NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 40
LCDT 012/12

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

AND

IN THE MATTER OF **TIMOTHY UPTON SLACK**, Lawyer, of Auckland

CHAIR
D J Mackenzie

MEMBERS OF TRIBUNAL
Mr S Grieve QC
Mr G McKenzie
Ms C Rowe
Mr W Smith

HEARING at Auckland on 3 December 2012

REPRESENTATION
Mr D Carden, for the Standards Committee
Mr J Billington QC, for the Respondent

RESERVED DECISION OF THE TRIBUNAL ON PENALTY AND COSTS

Introduction

[1] The practitioner, Mr Slack, faced two charges brought by Auckland Standards Committee No 2. The charges both related to undertakings Mr Slack had given in 2005 and 2006.

[2] Each of the charges alleged (in the alternative): professional misconduct; conduct unbecoming a barrister or solicitor; and, negligence or incompetence of such a degree as to bring the profession into disrepute.

[3] At the hearing counsel for the Standards Committee advised that Mr Slack had acknowledged that his conduct was negligent or incompetent and that his negligence or incompetence did bring the profession into disrepute. The Standards Committee indicated that as a consequence it did not wish to proceed with the alternatives of professional misconduct or conduct unbecoming a barrister or solicitor in each of the charges, and sought leave to withdraw those matters. Counsel for Mr Slack indicated his client's agreement.

[4] The Tribunal questioned counsel for the Standards Committee about the Committee's confidence that these matters justified that approach. The Tribunal had reviewed the evidence in support of the charges, which was lodged in affidavit form prior to the hearing, and had noted that, prima facie, there may have been a case supporting the bringing of a charge of professional misconduct.

[5] Counsel for the Standards Committee confirmed that the position had been reviewed by the Committee in light of Mr Slack's acceptance of one of the alternatives, and had decided that proceeding only with the negligence or incompetence charge was an appropriate outcome on the basis of the evidence it relied on.

[6] The Tribunal accepted that if the Standards Committee wished to proceed in that way on the basis of the evidence it proposed to rely on, then it would grant leave to withdraw the elements of misconduct and conduct unbecoming from both charges. The matter then proceeded on the basis of negligence or incompetence, and Mr Slack's admission of that conduct was confirmed by his counsel. The task for the Tribunal was then one of deciding the appropriate sanction.

Background to Charges

[7] It is useful to set out the particulars of the allegations admitted by Mr Slack, as that establishes the accepted factual base for the charges.

[8] In the first charge of negligence or incompetence by Mr Slack in his professional capacity and of such a degree as to bring his profession into disrepute, Mr Slack had given undertakings to two firms of solicitors acting for lenders making loans to his developer client. The undertakings incorrectly stated that in respect of an apartment block development, certain deposits had been paid on pre sales of apartments and were held in Mr Slack's firm trust account. Mr Slack knew at the time he gave those undertakings that they were not correct, as a significant number of the deposits were not held in his firm's trust account at that time.

[9] The developer for whom Mr Slack was acting was Symonds Street Developments Limited, and the development involved the purchase of land and the construction and sale of the apartments ("Madison Development"). The Madison Development was to be funded by loans from a trading bank and a finance company.

[10] The bank had approved a loan of $19.650m to the developer. The bank's loan proposal included conditions that prior to draw down of the loan, unconditional[1] pre-sales of apartments totalling $21.615m (excluding any GST) would have been contracted, and that the purchasers of each of the proposed apartments would have paid a minimum deposit of 10% of the apartment's purchase price. Those deposits were to be held by the developer's solicitors (Mr Slack's firm). Mr Slack was

[1] Apart from conditions relating to construction and title.

required to confirm that such deposits had been paid and were held in his firm's trust account at the time he sought draw down of the loan.

[11] On 16 August 2006, Mr Slack, on behalf of his firm, confirmed this matter to the bank's solicitors in the following form:

> "We undertake that the deposits as outlined in the schedule are held by us and any future deposits received will be held by us and such present and future deposits will not be released without Westpac's prior consent, other than in circumstances where as stakeholder we are contractually obliged to do so."

