misconduct is defined in section 7 and unsatisfactory conduct is defined in section 12 of the Act. The standards to which lawyers are expected to adhere are further expanded in a number of the Rules of Conduct and Client Care for Lawyers.

[49] In this case it would appear that both Acts may be applicable insofar as the conduct complained of originated under the former Act and has continued under the more recent Act. Given the approach that I have taken the distinctions between them

are unlikely to be material to this review. The question is whether Mr Sheffield's failure to honour the undertaking amounts to conduct which justifies disciplinary intervention.

[50] Reference is first made to section 89 of the Law Practitioner Act 1982 which provided:

> (1) All money received for or on behalf of any person by a solicitor shall be held by him exclusively for that person, to be paid to that person or as he directs, and until so paid all such money shall be paid into a bank in New Zealand to a general or separate trust account of that solicitor.

The equivalent section in the Lawyers and Conveyancers Act is found in s 110 (1). The gravity of this trust is reflected in the penalty section which provides for a fine not exceeding $25 000 where an offence against this section has been committed.

[51] It is clear that the reference to 'that person' is the person on whose behalf the money is held, and that the money is held 'exclusively' for that person to be paid to or at the direction of that person. In this case it is not disputed that the money was received on behalf of the vendors.

[52] The obligation of a lawyer in relation to trust monies was also discussed in *Heslop v Cousins* [2007]3 NZLR 679 where Chisholm, J noted that

> "A solicitor has no lien or right of set off if funds have been deposited into the solicitor's trust account for a particular purpose. In that situation the solicitor is obliged to use the funds for the particular purpose for which the funds have been entrusted to the solicitor. "

[53] It is a question of fact whether the money held by the solicitors was for a particular purpose. If so, a lien and/or set off was not available. If not, a lien and/or set off was available. Quoting Beaumont J in Re Wright (1984) 1 FCR 51 Chisholm, J continued,

> Where a money is paid to a solicitor for a particular purpose so that the solicitor becomes a trustee of that money, the solicitor's lien will not attach to the money unless it is allowed to remain in the solicitor's hands for general purposes with the client's express or implied consent after the particular purpose has been fulfilled or has failed … thus in such cases, a threshold question, essentially one of fact, arises as to whether the moneys were paid to the solicitor of a specially designated purpose on the one hand or were merely paid to him 'in the ordinary course of his business as solicitor for the client' on the other. "

[54] The present case differs insofar as the vendors were not a client of the firm of Sheffield Cardiff. Nevertheless, having received the money for a specific purpose and

given the undertaking to the vendors to hold it in trust for an agreed purpose the above principals would appear to apply equally to these circumstances. The fact that the money was received in trust for a purpose prevents it from being applied to any other purpose without the express consent of the owner. It has not been suggested that the vendors have given directions for an alternative application for the monies, nor that they are even aware that the Metrowaste account remains unpaid or that the practitioner claims a lien over the fund. The money therefore continues to be held for the benefit of the vendors in relation to their original directions which related to discharging their contractual obligation. There are no circumstances here to support a claim that the money is now held for the benefit of the purchaser, and therefore no foundation for claiming the lien.

[55] Mr Sheffield's refusal to apply the remaining trust fund to the Metrowaste account is a deliberate decision. Despite having had the opportunity to reconsider his position he has continued to assert a right to the lien as security for the complainant's debt to the firm. He appears to have given no thought to the position of the vendors to whom the undertaking was given, overlooking the fact that payment of the Metrowaste account benefited the vendors by discharging their contractual obligation. This includes payment of the Metrowaste debt and in that light it is irrelevant that Mr Workington intends to defend the Metrowaste claim. Failure to honour the undertaking to pay the cleanup account leaves the vendors exposed to legal action for breach of contractual obligation, and exposes the firm to a charge by the vendors of breach of trust.

[56] I find that Mr Sheffield's failure or refusal to honour the undertaking at the time that the vendor's consent was received by the firm amounts to conduct unbecoming his professional capacity in breach of section 106(3) (a) of the Law Practitioners Act 1982. It is conduct that could have led to disciplinary proceedings being taken against him under the Law Practitioners Act, and thus falls under the jurisdiction of the Standards Committee and this office.

