NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2010] NZLCDT 4

LCDT 17/09

IN THE MATTER of the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982

AND

IN THE MATTER of **JOHN STIRLING** of Auckland, Lawyer

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr J Clarke
Dr I McAndrew
Ms S Sage
Mr O Vaughan

APPEARANCES

Mr D M Carden and Mr M Treleaven for the New Zealand Law Society
Mr J Katz QC for the Practitioner

HEARING at AUCKLAND on 8 & 9 February 2010

DECISION OF THE TRIBUNAL

Charge

[1] The practitioner is charged by the Auckland Section 356 Standards Committee of the New Zealand Law Society ("NZLS") with misconduct in his professional capacity, or in the alternative conduct unbecoming a solicitor, or further, of negligence or incompetence of such a degree as to bring the professional into disrepute.

[2] The charge falls to be considered under the transitional provisions of the Lawyers and Conveyancers Act 2006 ("the LC Act"). It is agreed that pursuant to s.358(1) of the LC Act the Tribunal has the same powers as could have been exercised by the New Zealand Law Practitioners' Disciplinary Tribunal ("NZLPDT") under the Law Practitioners Act 1982.

[3] By the conclusion of the hearing it was common ground that since the charges as amended, were laid in the alternative, only one of the optional charges could be found by the Tribunal to have been proved.

Background Circumstances

[4] The practitioner is a partner in a small practice in Auckland. The firm had for a number of years represented a developer client (CTDL) in respect of a very large subdivision being developed in various stages, out of Auckland. One partner in the firm had been entirely responsible for this client with the assistance of a qualified legal executive who effectively had the day to day running and management of the files relating to sales of properties in the subdivision. Some hundreds of agreements were involved. In 2004 that partner retired from the firm. However the arrangement with the firm was that he would continue as a consultant to the firm, and in that capacity was to continue his responsibility for CTDL matters. The same legal executive was to continue handling matters on a day to day basis but with a newly appointed supervising partner within the firm. However the legal executive

also left the firm in 2005. Her role was handed over to the partner's new legal executive, Ms C.

[5] This development was complex and "heavily geared" and the presale of some lots was used to fund in part the development itself. Because of this, some agreements provided for the early release of deposits paid by purchasers to be used to partially fund the development. Due to the complexity and number of the transactions a schedule had been prepared by the first legal executive referred to. This set out in spreadsheet form information about the lot number, final purchaser's name, final (and where applicable, the intermediate [wholesale]) purchase price, developer's details, a record of first and second deposits, title reference, rebates, commissions and some other details. For the purposes of this matter the important information is contained in the "first deposit" column, and to a much more limited extent, the "second deposit" column.

[6] Part of the funding was provided by the ASB Bank. However it had a "take out" provision in its lending agreement providing for an alternative financier to be substituted at the bank's request. The bank made such a request and at the time leading up to the alleged breaches of undertaking by the practitioner, finance was being arranged through MARAC.

[7] Some of the lots were sold on a wholesale basis, to the W Trust and signed by Mr B as trustee. The agreements provided for payment of the deposit in instalments, by way of cash and deposit bonds. The agreements were also expressed to be conditional upon the purchaser providing a guarantee to the Vendor from a third party guaranteeing the purchaser's obligations in general under the agreement, and in particular, the payment of the deposit.

[8] Mr B had provided such a guarantee by way of a Deed of Guarantee and Indemnity dated 7 April 2004. One of the issues at the hearing was whether this guarantee was in lieu of, or in addition to, the primary obligations of the purchaser under the agreement, and particularly the obligation relating to payment of the deposit.

[9] There were two other, smaller categories of wholesale sales, one to M Investments Limited, where the vendor was entitled to early release of the deposits for development purposes. The other was to I Direct Limited, where the deposits were to be held by the vendor's solicitor until the agreements became unconditional.

[10] The "take out" finance was arranged through MARAC which instructed Bell Gully ("BG") to act on its behalf in connection with the advance to CTDL. In early 2006, when the undertakings giving rise to this complaint were given, the partner now responsible for CTDL, Mr N, was away on sabbatical. His files were handled, in his absence, by the practitioner charged, Mr S. Thus it was to him that correspondence about the refinancing was referred. The first correspondence in connection with this seems to have been with the mortgage broker.