[12] The finance company lending on the Madison Development approved a loan of $6.062m. This loan proposal also included conditions that there be unconditional[2] pre-sales of apartments, that the sales be to non-related parties, and that in respect of each sale a minimum deposit of 10% of the purchase price had been paid. On this loan the minimum aggregate value of the pre sales was to total not less than $22m (excluding any GST).

[13] The finance company also required that the deposit monies be held in trust for the developer. To facilitate draw down of these funds, Mr Slack, on behalf of his firm, on 24 August 2006 confirmed to the solicitors acting for the finance company as follows:

> "We confirm in relation to each Sale and Purchase Agreement on the attached schedule that:
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> ...
>
> (d) the deposit in respect of the presale is paid and is held on trust for the Borrower. Such monies shall remain undisbursed unless otherwise consented to in writing by Hanover."

[14] Mr Slack acknowledged that the undertakings constituted by these letters were incorrect. Given the sales said to have been achieved at that time in the Madison Development, for the undertakings to have been correct a sum of approximately $2.4m should have been held by Mr Slack's firm, representing

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[2] Apart from conditions relating to completion and title.

deposits received amounting to 10% of aggregate sales prices. In fact it held only $277,400.

[15] In the second charge of negligence or incompetence of such a degree as to bring the profession into disrepute admitted by Mr Slack, he was acting for 85 Wakefield Developments Limited as developer of another apartment block ("Tetra House Development"). In this case a finance company had agreed to lend the developer $16.730m.

[16] This loan was subject to a condition that there be pre-sales of apartments in the Tetra House Development to a value of not less than $50m (including GST) prior to any draw down. The sales were to be to non-related parties, unconditional[3], and were to provide for a 10% deposit against the purchase price to be paid. Amounts paid as a deposit were required to be held on trust and were not to be disbursed without the written consent of the finance company lender.

[17] By letter of 21 December 2005 to the solicitors acting for the finance company, Mr Slack, on behalf of his firm, advised:

> "We undertake that we hold all deposits paid under the Agreements as specified in the attached Schedule.
>
> We confirm that in our capacity as Stakeholder under the Agreements, we have placed all deposits received (together with all interest accrued on those deposits less withholdings required by law in respect of their interest) (**Deposit Monies)** in an interest bearing trust account."

[18] The schedule referred to in the letter showed pre-sales in the Tetra House Development totalling $48.197m, but the deposits paid and held by Mr Slack in his firm's trust account amounted to $241,400. That was not an amount that represented 10% of sales said to have occurred of $48.197m, an amount which would have been in excess of $4.8m.

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[3] Apart from conditions regarding completion and title.

[19] Mr Slack admitted his undertaking was incorrect, and specifically noted[4] that a Blue Chip Group company, Relson Developments Limited ("Relson"), had agreed to acquire a large number of apartments in the Tetra House Development and that it had not paid deposits due on those purchases, an amount of over $2.1m. Instead the amount owed for those deposits was to be offset against a "*sales fee"* the right to which had been acquired by Relson from another Blue Chip Group company. The sales fee had accrued as a result of Blue Chip Group arranging the sale of apartments in the development.

[20] These discrepancies between what was said in the various undertakings and the true situation, came to light when the Serious Fraud Office was investigating certain transactions involving Blue Chip Financial Solutions Limited, which had had an arrangement with the developers of both Madison Development and Tetra House Development to facilitate sales of the apartments. The Serious Fraud Office reported the discrepancies between the deposit monies stated in the undertakings to have been paid and held, and the actual amounts held at that time, to the Law Society, which commenced the investigations that have resulted in the present charges before the Tribunal.

[21] The Serious Fraud Office noted in its report to the Law Society that in respect of the loans on the Madison Development, the loan conditions relating to the holding of purchasers' deposits had not been observed, and the undertakings given by Mr Slack were false. From monies received on draw down of the loans Mr Slack arranged for amounts to be deducted and allocated as the required deposits. Mr Slack admitted that the conditions had not been complied with, and that his undertakings were incorrect, as he had allocated monies as stated.

