IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-5736

UNDER	SECTION 118 OF THE LAW PRACTITIONERS ACT 1982 AND PART 10 OF THE HIGH COURT RULES
BETWEEN	MANU CHHOTUBHAI BHANABHAI Appellant
AND	AUCKLAND DISTRICT LAW SOCIETY Respondent

Hearing: 15 December 2008

Court: Priestley J
Heath J
Winkelmann J

Counsel: R E Harrison QC for Appellant
G M Illingworth QC and M A Treleaven for Respondent

Judgment: 7 April 2009

JUDGMENT OF THE COURT DELIVERED BY HEATH J

This judgment was delivered by me on 7 April 2009 at 9.O0am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
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Auckland District Law Society, PO Box 58, Auckland
Counsel:
R E Harrison QC, PO Box 1153, Auckland
G M Illingworth QC, PO Box 7205, Wellesley Street, Auckland

The appeal

[1] Mr Bhanabhai appeals against a finding of professional misconduct made by the New Zealand Law Practitioners' Disciplinary Tribunal (the Tribunal) on 11 August 2008. The Tribunal censured Mr Bhanabhai. That order has given rise to a cross appeal by the Auckland District Law Society (the Society), on the grounds that the penalty was manifestly inadequate. The Society contends that Mr Bhanabhai ought to have been suspended from practice for six months.

[2] The finding of professional misconduct was based on Mr Bhanabhai's failure to honour a personal undertaking. Although the undertaking was given on 17 April 1997, the period during which it was alleged Mr Bhanabhai's breach constituted professional misconduct began on 27 April 2007.

Background

[3] Mr Bhanabhai is a solicitor who practises in Auckland. Between 1994 and 1997 he and his family interests became financially involved in a property development. Mr Bhanabhai chose to act as a solicitor for the various entities in which he had an interest. An issue arose in 1995 with the Commissioner of Inland Revenue in relation to the accounting for GST on the sale of various apartments in the development. By April 1997 the Commissioner indicated that a GST refund would be available to developers, providing an undertaking was furnished to pay GST from the sale proceeds of apartments in a subsequent stage.

[4] Mr Bhanabhai gave an undertaking on 17 April 1997, on his firm's letterhead. The undertaking read:

17 April 1997

The Commissioner
Inland Revenue Department
PO Box 76 178
MANUKAU

Attention: Mr S Cunningham

Fax: 279 8482

Re: Golden Gate Holdings Limited/Nautilus Developments Limited

We refer to the letter to you from O'Halloran & Co of today's date.
We are the solicitors for Golden Gate Holdings Limited. We have been instructed to settle the sale of the units in the development and *we undertake that on settlement of Units 3F, 5A, B, C, D, E, F, 6A, B, C, D, E and F we will forthwith pay to you the GST component of the sale consideration.*

Yours faithfully
DYER WHITECHURCH & BHANABHAI
(our emphasis)

[5] Mr Bhanabhai failed to account for GST out of those proceeds of sale that passed through his trust account. After the secured creditor, UDC, instructed its own solicitors to act on the sales, Mr Bhanabhai elected not to inform them of the existence of the undertaking. The proceeds of sale were used to reduce UDC's debt, one that had been guaranteed personally by Mr Bhanabhai.

[6] The Commissioner took proceedings against both Mr Bhanabhai and his partner to obtain payment of the GST. Three causes of action were pleaded: breach of undertaking, compensation for failing to honour the undertaking and breach of contract. The breach of contract allegation was subsequently withdrawn.

[7] On 5 October 2005, Laurenson J gave judgment in favour of the Commissioner: *Commissioner of Inland Revenue v Bhanabhai* [2006] 1 NZLR 797 (HC). The Judge found that the undertaking had been given by Mr Bhanabhai in his professional capacity. However, at the time of the hearing in the High Court, Laurenson J found that the undertaking was incapable of being performed. In those circumstances, the Judge decided to award compensation to the Commissioner for breach of the undertaking, exercising the High Court's inherent jurisdiction to supervise the conduct of solicitors, as officers of the Court.

[8] The amount of GST outstanding, at the time of judgment was given, was $490,556. Laurenson J awarded compensation, in the sum of $300,000. His Honour said:

> [177] Viewing the matter broadly with the object of achieving a just result and, at the same time, ensuring that the award of compensation demonstrates the Court's intention to preserve the integrity of solicitors' undertakings, I have concluded that an appropriate award of compensation in this case should be $300,000.

[9] Mr Bhanabhai appealed against the High Court judgment. The appeal was dismissed: *Commissioner of Inland Revenue v Bhanabhai* [2007] 2 NZLR 478 (CA). However, the Court of Appeal took a different view about the character of the undertaking. Their Honours held that the undertaking was unconditional in nature and capable of immediate performance.