[11] The schedule referred to above, had been prepared in 2005 to provide an overview to another finance company. On 28 June 2006 the mortgage broker forwarded a copy of what appears to be MARAC's loan offer to the practitioner, and specifically referred to the requirements of para 16.2, which, amongst other things stated that "the borrower's solicitor is to certify to MARAC that ... deposits in terms of the Agreements have been paid and will be held in Trust".

[12] In his fax, the broker requested that a copy of the 2005 schedule be provided for MARAC's purposes and this was sent to the broker by the practitioner under cover of a fax dated the same day. He acknowledged in evidence that he sent a 14-month-old schedule without checking it at all. The practitioner was therefore at that stage, providing information in a schedule to MARAC and upon which MARAC would be relying.

[13] Correspondence then took place between BG and Mr S, as to the form of undertakings required by BG on behalf of MARAC. It was supplied by BG on 6 July 2006, amended by Mr S, but the amendment was not accepted. On 14 July Mr S, in a letter to BG, expressly stated – "We undertake we hold in trust the amounts listed under first deposit, as well as in the case of two lots, the second deposits". This undertaking was given with reference to the data contained within

"an updated schedule" also enclosed with that letter which was an update of the schedule to which reference has earlier been made. Whether or not the schedule had in fact been updated is uncertain.

[14] After yet further exchanges between the practitioner and BG, the final form of undertakings and other associated documents were provided to BG on 17 July 2006. Thus it can be seen that although under some time pressure to facilitate a very large advance to renew the client's borrowing, there was clearly some time and effort expended by the practitioner in respect of the undertakings. The practitioner also had had the opportunity some two and a half weeks beforehand to verify the information which was being provided to MARAC.

[15] The final form of the undertakings (ie. those portions relied upon by NZLS) read:

> 1.1 "We undertake that we hold all deposits under the Agreements as specified in the **attached** schedules.
>
> 1.2 We confirm that in our capacity as Stakeholder under the Agreements we have placed all deposits received (together with all interest accrued on those deposits less withholdings required by law in respect of their interest) (**Deposit Monies**) in an interest bearing trust account.
>
> 1.3 We confirm that when any portion of the Deposit Monies are due and able to be released to the Vendor its successor or assigns under a relevant Agreement then unless such Deposit Monies are released on or after settlement of the sale under the Agreement, we shall obtain MARAC Finance Limited's prior approval to release the Deposit Monies".
>
> 2.2 "In respect of each of the agreements and any future agreement for sale and purchase entered into in relation to any property in the Development (**Purchase Agreements**) ... we certify that the Purchase Agreements relate to the property referred to in the attached Schedule and that the attached Schedule is correct to the best of our knowledge and belief having taken all due and prior care".

[16] In fact, it is conceded, that the information provided to MARAC, and those undertakings were wrong. None of the deposits referred to in the charges were in fact held in cash by the practitioner's firm. Instead of some $743,000 there was in fact only $263,000 held in the practitioner's trust account. The trust account records did not record specific amounts for specific sales, but instead the money paid as

deposits was held in a single ledger for the client. Ironically, this would have made it easier for the practitioner to verify how much the firm was holding as deposits on the sales. The practitioner acknowledged that he had ready access to trust account records. He further acknowledged that at the time he gave the undertakings (or at any time) he did not check the firm's trust account nor attempt to tally the figures indicated by the schedules which had been forwarded to BG and MARAC to confirm that the undertaking which he had given was correct. Indeed the practitioner does not deny that his undertaking was incorrect. However he says that BG also must have known that it was incorrect although no evidence to this effect has been provided.

[17] The practitioner says that he had formed the view that the guarantee provided by Mr B was "in lieu of the deposits being paid". Having formed that view, the data provided in the schedule, and hence his undertaking, were clearly incorrect. However he did not check what sum was held as deposits by the firm nor verify the accuracy of the schedule with the legal executive responsible for maintaining it.