[22] Mr Slack's position was that he understood that deposits paid on the apartments sold in the Madison Development had been paid to companies in the Blue Chip Group, which was acting as sales agent for the developer. Where a company in the Blue Chip Group passed on a deposit to Mr Slack's law firm, the deposit was held in his firm's trust account. Not many deposits were passed over in

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[4] In his written submissions to Standards Committee dated 7 December 2011, page 199 of the Committee's Bundle at paragraphs (k)(iii) and (m).

this way, with most deposits being said to have been released under separate arrangements approved by individual purchasers.

[23] A fee of $2,439,200 was due to Blue Chip Group in respect of sales of apartments in the Madison Development Mr Slack said. Blue Chip Group had advised that where purchasers' deposits had been received by it, and then released and not passed over to Mr Slack's firm to be held for the developer in trust, Mr Slack's firm was authorised to deduct an equivalent amount from the amount owed to Blue Chip Group by the developer from the loan proceeds as a fee in respect of the sales it had made. That would give the same economic result Mr Slack said, as the developer was required to pay the amount to Blue Chip Group and the lenders had approved payment of sales fees from the loan.

[24] Accordingly, when the loan funds were paid by the lenders, Mr Slack debited those loan proceeds with amounts equivalent to the aggregate of the various 10% deposits his firm had been due to receive from Blue Chip Group in respect of apartment sales in the Madison Development. The amounts so debited were credited as a deposit paid, for the benefit of the developer by the relevant apartment's purchaser, in his firm's trust account. The aggregate of those amounts was set-off against the sales fees the developer was required to pay Blue Chip Group out of the loan proceeds.

[25] In respect of the Tetra House Development, a large number of units was sold to Relson. Mr Slack advised that the deposits in respect of these units were paid on receipt of the finance company loan, particularly by utilising part of the loan monies to pay the deposits due by Relson on its purchases of apartments, as an offset against sales fees payable to Blue Chip Group by the developer.

[26] Mr Slack advised the Standards Committee during its investigation that because of the arrangements made regarding sales of apartments, in both the Madison Development and the Tetra House Development, he was always in a position to comply with his undertaking regarding the deposit monies. On receipt of loan proceeds he was able to take monies otherwise due to Blue Chip Group for sales fees, and utilise those amounts to allocate amounts as deposits within his trust

account. He did not apprehend that his undertaking was incorrect in those circumstances, Mr Slack said, believing that what he was really indicating in his undertaking was that his firm would have the requisite deposits and would hold them pending settlement of the various apartment agreements and the lenders' release consents. Basically, he said, he had not turned his mind to the precise wording used, and was aware that on receipt of the funds he would immediately be in a position to allocate part of the loan proceeds within his trust account as representing the deposits due.

[27] Mr Slack acknowledged that his undertakings to the various lenders were incorrect. He said that what he had done had given the economic result required by the lenders, because immediately on receipt of loan proceeds he allocated amounts to deposits within his trust account in an offset of amounts otherwise due by the developers to Blue Chip Group. These amounts were then held in accordance with the undertaking he had given not to disburse the deposit amounts until approved by the lenders.

[28] Mr Slack noted that while the form of his undertaking was incorrect, in all cases the lenders suffered no undue risk, because he allocated the required deposit money from the loan proceeds on receipt, and in fact no lender suffered any loss. Effectively he was saying that in substance he met his obligations under the undertaking to ensure deposits were paid and held. He said that with the benefit of hindsight the "*wording of our letters of undertaking should have been amended from the exact form of wording proposed by the lenders' solicitors".*[5]

[29] That amendment may not have been an available solution of course, because evidence filed by the Standards Committee from officers of the lenders makes it clear that the lenders took the undertakings at face value (ie that the deposits were held in Mr Slack's firm's trust account prior to draw down) and that if they had been aware of the true situation the loans may not have been made available.

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[5] Written submissions by Mr Slack to the Standards Committee dated 7 December 2011, page 202 of the Committee's Bundle at paragraph 1.

[30] The purpose of the particular undertakings was a factor that should be taken into account when assessing his conduct Mr Slack said. He said that the undertakings were required so that the lenders could have comfort that security for their loans was in place, as their security requirements included security over the sale agreements, which included the 10% deposit requirement. The process he had followed allowed Mr Slack to ensure that immediately after draw down of the loans, the deposits against the various sale contracts were held, he said, so the required security interest was in place.

