NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 37

LCDT 034/17

IN THE MATTER OF	The Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE NO. 2** Applicant
AND	**TIMOTHY JOHN BURCHER** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS

Mr S Grieve QC

Mr G McKenzie

Ms C Rowe

Ms S Stuart

DATE OF HEARING 24-26 July 2018

HELD AT Auckland District Court

DATE OF DECISION 10 October 2018

COUNSEL

Mr N Williams and Ms E Mok for the Applicant

Mr D Jones QC for the Practitioner

RESERVED DECISION OF THE TRIBUNAL ON LIABILITY

Introduction

[1] Mr Burcher faced two charges, the first, pleaded at the three possible levels of culpability, related to his management of the proposed sale of a Tauranga property in which he and his clients had invested considerable funds on mortgage security.

[2] The investment had initially been through Mr Burcher's firm's nominee company.[1] There had been problems, for some time, in the management and compliance of the company, and its wind-up was being overseen by a senior practitioner, Mr Robert Eades, who, in turn, was reporting to the New Zealand Law Society ("NZLS").

[3] The conduct complained of related, in part, to the failure of Mr Burcher to keep Mr Eades properly informed. Other issues arose as to the application of funds received for the deposit on sale of the property, and how contributors to the mortgage were treated in relation to each other.

[4] The second charge, pleaded as negligence or unsatisfactory conduct, involved more minor concerns about the handling of a deposit paid on the sale of another property, in Tokoroa, secured for investors in the nominee company.

Issues

[5] The issues which required determination were:

Charge 1

1. (a) Did Mr Burcher's failure to disclose the status of the sale of the Tauranga property breach Rule 11.1, as "misleading conduct"?

[1] Short Solicitors Nominee Company Limited ("Nominee Company").

(b) If so, was it a wilful or reckless breach such as to constitute misconduct?

2. Was Mr Burcher's conduct in paying the deposit to himself in priority to Mr M, a breach of Rule 5 (5.1, 5.2 or 5.4) as a conflict of interest or compromise of duties?

3. Did Mr Burcher's personal repayment of the B contributions breach the Rule 6.1 obligations as to conflicting duties?

4. Taken together, at what level of culpability does this conduct fall?

Charge 2

5. Did Mr Burcher's failure to transfer the deposit to the nominee company's trust account, and to place it on interest bearing deposit, amount to breaches of ss 110 and 114 LCA?[2]

6. Did Mr Burcher's actions in partially refunding the deposit without consulting other directors of the nominee company breach the firm's obligation as stakeholder?

7. If so, what level of culpability does this reach – negligence or unsatisfactory conduct?

Background

[6] Mr Burcher was a partner in the firm MBC Law and prior to that, its predecessor law firm Short & Partners.

[7] Following concerns about the operation of the nominee company, and troubling inspectorate reports having been delivered to the predecessor firm, the firm appointed Mr Robert Eades, a very senior practitioner, along with another practitioner, to oversee the winding up of the nominee company activities including the realisation of the mortgages held by it.

[2] Lawyers and Conveyancers Act 2006.

[8] As part of this process, Mr Burcher, as one of the directors of the nominee company, and the partner having most responsibility for the nominee company, gave undertakings to the NZLS, in which he agreed to cooperate with Mr Eades and comply with all reasonable directions given by him in the management and operation of the company.

[9] Mr Eades expected to be consulted about any significant steps relating to the business of the nominee company and, as part of the arrangement made, he reported to the New Zealand Law Society.

Tauranga Investment

[10] In 2007 the nominee company had advanced, with 10 contributors, some $945,000, secured by second mortgage, over a property in Tauranga. The property was a duplex which required significant work to realise its full potential. Unfortunately, the valuation for the property which had been obtained to support the borrowing, was subsequently shown to be very unrealistic, and the estimated cost of the works to be carried out to be grossly understated.

[11] After the global financial crisis struck in 2008, this investment became seriously at risk and it appeared that it would founder unless significant funds were injected to complete the project so that the apartments were saleable. Without this, there was little prospect of return to the contributors.

