

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [Area] Standards Committee

**BETWEEN**

**GM on behalf of ABC Limited**

Applicant

**AND**

**BN**

Respondent

**DECISION**

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

**Introduction**

[1] Mr GM has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of his complaint concerning the conduct of Mr BN.

**Background**

[2] Mr GM acted for ABC Limited on the purchase of a licensed bar and music venue business. Mr BN, a senior associate employed by [Firm A], acted for the trustees of the CNT Trust, the vendor.

[3] The agreement for sale and purchase of the business was conditional on two matters, the lessor's consent to the assignment of the premises lease, and due diligence.

[4] [Firm A] held the deposit in their trust account as stakeholder on behalf of CNT Trust and ABC Limited. Mr GM gave notice to Mr BN that the agreement was at an end

due to the conditions not having been satisfied and requested the return of the deposit. CNT Trust disputed that ABC Limited was entitled to end the agreement and to the return of the deposit.

### **The complaint**

[5] Mr GM lodged a complaint with the New Zealand Law Society Lawyers Complaints Service on 8 February 2017. The substance of Mr GM's complaint was that:

- (a) Before ABC Limited paid the deposit of \$20,000.00 to [Firm A], Mr BN, at Mr GM's request, provided an undertaking to Mr GM that the deposit would be "... returned [by [Firm A]] immediately without set off or deduction if [ABC Limited] cancels the Agreement".<sup>1</sup>
- (a) Because the condition in the agreement concerning the lease had not been fulfilled, he gave notice to Mr BN on 31 January 2017 that the agreement was at an end and requested the return of the deposit.
- (b) By not returning the deposit Mr BN was in breach of his undertaking to do so which is a contravention of rule 10.3.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 (the rules) that concerns funds held by a lawyer as stakeholder.

### **Standards Committee decision**

[6] The Standards Committee delivered its decision on 3 March 2017.

[7] The Standards Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

[8] The Committee referred to rule 10.3.2 which states that:

#### **Undertakings**

10.3.2 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.

[9] In reaching their decision the Committee determined that:

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<sup>1</sup> Email BN to GM (13 December 2016).

- (a) It was clear from rule 10.3.2 that Mr BN was required to “disburse the funds in accordance with the terms of the undertaking ... if your client cancels the agreement”.
- (b) However, because an issue in the dispute between the parties concerned the validity of ABC Limited’s notice of cancellation, Mr BN is “required to hold the funds in his trust account until the cancellation question has been resolved”.<sup>2</sup>
- (c) It followed that “[i]n those circumstances it is not possible to sustain a complaint that Mr BN has breached rule 10.3.2”.<sup>3</sup>
- (d) The validity of ABC Limited’s notice of cancellation is a matter for the Court to determine if the parties cannot resolve the dispute themselves.
- (e) Any issues that arise from such proceedings “which require a disciplinary response” concerning Mr BN’s conduct in this matter “can be considered once the Court has resolved those matters”.<sup>4</sup>

### **Application for review**

[10] Mr GM filed an application for review on 12 March 2017. The outcome sought is:

- (a) An order that [Firm A] honour the undertaking given by Mr BN, and
- (b) The return of the deposit of \$20,000.00.

[11] Mr GM:

- (a) Acknowledges that the District Court has jurisdiction to resolve the contractual dispute between the parties. However, he questions whether his client purchaser must await the outcome of the proceedings, if issued, before his complaint can be considered by a Standards Committee, or this Office on review.
- (b) Submits that if the Committee’s decision was widely applied, then it “could disrupt relatively mundane legal transactions” such as in conveyancing transactions.

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<sup>2</sup> Standards Committee decision at [5].

<sup>3</sup> At [5].

<sup>4</sup> At [5].