[57] The failure to honour the undertaking has continued into the disciplinary regime of the Lawyers and Conveyancers Act 2006, and therefore the conduct is also be considered against the standards that have applied since 1 August 2008. The equivalent to the above section of the Law Practitioners Act is s 12(b) of the Lawyers and Conveyancers Act 2006, and also relevant are the Lawyers Rules of Conduct and Client Care, in particular Rule 10.3 which governs undertakings and requires a lawyer to honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice. Rule 10.3.1 makes this rule applicable whether the undertaking

is given by the lawyer personally or by any member of the lawyer's practice. Rule 10.3.2 states *"A lawyer who receives funds on terms requiring the lawyer to hold the funds in a trust account as a stakeholder must adhere strictly to those terms and disburse the funds only in accordance with them*."

[58] I find that the ongoing refusal or failure of Mr Sheffield to honour the undertaking amounts to unsatisfactory conduct in contravention of s 12(b) of the Lawyers and Conveyancers Act 2006 and also in breach of s 12(c) insofar as it contravenes practice Rules 10.3.1 and 10.3.2 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008.

Penalty and costs

[59] Pursuant to section 211(1) (b) of the Lawyers and Conveyancers Act 2006 this office may exercise any of the powers that could be exercised by a Standards Committee in the proceedings in which the decision was made.

[60] In respect of the original breach of undertaking, Section 352 applies to complaints about conduct that occurred prior to the coming into force of the Act and states that any penalty imposed must be one that could have been imposed at the time the conduct occurred. The range of available penalties are found in s 106(4) of the Law Practitioners Act, and includes a maximum fine of $2,000 (s.106 (4) (a)).

[61] In relation to conduct occurring after 1 August 2008 this office may exercise any of the powers that may be exercised by a Standards Committee pursuant to section 156 of the Lawyers and Conveyancers Act. The range of orders that may be made under the Lawyers and Conveyancers Act are found in s. 156 of the Act.

[62] The penalties and costs I consider appropriate in this matter are identical under both Acts and it is therefore unnecessary to distinguish between the two Acts for this purpose.

Penalties

[63] The first order that I consider should be made is to require the practitioner, at his own expense, to rectify the omission in relation to the undertaking referred to in this review. Accordingly the following order is made.

- Mr Sheffield is ordered pursuant to s 156(1)(h) to rectify at his own expense the omission relating to the undertaking, and to forward to Metrowaste the sum of $6 239.02 to Metrowaste be applied to the debt it currently claims from the applicant. This payment is to be made within 7 days of the date of this decision.

[64] Consideration was also given to whether a remedial order is appropriate, noting that both Acts create a power to order the practitioner to compensate where the wrongdoing has caused loss. The loss or costs relevant to this matter are those that the applicant may incur as a result of the practitioner's wrongdoing, namely those which arise in relation to the court proceedings currently being pursued by Metrowaste. These costs are not presently quantified, being costs and interest claimed in the Statement of Claim. However, the applicant intends to defend the proceedings and it cannot therefore be certain that he will incur these costs. Be that as it may, I have also considered that there may be an argument that the applicant has himself contributed to the current state of affairs by refusing to pay the fees he owes to the law firm. It is considerably more than a year that Sheffield Cardiff has been asking Mr Workington to pay his fees and he has so far failed to do so. In the overall circumstances I do not considerate it appropriate to make a compensatory order in favour of the applicant largely for the reason that the practitioner, or rather the law firm, has also suffered loss as a result of the applicant's failure to pay his fees.

[65] Next I considered whether a fine should be imposed. I am mindful that I have made a finding of conduct unbecoming against Mr Sheffield. The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573, as to punish the practitioner, as a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct. It is important to mark out the conduct as unacceptable and deter other practitioners from failing to pay due regard to their professional obligations in this manner.

[66] I consider that the most appropriate way to fulfil the functions of a penalty in this context is by the imposition of a fine. Under the Law Practitioners Act 1982 District Disciplinary Tribunals could only impose a fine of up to $2000 (s 106(4) (a)). By comparison s 156(1) (i) of the Lawyers and Conveyancers Act provides for a fine of up to $15 000 when unsatisfactory conduct is found. For a fine of that magnitude to be imposed it is clear that some serious wrongdoing must have occurred. In allowing for a possible fine of $15 000 the legislature has indicated that breaches of professional standards are to be taken seriously and instances of unsatisfactory conduct should not pass unmarked. This is a significant change from the earlier Act.

