**LEGAL COMPLAINTS REVIEW OFFICER**
**ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2023] NZLCRO 119

Ref: LCRO 23/2021

| | |
|---|---|
| **CONCERNING** | an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a decision of the [Area] Standards Committee [X] |
| **BETWEEN** | **FY**<br>Applicant |
| **AND** | **NU**<br>Respondent |

## DECISION

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

### Introduction

[1] Mr FY has applied for a review of a decision by the [Area] Standards Committee [X]. The Committee had, following investigation into a complaint filed by Ms NU, concluded that Mr FY's conduct had been unsatisfactory.

### Background

[2] A couple who had been living in a de-facto relationship (QT and WD), separated in 2012.

[3] Mr FY acted for QT. Ms NU acted for WD.

[4] The couple owned a number of residential properties.

[5] A partial property settlement had been agreed in 2015.

[6] That agreement provided that a property situated at [Address 1] was to be sold and funds received from sale to be put towards clearing a number of debts. WD was to manage and receive rental income from the property pending sale.

[7] The agreement provided that WD would continue to reside at a jointly owned property situated at [Address 2], and that the parties' respective interests in that property, together with interests in another residential property similarly located in [Address 3] (no.XX) remained to be determined.

[8] Attempts to achieve a final settlement of the relationship property became protracted.

[9] The [Address 1] property did not sell.

[10] It was decided that QT would purchase the [Address 1] property but he was unable to secure necessary finance.

[11] Fresh arrangements were made.

[12] Agreement was reached that WD would take ownership of the [Address 2] property and that the [Address 3] property would be sold and proceeds of sale deployed to discharge mortgages over the [Address 2 and Address 3] properties, the [Address 1] property, and a property situated at [Address 4] that was then occupied by QT.

[13] A relationship property agreement was drafted in March 2019 to reflect the agreement reached. This agreement was not signed.

[14] The [Address 3] property was sold with settlement scheduled for [date].

[15] Mr FY was to undertake the conveyancing on the sale of the [Address 3] property.

[16] Ms NU's client was anxious to use the opportunity presented by the sale of the [Address 3] property to incentivise the parties to move forward with finalising a settlement of all outstanding relationship property matters.

[17] Ms NU prepared a relationship property agreement and forwarded the agreement to Mr FY.

[18] This agreement was not intended to conclude all outstanding matters. It was a step along the way, and recorded that "a final settlement agreement will be necessary".

[19] Mr FY did not consider the agreement was necessary, but his client signed it and Mr FY certified the agreement pursuant to s 21F of the Property (Relationships) Act 1976.

[20] To the extent the agreement has relevance for Ms NU's complaint (and this review), the agreement recorded that:

(a) the [Address 3] property was to be sold on Monday [date], and all outstanding debt to the [Bank A] ("[BANK A]") to be repaid on sale; and

(b) the approximate amount of the outstanding [BANK A] debt was recorded at [redacted]; and

(c) [BANK A] securities over four properties were to be discharged; and

(d) [Address 2] would be transferred into WD's sole name; and

(e) all reasonable costs relating to the easement,[1] and all legal fees and disbursements on sale, and the transfer to WD, would be paid from the proceeds of sale of [Address 3].

[21] At 3:31pm on settlement day, Ms NU emailed Mr FY in the following terms:

> Hello [FY],
>
> I am ready to go now.
>
> I have everything signed, and am waiting to attend on LINZ.
>
> Just waiting in [QT]'s part of the agreement, and some undertakings from you as follows:
>
> To contemporaneously:
>
> - repay the total [BANK A] lending in the amount of approximately [redacted].[2]
> - To discharge the mortgages over [Address 3], [Address 2], [Address 1], and [Address 4].
> - To sign certify and release the transfer for [Address 2].
> - To hold the balance funds remaining in your trust account pending final settlement between [QT] and [WD].

[1] Easement work completed for the [Address 2 and Address 3] properties.
[2] There appears to be a typographical error with this figure, 3 incorrectly inserted for 8. The property agreement records approximate cost to repay total [BANK A] loan of [redacted] with securities over all properties to be discharged. Mr FY's ledger statement records payment to the [BANK A] on [date] of [redacted].

- To send me updated titles by 10 am tomorrow.
- To send me a full trust account statement by end of business tomorrow.
- To send me your draft fees for approval.

I undertake that I will then sign certify and release the 2 withdrawals of notice of claim so you can settle it all.

I will also send you my fees that will need paying on a joint basis.

[22] Mr FY responded to that request at 3:43 pm, with an undertaking that he would:

- repay the total [BANK A] lending in the amount of approximately [redacted]
- discharge the mortgages over [Address 3], [Address 2], [Address 1], and [Address 4].
- certify and release the transfer for [Address 2].
- hold the balance funds remaining in "your" trust account pending final settlement between [QT] and [WD].

[23] It is clear that Mr FY, when returning the undertaking to Ms NU, recorded the undertaking in the terms as drafted by Ms NU, but excluding the requests made by her for undertakings that amended titles and a full trust account statement be provided to her on the day following settlement, and reference to the requirement that she be provided with Mr FY's draft fees for her approval.

[24] Mr FY's replication of the undertaking in respect to the initial four requirements specified by Ms NU in the form as drafted by Ms NU (likely cut and pasted), is reflected in Mr FY's indication that balance of funds would be held in Ms NU's trust account ("your trust account"). This was clearly intended by Mr FY to record that the balance of funds would be held in his trust account.

[25] Immediately on receipt of Mr FY's undertaking, Ms NU emailed Mr FY in the following terms:

Done

You are not authorised to pay your fees until they have been agreed alongside [WD]'s fees relating to the sale and [Address 1].