- (c) Argues that “the undertaking provided by [Firm A] did not give scope for their client or [Firm A] to question [his] client’s cancellation of the agreement or delay the release of the deposit”. He argues that [Firm A] “did not have the right to delay the return of the deposit pending the Court’s determination of any contractual dispute between [the parties],” and “had no right to question whether or not the cancellation of the agreement was valid”.<sup>5</sup>
- (d) Refers to rule 10.3 which provides that “A lawyer must honour all undertakings ...”, and to rule 10.3.2. He contends that [Firm A]’s “undertaking simply provided that if [his] client cancelled the agreement then [[Firm A]] would immediately and without deduction or set off return the deposit to his client”.<sup>6</sup>

### **Mr BN’s response**

[12] In response Mr BN:<sup>7</sup>

- (a) Draws a distinction between the issue of cancellation on the one hand and [Firm A]’s role as stakeholder of the deposit on the other hand.
- (b) Disagrees that a lawyer’s undertaking provided to another lawyer to release a transfer in a conveyancing transaction is analogous to his statement in his email of 13 December to Mr GM which concerns a conditional agreement.
- (c) States that his client, CNT Trust, disputes that Mr GM’s client, ABC Limited, validly cancelled the agreement. He argues that because a new lease was available from the landlord on “fair and reasonable terms” that the conditions of the agreement had been satisfied.
- (d) Submits that he had informed Mr GM that [Firm A] could not release the deposit “in the event of a dispute” until resolved and would continue to hold the deposit until then; it was not for [Firm A] to determine the merits of Mr GM’s cancellation.
- (e) Contends that his statement of 13 December:<sup>8</sup>

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<sup>5</sup> Submissions on review at [2].

<sup>6</sup> At [2].

<sup>7</sup> Letter (by email) BN to LCRO (21 April 2017).

<sup>8</sup> At [8].

was no more than an additional assurance that [[Firm A]] would comply with the terms of the Agreement regarding the handling of the deposit (which we have continued to do in our role as stakeholder).

- (f) States that CNT Trust had since issued a settlement notice to ABC Limited and upon expiry of the notice had cancelled the agreement.

### **Review on the papers**

[13] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[14] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

### **Nature and scope of review**

[15] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>9</sup>

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" ...

... 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 before her. Nevertheless, as the Guidelines properly recognise, 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.

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<sup>9</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

[16] More recently, the High Court has described a review by this Office in the following way:<sup>10</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[17] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

## **Analysis**

### *Issues*

[18] The issues on this review are whether:

- (a) Following receipt of Mr GM' notice that the agreement was at an end that Mr BN was required to return to Mr GM the deposit held by [Firm A] in their trust account as stakeholder.
- (b) If so, by holding on to the deposit as stakeholder until the cancellation issue is resolved that Mr BN contravened rules 10.3 and 10.3.2.

### *Relevant facts*

[19] The agreement between the parties was conditional on the lessor's consent to the assignment of the premises lease being obtained by 23 December 2016, and ABC Limited's due diligence being completed by 6 January 2017.

[20] Clause 2.4 of the agreement concerns the deposit paid to a stakeholder:

Where this agreement is entered into subject to a condition ..., the person to whom the deposit is paid shall hold it as a stakeholder until the agreement becomes unconditional or is avoided for non-fulfilment of any condition under sub-clause 8.3.

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<sup>10</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[21] Clause 8.3(5) provides that if either party avoids the agreement due to non-fulfilment of a condition by the required date then “the purchaser shall be entitled to the immediate return of the deposit and any other moneys paid by the purchaser to the vendor ...”.

[22] On 13 December at Mr GM’s request, Mr BN confirmed to Mr GM that the deposit would:<sup>11</sup>

... be held in [[Firm A]’s] trust account pending confirmation of the agreement and returned immediately without set off or deduction if your client cancels the agreement.

[23] The deposit of \$20,000 was paid that day by CNT Trust to [Firm A] as stakeholder.

[24] On 23 December Mr GM requested an extension of the condition dates to 20 January 2017. On 5 January 2017 Mr BN declined that request in respect of the due diligence condition.

