QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Healy* [2025] QCAT 171
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **JOHN FRANCIS HEALY** (respondent)
APPLICATION NO:	OCR269-23
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	7 May 2025
DELIVERED AT:	Brisbane
HEARING DATE:	23 April 2025
JUDGE:	Justice Davis Assisted by: Mr Richard Barnes, Practitioner Panel Member Ms Patrice McKay, Lay Panel Member

ORDER:

1. **Charge 1 is proved and unsatisfactory professional conduct is established.**
2. **Charge 2 is proved and unsatisfactory professional conduct is established.**
3. **The LSC shall file and serve any material and written submissions on sanction and costs by 4.00 pm on 14 May 2025.**
4. **The respondent shall file and serve any material and submissions in reply by 4.00 pm on 21 May 2025.**
5. **Each party shall have leave to file and serve a notice requesting to make further oral submissions by 4.00 pm on 28 May 2025.**
6. **In the event that no notice pursuant to order 5 is given by 4.00 pm on 28 May 2025, the issue of sanction and costs will be determined on any written submissions received without further oral hearing.**
7. **Costs reserved.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY

PROFESSIONAL CONDUCT – GENERALLY – where the respondent was retained by a client to act in a de facto property settlement – where the de facto partners executed a binding financial agreement pursuant to the *Family Law Act 1975* – where the terms of the binding financial agreement provided for the transfer of the de facto partners' interest in two properties from one to the other – where the respondent was provided with executed transfer documents for the transfer of the opposing party's interest in the two properties – where the respondent undertook to only use the transfer documents for "stamping purposes, pending settlement" – where the opposing party withdrew the respondent's authorisation for the use of the transfer documents – where the respondent used the transfer documents to unilaterally effect the transfer of the property – where the respondent was charged with breach of his undertaking made in relation to transfer documents and the failure to act with competence and diligence – whether the respondent was guilty of professional misconduct – whether the respondent was guilty of unsatisfactory professional conduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – GENERALLY – where the respondent was charged with the breach of an undertaking and the failure to act with competence and diligence – where the Commissioner submitted that the Tribunal could make findings as to the respondent's knowledge that their alleged conduct breached the undertaking – where the pleaded charges did not make any allegation about the respondent's state of mind at the time of the alleged conduct – where it was not put to the respondent in cross-examination that he had knowledge that his alleged conduct would breach the undertaking – where the respondent's evidence did not support a finding that they had knowledge that their conduct would breach the undertaking – where the Commissioner submitted that it was open on the charge to make a finding as to the respondent's knowledge that his conduct would breach the undertaking – where the Commissioner did not seek to amend the charge or the particulars – where the Tribunal's jurisdiction is limited to the allegations made in the disciplinary application – whether the Tribunal could make a finding as to whether the respondent breached the undertaking with knowledge that his actions would breach the undertaking

Family Law Act 1975 (Cth), s 90UD, s 90UL, s 90UM
Legal Profession Act 2007 (Qld), s 418, s 419, s 452
Uniform Civil Procedure Rules 1999 (Qld), r 150

Adamson v Queensland Law Society Incorporated [1990] 1 Qd R 498, cited
Banque Commerciale S.A., En Liquidation v Akhil Holdings Limited (1990) 169 CLR 279; [1990] HCA 11, considered
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, cited
Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In Liq) (1916) 22 CLR 490; [1916] HCA 81, considered
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1, followed
Legal Profession Complaints Committee v Detata [2012] WASCA 214, followed
Legal Services Commissioner v Bone [2014] QCA 179, cited
Legal Services Commissioner v Li [2023] QCAT 383, followed
Legal Services Commissioner v Madden [2009] 1 Qd R 149; [2008] QCA 301, explained
Legal Services Commissioner v Wrightway Legal [2015] QCAT 174, followed
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, followed
Puryer v Legal Services Commissioner [2012] QCA 300, distinguished
R v Trifyllis [1998] QCA 416, considered
Reinhard v Bell [2015] NSWSC 818, followed
Tatham v Huxtable (1950) 81 CLR 639; [1950] HCA 56, followed
Walsh v Law Society of New South Wales (1999) 198 CLR 73; [1999] HCA 33, cited

APPEARANCES & REPRESENTATION:

Applicant:	R K Micairan of counsel instructed by the Legal Services Commission
Respondent:	The respondent appeared in person

[1] An application was brought by the Legal Services Commissioner (LSC) pursuant to s 452 of the *Legal Profession Act 2007* against John Francis Healy. Mr Healy is a solicitor in private practice. The application alleges professional misconduct arising from Mr Healy's performance of a retainer concerning a binding financial agreement (BFA) executed by his client pursuant to the *Family Law Act 1975*. Significantly, it is alleged that he breached an undertaking which he gave to another legal practitioner acting in the matter.

Background

[2] John (a pseudonym) and Jane (a pseudonym) lived in a de facto relationship for about seven years before separating in early 2020. They sought to have their financial affairs settled by a BFA entered into pursuant to s 90UD of the *Family Law Act*.

[3] At the time of separation, John and Jane owned properties at Keperra and Russell Island. Both were subject to mortgages, one to the Commonwealth Bank of Australia (CBA) and one to the National Australia Bank (NAB).