[18] The hearing occupied two days. Evidence was given by Mr Laubscher, then Professional Standards Director of NZLS, and Mr B Town, as expert witness for NZLS. A "no case to answer" submission was made by Mr Katz, but after consideration was rejected and evidence was given by the practitioner and his expert, Mr R Narev.

Arguments for the NZLS

[19] Counsel for NZLS, Mr Carden, referred the Tribunal to a number of decisions relating to the meaning of "misconduct in professional capacity". In particular we were referred to the recent decision of a full Court of the High Court in *Complaints Committee No. 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105. That decision departed from the earlier authority of *Atkinson v Auckland District Law Society* (NZLPDT: 50/8/90, N Marque, Chair) preferring the approach in Australia in relation to a medical practitioner; *Pillai v Messiter* (No. 2) (1989) NSWLR 197, 200, a decision of the Australian Court of Appeal. In the *C* decision [33] the Court held:

> "To conclude, the *Atkinson* test adopted by the Tribunal incorrectly includes within the definition of professional misconduct falling within s.112(1)(c) and in other respects, is not particularly helpful. The Tribunal erred in directing itself that intentional wrongdoing is an essential element of a charge under s.112(1)(a). While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such conduct. The authorities referred to above (and referred to in the Tribunal decision) demonstrate that a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner."

[20] Counsel submitted that signing an undertaking which was admittedly incorrect in a number of respects is so reprehensible, because of the importance of undertakings in legal practice, as to constitute misconduct. In this regard the NZLS called expert evidence from Mr B Town. He confirmed that the banking and finance sectors are reliant upon solicitor's undertakings for its proper functioning. He confirmed that if incorrect undertakings were given and it became known to the industry that this occurred often enough, the legal profession would no longer be trusted to provide such undertakings and the profession as a whole would be brought into disrepute.

[21] This evidence was countered by expert evidence called by the practitioner in the form of Mr Narev. However Mr Narev did not seek to diminish in any way the importance of undertakings in general in respect of commercial and conveyancing transactions. Indeed, quite properly Mr Narev's evidence was that "they are generally regarded as sacrosanct. I am well aware that they are relied upon by fellow practitioners and third parties such as finance companies, insurance companies, local authorities and the like ... I do not consider that any practitioner, acting professionally, would quarrel with this."

[22] The second alternative finding sought by the NZLS was that Mr S's breach of the undertaking was so negligent or incompetent to such a degree as to bring the profession into disrepute. In this submission the Tribunal was referred to *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514. In that case the full Court of the High Court, after approving the comments in *Pillai* (above) went on at paragraph [80] to say:

> "In our view each of the paragraphs of s.106 is intended to catch different kinds of conduct which may be more or less serious in particular cases. For example, a charge of incompetence s.106(3)(c) may in a particular case be a more serious charge of misconduct in professional capacity (s.106(3)(a)) ... There is no hierarchy of seriousness as between paragraphs such as (a) is more inherently serious than (c) and nor do each of the paragraphs have to be considered relative to the others. Conduct is to be assessed in respect of the particular charge that has been brought.
>
> [81] The use of the epithet reprehensible is appropriate in the case of professional misconduct, but it is not a useful description to assist in deciding the degree of negligence that warrants a disciplinary finding measured by whether it reflects on fitness to practise or tends to bring the profession into disrepute. That means a "tendency" to distract from, or lower, the reputation of the legal profession in New Zealand. Professional misconduct will have this effect, but behaviour which does not necessarily amount to professional misconduct may be in separate category of offending in terms of s.106(3)(c). Reliance on epithets is not helpful in this context. No gloss should be placed on the statutory test."

[23] And later at para [82]

> " .... We do think it is relevant to consider whether the conduct falls below what is to be expected of the legal profession and whether the public would think less of the profession if the particular conduct was viewed as acceptable."

[24] The *W* case did not deal with breach of undertaking but with the failure to obtain an independent valuation and to recognise a conflict of interest. The counsel for NZLS pointed out that in the *W* case there was only one transaction involved and misconduct was found.