[12] Recognising this, Mr Burcher wrote, in November 2008, to the contributors setting out their various options. The third option, which was adopted by all contributors was that the partnership would advance funds, at its own risk, so that the project could be completed.

[13] However, that advance was made on the basis that these later advanced funds would take priority over the existing contributors' investments. Authorities were signed by the investors to confirm the agreement.

[14] Since neither of the other two partners in the firm were prepared to assist with the further advances, Mr Burcher took on this responsibility personally. He, or his family interests, advanced (eventually) in excess of $920,000. In addition to that, to

support the first mortgage over the property, a further $180,000 was advanced. In addition, Mr Burcher put many hours into the management of this project, as did his wife.

[15] These advances of over $1.1 million were made by Mr Burcher, he says out of loyalty to his clients and to ensure they would receive some return on their investment. This decision was clearly at enormous personal and financial cost to him over the period between 2009 and March 2015.

[16] In July 2010 the nominee company nominated, by way of deed, Mr Burcher to become the sole registered proprietor of the Tauranga property, following a mortgagee sale, and he thus took on the burden of the first mortgage commitments. Having done so, he executed a declaration of trust to secure the contributors, after any priority sums and secured sums were satisfied. He also registered a new mortgage against the title in favour of the nominee company.

[17] Over the early months of 2010 one of the original contributors, and a long-term client and friend of Mr Burcher's, Mr M, advanced a total of $112,000 on the basis that he too would have priority over the original investors, along with the later advances made by Mr Burcher and his associated interests.

[18] On 29 May 2015 Mr Burcher entered into an unconditional agreement for sale and purchase of the property for $1.6 million. On signing the agreement, a deposit of $100,000 was paid with a further deposit of $200,000 due on 30 July 2015. The purchaser was also a client of Mr Burcher[3] and authorised that the deposits paid be paid to the practitioner personally (to partially offset the payments advanced by him).

[19] Over the following months leading up to August 2015 Mr Burcher did not tell Mr Eades of the sale and purchase agreement.

[20] On 24 July 2015 Mr Eades specifically inquired about progress with the Tauranga property. Mr Burcher responded that he had been working with a private investor for some time and that he expected to have "something finalised within the next two weeks".

[3] Nothing was made of this relationship, so we assume the conflict situation was properly handled.

[21] It was not until 28 August 2015 that Mr Eades discovered, from Mr Short, another partner in the firm[4] that the Tauranga property had been sold.

[22] Mr Eades notified Mr Burcher of his dismay at the lack of information provided to him and that Mr Burcher had personally received the deposits.

[23] Mr Eades did not at that time have access to the authorities which Mr Burcher had obtained, which gave him priority to receive such funds, given the $1.1 million of "salvage" expenditure made by him.

[24] Mr Burcher subsequently explained his actions, and deficient communication to Mr Eades, on the basis that he had been concerned that the sale may not proceed up until the stage that the second deposit was received. He promptly apologised to Mr Eades.

[25] There is a further context for the practitioner's lack of openness with Mr Eades, and that is the acrimonious nature of the breakdown of the partnership between he and, at least, Mr Short. Mr Burcher described three sets of litigation issued by Mr Short against him, or him and Mr Macdonald, the third partner, apart from that flowing from this Tauranga enterprise. There was no semblance of the mutual reliance or "having each other's back" that one would normally expect to see in such a longstanding (30-year) partnership. Indeed, the words used by Mr Burcher to describe the relationship between himself and Mr Short were that they were "locked in mortal combat".

[26] We noted that Mr Short initially informed Mr Eades that his own company, which was a contributor to the original mortgage, had not signed an authority to give priority to the further advances made by Mr Burcher, thus putting into question the whole priority structure[5]. This information proved to be quite wrong, on subsequent inspection of the authorities, which went missing for six months.

[4] It should be noted that by this time relationships within the partnership had totally broken down.
[5] He also asserted incorrectly that nor had the B investors signed such an authority. Exhibit "A", email David Short to Mr Eades dated 16 September 2015.