[4] Mr Healy acted for John in the property settlement. Bridge Brideaux Porta Lawyers initially acted for Jane. Mr Healy prepared the first draft of the BFA and sent it to Bridge Brideaux Porta. After some negotiations about terms, the BFA was executed by both John and Jane.

[5] The terms of the BFA, which are relevant to the current application, are:

> "**1. Assets and liabilities**
>
> The assets and liabilities of the parties are set out in annexure A of this agreement. The parties confirm that they agree with the estimated values as set out in annexure A.
>
> **2. Transfer of real property**
>
> (a) [Jane] will do all acts and things and sign all documents necessary to transfer to [John] her right title interest in the [Keperra property] and [the Russell Island property] (**the real property**) at the expense of [John] (**the transfer**).
>
> (b) The transfer is to occur at a time to be agreed between the parties, but by no later than thirty (30) days of the signing of this agreement by both [John] and [Jane] (**the settlement date**).
>
> (c) Contemporaneously with the transfer [John]:
>
> (i) will assume all liability for and indemnify [Jane] against all payments for the mortgage debt secured over the property;
>
> (ii) will assume all liability for and indemnify [Jane] against all rates, taxes, duty and outgoings of or with respect to the property or the transfer of the property of whatsoever nature and kind;
>
> (iii) will refinance the mortgage debts currently in joint names into a new loan/s and mortgage/s in his sole name; and
>
> (iv) will pay to [Jane] the sum of FORTY THOUSAND dollars ($40,000.00) (**the payment**) in the manner described in clause 3 below.
>
> **3. Payment**

The payment to be made by [John] to [Jane] as described in clause 3 above is to be made to Bridge Brideaux Porta Lawyers Trust Account by 3.00 pm on the Settlement Date.

4. Default provision - Sale of real property

However, it is now agreed between the parties, that should the provisions of clause 3 not be honoured, [John] and [Jane] agree in the alternative, that:

(a) Both parties will take all necessary steps and execute all necessary documents to cause the real property to be sold by private treaty at the earliest possible date at a price to be agreed on between the parties and failing such agreement to be determined by the proper officer of the Real Estate Institute or their nominee and that the proceeds of the said sale be disbursed as follows:

(i) Payment of agent's commission and advertising expenses and legal expenses of the sale;

(ii) Payment of any money due and owing to the mortgagee;

(iii) The net balance to be divided between the parties as follows:

(1) 50% to [John]; and

(2) 50% to [Jane].

(b) That in the event that the real property fails to be sold by private treaty within a period of three months of the date of this agreement, then each party take all necessary steps and execute all necessary documents to cause the said property to be sold by auction at the earliest possible date at a reserve to be agreed upon between the parties and failing such agreement to be determined by the proper officer of the Real Estate Institute or their nominee and that the proceeds of the said sale be disbursed as follows:

(i) Payment of agent's commission and advertising expenses and legal expenses of the sale;

(ii) Payment of any money due and owing to the mortgagee;

(iii) The net balance to be divided between the parties as follows:

(1) 50% to [John]; and

(2) 50% to [Jane].

(c) That until the sale of the property the parties continue to pay as they fall due all regular instalments in respect of the mortgage, council rates and water rates in respect of the property.

5. Severance of Default Provision

> To remove any doubt, clause 4 above has no effect and is severable from this agreement if the terms of clause 3 above and the obligations therein are performed by [John] and [Jane]."

[6] As well as those clauses, the BFA obliged John to transfer to Jane his interest in a Toyota RAV4 motor vehicle. Otherwise, the BFA contained various provisions which are either formal in nature or necessary to have the agreement comply with the statutory requirements of the *Family Law Act*.

[7] Relevantly, John was to pay Jane $40,000 in exchange for her interest in the two properties, and John was to re-finance the loans secured by the mortgages on the two properties so as to extinguish Jane's liability to the CBA and the NAB.

[8] The BFA was executed on 31 August 2021. It was common ground that the 30-day period prescribed by clause 2(b)[1] expired on 30 September 2021.

[9] On 1 September 2021, Mr Healy sent transfer documents to Bridge Brideaux Porta under cover of a letter in which he said:

> "Please return completed Forms 1 and 24 upon our undertaking, hereby given, to use same for stamping purposes only, pending settlement."

[10] The Forms 1 and 24 were the forms necessary to transfer Jane's interest in the Keperra and Russell Island properties to John. I will refer to these documents as "the transfer documents".

[11] On 13 September 2021, Bridge Brideaux Porta wrote to Mr Healy enclosing the transfer documents executed by Jane. In the letter, Bridge Brideaux Porta said:

> "The transfers have been duly executed by our client and are delivered pursuant to your undertaking to hold for stamping purposes only until settlement has been effected."

[12] On 21 September 2021, Bridge Brideaux Porta wrote again to Mr Healy pointing out that, by the terms of the BFA, settlement was to be effected no later than 30 September 2021. They also asked for Mr Healy to confirm that he had arranged for the CBA and the NAB to discharge the two mortgages.

[13] Each bank required both John and Jane to execute an authority (called a discharge authority) authorising the bank to discharge the mortgage. Jane signed discharge authorities in favour of both banks, and, on 27 September 2021, Bridge Brideaux Porta sent those signed discharge authorities to Mr Healy. Copies had been emailed to Mr Healy earlier in the day.