[26] Mr FY forwarded a settlement statement to Ms NU on 1 May 2019. That statement recorded a balance of funds held from sale of the [Address 3] property in the

sum of [redacted]. In forwarding that statement, Mr FY advised Ms NU, that costs in respect to his invoices had not been deducted, as the accounts had not been presented to his client.

[27] Mr FY's statement recorded that deductions made from settlement funds received included:

(a) repayment of [BANK A] loans in the sum of [redacted]; and

(b) rates – payment in the sum of [redacted]; and

(c) payment to the [City B] City Council in the sum of [redacted]; and

(d) payment to [Company D] for easement work in the sum of [redacted]; and

(e) payment of [COMPANY G] fees in the sum of [redacted].

[28] Some months after sale of the [Address 3] property, Ms NU's and Mr FY's clients had still been unable to achieve a final settlement of all relationship property matters.

[29] That objective became achievable when an agreement was entered into for sale of the [Address 1] property with settlement scheduled for [date].

[30] Ms NU acted on the conveyance of the [Address 1] property.

[31] In April 2020, Ms NU made request of Mr FY to provide her with a statement recording year end interest and capital fund details for the balance of funds held from sale of the [Address 3] property.

[32] Mr FY responded to that request with a succinct "nil".

[33] Ms NU sought clarification as to why funds were not being held on an interest-bearing deposit.

[34] Mr FY responded by providing Ms NU with the statement he had forwarded to her in May 2019, but with the addition of handwritten notations, recording various invoices, including invoices for his fees.

[35] Ms NU says that she assumed that the invoices recorded were payments that Mr FY was proposing to be paid at a later date.

[36] On 15 April 2020, Ms NU made request of Mr FY to provide her with copies of the invoices that had been notated on the statement previously provided.

[37] Ms NU also asked Mr FY to provide her with copies of his ledger account. She says that Mr FY was resistant to providing that information.

[38] On 6 May 2020, Mr FY provided Ms NU with a copy of his ledger account.

**The complaint, Mr FY's responses and the Standards Committee decision**

[39] Ms NU lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 7 July 2020.

[40] Ms NU's primary complaint was that Mr FY had breached the undertaking provided to her on 15 April 2020, and released funds without authority to do so.

[41] Ms NU's complaint raised two other issues.

[42] The Standards Committee did not progress an inquiry into the additional matters raised and I do not propose to do so on review.

[43] The pivotal issue raised by Ms NU's complaint was a question as to whether Mr FY had breached an undertaking.

[44] Mr FY responded to the complaint on 18 July 2020.

[45] He commenced his response with indication that he had difficulty understanding the nature of Ms NU's complaint.

[46] His response addressed the peripheral issues Ms NU had raised in her complaint before providing a comprehensive response to the allegation that he had breached an undertaking provided.

[47] I do not propose to traverse the submissions raised in respect to the peripheral issues of complaint.

[48] Addressing the issue of the undertaking, Mr FY maintained that:

> The purpose of any undertaking as given is to prevent any payment to the client of the lawyer holding the funds. The undertaking I gave was for that purpose and the purpose was observed. Any "balance funds remaining" must necessarily be the amount after payment of all costs to get to that point; the undertaking provided did not reference to any particular amount. The invoice from [Company E] contracting although dated [redacted], related to services at the [Address 2 and Address 3] properties in order that Council could sign off on the work, the easement could be registered and the properties could be transferred to release funds ([Address 3] being sold to third party). The "balance funds" must necessarily be after deduction of the [Company E] invoice. And incidentally the [Company E] work greatly enhanced the property transferred to Ms NU's client.

[49] Further, Mr FY submitted that the [COMPANY F] invoice, which had been incurred prior to the undertaking, logically was a cost held to be deducted from any definition of “balance funds” even though the cost was not directly related to “arriving at the “balance funds” (available from [Address 3]).” This cost was, argued Mr FY, properly payable from the common fund, and never intended to be covered by the undertaking.

[50] Nor, says Mr FY, was the undertaking provided ever intended to impede his ability to settle his conveyancing fees from sale proceeds received.

[51] Mr FY says that Ms NU herself acknowledged that the undertaking did not have application in respect of his fees, by immediately, in her correspondence of 15 April 2019 (prior to settlement) emphasising that he was not authorised to deduct his fees. Mr FY says that if it had been implicit (affirmed by the undertaking given) that he was not authorised to deduct his fees, there would have been no point or purpose in Ms NU writing directly to him to insist that his fees not be deducted.

[52] Mr FY says that he did not agree to request that his fees not be deducted.

[53] He says that he had deducted the amount of his invoices, “some months later and only after there had been no objection as to the amount from Ms NU or any renewed demand (at that time anyway) for payment of her fictitious invoice”.

[54] Mr FY notes that on the sale of [Address 1], Ms NU (who had acted on the conveyance in that transaction) had deducted funds towards her invoice, “well before a final settlement had been agreed in May”.

[55] Mr FY says, that on receipt of Ms NUs invoice, he raised no objection to it, despite the fact that he considered the fees charged to be manifestly excessive.

[56] Mr FY provided further information to the Complaints Service on 24 July 2020.

[57] He attached to that correspondence, the Relationship Property Agreement (“the agreement”) which had been prepared by Ms NU.

[58] It was his view that the agreement that had been executed on the day of settlement, provided “complete vindication” of his actions in regard to deducting costs and paying outstanding expenses following settlement.

[59] He noted that the parties had agreed that Mr FY’s client would arrange for a valuation to be completed on the [Address 1] property ([COMPANY F] invoice), and that Ms NU’s client would attend to organising a valuation of the [Address 3] property.

[60] Mr FY submits that the parties were jointly responsible for payment of the [COMPANY F] invoice, and it was proper that the invoice be settled from the common fund. The valuation fee had been incurred prior to the settlement of the [Address 3] sale, but Mr FY had not received the invoice until after the sale had settled.