Discussion

[31] The Standards Committee submitted that the undertakings were given with significant degrees of negligence or incompetence, as Mr Slack's undertaking was factually incorrect in a material respect, the holding of deposits in respect of sales made. It was clear from the material before the Tribunal that the lenders wanted security over the sale agreements and the associated deposits as Mr Slack noted, but they also wanted assurance that bona fide apartment pre-sales had been completed before funding the development. That assurance was to be supported by the existence of actual contracts and the payment of the deposits to be held for the developers. That assurance regarding deposits did not exist prior to draw down, as few deposits were held by Mr Slack's firm on behalf of the developers despite his undertaking that all deposits were in fact held by his firm.

[32] In the circumstances, and as acknowledged by Mr Slack, most of the deposits would only be held after receipt of loan monies, as the deposits were taken from those funds on the basis described. That meant of course that certainty as to the requisite number of bona fide sales was not as assured as it should have been, a position the lenders were trying to avoid. Due diligence carried out by the lenders on sales contracts did not remove that risk, especially where, unknown to the lenders and contrary to the undertakings they were given, a critical term of the contracts was not observed in most cases (ie a deposit had not been paid by the purchaser) and the conditions of loan were breached (deposits were not held on behalf of the developers by Mr Slack's firm, despite his undertakings to the contrary).

[33] In its submissions, the Standards Committee noted that Mr Slack was an experienced practitioner who was dealing with unambiguous instructions from his clients' lenders. He gave undertakings he knew were not correct. He took a view that he could give the lenders the security they required by another route, arranging deposit payments in his trust account after and from loan receipts, rather than ensuring deposits were in place as required before the loan was paid. There was no loss to the lenders arising from his conduct, but it left the lenders exposed to a risk that sale contracts may not have been bona fide. The lenders would not have been exposed in that way if Mr Slack's undertaking regarding the payment and holding of deposits had been accurate, as the lenders would then have appreciated, before advancing funds, the true position (ie numerous deposits had not been paid and were not held by Mr Slack as he said).

[34] The Standards Committee did not seek that the Tribunal interfere with Mr Slack's right to practise for what it accepted was a matter of negligence. It submitted that a fine and censure were appropriate. It also sought costs, both those of the Standards Committee (amounting to $20,086), and those of the Law Society under s 257 Lawyers and Conveyancers Act 2006, (which the Tribunal certified at the hearing at $4,500) against Mr Slack.

[35] Mr Slack accepted the position of the Standards Committee on sanction, and submitted that the Tribunal should take into account the pressure he was under in completing these transactions and the fact that while he had been negligent in the way he had expressed his undertaking he had ensured that the requisite deposits were in his trust account immediately after receipt of loan proceeds. That was achieved in the ways noted above, and while it was not precise compliance he had simply not put his mind to that, relying on a substantive approach which left the lenders in the same position he said.

[36] Mr Slack acknowledged it was unacceptable, not only to fail to comply with the specific undertaking requirements in this situation, but also taking into account the wider requirement of solicitors' undertakings being able to be relied on by those receiving the undertaking.

[37] Counsel for Mr Slack referred the Tribunal to *W v Auckland Standards Committee 3 of the New Zealand Law Society*[6], a case where a practitioner had made an honest mistake regarding an undertaking. In that case it was held that it was irrelevant, in a charge of negligence that brought the profession into disrepute, whether the negligence was the result of an honest mistake. That endorsed Mr Slack's decision to admit the negligence charges in this case it was submitted. It was also noted that in *W* there was an inference that interference with right to practise would not necessarily follow in such circumstances.

[38] We agree that where there has been an honest mistake, striking off or suspension do not necessarily follow, notwithstanding that the conduct may be negligence of a nature that has brought the profession into disrepute. The assessment of the gravity of the conduct and a practitioner's culpability in such a case, and resulting questions of protection of the public interest, will always depend on the specific facts.