[14] On 29 September 2021, Bridge Brideaux Porta wrote to Mr Healy again, pointing out that settlement was due no later than 30 September 2021 and acknowledging that $30,000 of the $40,000 payable by John under the BFA had been paid to their trust account. They asked whether releases of the mortgages had been obtained. That was

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[1] Set out at paragraph [5] of these reasons.

an odd request. The banks, as a matter of commercial practice, would not release the mortgages until the debts secured were paid. It was common ground that in order to discharge the debts, John had to raise money by re-finance. In any event, the letter was concluded by:

> "Should your client not be able to fulfill its obligations under the Agreement, we recommend that an extension be sought by him."

[15] On 1 October 2021, a further $10,000 was paid to the trust account of Bridge Brideaux Porta, pursuant to the BFA.

[16] By 11 October 2021, Mr Healy had sent the signed discharge authorities to the banks, but there were some issues that needed to be attended to.

[17] On 12 October 2021, Bridge Brideaux Porta wrote to Mr Healy acknowledging receipt of a total of $40,000 and then said:

> "We note your client has not delivered releases of mortgages to our client and is in breach of the Agreement.
>
> We are obtaining our client's instructions in relation to the breach."

[18] On 26 October 2021, there was a conversation between Mr Healy and Jane's solicitors, which provoked an email to be sent by Mr Healy to John in these terms:

> "I have had a phone call from [Jane's] Solicitors warning that if these properties are not re-financed shortly, they will proceed to sell them under the Binding Financial Agreement.
>
> You may have to chase up the banks."

[19] The reference in that email to selling the properties pursuant to the BFA is no doubt a reference to clause 4 headed "Default provision - Sale of real property". Mr Healy wrote to Bridge Brideaux Porta on 1 November 2021 in these terms:

> "We refer to our recent telephone conversation and advise that our client instructs that re-finance of the CBA mortgage is expected to be completed in approximately one week, and re-finance of the NAB mortgage is expected in approximately three weeks.
>
> Each of the banks advise they are currently experiencing delays with re-finance applications.
>
> We shall keep you advised of the any further delays in completing the re-finances."[2]

[20] Jane terminated the instructions of Bridge Brideaux Porta. On 5 November 2021, those solicitors wrote to Mr Healy, relevantly:

> "We no longer act for [Jane] in relation to this matter. We have been informed that she has retained Helen Ruffles of Biggs Fitzgerald Pike Solicitors.

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2 This extract has been faithfully reproduced notwithstanding the appearance of obvious errors.

> We are presently arranging for our files to be delivered to Biggs Fitzgerald Pike.
>
> We note your undertaking to hold transfer documents for stamping only. We confirm settlement did not occur and accordingly we respectfully suggest you return the transfers to Biggs Fitzgerald Pike until they advise their client's position.
>
> We note [John] is in breach of the terms of the Financial Agreement."

[21] On the same day, Biggs Fitzgerald Pike wrote to Mr Healy in these terms:

> "We refer to the above matter and advise that we have received instructions to act on behalf of [Jane].
>
> We are presently taking instructions from our client in relation to the Financial Agreement between the parties dated 31 August 2021, specifically whether there are grounds for the same to be set aside.
>
> We are waiting to receive our client's file from her former solicitors.
>
> We note however that you wrote to Bridge Brideaux Porta Lawyers on 1 November 2021 with respect to the proposed refinancing of the Commonwealth Bank and National Australia Bank Mortgages Secured over the Keperra and Russell Island properties.
>
> **Pending our further advices to you, we advise that you are not to deal with the transfers for the Keperra and Russell Island properties that have been executed by our client and in particular you are not to cause them to be registered with the Department of Natural Resources, Mines and Energy. The transfers are held by you to our client's order and at this stage she does not consent to your dealing with them in any way.**
>
> We require your written undertaking by close of business today that you will not deal with the transfers pending further communications from ourselves.
>
> We look forward to hearing from you."

[22] Mr Healy responded on 5 November 2021 in these terms:

> "We refer to your letter of todays date.
>
> We note your request not to deal with the Transfers for the respective properties. Is this your clients attempt to repudiate the Binding Financial Agreement? If so, we will require greater substance than "we are presently taking instructions from our client".
>
> We have experienced delays with the relevant banks because of the current delays occurring with all banks in the current conveyancing climate.
>
> Settlements have not yet been booked. At present we are expecting settlements to occur around 12th November 2021.

> This gives you ample time to caveat the properties if you believe you have sufficient grounds, which we do not accept. If you do lodge caveats we will make application for removal, with costs.
>
> We do not undertake not to deal with the Transfers."[3]

[23] On 9 November 2021, Mr Healy attended settlement with the banks. The transfer documents were handed to the re-financing bank and the outgoing banks released their mortgages and thereby released Jane from all debt. Registration of the transfers resulted in John being the sole registered proprietor of the fee simple on both the Keperra and Russell Island properties.

[24] On the day of settlement Mr Healy wrote to Biggs Fitzgerald Pike advising of settlement of the transfer and the release of Jane from any liability under the mortgages of the two properties.

[25] Neither John nor Jane, apparently, had any complaint about Mr Healy's actions, but Biggs Fitzgerald Pike lodged a complaint to the LSC alleging a breach of the undertaking.