[10] Delivering the judgment of the Court of Appeal, William Young P said:

> [49] It is trite that enforcement of an undertaking involves resort to the disciplinary jurisdiction of the High Court and thus depends on the conduct of a solicitor as being such as to warrant sanction. This was recognised by the Judge, who put the issue in these terms at para [148]:
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> > "[148] The issue to be determined is, therefore, whether the defendants' failure to honour their undertaking in this case amounted to conduct which was inexcusable, or whether there was real scope for genuine misunderstanding by the defendants as to the nature of the commitment contained in the letter of undertaking."
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> [50] In concluding that there was misconduct on the part of Mr Bhanabhai, the Judge focused on Mr Bhanabhai having placed himself in a position in which his personal interests conflicted with his duties. He was particularly critical of actions taken (or not taken) by Mr Bhanabhai after the UDC facility fell due. The Judge's approach to this aspect of the case was very much a result of his limited interpretation of the undertaking. Since he treated it as applying only to settlement proceeds actually received by the firm to which UDC did not insist on priority, his finding against the firm was based essentially on breaches of what might be regarded as implied ancillary obligations. *On our approach, the undertaking was unconditional and the firm has simply failed to honour it. That factor in itself is enough to warrant (although it does not necessarily require) a response from the Court (see, for instance, Bentley v Gaisford [1997] QB 627 (CA) at p 648 per Henry LJ).*
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> [51] *Given that the undertaking was relied on by the Commissioner we see no reason why it should not be enforced.* (our emphasis)

Because there was no appeal (by either party) against the quantum of Laurenson J's award, there was no basis for the Court of Appeal to vary the amount to reflect its view of the nature of the undertaking.

[11] Mr Bhanabhai and his partner sought leave to appeal to the Supreme Court. On 26 April 2007, the application for leave was dismissed: *Bhanabhai v Commissioner of Inland Revenue* [2007] NZSC 25. Elias CJ, Blanchard and Tipping JJ said:

> [6] The judgment of the Court of Appeal is based upon the interpretation of a one-off undertaking entered into in a particular factual setting. The interpretation is of no general importance such as would engage s 13(2)(a) or (c) of the Supreme Court Act 2003. The applicants frame the issue for the court as:
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> > Is it the law that notwithstanding the actual intention of the parties a solicitor's undertaking in respect of matters outside the solicitor's control must be construed not as a conditional promise but as an absolute guarantee?
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> [7] That is not, however, a fair characterisation of the issue determined by the Court of Appeal. Rather, *the Court came to its conclusion about the proper interpretation of the undertaking on the basis of the language used, the factual context in which it arose and its commercial purpose to arrive at its objective meaning.* No error of principle in approach arises. *The applicants simply seek a different conclusion in application of a correct approach to the facts of the case.*
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> [8] The applicants seek also to invoke s 13(2)(b) of the Supreme Court Act 2003. They claim that a serious miscarriage of justice may have occurred. In order to come within the s 13(2)(b) ground for leave it is necessary to point to a sufficiently apparent error of such a substantial character that it would be repugnant to justice to allow it to go uncorrected. The circumstance that the Court of Appeal has reached its conclusion on a different basis than the High Court does not of itself suggest such error. *No error of principle in approach appears from the Court of Appeal decision. There is no apparent error such as would give rise to a miscarriage of justice.* (our emphasis)

[12] Following delivery of the Supreme Court judgment, Mr Bhanabhai's partner settled with the Commissioner, in the sum of $75,000. However, Mr Bhanabhai did not pay the balance; instead, he made attempts to compromise his debt to the Commissioner.

The disciplinary proceedings

[13] The Society was alerted to disciplinary issues arising out of Mr Bhanabhai's activities on receipt of Laurenson J's judgment. That judgment contained a number of adverse credibility findings against Mr Bhanabhai that the Society wished to investigate. After correspondence and discussions between senior counsel for both Mr Bhanabhai and the Society, the Society proffered a single charge, which Mr Bhanabhai denied.