[61] Mr FY forwarded further correspondence to the Complaints Service on 27 July 2020. He attached to that correspondence a copy of an email received from Ms NU on 23 April 2020. That email recorded Ms NU's agreement to payment of the [COMPANY F] invoice. Mr FY considered that the email served as ratification of his actions in having paid the [COMPANY F] invoice. Mr FY continued to reject the suggestion that he had breached any undertaking but noted that even if that had been the case, it was not open to Ms NU to make a complaint of the breach when she had, by her own actions, condoned the conduct of which she was now electing to make a complaint. Mr FY considered that Ms NU's actions breached the provisions of the Conduct and Client Care Rules 2008.

[62] Ms NU responded to Mr FY's submissions on 3 August 2020.

[63] She submitted that:

(a) it was her understanding of an undertaking provided in circumstances such as applied in this case, that the purpose of the undertaking was to prevent payment of any funds from a solicitor's trust account to any other party, until either agreement had been reached by the parties, or directions had been made by the court; and

(b) on 1 May 2019, Mr FY had forwarded her a statement recording that he was holding funds in the sum of [redacted] from the sale and settlement of [Address 3] and [Address 2]; and

(c) on 14 April 2020, Mr FY had forwarded her the same statement but this was with handwritten deductions recorded on the statement; and

(d) it was her and her client's understanding that the handwritten deductions recorded were "proposed deductions only"; and

(e) it had never been agreed that the [COMPANY F] valuation fee (for the [Address 1] property) would be settled by way of deduction from funds received from the sale of the [Address 3] property; and

(f) her 23 April 2020 email indicating agreement to payment of the [COMPANY F] invoice, was a consequence of without prejudice cross

correspondence in which agreement had been reached to pay the invoice as part of a global settlement proposal, and not intended to perfect a payment Mr FY had made in May 2019; and

(g) as at 23 April 2020, she remained unaware that the [COMPANY F] invoice had been paid; and

(h) the [law firm]-[Company E] invoice was rendered on 30 October 2019, some months after Mr FY had provided his undertaking, and the first time her client's attention was drawn to this invoice was when Mr FY had forwarded the invoice to her on 14 April 2020; and

(i) that invoice had been paid by Mr FY without reference to Ms NU's client; and

(j) it had been agreed that all legal fees and disbursements on sale of the [Address 3] property and costs involved in effecting the transfer into Ms NU's client would be paid from the proceeds of sale of the [Address 3] property; and

(k) the invoices rendered by Mr FY in respect to same were acceptable; and

(l) Mr FY had refused to agree to pay costs Ms NU had incurred in respect to work she had done towards the conveyance of the [Address 2 and Address 3] properties; and

(m) as part of the continuing negotiations, she was instructed to withdraw two of her invoices from the negotiations but subsequent to that, Mr FY deducted his accounts without reference to her; and

(n) in contrast, when she had attended to the conveyancing for the sale of the [Address 1] property in 2020, her letter of engagement advised that payment of her fee was required within 14 days of rendering her account, and an invoice was forwarded to Mr FY prior to settlement; and

(o) Mr FY had breached his undertaking in relation to deducting fees in September 2019; and

(p) deducting fees for the [COMPANY F] invoice when it did not relate to the [Address 2 and Address 3] properties, and the [Company E] invoice which was rendered well after settlement constituted a clear breach of the undertaking; and

(q) although payment of those accounts was eventually incorporated into the settlement agreement, Mr FY was not entitled to settle those accounts at the time he did; and

(r) Mr FY's fierce resistance to providing her with a copy of his ledger indicated that he was aware that his conduct had been unacceptable; and

(s) an invoice Mr FY had rendered for work in respect to the [Address 1] settlement was clearly rendered in an attempt to neutralise her invoice; and

(t) on at least two occasions, Mr FY had made errors in calculating settlement figures; and

(u) Mr FY's conduct during the course of negotiations had been discourteous and rude, and this behaviour was reflected in the manner in which he had couched his responses to her complaint.

[64] Mr FY provided a further submission to the Complaints Service on 4 August 2020.

[65] To the extent that his submission addressed matters that had not been previously traversed, Mr FY submitted that:

(a) his client had responsibility for oversight of the work to be completed at the [Address 2 and Address 3] properties, and it was "precious nonsense" for Ms NU to suggest that her client would have sufficient knowledge to query any payments to be made, including the payment made to [Company E]; and

(b) the agreement of 15 April 2019 authorised payments relating to the easement works, and until all payments had been made (including payment due to [Company E]), there was no "balance funds remaining"; and

(c) the parties had made a joint decision to engage valuers and to be jointly responsible for costs; and

(d) there being, between the parties, an "implicit authority" to agree to pay the valuation costs, it was appropriate to settle the accounts from funds held; and

(e) Ms NU's complaint was vexatious.

[66] A further submission was provided by Mr FY on 19 August 2020.

[67] In that submission, he contended that:

(a) payment of the [Company E] invoice had been authorised by the agreement of 15 April 2019; and

(b) that agreement mandated payment of the easement costs; and

(c) the agreement recorded that easement costs and legal sale costs would be paid from sale proceeds; and

(d) the balance of funds remaining could not be established until after all authorised payments had been made; and

(e) the intention of the undertaking was never that common funds could not immediately be made available for payment of any joint obligations of the parties, regardless of the subject matter of the debt incurred; and

(f) he was aware that bills were required to be paid, and would never have agreed to an undertaking which prevented or inhibited payment of those bills: and

(g) the undertaking originally provided by Ms NU had been modified by him to exclude the last three bullet points as those points would have constrained his ability to settle outstanding accounts; and

(h) the undertaking was never intended to impede payment to professional persons who were awaiting payment, and it did not do so; and

(i) Ms NU advances an argument that the undertaking was effective at the date of the provision of his statement towards the end of April 2019, but there was no rationale for that approach to be adopted; and

(j) Ms NU had ignored that a draft agreement prepared by her in June 2019 had provided for payments to be made to parties without "questions being asked"; and

(k) Ms NU had selected an arbitrary date as the date from which she would claim that an undertaking had been breached; and

(l) Ms NU's client's position was not prejudiced or compromised by payment of invoices that the parties were obliged to pay.