[26] In due course an application was filed by the LSC and later amended. The charges and particulars in their amended form are as follows:

> "***Charge 1 – breach of undertaking***
>
> 1. On 9 November 2021 the Respondent[4] breached a written undertaking given by him on 1 September 2021 to only use the completed Titles Registry Form 1 and Form 24 (**Transfer Documents**) for stamping purposes, pending settlement.
>
> **Particulars**
>
> 1.1 At all material times, the Respondent was:
>
> a. an Australian lawyer as defined under section 5(1) of the Act, having been admitted to practice in the state of Queensland on 14 May 1984;
>
> b. an Australian legal practitioner as defined in section 6(1) of the Act; and
>
> c. the sold practitioner of the law practice trading as John Healy & Co, and its principal as defined by section 7(4)(a) of the Act.
>
> 1.2 The Respondent acted for a client [John] with respect to a section 90UD Financial Agreement under the *Family Law Act* 1975 (**BFA**) with [John's] ex-partner, [Jane]. The BFA was executed on 31 August 2021.
>
> 1.3 [Jane] was represented by Bridge Brideaux Porta Lawyers (**BBPL**) when she entered into the BFA.

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3 This extract has been faithfully reproduced notwithstanding the appearance of obvious errors.

4 Mr Healy.

1.4 The BFA relevantly provided that:

'2. Transfer of real property

a. [Jane] will do all acts and things and sign all documents necessary to transfer to [John] her right title interest in the [Keperra property] and [the Russell Island property] (the real property) at the expense of [John] (the transfer).

b. The transfer is to occur at a time to be agreed between the parties, but by no later than thirty (30) days of the signing of this agreement by both [John] and [Jane] (the settlement date).

c. Contemporaneously with the transfer [John]:

(i) will assume all liability for and indemnify [Jane] against all payments for the mortgage debt secured over the property;

(ii) will assume all liability for and indemnify [Jane] against all rates, taxes, duty and outgoings of or with respect to the property or the transfer of the property of whatsoever nature and kind;

(iii) will refinance the mortgage debts currently in joint names into a new loan/s and mortgage/s in his sole name; and

(iv) will pay to [Jane] the sum of FORTY THOUSAND dollars ($40,000.00) (the payment) in the manner described in clause 3 below.

3. Payment

The payment to be made by [John] to [Jane] as described in clause 3 above is to be made to Bridge Brideaux Porta Lawyers Trust Account by 3.00 pm on the Settlement Date.

1.5 The BFA also provided at clause 4 that should the payment under clause 3 not be made, that the real property was to be sold at the earliest possible date and the balance proceeds to be split equally between [Jane] and [John].

1.6 <u>In relation to the real property named in clause 2 of the BFA, at all material times prior to 9 November 2021:</u>

a. <u>[The Keperra property] was mortgaged to the Commonwealth Bank of Australia (**CBA**); and</u>

b. <u>[The Russell Island property] was mortgaged to the National Australia Bank Ltd (**NAB**).</u>

1.7 On 1 September 2021, the Respondent sent a letter to BBPL which enclosed the unsigned Transfer Documents. In the Respondent's letter, he gave the following undertaking:

'*Please return completed Forms 1 and 24 upon our undertaking, hereby given, to use same for stamping purposes only, pending settlement.*'

(**Undertaking**)

1.8 On 13 September 2021, BBPL returned the Transfer Documents to the Respondent pursuant to the Undertaking.

1.9 On 29 September 2021, BBPL wrote to the Respondent to:

a. note the upcoming Settlement Date, which pursuant to the BFA was the following day, 30 September 2021;

b. confirm receipt of $30,000.00 (of the $40,000.00 payment) into BBPL's trust account from [John];

c. request proof of executed releases of mortgage documents for the real properties by the Settlement Date; and

d. suggest that [John] seek an extension of time for his obligations under the BFA if he was unable to settle by the Settlement Date.

1.10 [John] did not comply with clauses 2 and 3 of the BFA by the Settlement date of 30 September 2021.

1.11 On 1 October 2021 [John] paid an additional $10,000.00 into the trust account of BBPL.

1.12 On 4 October 2021, the NAB sent an email to the Respondent indicating that:

a. it had received the Discharge Authority form for the Russell Island Property; and

b. there were incomplete details or that further information was required before it could continue to process the discharge request.

1.13 On 12 October 2021, BBPL wrote to the Respondent to advise that:

a. there was no request by [John] to extend the settlement date;

b. in circumstances where they had not received releases of mortgages for the real property, they considered [John] was in breach of the BFA; and

c. they were obtaining instructions from [Jane] in relation to the breach.

1.14 On 12 October 2021, the NAB sent another email to the Respondent advising that the outstanding requirements to the Discharge Authority form still had not been met.

1.15 On 26 October 2021, the Respondent sent an email to [John] informing him of a telephone with BBPL during which BBPL warned that "*if these properties are not refinanced shortly, they will proceed to sell them under the Binding Financial Agreement.*"

1.16 On 1 November 2021, the Respondent wrote to BBPL as follows:

"*…our client instructs that refinance of the CBA mortgage is expected to be completed in approximately one week, and refinance of the NAB mortgage is expected in approximately 3 weeks.*

Each of the banks advise they are currently experiencing delays with refinance applications."

