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

LCRO 72/09

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| **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<br>Applicant |
| **AND** | **MS LUTON** of Nelson<br>Respondent |

## DECISION

[1] 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). Mr Bedford complained to the New Zealand Law Society alleging that Ms Luton had breached a solicitor's undertaking in respect of the filing of certain share transfers. The matter was referred to the Nelson Standards Committee for consideration.

[2] The Standards Committee found that the conduct complained of amounted to unsatisfactory conduct but determined that the conduct was not deserving of any sanction and declined to make any orders. Mr Bedford sought a review of that decision. In particular he considered that the breach of undertaking was ongoing due to the fact that Ms Luton refused to file share transfers in respect of two further companies which had come to light.

[3] The parties have consented to this matter being considered without a formal hearing and therefore in accordance with s 206(2) of the Lawyers and Conveyancers

Act this matter is being determined on the material made available to this office by the parties and the Standards Committee.

**Background**

[4] As part of certain refinancing it was agreed that half of the shares in companies which had previously been held solely in Mr H's name would be transferred into the name of the 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.

Ms Luton states that she faxed copies of signed share transfers in respect of the four companies subject to the refinancing to Mr Bedford on 19 November 2008. Mr Bedford did not take issue with that statement. It appears that settlement occurred on 28 November 2008.

[5] On 10 January 2009 Ms H died suddenly.

[6] 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.

[7] 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, noted that "the resolutions are in place" and observed that under the will of Ms H all of her assets passed to Mr H in any event. By return fax Mr Bedford took issue with the suggestion that the undertaking had not been breached.

[8] It appears that registrations of the share transfers in respect of four companies was effected on 21 January 2009 – the day the oversight was brought to Ms Luton's attention. However transfers were not effected in respect of the two further companies which had been identified by Mr Bedford.

[9] The failure to register transfers in respect of the two further companies objected to by Mr Bedford by a fax of 19 February 2009. One of those companies was incorporated in November 2008 (which was presumably after separation) and in his fax Mr Bedford stated

that providing no relationship assets were used to establish that company then a transfer would not be needed. The other company had been incorporated for some time and it appears that a share transfer ought to have been registered in respect of it. For completeness I observe that the existence of the latter company had been noted in a letter from Mr Bedford to Ms Luton of 15 July 2008. The failure to include that company in the share transfers faxed on 19 November seems to have been an oversight.

[10] Ms Luton responded to the fax of 19 February 2009 by return and stated that the company in respect of which the shares had not been transferred had not been included in the refinancing her firm had undertaken. She observed that given the death of Ms H and the terms of her will it would serve no useful purpose to register share transfers in respect of the remaining companies. She also observed that with the death of Ms H it was unclear how Mr Bedford considered himself authorised to act further in the matter.

**Which companies were covered by the undertaking?**

[11] There is some disagreement as to what was meant by "forthwith following settlement complete and file the Share transfers for all H companies". Mr Bedford considers it means all companies owned by Mr H (including the two further companies in respect of which transfers were never registered). Ms Luton considers it referred only to those companies in respect of which refinancing was being undertaken and copies of share transfers had been forwarded to Mr Bedford. Ms Luton stated in her response to the Standards Committee that the two additional companies were not part of the refinancing and "were unknown to the writer" (although as noted one of the companies had been referred to in earlier correspondence).

[12] In determining what the words of an undertaking mean an undertaking should be read sensibly and in light of the commercial context in which it is given: *Bank of British Columbia v Mutrie* (1981) 120 DLR (3d) 177, *Commissioner of Inland Revenue v Bhanabhai* [2007] 2 NZLR 478 para [42] per William Young P. In light of this I take into account the context of the dealings between the parties discussed above when determining what the words of the undertaking meant.

[13] I conclude that the undertaking referred only to those companies in respect of which the refinancing was being undertaken. I reach that conclusion on the basis that certain completed share transfers in respect of those four companies were faxed to Mr Bedford on 19 November. I note also that that Ms Luton was involved with a discrete set of transactions at that time relating to refinancing of the four companies. In light of these matters I am of the view that "all H companies" can properly be construed to mean those

companies in respect of which share transfers had been completed and forwarded to Mr Bedford and which the refinance related to.

[14] In light of this finding of fact I conclude that there was no breach of undertaking in respect of the failure to file share transfers relating to the two subsequent companies owned by Mr H which came to light.