[68] Ms NU responded to Mr FY's further submissions on 24 August 2020. She submitted that:

(a) the [law firm]/[Company E] invoice was not authorised for payment by the agreement of 15 April 2019; and

(b) that invoice had not been rendered until 30 October 2019; and

(c) although it was anticipated that the invoice would be paid at some point, Ms NU's client did not sight the invoice until 14 April 2020; and

(d) without reference to her, and without authority to do so, Mr FY had paid the invoice; and

(e) the [COMPANY F] invoice related to a valuation of [Address 1], and had nothing to do with the sale of [Address 3]; and

(f) Mr FY had no authority to pay the [COMPANY F] invoice; and

(g) Mr FY's reference to payment of a [COMPANY G] invoice (which had not been part of discussions around the complaint to date), ignored that it was anticipated that funds for settlement of this invoice would be paid from the sale of the [Address 1] property, not from proceeds of sale of the [Address 3] property.

[69] Mr FY provided a brief response to Ms NU's submission of 24 August 2020. It was his position, that:

(a) [COMPANY G] fees were authorised for payment by the agreement of 15 April 2019; and

(b) circumstances changed markedly for the parties over a four-year period, and it was not intended, as of 15 April 2019, that the property at [Address 1] be sold, but rather transferred to Mr FY's client; and

(c) the [COMPANY G] account fell within a similar category as the [City B] City Council and [Company D] invoices which had not been challenged by Ms NU.

[70] The Standards Committee issued the parties with a notice of hearing on 22 October. The Committee invited submissions from the parties on questions as to whether Mr FY had:

(a) breached his professional obligations under r 10.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules") in failing to comply with the terms of an undertaking he provided on 15 April 2019 to Ms NU; and

(b) breached his professional obligations under r 10.1 or 11 of the Rules in his interactions with Ms NU.

[71] Ms NU in correspondence to the Complaints Service of 2 November 2020, advised that she did not wish to provide further submissions.

[72] Mr FY provided a comprehensive response on 5 November 2020.

[73] He submitted that:

(a) Ms NU's complaint was driven by an "agenda"; and

(b) payments made which were alleged to have been made in breach of an undertaking were ratified and agreed by Ms NU and incorporated without question or objection into the final settlement; and

(c) it was not credible for Ms NU to make complaint about steps taken which she would have consented to; and

(d) Ms NU's motivation for her complaint was "retaliatory, vindictive and vexatious"; and

(e) the genesis for her complaint lay in concern that she wished to be paid for conveyancing work done in respect to the [Address 2 and Address 3] properties; and

(f) Ms NU had done minimal conveyancing work for those properties; and

(g) in contrast, he had been required to spend a considerable amount of time on the conveyance of the [Address 1] property (the transaction managed by Ms NU); and

(h) Ms NU's concern at not being paid had prompted her to "seek retribution by way of complaint"; and

(i) the agreement of 15 April 2019 was critical to an assessment of the complaint; and

(j) Ms NU's failure to provide a copy of that agreement with her complaint, was an omission that was either deliberate, or reflective of bad faith; and

(k) the complaint was vexatious; and

(l) pivotal to a consideration of the complaint, was an understanding of the definition of "balance funds"; and

(m) Ms NU had consistently failed to address the question as to what had been intended by the term "balance funds"; and

(n) Ms NU had drafted a draft relationship property settlement agreement on 28 June 2019, which records payment of amounts in the sum of $5,923.27 as being accepted by the parties as requiring payment; and

(o) those funds comprised the amount recorded on Mr FY's post settlement statement which had been provided to Ms NU on 1 May 2019; and

(p) the "balance funds" cannot be determined as the amount held as at 15 April 2019, as payments made after that date were acknowledged in Ms NU's proposed agreement as having "legitimacy outside the ambit of the undertaking"; and

(q) that legitimacy derived from the agreement signed on 15 April 2019 at the insistence of Ms NU; and

(r) clause 5 of the agreement of 15 April 2019 authorised payment of costs relating to [Address 3], and cl 7 required a "best endeavours approach to settlement of the balance property"; and

(s) the undertaking he had provided was in respect of that much of the balance property which was within his direct control, that is, the balance outstanding after all costs had been paid; and

(t) the agreement received on 28 June 2019 acknowledged the payments that were required to be made, and therefore intimates that the undertaking was to be construed as subject to cl 5; and

(u) the [Company E] account was anticipated, therefore there must "be an acknowledgement that the "balance funds" would not exist until the [Company E] account had been settled; and

(v) the effective date of the "balance funds" in his trust account was therefore 17 April 2020, being the date of payment of the [Company E] account; and

(w) the payment to [Company E] related to easement work authorised by the agreement of 15 April 2019; and

(x) the agreement of 15 April 2019 provided authority for payment of his invoices; and

(y) the undertaking in the form given would in usual circumstances be construed as reference to the balance of funds held on the day, but that undertaking had to be considered as being subject to "an overriding direction from the parties as to cost payments"; and

(z) reference to "balance funds" must, by necessity, be intended to reference the balance after payments had been made; and

(aa) the [COMPANY F] invoice was paid prior to the effective date he could be said to have been holding "balance funds", and the liability for that invoice was joint to the extent that the debt was incurred jointly; and

(bb) authority for payment was implicit in the joint agreement to incur the debt; and

(cc) was properly payable out of common funds; and

(dd) no member of the public would consider the payment to be unreasonable in all the circumstances; and

(ee) the intention of the undertaking was that matters be on hold pending a final settlement so that neither party could be advantaged or disadvantaged; and

(ff) it was never intended that funds would not be available if required on a joint basis for the benefit of both of the parties; and

(gg) he had complied strictly with the terms of the undertaking.