1.17 On 2 November 2021, Mr Jeffrey Biggs of Biggs Fitzgerald Pike Solicitors (**BFPS**) was engaged by [Jane].

1.18 On 5 November 2021, BBPL wrote to the Respondent and advised that:

a. they had not released trust moneys to [Jane];

b. they had not received the releases of mortgages; ~~and~~

c. that they no longer act for [Jane], and that she is now represented by the Mr Jeffrey Bigg's firm, Biggs Fitzgerald Pike Solicitors;

d. they were presently arranging for their files to be delivered to BFPS;

e. they noted the Respondent's undertaking to hold transfer documents for stamping only;

f. as settlement did not occur, they suggested that the Respondent return the transfers to BFPS until BFPS advised of [Jane's] position; and

g. they noted that [John] was in breach of the BFA.

1.19 On 5 November 2021, BFPS wrote to the Respondent and advised that they now act for [Jane] with respect to the BFA matter. BFPS advised:

a. that he was taking instructions from [Jane] in relation to setting aside the BFA;

b. requested that the Respondent not to deal with and/or register the Transfer Documents for the real property;

c. requested an undertaking from the Respondent that he not deal with the Transfer Documents pending further communication from Mr Biggs; and

d. that they were waiting to receive [Jane's] file from her former solicitors.

1.20 On 5 November 2021, the Respondent replied to BFPS and advised that:

'We note your request not to deal with the Transfers for the respective properties. Is this your clients [sic] attempt to repudiate the Binding Financial Agreement? If so, we will require greater substance than "we are presently taking instructions from our client"

We have experienced delays with the relevant banks because of the current delays occurring with all banks in the current conveyancing climate. Settlements have not yet been booked. At present we are expecting settlements to occur around 12th November 2021.

This gives you ample time to caveat the properties if you believe you have sufficient grounds, which we do not accept. If you do lodge caveats we will make application for removal, with costs.

We do not undertake not to deal with the Transfers.'

1.21 On 5 November 2021, the Respondent emailed [John] forwarding the correspondence from BBPL and BFPS referred to at 1.18 and 1.20 above.

1.22 In his email to [John] of 5 November 2021, the Respondent also wrote that:

a. they had received correspondence from the NAB indicating it was proceeding with the refinance;

b. they had not received any correspondence from the CBA, but have phoned the CBA; and

c. [John] should contact the CBA to clarify his instructions to the CBA.

1.23 On 5 November 2021, the Respondent wrote to the NAB by email to arrange settlement as follows:

a. that a paper settlement was required due to the need to hand over an executed 'Paper Transfer'; and

b. that it was hoped that the settlement could take place at the offices of the NAB or their agent in Brisbane CBD on 10 November 2021.

1.24 On 9 November 2021 at 11:03AM, BFPS wrote to the Respondent and stated:

'If you deal with our client's transfer documents when we have asked you not to, then you will have breached the written undertaking given in your letter to [BBPL] dated 1 September 2021.'

1.25 On 9 November 2021 at 5:13PM, the Respondent emailed Mr Biggs to advise him that settlement had been effected.

1.26 In the circumstances of particulars 1.2 to ~~1.17~~ 1.25 above, where:

a. the full payment under clause 4 of the BFA had not been made by the settlement date;

b. the releases of mortgages for the real property had not been provided to [Jane] by the settlement date;

c. the agreed settlement date under the BFA had elapsed and had not been extended; and

d. the respondent was put on notice that [Jane], through her solicitor, had requested that the Transfer Documents not be dealt with,

the Respondent unilaterally attending to settlement and lodging the Transfer Documents for registration constitutes a breach of the Undertaking.

Charge 2 – failure to act with competence and diligence

2. Between on or about 30 September 2021 and on or about 9 November 2021, the Respondent failed to act with competence and diligence with regard to his conduct in purportedly carrying out the terms of a binding financial agreement.

Particulars

2.1 The applicant repeats and relies on particulars 1.1 to 1.25 above.

2.2 In the circumstances where the Respondent:

a. was aware that it was contended that [John] was in breach of the BFA;

b. was aware that the settlement date under that BFA had elapsed;

c. was aware that [Jane] was considering exercising the option under BFA to sell the properties;

d. was informed that instructions were being sought from [Jane] by her legal representatives regarding setting aside the BFA;

e. was informed that [Jane's] brief was still to be received by her new legal representatives; and

f. was expressly requested by both [Jane's] previous and new legal representatives not to deal with the signed transfers;

the Respondent's conduct in unilaterally effecting settlement of the Keperra Property and the Russell Island Property fell short of a standard of competence and diligence expected of a reasonably competent legal practitioner."[5]

Observations about the charges

Charge 1

[27] During submissions, Mr Micairan for the LSC submitted that should I find that Mr Healy breached the undertaking knowing, at the time of the breach, that his actions, in fact, breached the undertaking, then professional misconduct would be established. If I found that Mr Healy did breach the undertaking, but did not believe that his actions breached the undertaking, then unsatisfactory professional conduct would be established, it was submitted.

[28] Neither the charge itself nor the particulars make any allegation as to Mr Healy's state of mind at the time he allegedly breached the undertaking.