[14] Leaving aside recitation of the judgments of the High Court, Court of Appeal and Supreme Court, the charge stated:

> **COMPLAINTS COMMITTEE NO 1** of **THE AUCKLAND DISTRICT LAW SOCIETY** hereby charges **MANU CHHOTUBHAI BHANABHAI** (**"the practitioner"**) that from on or about 27 April 2007, he has been and continues to be guilty of misconduct in his professional capacity as follows:
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> 1. On or about 19 April 1997 the practitioner gave a personal undertaking to the Commissioner of Inland Revenue (**"the Commissioner"**) to pay outstanding Goods and Services Tax (**"the undertaking"**) owed by a company or companies for which the practitioner was acting and of which the practitioner was a director, namely Nautilus Development Limited and/or Goldengate Holdings Limited.
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> 2. The undertaking required the practitioner to pay the Goods and Services Tax owing in respect of the sale of fourteen apartments situated in Hobson Street, Auckland, (**"the apartments"**) forthwith upon the settlement of the sale of each apartment.
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> …
>
> 6. The Goods and Services Tax was not paid to the Commissioner of Inland Revenue forthwith upon the settlement of the sale of each apartment and has remained unpaid ever since.
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> 7. From on or about 27 April 2007 down to the date hereof the practitioner has been in continuous breach of Rule 6.07 of the Rules of professional Conduct for Barristers and Solicitors by failing to comply with the undertaking after having received from the courts a final ruling on his liability pursuant thereto.

[15] We highlight two aspects of the charge:

a) First, we refer to the period during which professional misconduct was alleged: "from on or about 27 April 2007". That was the day after the Supreme Court dismissed Mr Bhanabhai's application for leave to appeal. Because Mr Bhanabhai had defended the proceedings on advice from senior counsel, the Society considered that he could not be regarded as guilty of misconduct in a professional capacity in the period before 27 April 2007.

b) Second, the Society relied on Mr Bhanabhai's failure to pay GST pursuant to the undertaking. That omission was alleged to amount to a breach of r 6.07 of the Rules of Professional Conduct for Barristers and Solicitors (the Rules).

[16] The charge was heard in Auckland on 11 August 2008. At the conclusion of evidence and submissions, the Chairman of the Tribunal gave an oral decision, to be supplemented by expanded reasons later. The Tribunal found Mr Bhanabhai guilty of misconduct in his professional capacity. In a separate penalty decision, given on the same day, the Tribunal rejected the Society's submission that Mr Bhanabhai should be suspended and, instead, imposed a censure.

[17] On the professional misconduct charge, the Tribunal addressed three issues raised on behalf of Mr Bhanabhai.

a) Whether the undertaking had merged with the High Court judgment of October 2005.

b) Whether the fact that the High Court had exercised its inherent supervisory jurisdiction meant that the Tribunal ought not to exercise its powers to discipline.

c) Whether Mr Bhanabhai was excused from his failure to honour the undertaking from 27 April 2007 by reason of alleged impecuniosity.

[18] On the issue of merger, the Tribunal held that the undertaking that formed the basis of the High Court order for compensation did "not disappear into or merge into the judgment". Alternatively, it regarded the doctrine of merger as restricted to *inter partes* decisions. As a result, it held that the Society could not be bound by the outcome of the proceedings brought by the Commissioner against Mr Bhanabhai.

[19] On the abuse of process point, while the Tribunal found that it was open to the High Court to make a compensation order pursuant to its inherent supervisory jurisdiction over legal practitioners, it did not consider that exercise of that jurisdiction by the Court prevented it from laying a disciplinary charge. The Tribunal held that Mr Bhanabhai's professional obligations were distinct from any personal obligations he owed to the party to whom the undertaking had been given.

[20] The Tribunal rejected the impecuniosity point. It held that it was not sufficient for a practitioner to say that he or she had attempted to negotiate with the party to whom the undertaking had been given to effect a compromise.

[21] The Tribunal emphasised the importance of undertakings by solicitors to the proper despatch of business transacted by or through them. It concluded that Mr Bhanabhai's failure to honour the undertaking amounted to professional misconduct. The Tribunal said, in its expanded reasons:

> [30] Undertakings must be honoured. If an undertaking is given it must be able to be fulfilled when the solicitor is called on to do so.
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> [31] If an undertaking is given by a solicitor and the solicitor is unable to fulfil it that in itself would warrant disciplinary action.
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> [32] If an undertaking is given and it is capable of fulfilment and is not fulfilled then that warrants disciplinary action as well.
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> [33] The undertaking under discussion here, in light of the view taken by the Court of Appeal, has always been capable of being fulfilled. Mere financial inability as pleaded here on behalf of the practitioner does not create a defence. The underlying ethical obligation continued.
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> [34] This practitioner, given the history of the litigation over this undertaking, was effectively called on to fulfil his obligations under the undertaking once the Supreme Court refused leave to further appeal.
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> [35] Once he was called on in this way to fulfil his obligations he had to honour them. The sacrosanct nature of the undertakings has been