[27] Mr Burcher, in his evidence, described the stress and pressure he was under at the time of the Tauranga sale, having made the huge financial commitment to attempt to rescue this transaction and working in what he described was a very toxic and suspicious work environment. He says that his decision not to inform Mr Eades was absolutely based on his "… *decision to avoid further hostilities from Short by not informing him of the sale and purchase agreement and the deposit*". As it turns out, his fears were realised when Mr Short commenced proceedings through his company against the nominee company, Mr Burcher and the firm.

[28] Mr Burcher met with Mr Eades on 7 October 2015, and it was Mr Eades' evidence initially that Mr Burcher was unable to provide not only copies of the authorities in question, but also "*evidence of the funds he had spent on the Tauranga Property at the time*". We are satisfied from the evidence that Mr Eades was mistaken about the latter because at the time of the meeting Mr Burcher clearly provided the ledger where every item of expenditure and income was noted, which was supported by three Eastlight folders of invoices supporting the payments[6].

[29] As to the authorities which had flowed from the November 2008 letter to all contributors, despite thorough searching, these were unable to be located by Mr Burcher to provide to Mr Eades until they suddenly appeared, having been "located" by Mr Short's secretary in March 2016. Oddly, Mr Burcher was not told of their "recovery", and learned this from NZLS.

[30] The agreement to sell the Tauranga property did not proceed and in August 2016 the deposit was forfeited.

[31] Mr Burcher did not pay any part of the $300,000 to Mr M, who was also a "prioritised" lender, having advanced "salvage" funds, like Mr Burcher. Mr Eades pointed this out to Mr Burcher, who readily acknowledged this error, and noted that he should have reimbursed Mr M some $40,000 as a proportion of the later advances made by him, although he also states that Mr M was not expecting to be paid until the property was sold.

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[6] Burcher affidavit of 19 February 2018, para [12].

[32] Mr M has sworn an affidavit confirming that he was "not concerned" that Mr Burcher had not provided for payment to him pro rata from the deposit, and had he been asked he would have told the practitioner to reimburse himself first, given the level of advances that Mr Burcher had made. However, Mr M was not given the opportunity to make such a concession at the time the funds were received by Mr Burcher and the Standards Committee argue that this does constitute a breach of Rule 5, as allowing a client's interests to be compromised because of a conflict with his own.

[33] Following the issuing of proceedings by Mr Short, which Mr Eades supported by means of an affidavit, the $300,000 which had initially been received by Mr Burcher was in fact redistributed on settlement of the proceedings as follows:

1. $200,000 pro rata to the original contributors.

2. $25,000 to Short & Partners.

3. $25,000 towards rates, repairs and sale costs.

4. $25,000 to Mr M as part-payment towards his further advances.

5. $25,000 was retained by Mr Burcher, of the $1.1 million which had been advanced by him.

[34] This settlement was not indicative of Mr Burcher's view of his proper entitlements.

[35] The next aspect of the practitioner's actions which are criticised in relation to the Tauranga investment, is that in 2013, 2014 and 2015 Mr Burcher used his own funds to replace the contributions of the original 2007 investors, who were members of the B family. The B family were related to a very long-standing staff member at Mr Burcher's firm he was aware that they were in need of the funds, and decided to replace their investment with his own funds. He says he did so out of a sense of loyalty.

[36] The Standards Committee submits that this constitutes a breach of the conflicting duties rule, Rule 6, because it says other contributors ought to have been given a similar opportunity to be replaced.

It is Mr Burcher's evidence that there was no such opportunity available to other investors, that he had specific reasons for assisting these particular people and that he was not in a position to do that in respect of all investors.

[37] As can be gleaned from the above, there are three aspects of the practitioner's conduct relating to the Tauranga investment which are to be scrutinised: his communication, or lack of, to Mr Eades; his failure to pay a portion of the deposit received to Mr M; and his substitution of himself for the B investors.