[39] In *W* the practitioner concerned had given an undertaking, in the context of a meeting proposed to discuss a contractual dispute between his client (D Ltd) and another, that he would hold the amount in dispute (some $91,000) "*pending satisfactory resolution of this matter".*

[40] The parties met in an attempt to resolve the dispute but were unable to reach agreement. The contract party claiming to be due the $91,000, attempted to obtain it by way of summary judgment, but was unsuccessful. Some time later it was successful against D Ltd in the High Court, but by this time D Ltd was in Receivership.

[41] The judgment creditor contacted W requiring payment of the $91,000 the subject of the undertaking, as there had been "*satisfactory resolution of the matter".* No payment was made by W, and disciplinary proceedings ensued against him for the breach of his undertaking, by failing to hold the funds until satisfactory resolution had been achieved. W had considered that the undertaking had only continued until

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6 *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401.

the parties had undertaken the preliminary meeting to see if they were able to resolve the dispute.

[42] The Court noted that the drafting of W's undertaking was imprecise, as it could be interpreted as enduring beyond that point, until the dispute was resolved by agreement or by judgment of the court.[7]

[43] We consider that case is in a different category to the present matter before us. In *W* the practitioner undertook to lodge funds in his trust account pending resolution of the matter. He did lodge the funds, but in the mistaken belief that his undertaking was at an end when the parties could not resolve the issue between them at a meeting, he released the funds. That seems to us to be in a different category to a practitioner who gives an undertaking he knows at the time is not correct, but considers that it will suffice, as he intends to achieve the result required, but in a different way from the position set out in his undertaking. That approach by Mr Slack did not give due weight to the fact that confirmation that deposits had been paid and were held, increased the surety to the lenders that sufficient bona fide pre sales in fact existed.

[44] In this regard Mr S Grieve QC, a member of the Tribunal, asked counsel for Mr Slack about certain comments made in the Serious Fraud Office summary before the Tribunal. These were to the effect that deposits credited against purchasers of Madison Development apartments in Mr Slack's firm's trust account from receipt of loan proceeds, were *"later reversed at around the time an actual deposit was received for the sale of each unit".*[8]

[45] The implication of this evidence was that in fact one of the matters on which the lenders to the Madison Development received assurance from the undertaking Mr Slack gave, that bona fide sales existed, was not in reality assured in the absence of deposits being paid in respect of most of the sales. If deposits had in fact been paid to a Blue Chip Group company, and offset by the developer against sale fees owed by them to Blue Chip Group, thus allowing deduction from loan

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7 *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401, at [39].

8 Page 23 Standards Committee Bundle at paragraph 22.

proceeds, what was it that had later changed to require the deposit so taken out of the loan proceeds to be reversed when an "*actual deposit"* was received? The inference to be taken is that in fact no deposit had been received by Blue Chip at the time Mr Slack offset the fees due to Blue Chip Group against deposits said to have been paid to Blue Chip.

[46] There was no evidence that could assist the Tribunal with a clear answer on this issue, but immediately following the hearing, counsel for Mr Slack lodged a supplementary memorandum in an endeavour to explain the position.

[47] Examples of three different positions were provided to explain what might constitute the reversal referred to in the Serious Fraud Office summary referred to above, although only two of the situations outlined involve a "reversal".

[48] In the first example provided on behalf of Mr Slack (*Ham, Unit 106*) the reversal operated in relation to a purchaser who had actually paid a deposit which was in Mr Slack's firm trust account at the time the loan monies were drawn down by him for the developer. There was obviously no need for a journal entry transfer of deposit monies to the trust account for the developer referencing that purchaser from the loan proceeds in that case. If, by mistake, such a journal entry had been made, the deposit would appear as being credited twice, and the journal entry for that deposit from the loan proceeds would have to be reversed. This occurred as a result of a deposit having already been paid by the client in this example.

[49] In the second example provided (*Berry, Unit 201*) the purchaser had not paid a deposit that was held in trust by Mr Slack's firm at the time the loan was drawn down. In that case a journal entry was made transferring from the loan proceeds an amount equivalent to the deposit, to the developer's trust account referencing that purchaser. This situation reflects the matters at the heart of the charges. The transfer in this situation was made from loan proceeds on the basis that it offset amounts due by the developer to Blue Chip Group for sales fees, and that Blue Chip Group had already received that purchaser's deposit for the developers which it had not passed to Mr Slack's firm.

