LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 98

Ref: LCRO 090/2019

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 [X]
BETWEEN	**WP** Applicant
AND	**MB** Respondent

DECISION

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

Introduction

[1] Mr WP, a partner with [Law Firm A], has applied for a review of a decision by the [Area] Standards Committee X (the Committee) to take no further action in respect of his complaint about the conduct of Mr MB, a lawyer who at the relevant time was in sole practice in his own firm, [Law Firm B].

[2] Mr MB's client, the [C Family Trust] (the vendor), owned a commercial property in [City] (the property) which it sold to Mr WP's client, [Company D] (the purchaser).

[3] The property was occupied by five tenants.[1] The lease documents were held by Mr MB on behalf of the vendor.

[1] The leases relate to: (1) [Company E], (2) [Company F], (3) [GL], (4) [DW], and (5) [Company G].

[4] As discussed in my later analysis, the agreed settlement date was Friday, 26 October 2018 deferred until the following Monday, 29 October pending clarification sought by the purchaser of the tenancy documents held by Mr MB.

[5] On Monday, 29 October 2018, Mr MB provided (by email) his undertaking to Ms RC, a lawyer and associate at [Law Firm A], that he "held", and would "forward" to [Law Firm A] "on completion of settlement", the tenancy documents listed. The documents described included a "Copy Agreement to Lease" in respect of the third tenancy document for [GL], and original documents in respect of the other tenancies.

[6] Mr MB delivered (by letter) the tenancy documents to Ms RC on 31 October 2018. One of the tenancy documents was a "Copy Agreement to Lease" whereas his undertaking specified an "Original Agreement to Lease". Another included "a certified copy of the Agreement to Lease", whereas the undertaking recorded an "Original Agreement to Lease".

[7] Having subsequently found both original agreements to lease on his file, Mr MB forwarded them to [Law Firm A] five weeks later.

Complaint

[8] Mr WP lodged a complaint with the Lawyers Complaints Service (LCS) on 15 November 2018.[2]

[9] He claimed that Mr MB did not honour the undertaking, and sought disciplinary action against [Mr MB] as considered appropriate by the Committee. He said in reliance on Mr MB's undertaking, his client purchaser settled the purchase "in the expectation it was receiving original lease documentation".

Undertaking provided

[10] Mr WP explained that on the agreed settlement day, Friday, 26 October 2018, Ms SP, a legal executive employed by Mr MB, informed Ms RC that [Mr MB] held (a) original lease documents for four tenancies, and (b) a "[c]ertified copy" of the documents for the fifth tenancy, which [Ms SP] confirmed by email at 4:43 PM that day.[3]

[11] He said settlement did not occur on 26 October due to "the vendor's failure to provide certainty" concerning those documents.

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[2] Mr WP, email/letter to Lawyers Complaints Service (15 November 2018).
[3] Fifth tenancy: [Company G].

[12] He said on the following Monday, 29 October, in response to his request to Mr MB for "clear undertakings as to what lease documentation" Mr MB held, and "would be forwarded" to him, Mr MB provided an undertaking at 1:14 PM.

[13] Mr WP said contrary to Ms SP's statement (by email) on 26 October 2018 that the document evidencing the third tenancy ([GL]) was an "Original Agreement to Lease", the document for that tenancy described in Mr MB's undertaking was instead described as a "Copy".

[14] He said "[n]otwithstanding that change", his client purchaser instructed him to complete settlement of the purchase "on the basis [Mr WP] would receive the lease documentation specified in [Mr] MB's undertaking" which he said Mr MB "purported to send" him on 31 October 2018.

Documents provided

[15] Mr WP later stated that Mr MB (a) "ha[d] now complied with the undertaking he gave", and (b) "does not dispute the key issues".[4]

[16] He said the "real question" for the Committee to consider was "whether Mr MB held the relevant lease documents", namely, originals of the second ([Company F), and fourth ([DW]) tenancies, "at the time [Mr MB] said he did" in the undertaking.

[17] He said Mr MB's response to his complaint was "equivocal on the point", but [Mr MB's] 9 November 2018 email that the documents forwarded were "all the documents [Mr MB] ha[d]" left "no doubt". That is, Mr MB did not have those two documents at the time the undertaking was provided.