[25] The following day Mr GM informed Mr BN that ‘he was instructed to confirm the conditions in the agreement ... subject to ...’ three variations. One of the variations requested was to replace the condition in the sale and purchase agreement that required the lessor’s consent to the assignment of the lease, with a condition that the lessor provide a new lease of the premises to ABC Limited. Mr GM stated that:<sup>12</sup>

If, for whatever reason, the landlord refuses to sign the Deed of Lease or my client and the landlord are unable to agree on the terms of the lease then my client may cancel the agreement ... on notice to your client. Immediately following such cancellation you must return the deposit to me without deduction or set off: ...

[26] The following communications between Mr GM and Mr BN led to Mr GM giving notice to Mr BN on 31 January that the agreement was at an end:

- (a) On 17 January Mr BN informed Mr GM that he was awaiting instructions in respect of the proposed variations to the agreement.
- (b) On 20 January Mr BN informed Mr GM that CNT Trust was considering Mr GM’s request but that he did not have instructions.
- (c) Mr GM followed up his request again on 25 January.

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<sup>11</sup> Email BN to GM (13 December 2016).

<sup>12</sup> Email GM to BN (6 January 2016).

- (d) On 27 January Mr BN requested confirmation from Mr GM that agreement had been reached between the parties concerning fire protection and maximum occupancy of the premises. If so, he also asked for confirmation that a new lease had been agreed between ABC Limited and the landlord.
- (e) Mr GM and Mr BN exchanged communications on 30 January in relation to the fire protection and maximum occupancy issues. Mr BN requested an update on the new lease issue.
- (f) On 31 January Mr GM, referring to his confirmation email of 6 January 2017, informed Mr BN that the purchaser had been unsuccessful in finalising the terms of a new lease, and that the agreement was at an end. He requested the return of the deposit to his trust account.

[27] CNT Trust subsequently served a settlement notice on ABC Limited, and upon expiry of that notice served notice of cancellation on ABC Limited.

#### *Lawyers' undertakings*

[28] Rule 10.3.2 concerns lawyers who receive funds as stakeholders. The rules also require that:

10.3 A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice.

10.3.1 This rule applies whether the undertaking is given by the lawyer personally or by any other member of the lawyer's practice. This rule applies unless the lawyer giving the undertaking makes it clear that the undertaking is given on behalf of a client and that the lawyer is not personally responsible for its performance.

[29] Undertakings are held out by the legal profession "as having an elevated and special status". For this reason, "it is necessary for the profession to scrupulously honour them".<sup>13</sup>

[30] To that end:

- (a) Care is required before providing an undertaking.<sup>14</sup> So too a lawyer proposing to rely on an undertaking is required to ensure that the undertaking is capable of performance by the lawyer giving it.<sup>15</sup>

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<sup>13</sup> *Auckland Standards Committee 3 of New Zealand Law Society v W* [2011] 3 NZLR 117 (HC) at [67].

<sup>14</sup> *Auckland Standards Committee v Stirling* [2010] NZLCDT 4.



- (b) An undertaking will be construed according to its “substance and intention” and not in a “technical legal manner”.<sup>16</sup>
- (c) Any “ambiguity” will generally be construed in favour of the recipient.<sup>17</sup>
- (d) Strict adherence is required.
- (e) The context in which the undertaking has been given must be considered objectively.<sup>18</sup>

### *Stakeholder*

[31] Clause 2.4 of the agreement provides that the person to whom the deposit is paid must hold it as a stakeholder pending satisfaction of the conditions, or the agreement being avoided due to non-fulfilment of any condition. In this context, “a stakeholder holds a deposit on trust, as agent for both parties, to be disbursed in accordance with the provisions of the contract”.<sup>19</sup>

[32] In circumstances where a purchaser is entitled to the return of the deposit “the stakeholder may release the deposit to the party entitled with the consent of the other party”.<sup>20</sup> However, if the parties are in dispute:<sup>21</sup>

the party claiming entitlement to the deposit may sue the stakeholder, whereupon the stakeholder should interplead and pay the money into court. The court’s order will determine which party is entitled to the deposit.