[25] The final alternative charge preferred by NZLS was that of conduct unbecoming. In closing submissions Mr Carden did not seek to advance this charge as being a realistic or appropriate one on these particular facts.

Arguments for the Practitioner

[26] While not seeking to minimise the importance of undertakings it was submitted for the practitioner as follows:

(1) The undertakings must be read and understood in their proper context.

(2) That the undertakings were drafted by another firm not the practitioner.

(3) That the practitioner had asked the other firm to specify the form of undertakings they wanted.

(4) The client for whose benefit the undertakings were given (MARAC) was independently advised by BG.

(5) BG and MARAC "considered the form of the undertakings and the supporting documentation provided that gave rise to the request for and drafting of the undertakings, and had all the necessary information required to form an independent view of what was appropriate".

(6) MARAC's subsequent solicitors raised no issue of professional reputation against the practitioner.

(7) That there had been no personal gain by the practitioner nor were there were any allegations of any untoward operation of his firm's trust account.

[27] In respect of the first five points Mr Katz for the practitioner, expanded on his argument with reference to the law of undertakings. He submitted that the undertakings in this particular case are unusual; or at least that if not unusual then they arise in unusual circumstances. Counsel referred the Tribunal to the decisions of *Reddy v Lachlan* [2000] Lloyd's Rep PN858 para 15, *Bhanabhai v ADLS* CIV 2008-404-5736, 7 April 2009 and *Templeton Insurance Brokers v Penningtons* [2006] EWHC, Ch 685 15 February 2006. In the *Penningtons* decision the Court quoted from the *Reddy v Lachlan* decision in support of the principle:

> "[8] ... I must have in mind the ordinary principles for the interpretation of contracts but there is also a special principle that applies to the interpretation of solicitor's undertakings discussed by the Court of Appeal in *Reddy v Lachlan* .... "an ambiguous undertaking is generally construed in favour of the recipient". Lewis J went on to refer to interpretation calling into play an examination of the context of the undertaking. It should be noted that this submission relies on the supposition that there is some ambiguity to be resolved."

[28] In developing the question of context counsel referred (at a number of points) to the assumed knowledge of BG and MARAC. However he also made the somewhat contradictory submission (at paragraph 47 of his submissions) that it was:

> " ... wholly irrelevant what BG (or its client MARAC) may have thought, believed or understood."

[29] Mr Katz further submitted that evidence from either of them would be inadmissible and that it was not for the practitioner to adduce evidence as to the state of mind of the firm to whom the undertaking was being given because that misconceived the burden of proof. Again, somewhat confusingly, counsel goes on to make the submission:

> "what matters is how the undertakings would be understood by a reasonable person in the position of BG/MARAC and aware of all of the common facts".

[30] Counsel placed great emphasis on the fact that the undertakings had not been prepared by the practitioner charged, but rather by BG. That of course is neither unusual nor, in our view, particularly relevant. The duty upon solicitors in respect of undertakings rests on the practitioner giving the undertaking, not the one receiving it.

[31] Counsel goes on to submit that misconduct ought not to be established where "the proper construction and interpretation of the undertaking may be troublesome and have to yield to the business realities ...".

[32] That submission is somewhat surprising given that the practitioner himself acknowledged the undertaking (which the Tribunal considers to be plain and unambiguous) to be clearly wrong.

[33] At paragraph 54 of his submissions Mr Katz further advanced the submission that any uncertainty or misunderstanding in an undertaking ought to be resolved in favour of the practitioner. That submission is clearly incorrect in terms of the Code of Professional Conduct, Rule 6.07(6):

"**6.07 Rule**

Every practitioner has a professional duty to honour an undertaking written or oral, given in the course of legal proceedings or in the course of practice; and this rule applies whether the undertaking is given by the practitioner personally or by a partner or employee in the course of the practice.

(6) A practitioner should try to ensure that an undertaking is precise and unambiguous in its terms. An ambiguous undertaking will generally be construed in favour of the recipient."