Tokoroa Investment

[38] The nominee company held a mortgage registered in February 2008, over a property in Tokoroa.

[39] On 2 July 2015 Mr Burcher arranged a private sale of this land for $150,000 on behalf of the nominee company (exercising its power of sale under the mortgage) to a Mr K, another of Mr Burcher's clients.

[40] A deposit of $15,000 was to be paid on 2 July 2015[7] but, despite Mr K having sufficient funds in trust by 7 July to make the payment, Mr Burcher did not arrange for the transfer of the deposit into the nominee company's trust account until 24 August 2015.

[41] There was a further delay before Mr Burcher placed the deposit into interest-bearing deposit on 30 September 2015.

[42] Then, prior to the settlement date, in late November 2015 at Mr K's request, because he had a temporary liquidity problem, Mr Burcher refunded $10,000 of the deposit to Mr K on a temporary basis.

[7] By transfer from the purchaser's funds held in the trust account to the vendor/nominee company's trust account.

[43] Mr Eades was not advised about this (refund) transaction. Mr Burcher says that having executed the agreement for sale and purchase on behalf of the nominee company he had authority to vary the agreement.[8]

[44] Mr Burcher made the following points about this transaction. Firstly, the price of $150,000, which incurred no agent's commission, was a very favourable one for the investor clients. Secondly, Mr Burcher was acting for Mr K in respect of a much larger transaction (in excess of $1 million). Mr Burcher obtained Mr K's agreement to pay the full settlement sum for the Tokoroa property from funds held in respect of the other transaction, in consideration of the temporary return of the $10,000.

[45] Both transactions proceeded and the nominee company was able to settle this sale on what was described as favourable terms to it. For these reasons and because of the minor nature of the overlooked deposits, Mr Burcher contends that this series of events does not even amount to unsatisfactory conduct.

[46] Certainly, in opening for the Standards Committee, Mr Williams conceded that this second charge would not normally have made its way to the Tribunal had it not accompanied the Tauranga matter and also against the background of the unsatisfactory management of the nominee company in the past.

[47] Mr Burcher conceded that with hindsight it would have been wiser to simply advance Mr K the $10,000 from the firm's account as had been done by the firm on previous occasions.

Issue 1(a) and 1(b)

[48] Rule 11.1 of the Rules.[9] reads:

> "A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice."

[49] We have determined in the past, that for this Rule to have been breached, the level of culpability of the practitioner must be established as having been high.[10]

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[8] The Standards Committee took no issue with this proposition.
[9] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[10] *Nelson Standards Committee of the New Zealand Law Society v Smith* [2018] NZLCDT 34.

[50] In so finding we relied on the decision in *A v New Zealand Law Society,*[11] where His Honour Collins J held:

> "A disciplinary offence in respect of misleading or deceiving a court requires a high level of culpability on the part of a practitioner. An inadvertent error in a submission does not provide a foundation for disciplinary proceedings. What is required is an intention on the part of the practitioner to mislead a Court or recklessness on the part of the practitioner as to whether or not she or he misled the Court."

[51] There is no question that Mr Burcher's somewhat bland reference to his dealings with the private investor, caused Mr Eades to be misled about the status of the agreement for sale and purchase which had been entered into. It is also somewhat disingenuous of him to initially say that Mr Eades had no status in respect of an "expired" mortgage, because Mr Burcher well knew he had registered a new one and held himself out as trustee for the original contributors, as well as the subsequent investors.

[52] Furthermore, having regard to Mr Burcher's acknowledged wish to keep Mr Short in the dark for as long as possible and therefore evasiveness of Mr Eades' questions, it has to be said that the fact that he was not forthcoming with Mr Eades was deliberate. In fact, in cross-examination Mr Burcher did concede that he was deliberately conveying to Mr Eades what he described as "not the correct impression".

[53] However, we accept the submission of Mr Jones QC, on behalf of Mr Burcher that the level of culpability is properly assessed in relation to the overall context in which the practitioner found himself.