[29] In *Legal Services Commissioner v Madden*,[6] the Court of Appeal held that the jurisdiction of the Legal Practice Tribunal (then the relevant body) was limited to the allegations made in the discipline application. Therefore, it was held that if an allegation is not made that the offending actions of the practitioner were done dishonestly, the Tribunal had no jurisdiction to find dishonesty.[7]

[30] Mr Micairan submitted that *Madden* only had application to allegations of dishonesty rather than any other state of mind. In other words, he submitted that it was open on the charge or the particulars to find that Mr Healy breached the undertaking knowing that his actions breached the undertaking, even though no such allegation is made in the charge or particulars.

[31] While it is clear from cases such as *Puryer v Legal Services Commissioner*,[8] that there are no hard and fast rules as to what language must be used, and that the scope of the allegations will ultimately depend upon the wording and structure of the charge as particularised, there is no reason in principle to doubt that where a particular state of mind, including dishonesty, is relied upon as an aggravating circumstance, that state of mind must be alleged in the charge or at least the particulars.

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5 The underlining identifies amendments made to the charges and particulars as originally filed.

6 [2009] 1 Qd R 149.

7 Following *Walsh v Law Society of New South Wales* (1999) 198 CLR 73 at 93-97; and followed in *Legal Services Commissioner v Bone* [2014] QCA 179.

8 [2012] QCA 300.

[32] The requirement to specifically plead a state of mind is a requirement of civil procedure.[9] Further, pleadings in civil cases[10] and particulars in criminal charges[11] serve to provide procedural fairness. The same principles apply to disciplinary proceedings.[12] If the LSC intended to seek a finding that at the time Mr Healy breached the undertaking he positively, subjectively knew that his actions were breaching that professional obligation, that allegation ought to have been alleged either in the body of the charge or at least in the particulars.

[33] Mr Micairan submitted that Mr Healy was cross-examined consistently with an understanding that the LSC was alleging he held the specific state of mind now identified. If that were so, that would not remedy the defects in the charge. It may found the basis of an application to amend either the charge or the particulars. No application was made. Any application would have faced difficulties. While it was put to Mr Healy that he was aware of certain things, it was not even remotely suggested that he knew that his actions were in breach of the undertaking. His evidence was quite to the contrary and not challenged.

[34] Charge 1 alleges that Mr Healy breached the undertaking to use the completed Titles Registry Form 1 and Form 24 (transfer documents) "for stamping purposes only, pending settlement". It was contemplated by Mr Healy and by Bridge Brideaux Porta that the transfer documents would be retained by Mr Healy after stamping. That is made clear by the fact that the undertaking requires the documents to be held pursuant to the undertaking "pending settlement". It follows that what was contemplated by the undertaking is that Mr Healy would use the documents at settlement. Therefore, as was accepted by Mr Micairan, the undertaking allowed Mr Healy to use the documents for two purposes: (1) stamping; and (2) settlement.

[35] Mr Healy, in fact, only used the documents for those two purposes, so the charge itself does not catch the gravamen of the conduct.

[36] The particulars to charge 1 make clear that the LSC's real case was that the undertaking only allowed Mr Healy to use the documents for "settlement" where he was otherwise entitled to proceed to settlement. The LSC's case is that once the time prescribed by clause 2(b) of the BFA expired, both John and Jane acquired the rights under clause 4, with the result that Mr Healy could not proceed to settlement unilaterally. That is, without the consent of Jane. To use the transfer documents without that consent was, on the LSC's allegations, a breach of the undertaking. Mr Healy accepted that was the case that he had to meet.

Charge 2

[37] Charge 2 is not charged as an alternative to charge 1, but as an additional charge. It is alleged by charge 2 that, in the circumstances, it was inappropriate for Mr Healy to unilaterally proceed to settlement, and that by so doing he "failed to act with competence and diligence" expected of a reasonably competent legal practitioner.

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9 *Uniform Civil Procedure Rules 1999*, r 150(k).

10 *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490 at 517; and *Banque Commerciale S.A., En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279 at 286 per Mason CJ and Gaudron J.

11 *R v Trifyllis* [1998] QCA 416 at [18]; following *R v Juraszko* [1967] Qd R 128 at 135.

12 *Legal Services Commissioner v Li* [2023] QCAT 383 at [89]; following *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [26].

[38] Charge 2 is, therefore, dependent upon a finding that Mr Healy was not entitled to proceed to settlement without the consent of Jane. For the reasons already explained, that is the gravamen of charge 1. Charges 1 and 2 are, therefore, different sides of the same coin. If Mr Healy was not entitled to proceed to settlement unilaterally, then he has: (1) breached the undertaking (charge 1); and (2) acted without due diligence and competence (charge 2).

[39] Charge 1 is the more serious charge. As charge 2 is really just a re-categorisation of the conduct alleged in charge 1, if both charges are made out then it is appropriate to impose a sanction on charge 1, but take no action on charge 2.

Proper construction of the binding financial agreement

[40] There is dispute between the LSC and Mr Healy as to the proper construction of the BFA.

[41] As already observed, it is common ground that by force of clause 2(b) the "settlement date" was fixed at 30 September 2021. Mr Micairan submitted that by force of clause 2(b) the settlement date can be extended by agreement. That submission should be rejected. Clause 2(b) does not contemplate the parties extending settlement past the "settlement date". Clause 2(b) contemplates settlement before the settlement date "at a time to be agreed between the parties", but that agreed date shall be "no later" than "the settlement date" which is 30 days from the signing of the BFA, namely 30 September 2021.