[34] It is also contrary to the dictum in *Reddy v. Lachlan* (above [27]).

[35] Counsel then turned his attention to whether a breach of an undertaking of itself would be sufficient to found the charges before the Tribunal. He referred the Tribunal to the *Bhanabhai* decision (above), where a full Court of the High Court had this to say at [60]:

> "While a breach of an undertaking will, generally, be regarded as professional misconduct, that result does not automatically follow."

[36] In that case professional misconduct was established. The Court quoted from the relevant section of the text "Ethics, Professional Responsibility and the Lawyer" (LexisNexis 2nd ed, 2006), author Professor Duncan Webb, paragraph 15.9.1 at 506-507:

> "The reasons for the rule, which requires the strict adherence to undertakings, are pragmatic. Undertakings are common throughout legal practice and the continued efficient working of legal practice requires that such undertakings be honoured regardless of other supervening circumstances. The additional reason for the strict application of the rule is to maintain the legal profession's integrity. Members of the profession must be seen as wholly trustworthy in that, once they have undertaken a particular course of action, they can be depended on to act accordingly. That the duty to honour undertakings is strict means even when a lawyer has erred or made an oversight, circumstances have changed radically, or for the lawyer to adhere to the undertaking will cause hardship, the lawyer must still adhere to the promises made."

[37] For the practitioner it was further submitted that mere negligence or carelessness is not enough; something more is required (*Pillai*). Further, that the standard is not one of excellence nor perfection and that "mistakes can and do occur and the public will as consumers of legal services expect that". Counsel then

referred to the relevant passage of *Pillai* to which we shall refer in the discussion section of this decision. This aspect of the submission was repeated in respect of the submissions directed to the charge of negligence or incompetence in a professional capacity of such a degree as to bring the profession into disrepute. Counsel submitted that the evidence did not establish that the negligence or incompetence involved in giving this incorrect undertaking was of such a degree as to reflect on the profession as a whole and as a result bring the profession into disrepute. Counsel referred the Tribunal to the full Court of the High Court decision in *CDLS Complaints Commitee v W* [2009] 1 NZLR 514, in particular drawing attention to paragraphs [90] and [91] where the Court found that the conduct "did not comprise a single error nor mere misjudgment. It involved the failure to recognise the conflict of interest that had to exist ...".

[38] The Court found in that matter that there was negligence of such a degree as to affect the good reputation or standing of the legal profession. The Court held:

> "members of the public would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. That is behaviour or actions which, if known by the public generally, would lead them to think or generally conclude that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing and reputation of the profession in the eyes of the general public."

[39] In this regard counsel referred back to the drafting of the undertakings by BG. The Tribunal was invited to consider it a defence that because the undertakings were drafted by another firm which the practitioner considered to be acting in conjunction with the practitioner on behalf of the client, that that somehow removes or lessens the obligations on the practitioner to ensure that the undertakings are carefully examined, and that the facts stated or actions to be performed are within the practitioner's personal knowledge or control.

Discussion and Findings

[40] The accepted test for misconduct in professional capacity is that set out in the portions of the *Pillai* decision relied upon in recent decisions of the High Court. In

C (above) para [40], and in *W* (above). The relevant passages are from the dictum of Kirby P:

> "The words used in the statutory test ('misconduct in a professional respect') plainly go beyond that negligence which would found a claim against a medical practitioner for damages: *Re Anderson* (at 575). Departures from elementary and generally accepted standards, of which a medical practitioner could scarcely be heard to say that he or she was ignorant could amount to such professional misconduct: ibid. But the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner ..."

[41] In the *C* case, the necessity to establish intentional wrongdoing in order to establish professional misconduct was rejected, see para [19] above.

[42] As to undertakings, although professional obligations in this regard are clearly understood we consider that we ought to briefly quote from the *Bhanabhai v ADLS* decision (above), a decision of the full Court of the High Court, where at paragraph [21] the Court repeated the Disciplinary Tribunal findings as follows:

> "[30] Undertakings must be honoured. If an undertaking is given it must be able to be fulfilled when the solicitor is called on to do so.
>
> [31] If an undertaking is given by a solicitor and a solicitor is unable to fulfil it that in itself would warrant disciplinary action.
>
> [32] If an undertaking is given and it is capable of fulfilment and is not fulfilled then that warrants disciplinary action as well."