> commented on often by this Tribunal and in the Courts. Practitioners should not give undertakings that they cannot fulfil. If they do give such undertakings then they are required to make every effort to fulfil them. Over the 15 or 16 months since the rejection of the application for leave to appeal further to the Supreme Court this practitioner has had a clear obligation to pay what is owed by him under his undertaking (a smaller amount than might strictly have been sought and ordered against him as this Tribunal has noted).
>
> [36] It is not sufficient for him to say "I have tried to negotiate with the Commissioner to achieve some sort of compromise" i.e. to make a conditional offer of some $325,000 to settle a debt which now runs at $526,684.45 together with interest at the daily rate of $61.643835 from 11 May 2007 until the date of payment. He has made offers hedged with conditions but has not put any money down at all in an attempt to meet his obligations i.e. what he is required now to pay under the undertaking. In the 15 or 16 months he has not done so. He has made no payments, not even attempted to pay anything off that lesser amount allowed him by the High Court and the Court of Appeal. It cannot be an answer to say that "financially I cannot pay the lot". He has paid nothing. He is still in receipt of a reasonable income. There are still assets available to him. The bankruptcy notice was served on him on the 31 August 2007 and a creditor's petition lodged on the 7 of December 2007, both seeking enforcement of his obligations.
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> [37] For this argument, and somewhat reservedly, the Tribunal accepts that, as both Counsel seemed to argue, that not every breach of one of the Rules of Conduct will necessarily amount to professional misconduct and likewise not every breach of an undertaking will necessarily amount to professional misconduct (the latter is the proposition on which the Tribunal remains reserved). The Tribunal comments that that may arguably be so in some rare circumstances, perhaps, but there is certainly force to Mr Illingworth's submission that "a breach of an undertaking will constitute prima facie misconduct under rule 6.07. if a practitioner has a sufficiently good reason for failing to comply with the undertaking, it may thus remain possible for a finding of professional misconduct to be avoided".
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> [38] That brings the Tribunal to the question as to whether, on the balance of probabilities, the Tribunal is satisfied that the practitioner's failure to comply with the undertaking here is sufficient to make him guilty of professional misconduct within the formulation of "a deliberate departure from accepted standards" or actions or inaction "done wilfully with a wrong intention" or "fault beyond the error of judgment" *(Complaints Committee No. 1 of the Auckland District Law Society v [C]…*).
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> [39] The Tribunal believes that misconduct in his professional capacity has been established. There has been a continuous failure, deliberate, by the practitioner to meet and fulfil what was required of him, since the rejection of his application to further appeal, in April 2007.

[22] On the question of penalty, the Tribunal considered that a censure was a sufficient and proportionate response to Mr Bhanabhai's misconduct. The Tribunal

considered there were circumstances which made the context of the misconduct unusual. It said:

> [9] There are peculiar circumstances which mitigate, in the Tribunal's view, and which enable the Tribunal to step back, and I will not keep it from you longer Mr Bhanabhai, from interfering with your right to practise. As I say, none of what follows should be seen as a condoning of a breach of undertaking nor be seen as a watering down of this Tribunal's approach to such matters.
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> [10] Some of the features that we see as significant and peculiar are first, the approximate six year lapse before the Commissioner gave you notice that he was going to enforce the undertaking or take steps in relation to the undertaking.
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> [11] Second, the bona fide attempts, on advice, to litigate and determine your liability which flowed from that and covered the next three years or so.
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> [12] Third, the fact that it was only from the 27th of April 2007 on, that is after the Supreme Court declined your application for leave to appeal to it, that it could be said in disciplinary terms at least that you, Mr Bhanabhai, had to fulfil your responsibilities under your undertaking.
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> [13] Fourth, the Tribunal accepts that you, with advice, tried to compromise with the Commissioner in the next 15 to 16 months or so, but during that period – and that is the period which the charge relates to – it seems to the Tribunal that you, Mr Bhanabhai, have not come to a full realisation of what was expected of you in terms of the undertaking, in terms of your obligations, that you are in effect in denial and that you have made no effort to make payments towards fulfilling your obligations.
>
> [14] And that is at the heart of the finding of this Tribunal that you are guilty of misconduct in your professional capacity. If you had, whilst negotiating with the Commissioner, been as well making some attempt to pay some moneys off the debt owing as a result of the undertaking you might well have found yourself in a different position *vis a vis* a finding of misconduct. It seems that after there was a rejection by the Commissioner of your proposal made over the January/February period of 2008, after that rejection by the Crown Solicitor on behalf of the Commissioner by letter of 8 February 2008 on the materials nothing further has been done by you towards meeting your obligation.
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> …
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> [17] The final point of peculiarity to this case is the very considerable publicity, to large measure adverse to you, Mr Bhanabhai, already visited upon you. The Tribunal is sure that that has had some impact. The matters have been well in the public domain.
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> [18] The District Society has not sought a striking off but suggests a sanction involving a suspension of up to six months. The Tribunal agrees with the District Society that strike off in these circumstances is not appropriate and given the features just outlined the Tribunal is of the view that suspension is not warranted and nor is interference with your right, Mr