[54] Taking account of that context, which we detail further, we find that although the misinformation was deliberate, it was neither wilful nor reckless in these particular circumstances.

[55] We accept that Mr Eades was justifiably "dismayed" and "angry". The practitioner's error in not promptly informing Mr Eades of his actions has had most unfortunate consequences, not least to himself. The Tribunal considers, with respect, that Mr Eades' reaction may have led to his being less than receptive to Mr Burcher's explanation about wishing to withhold information from Mr Short, with whom he considered himself to be "at war", and may have led to Mr Eades overlooking the

[11] *A v New Zealand Law Society* [2017] NZHC 1712 at [46].

material supplied to him by Mr Burcher. It was not helped by Mr Burcher referring to his own pressing financial needs, which may have raised concerns for Mr Eades that the practitioner was putting his own needs ahead of his clients'.

[56] Mr Eades was performing most of his supervisory role by telephone and email rather than being in the office, so although he was aware of the animosity between the partners, he is unlikely to have been aware of the level of this animosity. If he had, he may have guarded himself against being drawn into a more partisan role than he had intended.

[57] Certainly, we consider that the email[12] sent to Mr Eades by Mr Short, soon after he discovered he had been "kept out of the loop" in respect of the Tauranga property, may have misled Mr Eades into taking a much more negative or suspicious view of Mr Burcher's actions than he might have done otherwise.

[58] For example, the email states:

> "I am still incredulous at the efforts Tim took:
>
> (a) To hide the transaction from you, John Macdonald and myself.
> (b) To get his hands on the deposits which I understand from John Macdonald were taken, the instant the funds were paid/transferred and with retrospective journals without notice to or the consent of his co-directors.
> (c) I await with interest to see the alleged priority and consent letters and note:
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> i. Waitangi Investments Limited has never signed such a letter.
> ii. The B investors have, I am told, never signed such a letter and have been paid out in priority to the other contributors to the second mortgage using $72,000.00 of Tim Burcher's own funds drawn from Short & Partners."

[59] The statements about the signing of priorities, as recorded above, proved to be in error. They were repeated in Mr Short's own affidavit to the court in the ensuing litigation. Further, in that affidavit there was a suggestion that the original investors had not even been advised of their options - ignoring the carefully framed November 2008 letter of advice and accompanying authorities.

[12] Referred to in note 5.

[60] Although Mr Eades' own affidavit, in the litigation, was not sworn until some weeks after the authorities had reappeared and thus he was aware that Mr Burcher had authority to accord himself priority, as the provider of the "salvage investment funds", it seems that Mr Eades did not note the errors in Mr Short's statements about his company not having authorised the arrangement, and Mr Eades confirmed in evidence that he had never raised the discrepancies with Mr Short.

[61] The errors in Mr Short's information both to Mr Eades and to the Court are demonstrated by reference to the authorities, once located.[13]

[62] We consider that we are able to record that Mr Eades was clearly influenced by these erroneous comments and by his own absolutely understandable anger at Mr Burcher's actions in keeping these matters from him. We say this because of the language which is used in correspondence by Mr Eades, both to Mr Burcher directly and in reports to the New Zealand Law Society. For example, in an email to Mr Burcher following their October meeting Mr Eades uses the word "misappropriation" and, in a report to the New Zealand Law Society used the words "appropriated the deposits – for purposes of which I have not been told".

[63] In cross-examination Mr Eades accepted that the word appropriated was pejorative and "not well expressed".

[64] Mr Eades misapprehension was, of course, fuelled by the fact that the authorities remained missing for some six months before mysteriously reappearing. During this time Mr Burcher and his staff had made extensive searches to locate them, unsuccessfully.

[65] As to the propriety of Mr Burcher's action in retaining the deposit funds, in cross-examination, Mr Eades was also taken through the evidence of the two expert witnesses called on behalf of Mr Burcher, namely Mr C Moore and Mr M Foley.