[15] I note further that there may also be cases where even though there has been a breach of undertaking disciplinary findings need not be made against the lawyer. This might be the case where:

> The issue of whether the words amounted to an undertaking, or the further issue of whether there has been a breach, turns on the answer to a fine or subtle point of construction. Likewise where there was real scope for genuine misunderstanding on what was said or meant by a solicitor on a particular occasion. (*John Fox (a firm) v Bannister King & Rigbeys (a firm)* [1987] 1 All ER 737 at 742).

In such a case there may be no breach of professional standards even though after careful analysis it is found that a breach has occurred and the undertaking should be enforced. Even if the undertaking did refer to the two further companies the confusion was understandable in the circumstances and the failure to complete the share transfers would not amount to a breach which required a disciplinary response. This perhaps illustrates the utility of carefully wording undertakings of this nature.

[16] I should also note that the intervening death of Ms H would also seem to have changed matters significantly. It would seem unusual (if not impossible) to execute share transfers which had the apparent effect of transferring the shares to the deceased. If they were to be transferred at all it would appear to have been appropriate that they be transferred to the trustees of the estate of Ms H. I also observe that Mr H was the executor and sole beneficiary under the will of Ms H. It would not appear to be relevant that Ms H had not yet attended to the execution of a new will even if she intended to do so. In the rather unique circumstances of this case I am of the view that even had the undertaking extended to the additional two companies the death of Ms H would have amounted to a supervening event which relieved Ms Luton from the further performance of the undertaking.

[17] I turn now to consider whether there was a breach of undertaking in respect of the failure to register the executed share transfers between 28 November 2008 and 21 January 2009. In responding to the complaint Ms Luton noted that on 21 November (prior to the undertaking being given) Mr Bedford had stated that:

> I have no concern as to the completion of the share transfers after the refinance subject to obtaining an unconditional undertaking from your firm to complete and file those share transfers with the registrar of companies.

Ms Luton appears to suggest that this indicate that the undertaking did not have to be strictly complied with. I do not consider that much weight can be put on that statement given that it predated the undertaking. That statement cannot be seen as ameliorating the terms of the later undertaking. It does, however, make clear the intention that the share transfers were to be registered with the Registrar of Companies.

[18] Ms Luton states that the company accountants were instructed to register the transfers on-line on 22 December 2008 (some weeks after settlement). This was not attended to until 21 January 2009, after prompting by Mr Bedford.

[19] The terms of the undertaking were that the transfers were to be "filed" forthwith. Against the background of the correspondence and dealings with the parties it is clear that "filing" meant registration with the Registrar of Companies. The undertaking was a personal one and if Ms Luton chose to delegate the task of registration to a third party then it was incumbent on her to ascertain that her delegate had completed the task. The undertaking also required that action to be taken forthwith. While in the circumstances this might not have meant the same day, or perhaps even the next day, I am of the view that a delay of several weeks is clearly outside of what was contemplated by the undertaking.

[20] Rule 10.3 of the Rules of Conduct and Client Care for Lawyers provides that "A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice". Accordingly the Standards Committee was correct in its conclusion that Ms Luton was in breach of her undertaking. It was also to conclude that this amounted to unsatisfactory conduct.

[21] The Nelson Standards Committee found that the conduct of Ms Luton was not of sufficient gravity to require any sanction being imposed.

[22] The application for review was mainly directed at the finding that there had been no continuing breach of undertaking. Although the application stated that the breach of undertaking (including the alleged continued breach which has not been upheld) "was of sufficient gravity to require a sanction to be imposed" submissions on this point were not specifically made.

[23] Any breach of any undertaking is a very serious matter. In general where an undertaking is unconditional and the lawyer has simply 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; *Udall v Capri Lighting Ltd* [1987] 3 WLR 465.

[24] I am of the view that the decision of the Standards Committee not to impose any penalty warrants re-examination. It is proper that Ms Luton be given the opportunity to make submissions in this regard. She should also be given an opportunity to make submissions on whether costs should be imposed in relation to this proceeding pursuant to s 210 of the Lawyers and Conveyancers Act 2003.

**Conclusion**

[25] The determination of the Nelson Standards Committee as regards the finding that a breach of undertaking occurred which amounted to unsatisfactory conduct is confirmed. Submissions from Ms Luton in respect of penalty and costs are to be made within 10 working days of the date of this decision.

**DATED** this 29th day of June 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 Lawyers (as a related entity)
The Nelson Standards Committee
The New Zealand Law Society