[50] The question this example raises for the Tribunal is; if a deposit had been paid to Blue Chip Group by the purchaser and had not been passed through to Mr Slack's firm, and the allocation of a deposit amount from loan proceeds in this case was simply offsetting fees due to Blue Chip Group against the deposit received by Blue Chip Group and not passed over, why did Mr Unkovich, the solicitor for Berry, proceed to pay a deposit as if that still remained due from his client, requiring a reversal of the earlier amount transferred from the loan proceeds? There was no evidence before us that could assist the Tribunal in answering this question.

[51] The inference to be taken is that no deposit had been paid by Berry until that time, to Blue Chip Group or anyone else. If that is correct it does raise an issue regarding Mr Slack's claim that he applied part of the loan proceeds to offset deposits paid by purchasers to Blue Chip Group prior to his receipt of loan proceeds. This question arises in respect of the very matter that gave Mr Slack confidence that he could take the position he did with regard to deposits, that is, that deposits had already been paid by purchasers to Blue Chip so he was free to use loan proceeds to offset amounts otherwise due by the developer to Blue Chip, and felt comfortable giving the undertakings.

[52] The third example provided (*Dewsnap, Unit 705*) involved a situation where a deposit had been received by Mr Slack's firm prior to the loan proceeds being drawn down, and no deposit was transferred ex the loan proceeds because it was clear a deposit had already been paid and received. The issue of reversal does not arise here.

[53] We understand the need for reversal of an amount ex loan proceeds allocated as a deposit where an actual deposit had previously been paid by a purchaser, as in the first example. The second example, regarding a payment of an actual deposit by a purchaser, after the previous allocation of some loan proceeds to that purchaser's account as a deposit, is troubling. Prima facie it indicates that despite Mr Slack's position on taking an offsetting position for deposits paid but not passed to him, there were situations where no deposit had been paid at all, a matter on which the lenders were misled by Mr Slack's undertaking.

[54] We can take the matter no further than to express the same concern that we expressed to counsel for the Standards Committee at the hearing. There are facts and circumstances here that we believe could have benefitted from more investigation, and dependent on that investigation, might have resulted in a more serious charge being progressed. As a minimum, a review of evidence as to whether deposits had been paid to Blue Chip Group as claimed should in our view have been undertaken by the Standards Committee.

[55] Similarly, in the Tetra House Development, the nature of the Relson transaction warranted further investigation by the Standards Committee in our view. We note the nature of Relson's involvement in this context, with a "bulk" purchase of unsold apartments and no deposits being paid. There was no evidence that could assist the Tribunal to understand the role of Relson, for example whether it was the end buyer or an interim holder of an agreement to purchase pending on-sale, as the Standards Committee investigation did not look into such matters and provide any evidence relevant to such an issue. Accordingly it is not an issue relevant to the Tribunal assessing Mr Slack's conduct, but we have highlighted it as an example of a further investigation by the Standards Committee that may have been warranted to provide a complete picture of the transactions and arrangements around the undertakings concerned.

[56] We raised our concerns about the approach to investigation and prosecution of the negligence charges at the hearing. We make no criticism of counsel for the Standards Committee, who was obliged to act in accordance with the instructions he had received and the evidence provided by the Committee for the purposes of the charges. We simply record that we consider there may be some unanswered issues here, which a more comprehensive and analytical investigation by or on behalf of the Standards Committee may have assisted.

[57] The Tribunal can only deal with this on the basis of the accepted facts and agreed evidence before it, and the approach taken by the Standards Committee to pursue only negligence. If there had been evidence before us indicating that Mr Slack not only knew that he did not hold the deposits he undertook were in his trust account, but also knew that deposits had not been paid by purchasers to Blue Chip

Group, or that Relson, which had paid no deposits, was holding the apartments it had acquired as a vehicle for on-sale, more serious issues may have arisen related to his undertakings.

Determination

[58] The practitioner, Mr Slack, has admitted two charges of negligence or incompetence in his professional capacity and that the negligence or incompetence has been of such a degree as to bring his profession into disrepute. The matters arose as set out earlier in this decision, regarding undertakings that were not correct.