> Bhanabhai, to practise on your own account. So we step back from those matters even without having regard, as we do in reaching the ultimate decision as to what we will do with you on the finding of guilt, to features that you can call in aid; your age of 53, your practising life which has extended for the last 28 years or so, the lack of any previous blemishes in terms of your practising record, the, (as Mr Illingworth described it), and we accept, the "one-off" nature of this matter.
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> [19] The result is that the Tribunal under s 112 proposes to and does make the following orders: First and foremost, and mot importantly, and it must be published and it must be publicised, you are censured. It is no token censure; it should be read in the context of what has already been said about undertakings and the importance thereof. It is a censure that needs to resonate not just within you, Mr Bhanabhai, but within the profession generally; that undertakings must not be lightly given and if given must be fulfilled, they are not to be treated in some cavalier way. And they must be understood by the person giving them to have the serious consequences, which they do.
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> ….

Competing submissions

[23] Mr Harrison QC submitted that the common law doctrine of merger applied, with the consequence that, upon entry of the compensation judgment in the High Court, Mr Bhanabhai's obligation was to meet a money judgment, not to perform an undertaking. In those circumstances, he contended that the undertaking was discharged by Laurenson J's judgment. If that were right, there is no continuing undertaking on which the charge can bite. Mr Harrison relies, in particular, on *Craddocks Transport Ltd v Stuart* [1970] NZLR 499 (CA), *Shiels v Blakeley* [1986] 2 NZLR 262 (CA), *Republic of India v India Steamship Co Ltd* [1993] AC 410 (HL) and *Fraser v HLMAD Ltd* [2007] 1 All ER 383 (CA).

[24] Mr Harrison emphasised that the sealed judgment of the High Court recorded dismissal of the first cause of action, based on breach of undertaking. The compensation judgment was sealed on the basis of the second cause of action only.

[25] Mr Harrison contended that, because the amount of compensation was lower than the amount owing under the undertaking, it was not open to the Commissioner to insist that Mr Bhanabhai honour the undertaking once the High Court judgment

had been delivered. The Commissioner's ability to enforce was limited to the amount of compensation ordered.

[26] Even if we were to find against him on the merger point, Mr Harrison submitted that what had been proved did not amount to professional misconduct. In identifying the appropriate test for professional misconduct, Mr Harrison relied on *Re A (Barrister and Solicitor of Auckland)* [2002] NZAR 452 (HC) at [49]-[52] and *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105 (HC) at [27].

[27] Mr Harrison submitted that the Tribunal had not, in fact, engaged in the task of determining whether the conduct it found proved amounted to professional misconduct. He referred to para [39] of the Tribunal's expanded reasons (set out at para [21] above) and contended that the reasoning was "purely conclusory".

[28] Mr Harrison criticised the lack of any analysis of evidence that led to the finding that Mr Bhanabhai's failure to honour the undertaking was "deliberate". In doing so he pointed to uncontradicted evidence given by Mr Bhanabhai and Mr Gilchrist, a barrister instructed on bankruptcy proceedings brought against Mr Bhanabhai by the Commissioner, to support the propositions that Mr Bhanabhai acted on advice from counsel experienced in bankruptcy proceedings, was unable to pay and could not comply with the undertaking.

[29] Mr Illingworth QC, for the Society, submitted that the doctrine of merger did not apply to disciplinary proceedings brought in respect of an alleged breach of undertaking, notwithstanding the earlier invocation of the High Court's inherent jurisdiction to supervise its officers on the application of the person in whose favour the undertaking was given. He submitted that while the action taken by the Commissioner "may have consequences *inter partes*, there is no reason to conclude that a disciplinary body that was never a party to the Court proceedings, and which had no say whatsoever in the form of the order made, should be bound by a technicality arising from the precise form of the judgment". Mr Illingworth relied on what he described as the "classic description of cause of action estoppel", set out in *Thoday v Thoday* [1964] P 181 (CA) at 197-198, per Diplock LJ.

[30] On the professional misconduct point, Mr Illingworth submitted that the real issue was whether the points raised by the practitioner amounted to an adequate excuse for failure to comply with the undertaking. While, he submitted, those factors were relevant to penalty and could be taken account in mitigation, they did not provide the practitioner with a defence, as no justification existed for the continued breach.

[31] Mr Illingworth submitted that breach of an undertaking, without adequate excuse, is a classic example of professional misconduct. He relied on the observations of Carswell LCJ in *Re A Solicitor* [2001] NIQB 52.