[74] The Standards Committee delivered its decision on 23 December 2020.

[75] The Committee determined that there had been unsatisfactory conduct on Mr FY's part.

[76] In reaching that decision the Committee concluded that:

(a) it was satisfied that Ms NU's understanding of the undertaking was correct, and that Mr FY's interpretation of the undertaking ran contrary to the obvious and intended purpose of the undertaking; and

(b) the undertaking clearly related only to the [Address 3] property; and

(c) Mr FY's conduct fell below that which would be expected of a competent practitioner; and

(d) whilst the Committee considered that Mr FY had shown a lack of respect to Ms NU in the content and tone of his responses to the Committee, it did not conclude that this conduct constituted a breach of the Rules.

**Application for review**

[77] Mr FY filed an application for review on 9 February 2021.

[78] Mr FY's submissions filed in support of his application were subsequently bolstered by further submissions filed by Ms KF (KC).

[79] It will be apparent from the summary of the submissions filed by Mr FY in the course of the complaint progressing through the stages of the Committee's investigation, that Mr FY had provided a very comprehensive response to the complaint.

[80] I do not propose to provide account of all of the arguments advanced by Mr FY on review, but rather to summarise the key points. There was, as is understandably the case when comprehensive submissions have been filed at the complaint investigation stage, a degree of replication in the review submissions filed.

[81] Failure to reference a specific submission is not to be taken as indication of a failure to consider the submission(s).

[82] Key arguments advanced by Mr FY were that:

(a) the Committee had failed to give fair consideration to the complaint; and

(b) the Committee's failure to reference and address the significance of the 15 April 2019 agreement presented as a "gross inequity"; and

(c) Mr FY's client was entitled to have the terms of the agreement upheld and enforced; and

(d) that agreement provided a clear and unequivocal direction that certain costs would be paid from the proceeds of sale of the [Address 3] property; and

(e) in making payments required by the agreement, he was acting on his client's instructions and obliged to follow those instructions; and

(f) the undertaking had to be read as subject to the instructions in the agreement; and

(g) the agreement had precedence over the undertaking; and

(h) the agreement contemplated and authorised payment of previously known costs relating to relationship property, together with legal fees associated with the sale of a particular property; and

(i) care had been exercised in the providing of the undertaking, and conditions removed from the undertaking that would have compromised his ability to pay required costs; and

(j) reference to "balance of funds" would conventionally be interpreted to refer to balance held after payment of costs; and

(k) the intention of the undertaking could only have been that he was required to hold "balance funds" after costs had been paid; and

(l) the Standards Committee had wrongly concluded that the only reasonable interpretation of the term "balance funds", was that it related only to the property being sold and to funds being held without payment of any costs; and

(m) considered in context, the correct and objective meaning of the undertaking was that there was authority to pay disbursements and costs from the retained funds without further reference to the other party; and

(n) he had strictly complied with the undertaking provided; and

(o) an examination of earlier agreements prepared by Ms NU support the contention that there was a clear understanding that invoices paid were required to be paid; and

(p) the Standards Committee had incorrectly articulated in its decision the manner in which Ms NU had expressed demand that Mr FY refrain from deducting fees; and

(q) the agreement of 15 April 2019 was an instruction from the parties on what was to be paid, and Ms NU was not in a position to countermand those instructions; and

(r) it had been "convenient" for the Standards Committee to ignore the agreement; and

(s) Ms NU's demand that his fees not be deducted was a clear acknowledgement from her that the agreement had priority; and

(t) the agreement had been signed prior to the undertaking being provided; and

(u) the agreement of 15 April, and an earlier proposed version, clearly contemplated that "balance remaining" was intended to reference balance remaining after payment of agreed costs; and

(v) indication to Ms NU of a "nil balance" was intending to reference the fact (as explained to Ms NU) that there was negative value in lodging the funds in an interest-bearing account; and

(w) payments made were authorised by the agreement of 15 April 2019; and

(x) fees charged were reasonable.

[83] Ms KF's submissions for Mr FY reiterated the arguments he had advanced in his comprehensive submissions in response to the complaint and in support of his review application.

[84] Argument was reinforced for Mr FY that:

(a) the agreement executed authorised payment of previously known costs; and

(b) the correct and objective meaning of the undertaking, was that there was authority to pay disbursements and costs from the funds retained without reference to the other party; and

(c) the Standards Committee decision was short on factual detail and misstated the email Mr FY had forwarded providing his undertaking; and

(d) the Committee had accepted Ms NU's analysis of what constituted "balance funds" without sufficient consideration given to Mr FY's view; and

(e) the undertaking provided had to be interpreted by reference to the context of all the documentation; and

(f) there was no basis for the conclusion that the intended purpose of the undertaking was to protect a balance existing before payment of agreed shared expenses rather than after such payments; and

(g) the Committee's comments concerning Mr FY "in essence" holding funds for both clients, requirement for Mr FY to have exercised caution, and explanation that Ms NU had clarified the position in a subsequent email, were observations that did little to support the conclusions arrived at by the Committee; and

(h) whilst it may have been courteous for Mr FY to have advised Ms NU that her "clarification" email did not accord with his (correct) interpretation of the undertaking, that omission did not change the meaning of the undertaking; and

(i) the Committee had erred in concluding that Mr FY's actions had deprived Ms NU's client of funds as Ms NU had accepted that "all payments made were eventually agreed as part of the settlement"; thus

(j) if the finding of unsatisfactory conduct was upheld, then the Committee's penalty finding that required Mr FY to repay funds to the account that was the subject of the undertaking was inappropriate and excessive.