[59] The charges relate to conduct prior to the date the Lawyers and Conveyancers Act 2006 came into force on 1 August 2008. Accordingly the transitional provisions of s 351 of that Act apply, and the conduct is to be dealt with under the processes and procedures of the Lawyers and Conveyancers Act 2006, but with reference to the conduct as it existed under the Law Practitioners Act 1982, and applying only sanctions available under that Act.[9]

[60] Given the importance of solicitors' undertakings and the fact that Mr Slack knew the undertaking he was giving was incorrect, this is a serious issue. The negligence has arisen as a result of the approach Mr Slack considered he was able to take, ensuring in his view, the lenders were in an economically equivalent position by him taking deposits from the loan proceeds and offsetting amounts otherwise due to be paid from loan proceeds by the developers.

[61] We are not sure it was equivalent because it failed to recognise the surety that his undertaking provided regarding the existence of a minimum number of bona fide sales. Auditing the contracts as part of a due diligence exercise undertaken by the lenders could not resolve this issue. Payment of a deposit gives a clarity to bona fides that is otherwise not available from just the face of the documents themselves.

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[9] See s 352 Lawyers and Conveyancers Act 2006.

[62] We have commented on our concern about lack of investigation by the Standards Committee of matters that may have been important, and the approach to the charges resulting, something we noted at the hearing. Because the undertakings given were false, the assurance of deposits having been paid, reflecting the existence of bona fide purchasers who could be expected to complete in due course, was lost by the lenders, unbeknown to them. Mr Slack may consider himself fortunate that the Standards Committee took the approach it did regarding the charges it decided to press.

Orders

[63] The Tribunal Orders as follows:

(a) That Timothy Upton Slack be and is hereby censured for his conduct. He had clear instructions and he knew that what he said in his undertakings was not correct. He developed a scheme to deal with the issues arising as he considered appropriate, by allocating from loan proceeds amounts that had been required by lenders to be held by him prior to drawing down of those loans. It was a very casual approach to complying with the various lenders' requirements, and it misled them as to the true state of affairs. Mr Slack may well consider that what he did was commercially pragmatic, but on any analysis of what he did he is well short of an acceptable standard of behaviour expected from a practitioner regarding the giving of undertakings. As it turned out the sales were all settled and no loss was suffered by a lender, but that is not the point when assessing Mr Slack's conduct. Undertakings have to be given accurately and complied with meticulously, and Mr Slack's conduct in not turning his mind (as he described it) to the precise form of his undertaking is serious negligence, and without doubt adversely affects the profession's reputation. The profession relies on undertakings to facilitate its day to day activities, so conduct which undermines the value of an undertaking is an important issue. It is noteworthy, and unsurprising, that the major trading bank concerned in

this matter as a lender, ceased dealing with Mr Slack or his firm on this matter becoming known.

(b) Mr Slack is to pay the New Zealand Law Society the sum of $5,000 by way of penalty. The amount we order is limited to that amount because it is the maximum that could have been ordered for his conduct under the Law Practitioners Act 1982[10]. If that was not the case it would have been substantially higher. The Standards Committee did not seek that we interfere with Mr Slack's right to practise, and as Mr Slack's admissions, and submissions from both parties, proceeded on that basis we do not think it fair to take a different position now, although it was something within contemplation.

(c) Mr Slack is to pay the Standards Committee costs of $20,086, and is to reimburse the New Zealand Law Society the amount it must pay under s 257 Lawyers and Conveyancers Act 2006, the sum of $4,500.

[64] Mr Slack's firm, Carter & Partners, indicated that it intended to seek a suppression order in respect of its name as a firm. No such application was formally made, so there is no determination to be made in that regard. We note that where a practitioner has been found guilty, remains in the firm of which he was a member at the time of the conduct, the firm itself is not a victim of dishonesty, and no suppression order is made regarding the practitioner, suppression of the firm's name would require something of considerable weight to justify suppression of its name.

DATED at AUCKLAND this 21st day of December 2012

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D J Mackenzie
Chair

[10] See s 352 Lawyers and Conveyancers Act 2006.