[32] On the penalty appeal, Mr Illingworth submitted that the censure was manifestly inadequate having regard to the nature of the breach and that a period of suspension was required. Mr Harrison rejected that approach, submitting that the penalty imposed was within the range available to the Tribunal.

[33] By the end of the hearing, we discerned no real difference between counsel on the appropriate appellate approach to the issues raised:

a) On the professional misconduct issues, we are obliged to consider afresh the issues raised and to form our own view on them: *Austin Nicholls & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC) at [5] and [16].

b) The penalty decision is a discretionary decision which should be approached by reference to the principles set out in *May v May* (1982) 1 NZFLR 165 (CA), *Blackstone v Blackstone* [2008] NZCA 312 (CA) at [8] and *R v D(CA253/2008)* [2008] NZCA 254 at [66].

Analysis

(a) Was there a breach of undertaking?

[34] In the High Court, Laurenson J held that Mr Bhanabhai had given an undertaking that the GST debt would be paid to the Commissioner on receipt of proceeds of sale. Nevertheless, the Judge took the view that the undertaking was no longer capable of being honoured and, for that reason, made a compensation order.

[35] The Court of Appeal regarded the undertaking as an unqualified personal undertaking that Mr Bhanabhai was obliged to honour: at paras [50] and [51], set out at para [10] above. The Court of Appeal differed from the High Court in its view that the undertaking remained capable of being honoured. Although the Supreme Court did not decide the point, paras [7] and [8] of the leave judgment (set out at para [11] above) strongly suggest that that Court agreed with the Court of Appeal's analysis.

[36] Notwithstanding the change in reasoning, the sealed judgment of the High Court remained the same. To discharge his professional obligation, Mr Bhanabhai was required to pay $300,000 plus accrued interest and costs to the Commissioner, being the compensation awarded in the High Court. If the Commissioner had cross appealed on quantum, it is difficult to see why the amount Mr Bhanabhai was required to pay would not have been increased to $490,556 plus interest and costs. That was the amount of GST outstanding at the time the proceeding was determined.

[37] The combined effect of the Court of Appeal's reasoning and the High Court's sealed judgment is that Mr Bhanabhai's liability to the Commissioner was limited to $300,000, plus accrued interest and costs.

[38] Was that change to the debt payable by Mr Bhanabhai sufficient to discharge the undertaking? Mr Harrison's argument on the merger point rests on the proposition that the Society is bound by the consequences of the High Court

judgment, notwithstanding the difference in reasoning in the Court of Appeal and the fact that the Society was not a party to those proceedings.

[39] We have no doubt that the Tribunal's disciplinary powers, exercised on the basis of the public interest in ensuring solicitors honour undertakings, were different in kind from the enforcement proceedings taken by the Commissioner to promote his own private interest.

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

[41] We agree with Mr Illingworth that the doctrine of merger does not apply in this situation. Our starting point is the Court of Appeal's characterisation of the undertaking. The Court of Appeal reached its interpretation on the basis of the language used, the factual context in which the undertaking was given and its commercial purpose. If that reasoning had been applied in the High Court, it is likely that the award in favour of the Commissioner would have been higher.

[42] Compensation was payable because Mr Bhanabhai breached an undertaking that the High Court found incapable of present performance. On the reasoning of the Court of Appeal (with which we, respectfully, agree), the undertaking was capable of immediate performance, by paying the amount due to the Commissioner.

[43] It is impossible to divide the two causes of action pleaded in the High Court in any meaningful legal sense. Both were based on the existence and breach of an undertaking. The fact that one was dismissed but the other was not adds nothing to the analysis of the nature of the undertaking.

[44] While obligations of a fiduciary nature were incorporated into the particulars of the cause of action seeking compensation, the Commissioner's case was never put on the basis of breach of any independent fiduciary duty.

[45] The authorities on merger to which Mr Harrison referred us are all based on issue estoppel or abuse of process. In particular, we refer to the most recent analyses of the issue contained in *Fraser v HLMAD Ltd* at [20]-[22] and [29] (Mummery LJ) and [39], [50], [51] and [55] (Moore-Bick LJ). Neither issue estoppel nor abuse of process are relevant considerations in this case.

[46] Mr Bhanabhai gave an unconditional personal undertaking to pay the sum of GST to which his letter (see para [4] above) of 17 April 1997 referred. He was obliged, as the Court of Appeal found, to make payment personally, whether out of the proceeds of sale of specified units or otherwise.

[47] The High Court, fortunately from Mr Bhanabhai's perspective, limited the amount payable on a mistaken view of the intent of the undertaking. The Commissioner was unable to seek more from Mr Bhanabhai because he did not appeal the quantum of the compensatory order.