[85] Invited to respond to Mr FY's review application, Ms NU advised that she relied on the submissions filed with the Standards Committee.

**Review on the papers**

[86] This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 ("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.

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

**Nature and scope of review**

[88] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … 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.

[89] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

[90] 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:

(a) Consider all of the available material afresh, including the Committee's decision; and

---

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

(b) Provide an independent opinion based on those materials.

**Discussion**

*Overview*

[91] Having carefully considered the extensive material filed, it is my view that it is regrettable that issues of disagreement between Mr FY and Ms NU fall to be determined through the vehicle of a professional conduct complaint.

[92] The pivotal issue raised by the complaint (a lawyer's obligations in respect to the providing of undertakings) is an issue of significant importance, and in expressing concern that the disagreement arrived at the door of the Complaints Service, I do not diminish the importance of the issue raised by Ms NU's complaints.

[93] But the clearly acrimonious professional relationship between Ms NU and Mr FY (and I make no comment on the reasons for that) appears to have frustrated the lawyers' ability to resolve issues that could have been capable of resolution if there had been a degree of professional courtesy and goodwill in play.

[94] Ms NU says that it was no secret that "Mr FY and I do not get on",[5] and complains that Mr FY had, in his dealings with her on occasions, been rude and uncollegial. She notes that in the course of responding to her complaints, Mr FY had variously described her as "imperious, a hypocrite, obsessive, arrogant, stupid, ill-considered and sloppy".

[95] Mr FY took exception to what he perceived to be Ms NU's disparaging comments regarding his experience in managing aspects of a relationship property case.

[96] These grievances have, to a degree, in both the advancing of and responding to the complaint, diverted attention from the key issue.

[97] Argument as to whether Mr FY should have agreed to Ms NU's claim to be reimbursed for work she maintained had required to be undertaken by her to facilitate the sale of the [Address 3] property and disagreement as to whether fees were claimed by Ms NU for conveyancing undertaken were reasonable, is irrelevant to an examination of the complaint that was put before the Standards Committee for consideration, as is argument as to Ms NU's motivations for bringing her complaint.

[5] Ms NU's correspondence to the Law Society (3 August 2020).

*Undertakings*

[98] It is approaching the trite to emphasise the importance of lawyers complying with undertakings provided.

[99] Undertakings form the basis upon which a multitude of transactions between lawyers and other parties are guided and affected. The duty of compliance with those undertakings, if in any way diminished, will be to the detriment of legal practice, commercial transactions and the numerous parties who rely on those undertakings. It goes without saying that their terms must be clear, precise and unambiguous.

[100] Rule 10.3 of the Rules provides "A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice".[6]

[101] Strict adherence to undertakings is required.

[102] In *Ethics, Professional Responsibility and the Lawyer*,[7] Duncan Webb, Kathryn Dalziel and Kerry Cook describe the rationale for this rule as follows:[8]

> 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.

[103] In determining what the words of an undertaking mean, an undertaking should be read sensibly and in light of the commercial context in which it is given.[9]

[104] Because undertakings are held out by the legal profession "as having an elevated and special status, it is necessary for the profession to scrupulously honour them".[10]

[105] Importantly:

---

[6] Rule 10.3 was the relevant rule at the time, it has since been moved to r 10.5 following amendments to the Rules in 2021.
[7] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016).
[8] At [15.9.1].
[9] *Bank of British Columbia v Mutrie* (1981) 120 DLR (3d) 177.
[10] *Auckland Standards Committee 3 of New Zealand Law Society v W* [2011] 3 NZLR 117 (HC) at [67].

(a) Care is required before providing an undertaking.[11] So too a lawyer proposing to rely on an undertaking is required to ensure that the undertaking is capable of performance by the lawyer giving it.[12]

(b) An undertaking will be construed according to its "substance and intention" and not in a "technical legal manner".[13]

(c) Any "ambiguity" will generally be construed in favour of the recipient.[14]

(d) Strict adherence is required.

(e) The context in which the undertaking has been given must be considered objectively.[15]

*The Argument*

[106] As noted, Mr FY has filed comprehensive submissions in support of his contention that he did not breach the undertaking provided.

[107] I have given careful consideration to the submissions filed.

[108] I intend no disservice to the conscientious manner in which Mr FY advances his argument, but his argument is capable of succinct summary.

[109] The core of Mr FY's argument was his contention that it was clearly understood that following settlement of the [Address 3] property, he was required to settle all costs that [QT] and [WD] had incurred in the course of progressing settlement of their property matters.

[110] Those costs included costs associated with organising an easement for the [Address 2 and Address 3] properties, and costs incurred in obtaining property valuations.

[111] It was Mr FY's understanding that the undertaking did not constrain him from settling those costs. To the contrary, he argues that he was required to settle the costs, that it was agreed and understood that he would do so, and that his understanding of what was to happen with the "balance of funds" was confirmed by the relationship property agreement that had been executed by the respective clients on settlement day.

---

[11] *Auckland Standards Committee v Stirling* [2010] NZLCDT 4.
[12] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, 2017) at [22.70].
[13] *W*, above n 9, at [41] and [60].
[14] At [42] and [60].
[15] At [64].

[112] I accept Mr FY's argument that costs that were paid from settlement funds received were costs that ultimately had to be paid by the parties, and costs that had been agreed by them would be paid.

[113] For Mr FY, that is the end of the matter. The costs settled were costs that the parties had agreed would need to be paid.

[114] Further, argues Mr FY, the Relationship Property Agreement that Ms NU had insisted the parties were to sign before settlement could proceed, provided what Mr FY described as a complete defence to the allegation that he had breached an undertaking. That agreement, argues Mr FY, authorised the payment of the costs that he had paid, and prevailed over the undertaking that had been provided.

[115] The starting point is an examination of the undertaking given by Mr FY.