[42] Nothing, though, turns on this because it is common ground that:

(a) the settlement date came and went without settlement being effected;

(b) by the law of contract, the parties could by mutual agreement extend the settlement date, without the authority for the extension being found in clause 2(b); and

(c) no agreement setting a date for settlement whether before or after the "settlement date" was reached.

[43] Mr Healy submits that, by force of clause 5 of the BFA, once the payment of $40,000 prescribed by clause 3 is made, clause 4 has no operation. The LSC submits that there is a typographical error in each of clauses 3, 4 and 5, and that the reference in each of those clauses to "clause 3" should be a reference to "clause 2".

[44] Either of John or Jane could have applied for rectification of the BFA in order to correct any typographical error. Neither the LSC nor Mr Healy had such a right, as neither were a party to the agreement.

[45] Rectification is not necessary to correct error when the meaning of the clause(s) is otherwise clear from the proper construction of the agreement.[13] Neither the LSC nor Mr Healy submitted that the current dilemma could not be resolved upon a proper construction of the BFA.

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13 *Tatham v Huxtable* (1950) 81 CLR 639 at 645; and *Reinhard v Bell* [2015] NSWSC 818 at [25].

[46] The alleged typographical error has some significance. If the BFA is read literally, then once the payment prescribed by clause 3 is made by John, clause 5 operates so that the contractual rights upon default in settlement prescribed by clause 4 do not arise. It follows that, as time was not of the essence of the BFA, the parties would be left only with common law remedies subject to the statutory restrictions of the *Family Law Act*. The *Family Law Act* provides that a party cannot rescind a BFA, but must apply to the Federal Circuit and Family Court for relief.[14]

[47] If the BFA is construed as submitted by the LSC, then clause 5 nullifies the rights bestowed by clause 4 only when all the obligations under clause 2 are fulfilled. The fulfilment by John only of his obligation to pay $40,000 to the trust account of Bridge Brideaux Porta will not suffice to engage clause 5 and nullify the effect of clause 4.

[48] Acceptance of the LSC's proposition does give rise to a curious result. The LSC's position is that clause 4 operates where there has been a breach of any of the various obligations imposed by both parties by clause 2. If John and Jane comply with their respective obligations under clause 2, then settlement has occurred; Jane has the money to be paid to her under clause 2(c)(iv) and will have been released from her obligation to the banks, and John will have sole title to the Keperra and Russell Island properties.

[49] Once the obligations imposed upon the parties by clause 2 are fulfilled, then, completely independently of clause 5, clause 4 can have no operation because:

(a) if the reference in clause 4 to "clause 3" should be a reference to "clause 2", then the prerequisite to the rights in clause 4 arising will not be fulfilled. This is because clause 4 only has effect if "the provisions of clause [2] [are] not honoured";

(b) clause 4 contemplates that John and Jane will join in selling the Keperra and Russell Island properties. If clause 2 is complied with, Jane no longer has an interest to sell; and

(c) clause 4 contemplates that upon sale Jane will receive 50 per cent of the proceeds. That cannot be contemplated by clause 4 if clause 2 has been complied with, because Jane would have no interest in either the Keperra or Russell Island properties.

[50] In my view, though, the curiosity is solved by the expression of the purpose of clause 5. The purpose of clause 5 is expressed as "to remove any doubt". Clause 2 prescribes a scheme whereby John will pay Jane money and secure the release of her obligations to the banks and Jane will transfer to John her interest in the Keperra and Russell Island properties. Clause 4 provides an alternate scheme whereby the two properties will be sold, and the proceeds split. Clause 5 then operates "to remove any doubt" that the primary scheme is that prescribed by clause 2, and the default scheme which is provided by clause 4 only applies if the scheme prescribed by clause 2 fails through non-compliance by the parties with it.

[51] Once that is understood, the LSC's submission must be accepted.

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14 *Family Law Act 1975*, Part VIIIAB, in particular ss 90UL and 90UM.

[52] The reference in clause 3 to "clause 3" must be an error. Clause 3 reads:

> "… as described in clause 3 above …".

Clause 3 is not "above" clause 3. Clause 2 is "above" clause 3. Clause 3 refers to "the payment to be made by [John] to [Jane]". That payment is prescribed by clause 2, not by clause 3. Clause 3 only specifies the manner in which the payment is to be made, namely, to Bridge Brideaux Porta's trust account.

[53] The reference in clause 5 to "clause 3" must also be an error. That is because clause 5 refers to "the terms of clause 3 above and the obligations therein are performed by [John] and [Jane]". There are obligations imposed upon both of John and Jane by clause 2. Clause 3 merely describes how the obligation imposed upon John by clause 2(c)(iv) will be fulfilled. Clause 5 must be referring to a clause which imposes obligations upon both John and Jane. That is clause 2, not clause 3.

[54] It follows that the reference in clause 4 to "clause 3" is also an error. Once it is understood that in each of clauses 3 and 5 the reference to "clause 3" should be to "clause 2", it can be seen, as already explained, that the structure of the BFA is that clause 4 only operates if the obligations in clause 2 are not fulfilled. It is, as I have explained, an alternative scheme for the division of assets. The intention of the parties objectively ascertained from the terms of the BFA properly construed[15] is that the default provision in clause 4 only operates if there has been default in performance of the parties' respective obligations in clause 2, and therefore the scheme for division of assets prescribed by clause 2 has failed.