### *Whether Mr BN must return the deposit?*

[33] Mr GM argues that his client, ABC Limited, validly ended the agreement. He refers to the statement in Mr BN’s email of 13 December to [Firm A] as:

- (a) An “assurance” which he contends “did not ... provide that [[Firm A]] may hold off returning the deposit if [CNT Trust] disputed [ABC Limited’s] cancellation of the agreement”. In support of his position he refers to rule 10.3.2 and clause 8.3(5) of the agreement.<sup>22</sup>

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<sup>15</sup> GE Dal Pont *Lawyers’ Professional Responsibility* (6<sup>th</sup> ed, Thomson Reuters, Sydney, 2017) at [22.70].

<sup>16</sup> Above n13, at [41].

<sup>17</sup> At [42] and [60].

<sup>18</sup> At [63].

<sup>19</sup> *NZ Conveyancing Law and Practice Commentary* (CCH, Wolters Kluwer, online) at [7.170].

<sup>20</sup> At [7.200].

<sup>21</sup> At [7.200].

<sup>22</sup> Email GM to BN (3 February 2017).

- (b) An “undertaking” which he argues does not give “[Firm A] scope for [them or CNT Trust] to question [ABC Limited’s] cancellation of the agreement or delay the release of the deposit”.<sup>23</sup>

[34] By arguing that rule 10.3.2 applies, Mr GM views the “undertaking” as a term on which [Firm A] hold the deposit as stakeholder. In the alternative he says that Mr BN is obliged to honour the “undertaking” irrespective of [Firm A]’s role as stakeholder in which case rule 10.3 applies.

[35] Mr BN disagrees. He claims that it is not for [Firm A] to determine whether [Firm A]’s position or Mr GM’s position on [Firm A]’s role as stakeholder is correct.

[36] Mr T, a partner at [Firm A], in response to Mr GM, claims that:<sup>24</sup>

- (a) ABC Limited confirmed the agreement (including due diligence condition) on 6 January 2017 following CNT Trust’s refusal to grant an extension of the condition dates.
- (b) The new conditions “related to building work ... to increase the maximum of occupancy of the premises [which has subsequently been satisfied] and [ABC Limited] formalising a new Deed of Lease of the premises with the landlord”.<sup>25</sup>
- (c) The purported cancellation was “on the basis of an inability to finalise the terms of the new lease, but [CNT Trust] considers that a lease on reasonable commercial terms was [and remains] available”.

[37] The complaints process is not an alternative to court proceedings. Section 138(1)(f) of the Act provides that a Standards Committee may, in its discretion, decide to take no action, or as the case may require no further action, on any complaint if, in the opinion of the Committee there is in all the circumstances an adequate remedy that it would be reasonable for the person aggrieved to exercise.

[38] [Firm A] holds the deposit for both CNT Trust and ABC Limited as a stakeholder. Performance of Mr BN’s “assurance” or “undertaking” is expressed to be contingent on cancellation of the agreement.<sup>26</sup> Central to the parties’ disagreement about ABC Limited’s claimed entitlement to the return of the deposit from [Firm A] as stakeholder, or pursuant to Mr BN’s “assurance” or “undertaking” is whether ABC

<sup>23</sup> Application for Review GM to LCRO (12 March 2017).

<sup>24</sup> Letter (by email) T to GM (9 February 2017).

<sup>25</sup> At [3].

<sup>26</sup> *The Trustees of the Grangemouth Family Trust v Weston & Perthshire* LCRO 42/2010 at [14].

Limited validly ended the agreement. This is a contractual dispute. As such, it is a matter for the courts to determine.

### *Conclusion*

[39] I agree with the Committee's finding that the cancellation issue is a matter to be determined by the Court. If conduct issues are raised during the course of any proceedings then it would be open to either Mr GM or Mr BN to bring such issues to the attention of the Lawyers Complaints Service.

### **Decision**

[40] For these reasons pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

**DATED** this 6<sup>th</sup> day of July 2017

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**B A Galloway**  
**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 GM as the Applicant  
Mr BN as the Respondent  
Mr T as a Related Person  
[Area] Standards Committee  
The New Zealand Law Society