[48] If the High Court had not limited the amount payable to the Commissioner on a mistaken view of the ability of Mr Bhanabhai to perform the undertaking at that time, Mr Bhanabhai would have had an obligation to pay the full amount covered by the undertaking. The undertaking continued in effect after the Supreme Court leave judgment, albeit limited to the amount of $300,000 plus accrued interest and costs.

[49] The Tribunal was right to find that the undertaking continued in effect and that the doctrine of merger did not apply.

(b) Impecuniosity

[50] We deal next with the impecuniosity point. The starting point is that a practitioner ought not to give an undertaking which he or she cannot meet.

Impecuniosity contemporaneous to the time at which an undertaking is given is a reason why compliance might not be made and is, if anything, an aggravating factor.

[51] The position may be different if insolvency intervenes between the time an undertaking is given and the time at which it falls to be honoured. In those circumstances, the inability to pay might arise from circumstances beyond the solicitor's control. While noting the possible distinction, we leave that point open for consideration in an appropriate case.

[52] Nor is reliance on professional advice not to pay justification for a failure to honour the undertaking. Counsel advised, at the time of the negotiations, on commercial issues that were distinct from professional obligations. As we have already said (see para [40] above) contractual and professional obligations must be considered independently of each other.

[53] In the period after 27 April 2007, Mr Bhanabhai showed far more interest in protecting his personal position than in honouring the undertaking he had given, notwithstanding the professional consequences of undertakings being breached. He was not transparent about his financial position or his ability to borrow funds from family members to meet his obligations to the Commissioner. There is no foundation for the impecuniosity defence.

(c) Was the breach professional misconduct?

[54] The charge is based on a breach of r 6.07 of the Rules. That rule states:

> **6.07 Rule**
>
> Every practitioner has a professional duty to honour an undertaking, written or oral, given in the course of legal proceedings or in the course of practice; and this rule applies whether the undertaking is given by the practitioner personally or by a partner or employee in the course of the practice.

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

112 Powers of New Zealand Disciplinary Tribunal in respect of charge against practitioner

(1) Subject to this Part of this Act, if after inquiring into any charge against a practitioner the New Zealand Disciplinary Tribunal—

(a) Is of the opinion that the practitioner has been guilty of misconduct in his professional capacity; or

(b) Is of the opinion that the practitioner has been guilty of conduct unbecoming a barrister or a solicitor; or

(c) Is of the opinion that the practitioner has been guilty of negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute; or

(d) Is satisfied that the practitioner has been convicted of an offence punishable by imprisonment, and is of the opinion that the conviction reflects on his fitness to practise as a barrister or solicitor, or tends to bring the profession into disrepute,—

it may if it thinks fit make an order under this section.

[56] Delivering the judgment of the Full Court in *Complaints Committee No 1 of the Auckland District Law Society v C,* Winkelmann J approved the following observations, made by Kirby P in *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (CA) at 200:

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

See also the passage from *Corpus Juris Secundum* Vol 58, 1948, p 818 set out at para [32] of *Complaints Committee No 1 of the Auckland District Law Society v C.*

[57] In our view, Mr Bhanabhai deliberately chose before 27 April 2007 (albeit on professional advice) not to honour the undertaking he had given in 1997. Having contested his liability to pay the GST owing to the Commissioner, Mr Bhanabhai fortuitously received the benefit of a compensatory order that reduced the amount required to $300,000. Even then, he continued his refusal to honour the undertaking while he sought leave to appeal to the Supreme Court.

[58] From the date of the Supreme Court decision, Mr Bhanabhai knew that he had an uncontestable legal obligation to pay $300,000 plus accrued interest and costs to the Commissioner. He knew that obligation stemmed from a breach of undertaking. There was no other basis on which a money judgment could have been entered. At best, from 27 April 2007 until the Tribunal hearing, Mr Bhanabhai deliberately tried to avoid his obligation to pay, showing complete indifference to his professional obligation to honour the undertaking. In our view, the breach after 27 April 2007 was deliberate. That is an accepted basis for a finding of professional misconduct: see *Pillai* at 200, as adopted by *Complaints Committee No 1 of the Auckland District Law Society v C*.

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

[60] While a breach of an undertaking will, generally, be regarded as professional misconduct, that result does not automatically follow. In a case involving an unconditional undertaking designed to meet an obligation out of the proceeds of sale of a property (*Countrywide Banking Corporation Ltd v Cooke* (1990) 4 PRNZ 252 (HC) at 257), Barker J said:

> [An order compelling performance of an undertaking] does not constitute a finding of unprofessional conduct against the defendant. There are many

> examples of solicitors being required to honour clear undertakings given purely to assist their clients and with no motive of personal gain whatsoever. This case demonstrates that, if an undertaking is to be conditional, then any condition must be clearly spelled out in the wording of the undertaking. One has considerable sympathy for the defendant who appears to have been let down badly by his client. However, for what consolation it is worth, the authorities indicate that he is now subrogated to the client's rights against the purchaser.