[43] At paragraph [40]:

> "Two duties flow from a solicitor's undertaking. The first is a personal duty to honour the undertaking, which may be enforced at the suit of the party to whom the undertaking is given. The second is an ethical obligation, the breach of which may result in disciplinary sanctions by the relevant professional body. The two obligations are different in nature but run coextensively. They ought not be conflated."

[44] And at paragraph [55] having set out Rule 6.07, in addressing the issue of whether the breach constituted professional misconduct the Court had this to say:

> "Section 112(1)(a) of the Law Practitioners Act 1982 identifies the charge of professional misconduct. It is a distinct charge and represents the most serious finding that can be made against a practitioner. The charge can be contrasted for lesser breaches of professional obligations to which section 112(1) also refers."

[45] The Court went on to find that in deliberately choosing not to honour the undertaking he had given, Mr Bhanabhai showed (paragraph 58):

> "... complete indifference to his professional obligation to honour the undertaking. In our view the breach after 27 April 2007 was deliberate. It is an accepted basis for finding of professional misconduct ..."

[46] And finally at paragraph [59]:

> "The giving of undertaking by solicitors and the practice of acting upon them is widespread. It is a practice which enables many transactions to be completed without interruption or delay. An undertaking is generally accepted as a substitute for strict performance of some commercial, contractual or procedural requirement: see Laws NZ*, Law Practitioners,* paragraph 101. In cases where a solicitor undertakes to hold proceeds of sale and to apply them in accordance with the undertaking, the High Court will require the solicitor to honour the undertaking given: for example, re *C* (a solicitor) [1982] 1 NZLR 137 (HC)."

[47] The particulars pleaded in support of the alternate charges contained portions of the undertakings as part of Particular 1. This was not disputed by the practitioner.

[48] As to Particular 2 – it is alleged that the undertakings were breached in that the schedules referred to were incorrect because the firm was not holding deposits in respect of certain of the lots; we find these particulars clearly proved and the practitioner acknowledged in evidence that the deposits were not held in his firm's trust account. He acknowledged that he had despatched an old schedule which had been prepared over a year previously for the benefit of another finance company without checking its accuracy. He did not make inquiries of the legal executive responsible for updating the schedule. Both expert witnesses agreed in their evidence that each would have carefully questioned the legal executive as to the accuracy of the statements.

[49] The practitioner did not check that cash deposits had been received, despite referring in a letter to BG dated 10 July, to the "schedule relating to deposits received

on the above agreements". It was the evidence of Mr Town, and later accepted by the practitioner, that this check could have been carried out in 10 seconds on his computer.

[50] The practitioner accepted in evidence, as did his expert witness, that the guarantee provided by Mr B in relation to the lots to be purchased by the W Trust was enforceable **in addition to** the covenant to pay deposits. Thus, such guarantee was not simply "in lieu of" deposits as the practitioner tried to suggest initially.

[51] The practitioner obviously considered and paid attention to the undertakings, and on more than one occasion, amended them. However he did not pay attention to the most central issue which was whether the deposits were held and therefore whether his undertaking could be honoured. On three separate occasions, namely 10, 14 and 17 July 2006 respectively the practitioner undertook that he held deposits when in fact he did not.

[52] As to Particular 3 – that the practitioner was unable to honour the undertakings in Clauses 1.2 and 1.3 because he did not hold the deposits in respect of those transactions as he had earlier undertaken, we also find this clearly proved. Again the practitioner did not check the trust account. If he had merely totalled the deposits' column he would have found a figure in excess of $700,000 as earlier stated or even taking in to account early release payments, it should certainly exceeded $400,000. Instead of which what was actually held in the trust account was $263,000. That simple check would have alerted him to the inaccuracy of the undertaking he was giving.