[67] There are several factors which are appropriate to take into account. The practitioner failed to honour the undertaking at the time the vendors provided consent to pay the cleanup account in July 2007. The practitioner's deliberate refusal to honour the undertaking after having been reminded of the vendor's consent was essentially

aimed at benefiting the firm by providing a security for unpaid fees of Mr Workington, effectively at the expense of the person for whom the fund is held. There is also the fact that the practitioner provided erroneous information to the Standards Committee concerning the matter of the vendors' authority.

[68] In cases where unsatisfactory conduct is found as a result of a breach of applicable rules (whether the Rules of Conduct and Client Care, regulations or the Act) and a fine is appropriate, a fine of $1000 would be a proper starting place in the absence of other factors. I consider it appropriate to impose a penalty that reflects the egregious nature of the wrongdoing in this case I am also mindful of the significant difference between the present and former legislation concerning the range of possible fines, and the fact that the original omission occurred under the former Act.

[69] Taking into account all of the above matters I consider an appropriate fine to be $1,500.

- Mr Sheffield is ordered to pay a fine of $1,500 pursuant to s156 (1) (i) of the Lawyers and Conveyancers Act 2006. That fine is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

[70] In addition, noting that both Acts allow for the censuring of the practitioner, I consider that all of the circumstances make such an order appropriate. Accordingly I make the following order:

- Mr Sheffield is censured pursuant to section 106(4) (b) of the Law Practitioners Act and section 156(1) (b) of the Lawyers and Conveyancers Act 2006.

Costs

[71] The power to make orders for payment of costs are found in s. 157 of the Act. Since a finding has been made against a practitioner is it appropriate that a costs order in respect of the expense of conducting the review be made against him. In making this costs order I take into account the Costs Guidelines published by this office. Section 210(1) of the Lawyers and Conveyancers Act empowers me to make such order as to the payment of costs and expenses as I see fit. That power is further particularised in s 210(3) which provides that an order against the lawyer complained about may be appropriate. Section 210(4) provides that expenses included such amounts in respect of salaries of staff and overhead expenses as are considered properly attributable to the proceedings. Applying those guidelines I do not consider this to have been a straightforward review notwithstanding that it was conducted on the papers with the consent of the parties. I make the following order.

- Mr Sheffield is ordered to pay to the New Zealand Law Society $1,200 in respect of the costs incurred in conducting this review within 30 days of the date of this decision.

[48] No order for costs will be made in relation to the investigation of the New Zealand Law Society.

Publication

The Guidelines for Parties to Review of this office state that the interim position is that "in general the LCRO will not publish the names of lawyers or conveyancers who are found guilty of unsatisfactory conduct for the first time". There is no reason to depart from this position in this case

Result

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act the decision of the Standards Committee is confirmed in respect of all complaint but excluding the complaint concerning the lawyer's failure to apply trust monies to the Metrowaste cleanup account which is reversed.

The following orders are made:

- Mr Sheffield is censured pursuant to s 106(4) (b) of the Law Practitioners Act 1982 and section 156(1) (b) of the Lawyers and Conveyancers Act.

- Mr Sheffield is pay to the New Zealand Law Society $1,200.00 in respect of the costs incurred in conducting this review within 30 days of the date of this decision.

- Mr Sheffield is to pay a fine of $1,500 pursuant to s156 (1) (i) of the Lawyers and Conveyancers Act 2006. This fine is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

- Mr Sheffield is ordered pursuant to s 156(1)(h) to rectify at his own expense the omission relating to the undertaking, and to forward to Metrowaste the sum of $6 239.02 to Metrowaste be applied to the debt it currently claims from the applicant. This payment is to be made within 7 days of the date of this decision.

- This decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 26th day of August 2009

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Hanneke Bouchier
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 Workington as Applicant
Mr Sheffield as Respondent
Sheffield Cardiff as a related entity
The Auckland Standards Committee
The New Zealand Law Society