[116] It would present as a discourtesy to Mr FY to suggest that a practitioner of his experience would not understand the importance of compliance with undertakings provided, and the need to ensure that in providing an undertaking, he fully understood the scope and parameters of the undertaking.

[117] The undertaking is expressed in clear and straightforward language.

[118] This is not one of those cases where there is ambiguity in the framing of the undertaking such as could provide foundation for legitimate disagreement as to the intended meaning of the undertaking.

[119] Mr FY amended (by way of deletion) elements of the undertaking that had been forwarded to him.

[120] He had clearly perused the undertaking and identified those aspects of it with which he was prepared to comply, and those that he was not.

[121] The contestable element of the undertaking is the requirement that Mr FY hold "the balance funds remaining in your trust account pending final settlement between [QT] and [WD]".

[122] In my view, the only reasonable construction that could be put on the demand made of Mr FY that he retain funds pending final settlement, was precisely what the undertaking said and provided for.

[123] The undertaking as expressed, does not anticipate, point to, or allow for, Mr FY to calculate "balance of funds" by reference to his understanding as to what the parties had agreed would be paid.

[124] What the undertaking says, is that Mr FY would repay the [BANK A] debt, discharge all the mortgages, sign, certify and release the transfer for the [Address 3] property, and hold the balance of funds in his trust account, pending final settlement between [QT] and [WD].

[125] The undertaking authorises him to do no more.

[126] I have noted that I agree with Mr FY, that the expenses he ultimately settled, were expenses that the parties had agreed would need to be paid.

[127] But his ability to pay those accounts was clearly constrained by the undertaking he had provided.

[128] Mr FY argues that the property agreement executed by the parties on the settlement date had to be taken into account when considering the question as to what constituted "balance funds".

[129] He points to the fact that the relationship property agreement specifically records that [QT] and [WD] had agreed that all reasonable costs relating to the easement, and all legal fees and disbursements on sale and the transfer "would be paid from the proceeds of sale of [Address 3]".

[130] This agreement had been executed (at relatively late notice on settlement date) at the apparent insistence of Ms NU's client, and progressed with the optimistic expectation that it would assist the parties to expedite the protracted property dispute forward to final settlement.

[131] It is understood that Mr FY has, as he clearly does, a sense of frustration that his decision to pay accounts that had been agreed by the parties would be paid from proceeds of sale, was met with a conduct complaint.

[132] But with respect to Mr FY, he underestimates the force and reach of the undertaking provided, when he argues that the undertaking was subject to the property agreement.

[133] The relationship property agreement was an agreement between Mr FY's and Ms NU's clients.

[134] That agreement recorded an understanding reached between them, as to how various costs would be paid.

[135] But the undertaking provided by Mr FY, was a commitment given by him as a practitioner, to a fellow practitioner.

[136] It was an undertaking entirely independent of the agreement reached between the lawyers' clients.

[137] The undertaking did not compromise or frustrate the parties' indication of intention as to how they would wish for various costs to be ultimately settled. Following settlement, it would have been expected, that Mr FY and Ms NU would have promptly turned their attention to proceeding to finalise matters in a manner consistent with the terms of the property agreement.

[138] But the undertaking Mr FY provided, clearly required him to hold the balance of settlement funds received following payment of the sums allowed for by the undertaking provided.

[139] Mr FY says that the email Ms NU forwarded to him following her receipt of his undertaking in which she advised Mr FY that he was not authorised to pay his fees until they had been agreed along with her client's fees relating to the [Address 3] and [Address 1] property sales, supports conclusion that it was understood and agreed that his fees were to be properly deducted from proceeds of sale (along with other costs), before the balance of funds was arrived at.

[140] I do not agree that the construction Mr FY ascribes can be placed on Ms NU's email.

[141] I think it probable that the regrettably acrimonious relationship between the practitioners had prompted Ms NU to seek assurances that her fees would be protected, and in emphasising to Mr FY that he was not authorised to pay his fees from sale proceeds, she was reinforcing her position that she had expectation that costs she had incurred would be settled.

[142] In providing background to her complaint, Ms NU explains that following settlement of the [Address 3] property sale, Mr FY had refused to agree to reimbursement of conveyancing costs Ms NU said she had incurred in respect to the transaction.

[143] Mr FY says that accounts rendered by Ms NU were exorbitant.

[144] Ms NU explains that when the sale of the [Address 1] property was settled, she had carried out the necessary conveyancing work and had submitted her account for Mr FY's approval, some time prior to settlement date.

[145] The argument between Mr FY and Ms NU, over the scope of the undertaking, drew in criticisms by both of the other, of the approach each had adopted to calculating their fees for conveyancing work completed.

[146] It is understood that disagreement over fees was a source of contention between the parties, but that disagreement has little relevance to the question as to whether Mr FY breached an undertaking provided.

[147] It does not fall within the scope of this review, to comment specifically on the arrangements lawyers enter into when, as was the situation here, conveyancing costs are incurred in circumstances where the costs incurred relate to property that falls within a relationship property pool, but a common feature of such arrangements, is the requirement for absolute transparency and for there to be clear agreement between the lawyers as to fees and costs that are authorised to be paid.

[148] The practice commonly adopted in circumstances where lawyers are acting for parties engaged in a relationship property dispute, and residential property which falls within the parties' relationship property pool is being sold, is for the lawyers to reach a clear understanding prior to sale on who is to manage the conveyancing, an understanding as to what the approximate conveyancing costs will be, and for all arrangements involving settlement of costs incidental to the sale (or costs required to be settled as part of any broader property agreement) to be scrutinised by both lawyers and for no steps to be taken to settle any costs without both lawyers confirming their clients' agreement.

[149] That cautious approach, and the need to be attentive to requirement that clients are aware of fees charged, and that funds are not disbursed without agreement, is reinforced by the New Zealand Law Society Property Law Section guidelines.[16]

[150] Mr FY of course argues that this was precisely what happened here, and that there was agreement reached on both payment of his fees, and payment of the accounts he had settled.