[13] We wish to be careful to point out that Mr Short did not give evidence before the Tribunal and has not had the opportunity of making any comment in response, and thus we make no comment on his statements except to point out inconsistencies between his statements and the documents which have been provided to the Tribunal in these proceedings.

[66] Both had provided the opinion that "as a trustee with clearly established priority for funds" Mr Burcher was entitled to be indemnified for his expenditure from any funds received including the $300,000 deposit.

[67] Having regard to the opinion of the other practitioners, as well as the matters traversed in cross-examination concerning the authorities and the careful nature of the advice that went to the investors, albeit somewhat dated by the time of the funds being received, Mr Eades finally conceded that Mr Burcher may well have been entitled to have been indemnified from the funds[14].

[68] While the concession and indeed the broader picture and context of this matter do not detract from the fact that Mr Burcher, as he rightly concedes, ought to have told Mr Eades about the transaction rather than suggesting it was still to be finalised, it does sweep away the negative and suspicious inferences and doubts which were earlier cast upon Mr Burcher's failure to be honest about this situation.

[69] The answer to Issue 1(a) is therefore yes there was a technical breach of Rule 11.1 in that Mr Eades was misled by Mr Burcher's statements but, turning to Issue 1(b), for the reasons set out above we are not minded to classify it as either a reckless or wilful breach, such as to raise this aspect of the charge to misconduct.

Issue 2 – Failure to pay Mr M

[70] Mr M swore an affidavit in which he described himself as "a reasonably astute investor". He was an original contributor to the nominee company mortgage for the Tauranga property and as such received the letter of 3 November 2008 setting out the three options for consideration.[15] He states that because of this letter, when he invested the $112,000 subsequently, towards the "salvage funds", he was clear that any repayment of the latter would be in priority to those who had invested in the original loans, including himself.

[14] NOE page 103, line 20.

[15] This letter, although signed by Mr Burcher as the nominee company partner, was, on his evidence, fully discussed with the other two partners before it was sent to the investors as was the overall salvage proposal. Mr Short had apparently previously travelled with Mr Burcher to inspect the property.

[71] His expectation was that he would be repaid by Mr Burcher, as trustee for the investors, from the eventual sale of the property. He learned that Mr Burcher had received the $300,000 deposit and initially retained these funds for himself:

> "I was not concerned that I did not receive a pro rata share of the deposit. I would have told Tim to ensure he received funds first as he had advanced so much to salvage the property."

[72] Mr M confirmed that, in the subsequent settlement of the litigation, he received $25,000 as part of the deposit leaving some $87,000 outstanding.

[73] Mr M had already been advised about, and declined the opportunity to take independent advice. If the receiving of the deposit payment were seen as a new transaction in which the interests of the practitioner and the client conflicted, then there would be a technical breach of Rule 5.4.4.

[74] But having regard to Mr M's understanding that he was unlikely to receive any funds back until sale of the property and Mr Burcher's ready acknowledgement to Mr Eades that Mr M's priority had been overlooked by him and could be remedied promptly, we do not consider this to be a particularly serious breach of the Rules.

Issue 3 – Repayment of the B Contributions

[75] At first sight, the submission of the Standards Committee that the three repayments to the B family in relation to the original mortgage, from the personal funds of Mr Burcher, did appear to be the preferring of one client over the interests of another and therefore in breach of Rule 6.1.

[76] However, having considered the expert evidence of Mr Foley and of course the expertise which resides within the Tribunal, it is apparent that it is a common practice for contributors to nominee company mortgages to be substituted from time to time. The evidence of Mr Foley was:

> "When a practitioner or his firm is using personal funds to repay a particular contributor in a mortgage there is no requirement that other contributors must be treated pari pasu. The situation is not akin to a repayment of the principal sum or interest owing pursuant to the mortgage."

[77] Effectively what was happening was that Mr Burcher was stepping into the shoes of the B's and taking the mortgage, which had already been in default for some

years, at his own risk. At this time, he would have known that he was unlikely to receive any return on the investment.

