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

LCRO 72/2009

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	A determination of the Nelson Standards Committee
BETWEEN	**MR BEDFORD** of Nelson Applicant
AND	**MS LUTON** of Nelson Respondent

DECISION ON PENALTY AND COSTS

[1] In a decision of 29 June 2009 I upheld the finding of the Nelson Standards Committee that Ms Luton had been guilty of unsatisfactory conduct in failing to adhere to the terms of an undertaking. I did not uphold the application for review which sought findings of breaches of other alleged undertakings. The Standards Committee concluded that the breach was not of sufficient gravity to impose any sanction.

[2] I considered that whether a sanction ought to have been imposed required re-examination and invited submissions from Ms Luton on the point, as well as on the question of costs. Those submissions were received on 7 July 2009.

The breach

[3] Mr Bedford represented Ms H in respect of a relationship property dispute. Ms Luton acted in respect of refinancing of certain companies and commercial interests of Mr and Ms H (Mr H was separately represented in respect of the relationship property matters). As part of certain refinancing it was agreed that half of the shares in companies which had previously be held solely in Mr H's name would be transferred into the name of Ms H. In this regard Ms Luton provided a solicitor's undertaking by which she undertook that she would:

forthwith following settlement complete and file the Share transfers for all [H] companies.

[4] Settlement occurred on 28 November 2008. On 21 January 2009 Mr Bedford became aware that no company transfers had been registered and brought this to the attention of Ms Luton. In doing so he identified six companies which he considered were covered by the undertaking and in respect of which share transfers should be registered. It is of note that he identified two additional companies wholly owned by Mr H which were not subject to the refinancing and had not been identified in the share transfers faxed to him on 19 November.

[5] Ms Luton replied by fax on the same day stating that she did not consider that the undertaking had been breached because she had forwarded the transfers to the company accountants for registration (this occurred on 22 December). She stated that she would follow the matter up that day and noted that "the resolutions are in place".

[6] The registrations of the share transfers in respect of the four companies was effected on 21 January 2009 – the day the oversight was brought to Ms Luton's attention.

[7] I found that a breach of undertaking had occurred in respect of the failure to file share transfers in respect of four of the companies. I found that no breach of undertaking had occurred in respect of the two further companies. In this regard the decision of the Standards Committee was confirmed.

Principles in imposing penalties

[8] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 as being:

- 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.

To that list might perhaps be added the purpose of maintaining public confidence in the provision of legal services (which is also one of the overriding purposes found in s 3 of the Lawyers and Conveyancers Act 2006). I also note that various other orders which are not of a penal nature may be made by a Standards Committee under s 156 of the Lawyers and Conveyancers Act 2006. Those order have the functions of improving the competence of practitioners, ensuring ongoing compliance with regulation, and providing redress to wronged parties.

[9] I am of the view that the decision of the Standards Committee not to impose any penalty (even by way of censure or reprimand) was wrong. This was not a case in which the breach of the practitioner was trifling or the complaint frivolous (in which case the complaint could have been dismissed pursuant to s 138(1) of the Act.

[10] There has been a significant change in the regulatory framework applicable to lawyers. By s 156(1)(i) of the Act a fine of up to $15 000 may be imposed when unsatisfactory conduct is found. For a fine of that magnitude to be imposed it is clear that some serious wrongdoing must have occurred. It is unlikely that a large fine would properly be imposed for conduct which was due to inadvertence or a failure to appreciate the proper legal position. 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 radical departure from the position under the Law Practitioners Act 1982 by which a District Disciplinary Tribunal could only impose a much more modest fine of up to $2000 (s 106(4)(a)).

[11] I observed in LCRO 29 / 2009 that:

> 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 note that by definition such a breach is not wilful or reckless.

I take that as my starting place in this matter.

Breach of Undertaking

[12] Any breach of any undertaking is a very serious matter. In general where an undertaking is unconditional and the lawyer has failed to honour it that factor in itself is enough to warrant a disciplinary response: *Bentley v Gaisford* [1997] QB 627 (CA) at p 648 per Henry LJ); *Commissioner of Inland Revenue v Bhanabhai* [2007] 2 NZLR 478 para [50] per William Young P. The English Court of Appeal has stated that failure to implement a solicitor's undertaking is prima facie to be regarded as a professional breach: *Udall v Capri Lighting Ltd* [1987] 3 All ER 262 at 269. The fact that there has been no “dishonourable conduct” does not change this: *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296. Indeed in the event that a breach of undertaking included some genuinely disgraceful or dishonourable conduct that would take the breach beyond unsatisfactory conduct and into the realms of misconduct as defined by s 7(1)(a)(i) of the Act.

[13] There are numerous dicta to the effect that the ability of others to rely on the undertakings of lawyers is of fundamental importance. Lawyers' undertakings are to be implemented "optima fide" *Re WP Roberts* (1856) 26 LT (OS) 239. This is also apparent from r 10.3 of the Rules of Conduct and Client Care which state that "A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice".

[14] The reasons why a particularly stringent approach ought to be taken to a breach of undertaking was explained by the Legal Services Tribunal in *Vincent Cofini* [1994] NSWLST 25 when it said:

> Undertakings are given by legal practitioners for the specific purpose of enabling legal activities to be carried out. Other persons rely on those undertakings. The undertakings are personal to the legal practitioner and bind that practitioner, not as a matter of contract but as a matter of professional conduct and comity, and will be enforced by the Courts because legal practitioners are officers of the Court and because without enforcement undertakings would be worthless, persons and Courts would be unable to rely on the word of the legal practitioner and this aspect of legal practice, that demands compliance for legal efficiency, would collapse.