[151] Ms NU rejects that argument. She notes that Mr FY had paid accounts that were rendered some months after settlement had concluded. She makes complaint that Mr FY settled invoices without extending the necessary courtesy to her of providing her

[16] PLS Property Law Guidelines 2021, at p 2.16.

with a copy of the invoice to be paid and allowing her opportunity to seek her client's agreement to the invoice being paid.

[152] But these arguments do not divert attention from the pivotal question. What was the scope of the undertaking provided by Mr FY, and did that undertaking prevent him from paying both his fees, and the accounts that he had concluded there was mutual agreement he was to pay?

[153] In my view, the undertaking provided by Mr FY demanded of him that he do what the undertaking permitted him to do. It did not provide authority to Mr FY to settle accounts (or pay fees) in accordance with his understanding of the broader agreement that had been reached by his client.

[154] As mentioned earlier, in determining what the words of an undertaking mean, an undertaking should be read sensibly and in light of the commercial context in which it is given.[17]

[155] The purpose and intent of the undertaking was emphatically clear on its face.

[156] Mr FY was to settle the sale, pay off the [BANK A] debt, and deposit the balance of funds held to his trust account.

[157] I do not agree with Mr FY's broader explanation as to what constituted "balance of funds".

[158] No sensible or reasonable construction can be placed on the undertaking provided, other than that it presented as a clear undertaking by Mr FY that he was to pay off the [BANK A] debt, settle the sale, and deposit the balance of funds held to his trust account.

[159] It could reasonably have been anticipated, that immediately following sale, agreement would have been reached that Mr FY would deduct what presented as clearly reasonable fees for the services he had provided, and that he would attend to paying costs that the parties had agreed would need to be settled.

[160] But the undertaking which Mr FY provided, did not permit him to go further than what the undertaking specifically provided.

[161] I have emphasised that Mr FY's fees clearly had to be paid (and neither Ms NU nor her client could raise reasonable objection to that provided the fees were reasonable)

---

[17] *Mutrie*, above n 8; and *Bhanabhai v Commissioner of Inland Revenue* [2007] 2 NZLR 478 (CA) at [42] per William Young P.

and that the additional invoices that Mr FY settled were clearly costs that had been agreed by the parties would need to be paid.

[162] But compliance with undertakings is critical.

[163] Undertakings play a critical role in conveyancing transactions.

[164] Adhering to undertakings is essential in upholding the integrity of property transactions and promoting a reliable and efficient land transfer system.

[165] I think it possible that Mr FY did not pay sufficient attention to the undertaking he had provided.

[166] He could have refused to provide the undertaking in the form as presented, and indeed, did delete conditions from the undertaking Ms NU had provided.

[167] Mr FY argues that an examination of the provisions in the undertaking that he had refused to incorporate in the undertaking returned to Ms NU, reinforces his argument that he was authorised to settle the debts he had.

[168] Mr FY says that if he had agreed to those provisions, that would have put constraint on his ability to settle outstanding accounts.

[169] That argument is unconvincing. None of the provisions deleted by Mr FY carried potential for the consequence that he argues for.

[170] The fact that Mr FY had certain provisions removed simply reinforces that he had considered the undertaking Ms NU had requested he provide, that he had made a judgment as to what he was prepared to agree to and what he was not, and that he had in contemplation of the imminent sale, agreed to hold the “balance of funds held” in his trust account, after fulfilling all other obligations his undertaking required him to meet.

[171] He did not give sufficient attention to what the undertaking required of him.

[172] No other reasonable construction can be placed on the undertaking provided, other than that the balance of funds held was clearly intended to reference all funds held after the specific obligations referenced in the undertaking had been met.

[173] I am satisfied, as was the Standards Committee, that Mr FY breached the undertaking provided, that the breach amounted to a breach of r 10.3 of the Rules, and that the conduct amounted to unsatisfactory conduct pursuant to s 12(c) of the Act.

*Penalty*

[174] The Standards Committee directed that Mr FY was to repay the sum of his three invoices which had been deducted from the balance of funds (invoices totalling $2,268) to the account which was the subject of the undertaking.

[175] I propose to reverse that order.

[176] With respect to the Standards Committee, in the face of Ms NU's indication that agreement had been reached that Mr FY's invoices for conveyancing work completed would be paid (and the other costs), I see little practical purpose in direction being made that the invoices be repaid into the account which was the subject of the undertaking.

[177] Ms NU appears to have accepted (seemingly on the instructions of her client) to take matters relating to her fees no further.

[178] I think it probable that Ms NU would not be enthusiastic at the prospect of continuing engagement with Mr FY. She emphasised at commencement that she had felt compelled to bring her complaint but was nevertheless somewhat reluctant to do so.

*Costs*

[179] Where an adverse finding is made or upheld, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr FY is ordered, pursuant to s 210(1) of the Act, to pay costs in the sum of $900 to the New Zealand Law Society, those costs to be paid within 30 days of the date of this decision.

*Enforcement of costs order*

[180] Pursuant to s 215 of the Act, I confirm that the order for costs may be enforced in the civil jurisdiction of the District Court.

*Anonymised publication*

[181] 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 bereft of anything as might lead to their identification.

**Orders**

(1) The order that Mr FY is to pay $2,268 into his trust account is reversed (pursuant to s 211(1)(a) of the Act).

(2) In all other respects the decision of the Standards Committee is confirmed (pursuant to s 211(1)(a) of the Act).

**DATED** this 10TH day of OCTOBER 2023

_____

**R Maidment**
**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 FY as the Applicant
Ms NU as the Respondent
Ms KF KC as the Applicant's Representative
[Area] Standards Committee [X]
New Zealand Law Society