[61] The importance of undertakings to the work of members of the legal profession is emphasised by Professor Duncan Webb, in *Ethics, Professional Responsibility and the Lawyer* (LexisNexis, 2nd ed, 2006), para 15.9.1 at 506-507:

> The reasons for the rule, which requires the strict adherence to undertakings, are pragmatic. Undertakings are common throughout legal practice and the continued efficient working of legal practice requires that such undertakings be honoured regardless of other supervening circumstances. The additional reason for the strict application of the rule is to main 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.

[62] Although expressed in different words, the themes to which we have referred are reflected fully in the judgment of the Tribunal. Rightly, the Tribunal emphasised the need for practising lawyers to be able to rely upon each other and the concomitant problems that can arise if lack of confidence in a practitioner's trustworthiness to perform his or her undertaking exists.

[63] In our view, Mr Bhanabhai's conduct in not honouring the undertaking breached r 6.07 of the Rules. Indisputably, he failed to pay the Commissioner as promised. The undertaking continued in effect after 27 April 2007 and gave rise to an ethical obligation that could be met by disciplinary sanction. The fact that it could also be enforced by the Commissioner bringing bankruptcy proceedings against Mr Bhanabhai is beside the point.

[64] To explain our reasons for reaching that view, it is necessary to refer to events that occurred before 27 April 2007. Those events are relevant because they

demonstrate a continuing course of conduct which provides the context in which Mr Bhanabhai's failure to honour the undertaking after that date should be assessed:

a) First, the undertaking was given as a means of securing a refund of GST from the Commissioner in circumstances in which it would not otherwise have been paid.

b) Second, there was no attempt to pay GST to the Commissioner, in respect of the sale of some individual units, even though some of the proceeds of sale passed through Mr Bhanabhai's trust account.

c) Third, at the time the undertaking was breached Mr Bhanabhai had a clear conflict of interest between allowing the net proceeds of sale to be used to reduce the debt to UDC (which he had guaranteed) and his ethical obligation as a solicitor to honour his undertaking to pay those funds to the Commissioner. Therefore, the breach does not fall within the lesser category of breach to which Barker J referred in *Countrywide Banking Corporation Ltd v Cooke*; see para [60] above.

d) Fourth, leaving aside the period during which there was a dispute about enforceability of the undertaking, once the Supreme Court dismissed his application for leave to appeal, Mr Bhanabhai made no serious attempt to pay the Commissioner. While he has criticised the Commissioner's stance in not accepting his offers of settlement, it appears that the Commissioner's view that he would be paid a greater sum if Mr Bhanabhai was taken to the brink of bankruptcy proved correct. We were told at the hearing that the undertaking has, since the hearing before the Tribunal, been discharged.

(e) The penalty appeal

[65] We deal briefly with the Society's cross appeal against the penalty imposed.

[66] Having regard to the circumstances of the breach and the mitigating factors identified by the Tribunal, Mr Bhanabhai was fortunate not to be suspended from practice. A differently constituted Tribunal may have legitimately concluded that suspension was the correct penalty.

[67] However, applying the *May v May* test for appeals against discretionary decisions, we cannot say that the penalty imposed was outside the range available to the Tribunal.

[68] A censure can be seen as an effective penalty. Mr Bhanabhai is now a sole practitioner. Those members of the profession who read the published censure will become aware (or be reminded) that he has breached an undertaking in a manner that amounts to professional misconduct. In the context of a person who practises alone, the likely consequence of other practitioners not accepting his undertaking is severe.

[69] The penalty was not manifestly inadequate. The cross appeal fails.

Result

[70] The appeal against the finding of professional misconduct is dismissed. The cross appeal against penalty is also dismissed.

[71] On 30 September 2008, without opposition from the Society, Venning J made an order suppressing Mr Bhanabhai's name from publication, pending further order of the Court. Counsel agree that there is no reason to continue name suppression, if the appeal were unsuccessful. Accordingly, the order suppressing Mr Bhanabhai's name is discharged.

[72] We did not hear counsel on questions of costs. We prefer to give counsel time to consider those issues. A joint memorandum shall be filed on or before 1 May 2009 indicating whether costs have been agreed. If costs have not been agreed, counsel's memorandum shall submit a timetable for the exchange of submissions (not to exceed five pages each) for the Court's approval. Issues of costs will be addressed on the papers.

[73] We thank counsel for their assistance.

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Priestley J

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P R Heath J

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H D Winkelmann J

Delivered at 9am on 7 April 2009