

CONCERNING

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

AND

CONCERNING

a determination of City Standards Committee

BETWEEN

LP

Applicant

AND

MT

Respondent

DECISION AS TO PENALTY

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

Background

[1] On 22 October 2014 I issued a decision (the findings decision) in which I found that MT's conduct constituted unsatisfactory conduct by reason of s 12(a) of the Lawyers and Conveyancers Act 2006.

[2] The parties were invited to provide submissions as to penalty.

[3] Submissions have been received from Mr MT's counsel and I have carefully considered these.

[4] Ms LP advised she would defer to the decision of the Legal Complaints Review Officer (LCRO).

[5] In the findings decision I came to the view that Mr MT had failed in his obligation

to advise Ms LP of the terms of the agreement and that she did not have the benefit of the standard terms of agreement or the clauses relating to the EQC claim and insurance.¹

¹ Findings decision 22 October 2014 at [72].

[6] That was the focus of the decision.

[7] At [76] of the decision I specifically noted that EQC had accepted Ms LP was entitled to the benefit of the claim lodged by the vendor and there was no certainty as to what would have followed even if Ms LP had been fully advised of the terms of the Agreement.

[8] The submissions received from Mr MT's counsel are comprehensive. They argue that no penalty should be imposed as Mr MT's conduct is at the lowest end of the spectrum and he has taken note and learned from the matters raised by the complaint such that a similar situation will not arise in the future.

[9] Counsel referred extensively to Professor Webb's text *Ethics, Professional Responsibility and the Lawyer*² and also included quotations from *Bolton v Law Society*.³ These references have limited application to a finding of unsatisfactory conduct as they refer to the law and disciplinary processes provided in the Law Practitioners Act 1982.

[10] Unsatisfactory conduct was a concept which was introduced by the Lawyers and Conveyancers Act 2006 which came into force on 1 August 2008. It is described by Professor Webb⁴ as conduct:

which is not so egregious as to amount to misconduct, but is still deserving of being marked out as falling below the standard of conduct or behaviour that clients and the public are entitled to expect. It is a professional lapse.

It "covers conduct from the mere slip or oversight which is less than satisfactory to conduct on the border of misconduct which is deserving of serious sanction".

[11] Professor Webb goes on to note that:

To mark out conduct as unsatisfactory is hardly damning condemnation. To state the obvious, lawyers' conduct can be either satisfactory or not. It is suggested that the choice of the only faintly damning description of "unsatisfactory" indicates that a finding of unsatisfactory conduct is not intended to be an indicator of any kind of egregious conduct, but is rather an indication that the practitioner in question "must try harder".

[12] Within the concept there must of course be a range of conduct which, as noted by Professor Webb, ranges from the mere slip or oversight to conduct bordering on misconduct. Professor Webb goes on to note that:

² Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, Lexis Nexis, Wellington, 2006).

³ *Bolton v Law Society* [1995] 2 All ER 486.

⁴ Duncan Webb "Unsatisfactory conduct" under the Lawyers and Conveyancers Act 2006, Law Talk 717], 29 September 2008 at 18.19.

There will be cases where a finding of unsatisfactory conduct is made on the basis that a breach has occurred, but no penalty beyond a censure is made (along with compensatory orders if appropriate). It is important to note that such findings may have no reflection on the professionalism of the practitioner overall.

[13] That is the nature of Mr MT's conduct.

[14] Much has been made in submissions about Ms LP's own conduct in the matter including the fact that she signed what she cannot have failed to recognise was a completely different agreement without seeking legal advice, and the fact that the extremely short time frame between signing and settlement meant that Mr MT and Ms NQ's actions were directed towards completing settlement. These are factors which must necessarily be taken into account when considering the appropriate penalty to impose.

[15] In her complaint, Ms LP seeks:

...damages for the negligent way [Mr MT's] firm handled my business. It has been a very stressful period, not knowing where I stand over repairs and all the uncertainty that comes with it.

[16] In her review application Ms LP seeks:

a second opinion: some common sense applied to the role of the solicitor and how Firm R failed me/left me exposed due to lack of due diligence/failure to advise/read contracts.

[17] Mr MT's conduct did not leave Ms LP exposed as she claims – she was exposed by her own action in committing to the terms of the agreement. Mr MT's shortcoming was that he did not advise Ms LP of the terms of the agreement.

[18] The range of penalties that can be imposed is set out in s 156(1) of the Lawyers and Conveyancers Act 2006. They include a fine, reduction or cancellation of fees, and compensation. I dismiss at the outset any censure or reprimand as that has been described as a response to conduct of a serious nature.⁵ In this regard, the comments by the Court in *New Zealand Law Society v B* have been made after Professor Webb wrote his article, at a time when a censure or reprimand was not necessarily considered to be as serious as the Court has now suggested.

[19] Although it is accepted that compensation can be awarded for stress occasioned by a lawyer's conduct⁶ I do not consider that to be appropriate. Ms LP's stress was caused by her own conduct. She signed the agreement without legal advice and any ability to

⁵ *New Zealand Law Society v B* [2013] NZCA 156, [2013] MZAR 990.

⁶ *Hartlepool v Basildon* LCRO 79/2009.

vary the terms of the agreement was limited and certainly not a foregone conclusion. I have specifically noted this at [76] of the findings decision.

[20] Neither do I consider it appropriate to order Mr MT to reduce or cancel his fees. Mr MT's counsel advised that the fee charged was \$850 plus GST and disbursements. Ms LP received value for that fee, notably settlement of the purchase within the time frame required. There are no grounds to require the fee to be reduced or cancelled.

[21] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand*⁷ being:

- To punish the practitioner.
- As a deterrent to other practitioners;
- To reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[22] I accept the submission by Mr MT's counsel that the unsatisfactory conduct is at the lowest end of the range of conduct included in a finding of unsatisfactory conduct. I do not think there is a need to impose a fine to punish, deter or express opprobrium. I consider the correct level of response to the finding is the fact that the finding itself will serve to remind Mr MT that he "could have done better" in the circumstances which presented.

[23] There will however be an order for costs as is usual following a finding of unsatisfactory conduct.

Penalty

[24] For the reasons set out above no penalty is imposed consequent upon a finding of unsatisfactory conduct.

Costs

[25] Pursuant to the Costs Orders Guidelines issued by this Office and to s 210 of the Lawyers and Conveyancers Act 2006, Mr MT is ordered to pay the sum of \$900 by way of costs to the New Zealand Law Society, such payment to be made by no later than 22 December 2014.

⁷ *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA).

Publication

[26] Mr MT's counsel have made submissions that publication of Mr MT's name is not warranted in the circumstances. I accept those submissions. The facts of the matter removing all identifying details will be published in the usual way on the website of this Office for educative purposes.

DATED this 21st day of November 2014

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:

Ms LP as the Applicant
Mr MT as the Respondent
Mr SJ as the Respondent's Representative
City Standards Committee
The New Zealand Law Society