Breach of undertaking

[18] Although, as noted above, Mr WP later said Mr MB had complied with the undertaking, he claimed Mr MB "failed or refused to honour the undertaking in a timely manner".

[19] Mr WP stressed "the importance of undertakings in the profession". He said whilst Mr MB's 8 November email expressed "confidence" the "correct documentation had been delivered", the "correct position" was that Mr MB "failed or refused to honour the undertaking" by (a) "ignoring [Ms RC's and Mr WP's] correspondence", (b)

[4] Mr WP, email to Lawyers Complaints Service (19 December 2018).

"suggesting" the undertaking "did not cover these documents", and (c) stating that the documents [Mr MB] forwarded to [Law Firm A] were "all the documents [Mr MB] ha[d]".

Response

[20] I refer to Mr MB's response in my later analysis.[5]

Standards Committee decision

[21] The Standards Committee delivered its decision on 20 May 2019 and 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.

[22] The Committee stated that while "question[ed]" by Mr WP (a) it "appear[ed]" Mr MB was able to comply with his undertaking when given by him, and (b) Mr MB had complied with the undertaking "after a short delay".

[23] In reaching that conclusion the Committee referred to the parties' "accept[ance]" that the documents Mr MB undertook to deliver had since been delivered, "albeit somewhat belatedly".

[24] The Committee noted that "there may have been an administrative error" by Mr MB who mistakenly thought he had "provided all documents required by the undertakings".

Complaint

[25] The Committee stated that Mr WP's complaint concerned Mr MB's undertaking "to provide original or certified copies" of five lease agreements to Mr WP on completion of settlement of the sale of the property.

Undertakings

[26] The Committee explained the importance to lawyers acting in property transactions being able to rely on colleagues' undertakings "without question in order to complete remote settlements in an orderly manner" thereby "allow[ing] [the] transactions to flow smoothly".

[5] Mr MB, letter to Lawyers Complaints Service (7 December 2018).

[27] For that reason, the Committee stated that lawyers ought "only give undertakings" where "unquestionably able to comply with" the undertaking.

Mr MB's responses

[28] The Committee stated Mr MB's incorrectly said in his 8, and 9 November 2018 emails to Ms RC, and Mr WP respectively that (a) his undertaking did not "cover the documents being requested" when "clearly it did", and (b) "all the documents [he] held had been sent" when that "was not the case".

[29] The Committee described Mr MB's statements made in response to Ms RC's question whether he had complied with his undertaking" as "unfortunate and inadequate" observing this had led to Mr WP's complaint.

[30] Instead, the Committee said Mr MB "should have checked his files to confirm the correct position".

Application for review

[31] Mr WP filed an application for review on 1 July 2019 in which he asks that the Committee's decision "be reviewed in accordance with the law as to undertakings".

[32] He says the Committee accepted that "in light of Mr MB's responses" to [Law Firm A], and "in the absence of [his] complaint" it seemed "unlikely that the undertaking would have been complied with".

[33] In his submission, by concluding Mr MB had complied with the undertaking, "albeit somewhat belatedly", which did not meet the threshold for a finding of unsatisfactory conduct, the Committee had "incorrectly applied the law and failed to recognise Mr MB's conduct is a breach of an undertaking".[6]

Clear breach

[34] Referring to a decision of the High Court, Mr WP submits Mr MB's undertaking was "clear and unequivocal", and there were "no unique features" which suggested that [Mr MB's] breach of undertaking "was a result of an honest error" by [Mr MB].[7]

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[6] Mr WP refers to an article in LawTalk, Matt Fogarty "Unsatisfactory conduct or misconduct?" (2019) 926 LawTalk, which notes that a finding of (a) unsatisfactory conduct can be made for an unintentional breach, or (b) misconduct for a wilful or reckless breach, of an undertaking. Findings of misconduct are made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, and on appeal, by the High Court, and Court of Appeal: see ss 241, 253, 254 of the Act.

[7] *Auckland Standards Committee 3 of New Zealand Law Society v W* [2011] 3 NZLR 117 (HC).

[35] In Mr WP's submission the Committee "failed to recognise and address" that although Mr MB "eventually complied", there was "nonetheless a clear breach" of the undertaking.