[53] Particulars 4, 5 and 6 relating to holding funds as a stakeholder, and seeking authority of MARAC before release of deposit funds are hypothetical and do not need to be addressed as they flow from the primary failure and breach which we find to be established.

[54] As the practitioner who was giving the undertaking, S was nominally the author of the document and the person with the obligation to ensure it was correct.

[55] As to the submission in respect of the actions of BG and its state of knowledge, we find the state of knowledge of the other firm to be irrelevant.

(1) because the undertaking itself is unambiguous and can be read as to its plain meaning without context to assist; and

(2) because the practitioner is the person with the obligation to sign the correct undertaking, not BG despite its involvement in the drafting.

[56] We reject the submission that S could relax his guard because he took the view that he was acting in conjunction with BG for the client – BG was acting for MARAC and had been instructed by MARAC to protect its interests. BG was not assuming any obligation to S's client or to S and it is a misconstruction of BG's role if S took the view that they were acting together for S's client.

[57] It was the evidence of Mr Town that even if one received undertakings drafted by one of the most respected firms in the country the practitioner still has an obligation to scrutinise them carefully before signing.

Context

[58] There are three levels at which this could potentially be relevant. Firstly, in straight interpretation the practitioner relies on the proposition "we all knew what we were talking about", "we were on the same page". In sending the deed of guarantee to BG without any indication that he considered it to be "in lieu of" deposits, the Tribunal cannot assume that the propositions put by the practitioner are correct and that indeed that was how BG did view the guarantee. Since no evidence was called from BG, it is not the Tribunal's role to make assumptions about the state of that firm's knowledge. In any event since we have found the undertakings themselves are plain and unambiguous on their face particularly having regard to the reference to the schedule which lists deposits, tending to underpin the word "paid", we find it unnecessary to have regard to context to interpret the plain meaning of the words.

[59] The second level in which context may be relevant is in assessing the seriousness of the conduct or the negligence. In this regard counsel submitted that

the situation was analogous to that which existed in *Pillai*, ie: that others knew that something was wrong also and did nothing. Once again we repeat that we do not have the evidence that others did have the same knowledge as the practitioner or that the practitioner ought to have had. Thus evidence of context cannot be influential on assessment of the seriousness of the negligence itself.

[60] The third level at which context may be relevant is as to penalty, and we accept that at that level context is likely to be much more relevant.

Seriousness and alternative charges

[61] The question is whether the practitioner's acknowledged negligence was so serious as to portray indifference to and abuse of the privileges and responsibilities of a legal practitioner.

[62] On three occasions the practitioner said that the deposits were held and was indifferent to the truth of that. The Tribunal considers that indifference to the accuracy of an undertaking, which is a special class of statement reserved to the legal profession, and upon which the commercial and financial communities rely, as do the general public, that the negligence must be regarded as serious and an abuse of professional privileges and responsibilities. It is such a crucial and fundamental part of being a legal practitioner that it cannot be treated casually or with inaccuracy. As stated in *Bhanabhai* [60] breach of an undertaking will generally be regarded as professional misconduct. The Tribunal rejects the submission that there is anything so unusual or exceptional in this case as to counter such a finding.

Alternate charge

[63] We are also bound to say that if we are incorrect in the assessment of the first charge, we would also have found the practitioner to have been negligent in his professional capacity to such a degree as to tend to bring the profession into dispute. We refer to the finding in the *W* case [91] which related to breach of an undertaking and failure to recognise a conflict of interest in a transaction:

> "In our view it was negligence of a degree that tends to affect the reputation and standing of the legal profession generally in the eyes of the reasonable and responsible members of the public. Members of the public would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions, which if known by the public generally, would lead them to think or conclude that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing and reputation of the profession in the eyes of the general public."

[64] We consider that the behaviour of the practitioner in the matter before us to have been at least as serious as in the *W* case.

Result

[65] The Tribunal finds the practitioner guilty of misconduct in his professional capacity. Counsel are invited to provide within 21 days written submissions as to penalty and notify the case officer as to the availability for a penalty hearing.

DATED at AUCKLAND this 5th day of May 2010

Judge D F Clarkson
Chair