[15] While there may be cases in which the lawyer who breached the undertaking can point to special circumstances which show that the breach ought not be regarded as a professional breach there are no such circumstances in this case.

Factors in this case

[16] Ms Luton made a number of points in support of her argument that no disciplinary response other than a bare finding of unsatisfactory conduct should be visited upon her. She noted that no loss had resulted in her failure and that she complied with the undertaking when Mr Bedford drew the breach to her attention. She was of the view that in light of these matters the Standards Committee had acted appropriately in not imposing any further sanction.

[17] I am not convinced that Ms Luton recognises that any breach of an undertaking is a serious matter. While she accepts that "compliance with an undertaking is mandatory" (in her submissions to this office on penalty) and states that "I am aware of the obligation to honour undertakings and I have always done so. I do not treat them lightly" (in her submission to the Standards Committee of 17 April 2009) she appears to consider that in

this case the breach was trifling, that Mr Bedford acted unreasonably in bringing it to the attention of the Society and that his complaint was unwarranted. Ms Luton has not expressed any regret or contrition in respect of her failure, or any meaningful acceptance that she acted inappropriately.

[18] When the breach was first brought to her attention on 21 January 2009 she expressed the view that she did not consider that the undertaking had been breached on the basis that her obligations were discharged once she instructed the client's accountants to register the relevant share transfers. This was clearly not the case as she had undertaken to ensure the filing of the transfers personally. A lawyer's obligation to honour an undertaking is personal and is not discharged by delegation of the task. It is also noted that despite the fact that the transfers were to be filed "forthwith" Ms Luton did nothing at all between the date of settlement (28 November 2008) and immediately before the Christmas break (22 December 2008) when the matter was referred to the accountants.

[19] Ms Luton indicated that this is the first "oversight" of this nature in her career. I take into account her previously unblemished professional record.

Consideration

[20] I consider it important to indicate to the wider profession that unless very special circumstances exist it is never acceptable to breach an undertaking. A lawyer who falls short in this regard should properly expect to have professional sanctions visited upon him or her. It is also important to signal to the wider public that an undertaking from a lawyer can be depended upon absolutely and that a lawyer who fails in this regard will be subject to professional discipline.

[21] I have taken some guidance from the approach of the Australian Disciplinary Tribunals in this regard. In *Law Society of New South Wales v Martin* [2002] NSWADT 27 (27 February 2002) a lawyer had failed to honour an undertaking to provide evidence of payment of certain accounts. In that case the other party had been compensated for loss and the practitioner expressed contrition, accepting that the conduct was unsatisfactory. It was also relevant that the practitioner there no longer acted for the client in respect of whom the undertaking had been given. A bare censure was imposed. By contrast in *Law Society of New South Wales v Hinde* [2005] NSWADT 199 (24 August 2005) the lawyer had failed to honour an undertaking that commission be paid to a real estate agent on the basis that it was his client's obligation rather than his to pay. The lawyer failed to honour the undertaking for a considerable period and his explanations showed a failure to appreciate the severity of such

conduct. In that case a fine of $3000 was imposed. I am of the view that this case sits between those two examples, but clearly closer to *Martin* than *Hinde.*

[22] It is proper to censure Ms Luton for this professional breach. The purpose of a censure is to set out the conduct as unacceptable and to reflect the condemnation of the conduct by the public and the profession. However, I consider that in the circumstances a censure alone does not go far enough in that it does not satisfy the function of punishing the Ms Luton for the conduct and (more importantly in this case) deterring other lawyers from engaging in similar conduct.

[23] As stated above in *T v G* (LCRO 29/09) I considered a fine of $1000 to be the starting point in cases of unsatisfactory conduct where it was appropriate that a fine be imposed. Taking into account the matters traversed above I consider that on balance that amount should be reduced to take into account the fact that the undertaking was complied with immediately when the breach was brought to Ms Luton's attention and that no loss flowed from the breach. In all of the circumstances a fine of $500 is imposed.

Costs

[24] Ms Luton was invited to make submissions on costs but did not do so.

[25] In general a lawyer in respect of whom orders have been made will be expected to meet a significant portion of the costs of the review. The Guidelines on Costs issued by this office state that in general for a case of this type (relatively straightforward and dealt with on the papers) a costs order of $900 would be made. I also take into account that notwithstanding a finding of unsatisfactory conduct the Standards Committee imposed no costs order.

[26] I observe however that the primary finding of the Standards Committee was not disturbed and that the primary grounds upon which the application for review was brought (that there had been other breaches of undertakings) were not upheld. However it remains appropriate that Ms Luton bear some of the costs of the review rather than them falling entirely on the wider legal profession. In light of this an order of costs of $450 is appropriate.

Result

[27] The application for review is upheld pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Nelson Standards Committee is modified in part. In particular the finding of the Nelson Standards Committee that Ms Luton in failing to honour an undertaking had engaged in unsatisfactory conduct is confirmed. The following additional orders are made:

- Ms Luton is censured.
- Ms Luton is to pay a fine of $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.
- Ms Luton is to pay $450.00 in respect of the 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 15th day of July 2009

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Duncan Webb

Legal Complaints Review Officer

This decision is to be provided to:
Mr Bedford as applicant
Ms Luton as respondent
YY (as a related entity)
The Nelson Standards Committee
The New Zealand Law Society