[36] Mr WP says his view that Mr MB's provision of the undertaking was "at the very least…reckless" is supported by Mr MB's "subsequent conduct" which "indicate[d]" [Mr MB] "may never have had such documentation".

[37] He maintains that whilst Mr MB undertook [Mr MB] "held certain documents" to be "provided on completion of settlement", in "clear breach of the undertaking" Mr MB subsequently (a) suggested the undertaking "did not apply to certain documents", and (b) stated he had provided all the documents in his possession.

Inadequate explanation

[38] Mr WP says Mr MB had not explained why [Mr MB] denied, in his 8 November response, the undertaking "covered" such documents. He says he interpreted Mr MB's further 9 November response to mean [Mr MB] either "did not hold the documents", or, was "wilfully indifferent to honouring the undertaking".

Response

[39] In his response, Mr MB says he has nothing further to add to his comments in response to Mr WP's complaint.[8]

Review on the papers

[40] The parties have agreed to the review being dealt with on the papers.

[41] 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.

[42] 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

[8] Mr MB, email to LCRO (11 July 2019).

available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

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

> … 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.

[44] More recently, the High Court has described a review by this Office in the following way:[10]

> 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.

[45] 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 consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Issues

[46] The issues I have identified for consideration on this review are:

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[9] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[10] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(a) Did Mr MB know he had the documents described in his 29 October 2018 undertaking in his possession at that time?

(b) If not, did Mr MB, between 1 November 2018 and 9 November 2018, search his office for those of the documents Ms RC claimed he did not forward to her on 31 October 2018?

(c) If the answer to those questions is no, did Mr MB provide his undertaking with sufficient care?

Analysis

[47] Because all three issues interrelate I will consider them together.

(1) Parties' positions

[48] Mr WP claims Mr MB, by not providing to [Law Firm A] all of the documents described in [Mr MB's] 29 October 2018 undertaking until five weeks after completion of settlement, Mr MB did not honour the undertaking. He says when providing the undertaking on 29 October, Mr MB either "did not hold the documents" for two of the tenancies, or was "wilfully indifferent to honouring the undertaking".

[49] Mr MB disagrees. He says he did not "fail or refuse to honour" his undertaking. He says there was "no question as to whether [he] held the relevant lease documents" when he provided his undertaking which he says had "since been delivered" to Mr WP.

(2) Undertakings – professional rules

[50] Lawyers' undertakings have an important role, and have "an elevated and special status" in the practice of law. Because they are recognised by, and enforced by the Courts, "it is necessary for the profession to scrupulously honour them".[11]

[51] In acknowledgement of the importance of the care a lawyer must take when providing an undertaking to another lawyer, the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) provide:

[11] Section 268 of the Act: the High Court has inherent jurisdiction in respect of the conduct of lawyers who are officers of the Court. The third purpose of the LCA is "to recognise the status of the legal profession" (s 3(1)(c) of the Act); *Auckland Standards Committee 3 of New Zealand Law Society v W*, above n 6 at [67].

Undertakings

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.

[52] An undertaking must (a) be given by the lawyer personally in the lawyers' capacity as a lawyer, and (b) state, whether expressly or impliedly, a date on, or by when the undertaking will be fulfilled or honoured.[12]

[53] Although a lawyer's undertaking need not include the word "undertake", or be in a particular form, to be enforceable the undertaking must contain a promise, and the language used must be "precise and unambiguous in its terms." To achieve that:

(a) Care is required before providing an undertaking.[13]

(b) The subject matter of the undertaking must be within the lawyer's control.[14]

(c) An undertaking will be construed according to its "substance and intention" and not in a "technical legal manner".[15]

(d) Any "ambiguity" will generally be construed in favour of the recipient.[16]

(e) Strict adherence is required.

[54] The context in which the undertaking has been given must be considered objectively.[17] The Court of Appeal has stated that "[t]he subjective views of the practitioner giving the undertaking are irrelevant. So too, are the views of the practitioner or party receiving the undertaking."[18]

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[12] See Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [15.9.1]; GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [22.05]. Also see the previous New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors (7th ed, 2004) at rule 6.07, commentary: (4) "An undertaking should be given expressly and not merely by implication"; (6) "A practitioner should try to ensure that an undertaking is precise and unambiguous in its terms".
[13] *Auckland Standards Committee v Stirling* [2010] NZLCDT 4.
[14] See discussion by GE Dal Pont, above n 11 at [22.65].
[15] *Auckland Standards Committee 3 of New Zealand Law Society v W*, above n 6 at [41].
[16] At [42] and [60].
[17] At [63].
[18] *W v Auckland Standards Committee 3 of New Zealand Law Society* [2012] NZCA 401 at [45].