[78] It is Mr Burcher's evidence that when a mortgage is in default, the requirement is to advise the new or replacement investor, namely himself, rather than there being a requirement to seek consent of other investors. It is the failure to inform other investors which is pleaded as the default in this matter.

[79] We do not consider that this has been established on the balance of probabilities as a breach of any of the provisions of Rule 6 as pleaded.

[80] The opportunity for the investment to be replaced by the practitioner personally was clearly not open to other investors, only to this particular investor with personal connections to the practitioner and the firm.

[81] We do not consider that Mr Burcher ought to be penalised for stepping in to uphold a moral duty at his own personal cost.

Issue 4 – Level of Culpability?

[82] It will be apparent from the above findings that we have found at best a technical breach of Rule 5.4.4 in relation to the failure to share the deposit with Mr M. We have rejected the particulars concerning the repayment of the B investments. We have made a finding that, although deliberately concealing the sale from Mr Eades, there was not a wilful or reckless intention to mislead on Mr Burcher's part.

[83] That leaves a straightforward breach finding in respect of Rule 11.1. Although this is a serious matter, as conceded by Mr Burcher, we note that he apologised promptly for it and against that has committed enormous resources both in time and personal funds to the salvage of this project on behalf of the firm and the nominee company and out of loyalty to his clients. We do consider that the context can be taken into account in assessing level of culpability and we find this to be "unsatisfactory conduct" on the part of Mr Burcher.

Charge 2

Issue 5 – Handling of Trust Account Funds

[84] As conceded by Mr Williams in opening, the sort of breaches of ss 110 and 114 of the LCA represented by this conduct would not normally reach the Tribunal. Clearly Mr Burcher overlooked transferring the deposit to the correct trust account for a period of weeks. And we note that he delayed for a further month before placing the funds on interest-bearing deposit.

[85] The breaches are more concerning because of the disciplinary history, in that around that time in 2015 Mr Burcher was facing serious disciplinary charges about management of the nominee company and proper handling of funds and therefore ought to have been extremely careful in adhering to the letter of every Rule. Certainly, he ought to have been more concerned about Mr Eades' scrutiny and mindful of his obligations to him.[16]

Issue 6 – Deposit Partial Refund

[86] While Mr Burcher says that, acting as vendor, he was entitled to vary the agreement and therefore was not bound by the stakeholder clause and that he received consideration by obtaining from Mr K an undertaking that the balance of the purchase price would be paid from the funds which were at that point not accessible, we are concerned that Mr Burcher did not see fit to consult with Mr Eades. Mr Eades had been specifically inquiring about this transaction and had been concerned that settlement had been delayed. He had advised Mr Burcher by an email "*you should certainly not grant any further tolerance without reference to me*". Despite that direction the practitioner went ahead, exercising his own judgment that he was assisting the purchaser client to complete the larger transaction, which would in turn guarantee settlement of the nominee company matter.

[87] Mr Burcher proved correct in his assessment and thus no harm was done. Indeed, a favourable sale was achieved for the contributors. However, his lack of regard to direction by Mr Eades is of significant concern.

[16] However we note that Mr Burcher has not been charged in respect of any breach of undertaking to Mr Eades on either Charge 1 or Charge 2.

Issue 7 – Level of Culpability

[88] In this matter we do not consider the two-stage test for negligence is met. In other words, the practitioner's conduct (not having been frequent), did not reach the level of bringing the profession into disrepute.

[89] We find the practitioner guilty of unsatisfactory conduct in respect of the particulars pleaded under this charge.

Summary of Findings

[90] We find both Charges 1 and 2 proved to the level of unsatisfactory conduct.

Directions

1. Counsel for the Standards Committee is to file submissions as to penalty within 14 days.

2. Counsel for the respondent practitioner may have a further 14 days to file submissions in reply.

3. Counsel are to confer as to whether a hearing is required or the matter can be determined on the papers and file a joint memorandum within 30 days.

DATED at AUCKLAND this 10th day of October 2018

Judge D F Clarkson
Chair