[55] A lawyer proposing to rely on an undertaking is equally required to ensure that the undertaking received is capable of performance by the lawyer providing it.[19]

(3) Context

[56] To provide context for discussion of the issues it is helpful to set out the events (a) which led to Mr MB providing his undertaking, and (b) which followed soon afterwards.

[57] The agreed settlement date was Friday, 26 October 2018. At 4:43 PM that day Ms SP, Mr MB's legal executive, informed (by email) Ms RC at [Law Firm A], that Mr MB had asked [Ms SP] to tell [Ms RC] that he held original lease documents in respect of the first four tenancies, and a certified copy in respect of the fifth.

[58] In response (by email) at 4:51 PM Ms RC informed Ms SP that [Ms SP's] 4:43 PM email was (a) "not an undertaking as requested", and (b) because the email had been received "after 4:30 PM, being the cut-off time for making same day cleared payments", [Law Firm A] were "unable to process the payment" for settlement that day.

[59] On Monday, 29 October 2018, at 11:12 AM, Ms RC asked (by email) Ms SP to "forward your solicitor's undertaking that you hold the following documentation and that you will forward that documentation to us upon completion of settlement".

[60] Although the list of documents in Ms RC's email included fuller descriptions of the tenancy documents than Ms SP's 26 October email, nonetheless Ms RC's list mirrored Ms SP's list by referring to original lease documents in respect of the first four tenancies, and a certified copy in respect of the fifth.

[61] In his response (by email) to Ms RC on 29 October at 1:14 PM, Mr MB undertook "I hold the following documentation and will forward the documentation to you on completion of settlement". Consistent with Ms SP's 26 October, and Ms RC's 29 October emails, except for the third tenancy document ([GL]), which Mr MB stated was a copy, the documents for the other tenancies were stated to be originals.

[62] On 31 October 2018 Mr MB sent a letter, on which the words "By Hand" was hand written, to Ms RC stating "Please find enclosed the lease documents as per our undertaking".

[63] The following day, 1 November 2018, Ms RC listed (by email) for Mr MB the documents received from him the previous day. Ms RC informed him that a copy of the agreement to lease in respect of the second ([Company F]) tenancy, and a certified copy

[19] GE Dal Pont, above n 11 at [22.70].

in respect of the fourth ([DW]) tenancy did "not fully reflect those detailed in [Mr MB's] undertakings".

[64] Ms RC asked Mr MB to "please check your files to ensure the above are all the documents to be forwarded to us".

[65] A week later, on 8 November 2018, at 12:56 PM, Ms RC followed up (by email) with Mr MB noting she had "not received a response" to her 1 November enquiry. She asked Mr MB to "advise whether [[Law Firm A]] [was] to expect receipt of" the original documents for the second and fourth tenancies.

[66] In reply at 3:49 PM that day, Mr MB informed (by email) Ms RC that his "undertaking did not cover these documents".

[67] Mr WP responded to Mr MB at 5:27 PM. He said he was "completely perplexed" by Mr MB's reply "given the clear wording" of Mr MB's 29 October undertaking. He asked Mr MB to "please clarify by return". He concluded stating he would refer the matter to the Law Society "without further delay" if Mr MB was "unwilling or unable to comply with [Mr MB's] undertaking".

[68] On 9 November, Mr MB responded (by email) to Mr WP stating "[t]here has been some confusion", insofar as "[t]he documents that [he] ha[d] forwarded to [[Law Firm A]] are all the documents [he] ha[s]".

[69] On 14 November, Mr WP informed (by email) Mr MB there was "no confusion from [his] side". He said "[i]n response to a number of telephone discussions and emails [Mr MB] gave a clear and unequivocal undertaking that [Mr MB] [was] holding and would forward certain documentation" to [Law Firm A]. He claimed Mr MB "ha[d] failed to forward two of the original documents" referred to in Mr MB's undertaking.

[70] Referring to Mr MB's 8, and 9 November emails, Mr WP stated "[i]t appears" Mr MB "never ha[d] held those original documents", and was "not in a position to honour [Mr MB's] undertaking" which [Mr WP] regarded as "completely unsatisfactory".

(4) Discussion

[71] The essence of Mr WP's complaint is whether Mr MB, when providing his undertaking to Ms RC, knew that he could, and as promised, was subsequently able to perform his undertaking.

Control

[72] In support of his submission that Mr MB's breach of undertaking was not the result of an "honest error" by Mr MB, Mr WP refers to Mr MB's statements to Ms RC on 8 November that the undertaking did not "cover" the documents requested, and on 9 November that there were no other documents to forward to [Law Firm A].

[73] He says Mr MB's 8, and 9 November 2018 emails evidence that [Mr MB's] undertaking "at the very least" was "reckless" because Mr MB "may never have had" the original lease documents for the second ([Company F]) and fourth ([DW]) tenancies when the undertaking was provided.

[74] Mr MB's position is that he "did not give undertakings that [he] [could] not honour", and "intended to comply" with the undertaking he provided to Ms RC.

[75] As noted above, one of the essential tasks for a lawyer before providing an undertaking is to satisfy himself or herself that the subject matter of the undertaking is "within [his or her] control". For that purpose, before providing his undertaking, Mr MB would have needed to check his files to make sure the documents he would promise to provide were in his possession.

[76] It is evident from Mr MB's 8 and 9 November responses to Ms RC's, and Mr WP's requests for the documents that Mr MB had not, at that stage, checked his files which he acknowledges he later did following Mr WP's complaint.

[77] I am persuaded by (a) Mr MB's statement in his 9 November response to Mr WP that the documents he sent to Ms RC on 31 October were "all the documents [he] had", and (b) his subsequent search for the documents, that it was more probable than not that Mr MB did not know the whereabouts of the documents on 29 October when he provided his undertaking. [20]

Performance

[78] Mr WP refers to the Committee having accepted that "in light of" Mr MB's 8, and 9 November responses, it was "unlikely" in "the absence of" his complaint Mr MB would have "complied with" the undertaking. In his view, although Mr MB later provided the originals of the two outstanding tenancy documents, there was "a clear breach" of the undertaking by Mr MB which the Committee "failed to recognise and address".

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[20] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [26].

[79] Mr MB says he "did not deliberately retain the original lease documents". He says on "further investigation" he "located both original lease documents" which he delivered to Mr WP five weeks later. He says until delivery, Mr WP held "copies" of the documents "albeit sent" by his firm "in error".

[80] The New Zealand Law Society's "Property Transactions and E-dealings Practice Guidelines" (the guidelines) at the relevant time, which "reflect recommended practice for residential property transactions and for e-dealings", assist lawyers by explaining how undertakings provided for settlement should be complied with.[21]

[81] For settlement purposes, the form of undertaking recommended to be provided by the vendor's lawyer to the purchaser's lawyer includes the obligation that "on payment of the settlement funds" the vendor's lawyer "will: immediately release the instruments", and "any relevant documents", and "send [them] to the purchaser's lawyer by a method to be agreed."[22]

[82] Although not strictly on those terms, Mr MB undertook he would provide the documents listed in his 29 October email "on completion of settlement".

[83] The first opportunity presented to Mr MB by [Law Firm A] to comply with his undertaking was Ms RC's 1 November enquiry to which Mr MB did not reply. The second opportunity was Ms RC's 8 November follow-up to which Mr MB responded that his undertaking did not extend to the documents asked for. In his response to the third opportunity presented by Mr WP that evening, on 9 November Mr MB said he had no other tenancy documents in his possession.

[84] It could be expected that on receipt of Ms RC's 1 November enquiry Mr MB would have immediately searched his files for the documents. All the more so on receipt of Ms RC's and Mr WP's 8 November emails.

[85] However, instead of searching his files, in his first response Mr MB endeavoured to limit the scope of his undertaking. In his second response he said he held no other documents.

[86] Whilst Mr MB did later find, and produce the missing documents to Mr WP, it is my view that by not searching for the documents until a later time, from 9 November at

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[21] New Zealand Law Society Property Law Section *Property Transactions and E-Dealing Practice Guidelines* (April 2015). The guidelines are subject to the Rules.
[22] Guidelines 6.6(d), 6.7: "…(subject only to the qualification in paragraph (iv))", namely, "where circumstances beyond [the vendor's lawyer's] control result in a delay".

the latest, he was in breach of his undertaking by not providing the documents "upon completion of settlement" as he promised he would.

[87] This is unlike circumstances previously considered by this Office where land transfer documents required for registration had been released at 4:05 PM, where the cut off time for registration was 4.00pm at that time.[23] The lawyer had been in meetings that day. Although expressing concern how the lawyer had organised [the lawyer's] day to ensure compliance with professional obligations, in those particular circumstances neither the Standards Committee nor the Review Officer on review considered that the lawyer had breached the undertaking.

[88] Mr MB says there was "no question as to whether [he] held" the lease documents when he provided his undertaking. He says Mr WP was wrong in saying he had "failed or refused to honour" his undertaking. He says once subsequently found, the documents had been delivered to [Law Firm A] five weeks later. He explains those circumstances as "miscommunication between [his] staff and [him]".

[89] I am not persuaded by Mr MB's position. In my view, Mr MB did not, in his 8, and 9 November replies to Ms RC's and Mr WP's requests for the missing documents, respond as requested, namely, by providing the documents he had undertaken to provide, or explain why he could not do so.

[90] All Mr MB had to do upon receipt of Ms RC's and Mr WP's requests was, as he later did, search his files and provide the documents requested. I am satisfied that by not immediately doing so Mr MB breached his undertaking to provide the documents, namely, "upon completion of settlement".

Conclusion

[91] The conclusion I have reached is that in contravention of r 10.3 of the Rules, Mr MB breached his undertaking by (a) not knowing that the documents requested were in his possession at the time he provided his undertaking, (b) not responding to Ms RC's and Mr WP's requests for the documents promptly having checked on his files, and then (c) not producing the documents immediately.

Decision

[92] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed as to the finding to take no further action on

[23] *FY v UM* LCRO 239/2010 (26 October 2011).

Mr WP's complaint, and substituted with a finding that by breaching his undertaking Mr MB contravened r 10.3 of the Rules which constitutes unsatisfactory conduct under section 12(c) of the Act.[24]

Orders

[93] Having made a finding of unsatisfactory conduct, section 156 of the Act includes among the orders that a Standards Committee can make, orders in the nature of penalty. In this regard, the functions of penalty in the disciplinary context have been described by the Court of Appeal as:[25]

(a) punishing the practitioner;

(b) a deterrent to other practitioners; and

(c) to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[94] The starting points for penalty are the seriousness of the conduct and culpability of the lawyer concerned. Mitigating and aggravating features, as applicable, are also taken into account. Acknowledgement by the lawyer of error, and acceptance of responsibility are matters to be considered in mitigation.

(a) Fine

[95] A fine is one of the orders a Standards Committee, or this Office on review, can make. The maximum fine available is $15,000.[26] Concerning an appropriate fine, this Office has stated 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 $1,000 would be a proper starting place in the absence of other factors.[27]

[96] In these particular circumstances, where in addition to breaching his undertaking Mr MB's responses to Ms RC's and Mr WP's enquiries as to the whereabouts of the missing documents were, as described by the Committee "inadequate", I consider that a fine is warranted.

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[24] Section 12(c) includes "a contravention of … practice rules made under this Act ".
[25] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [21].
[26] Section 156(1)(i) of the Act.
[27] *Workington v Sheffield* LCRO 55/2009 (26 August 2009) at [68].

(b) Orders

Fine

[97] Pursuant to s 211(1)(a) of the Act, Mr MB is ordered to pay a fine to the New Zealand Law Society of $1,000.00 within 30 days of the date of this decision: s 156(1)(i) of the Act.

Costs

[98] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that pursuant to s 210(1) of the Act Mr MB is ordered to pay costs in the sum of $900.00 to the New Zealand Law Society within 30 days of the date of this decision. Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[99] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and absent of anything as might lead to their identification.

DATED this 23rd day of June 2020

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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 WP as the Applicant
Mr MB as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society