The parties' respective cases on charge 1

[55] The LSC submits that its case on charge 1 is proved if it demonstrates that the acts of Mr Healy are contrary to the terms of the undertaking. As previously explained, the undertaking required Mr Healy to hold the transfer documents unless authorised to hand them over. The delivery of the transfer documents, the LSC submits, constituted unauthorised use of the documents because:

(a) there had been no extension of the settlement date;

(b) no new settlement date had been otherwise set;

(c) Jane had her rights under clause 4 which she had not waived or compromised; and

(d) Mr Healy had been told by Biggs Fitzgerald Pike that Jane considered that John was in breach, and that Mr Healy should not deal with the transfer documents and specifically should not cause their registration.

[56] Mr Healy read clauses 3, 4 and 5 literally. In other words, he assumed those clauses correctly referred to "clause 3", not clause 2. His case was that as John had paid the $40,000 pursuant to clause 2(c)(iv), clause 5 operated so as to exclude the operation of clause 4. As no provision in the BFA made time of the essence, the failure of John to complete his obligations under clause 2 did not avail Jane of a right to rescind. The

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15 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46]; following *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; and *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640.

only avenue to rescission was by application to the Federal Circuit and Family Court. Mr Healy submitted that Jane was therefore bound to proceed to settlement, and consequently he was authorised to deal with the transfer documents for that purpose.

Consideration of charge 1

[57] In order to prove charge 1, all that was necessary was to objectively prove that the conduct breached the terms of the undertaking. No specific state of mind of Mr Healy need be proved.[16]

[58] The question facing Mr Healy was not whether or not Jane had a right of rescission. The issue was whether Mr Healy had authorisation to deal with the transfer documents where Jane was asserting otherwise.

[59] Whether time had ever been of the essence was also beside the point. The 30-day period prescribed by clause 2 had expired. That triggered clause 4. Both parties therefore had no obligation to unilaterally settle the property division pursuant to clause 2. They could, if they elected to do so, have the property divided pursuant to clause 4 of the BFA. It follows that Mr Healy had no authority to complete settlement in accordance with clause 2. Mr Healy's underlying understanding, no doubt caused by the typographical error in clauses 3, 4 and 5, was that settlement in accordance with clause 2 was a *fait accompli* and that Jane had no alternative courses available to her and he was thereby authorised to use the documents to settle. That understanding was incorrect.

[60] Even if that understanding was correct, Mr Healy was not authorised to deal with the documents once any authority he did have was countermanded. The transfer documents had been signed by Jane and she was under no obligation to hand them over, except in exchange for performance by John of his obligations under clause 2(c). Clause 2(c) expressly provides that John's obligations will be performed "contemporaneously with the transfer". The undertaking was a means by which Mr Healy borrowed the documents so as to stamp them. He held the documents subject to the undertaking, but also clearly subject to Jane countermanding his authority to hold them. Once Biggs Fitzgerald Pike, on Jane's behalf, withdrew Mr Healy's authority to deal with the documents, any authority to proceed to settlement was revoked and dealing with the documents was a breach of the undertaking.

[61] Mr Healy asserted during his cross-examination that he thought he was entitled to deal with the transfer documents as he did. While I have found that he was wrong about that, and I have held that the LSC have not alleged that he knew his actions breached the undertaking, I should consider whether he was honestly mistaken. If he was, that is a mitigating circumstance upon which Mr Healy can rely.

[62] Mr Healy's understanding of the position he was in was summarised in his written submissions as:

> "The Respondent stamped the Transfers and tendered them on settlement as required by the Financial Agreement.
>
> Mr Biggs was not entitled to demand return of the Transfer documents as he was obliged to effect the requirement of the Binding Financial

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16 *Legal Profession Complaints Committee v Detata* [2012] WASCA 214.

> Agreement, unless there were circumstances as to why this should not happen. No such circumstances were ever outlined by Mr Biggs.
>
> The Binding Financial Agreement had not been terminated and thus [Jane] was not entitled to prevent the terms of the Agreement from being completed.
>
> The Binding Financial Agreement was still valid and enforceable as t 9th November 202 and thus the Respondent had not breached the undertaking by using the Transfer documents at settlement.
>
> Until the Binding Financial Agreement was terminated, [Jane] could not prevent the Transfer documents being tendered at settlement.
>
> Mr Biggs has treated the Undertaking as a right to veto the settlement, when he was obliged to give effect to the terms of the Financial Agreement.
>
> Mr Biggs gave no reasons for not wishing to effect settlement.
>
> He did not seek an extension of settlement in order investigate or negotiate these unknown reasons.
>
> The Respondent has acted competently and diligently in carrying out the terms of the Financial Agreement. Indeed, to not so act, would have been incompetent."[17]

[63] It can be seen that Mr Healy's focus is upon whether the BFA could be terminated by Jane. As already observed, that is the wrong question.

[64] In cross-examination he explained:

> "[MR MICAIRAN:] When you write, "Stamping purposes only pending settlement" – that's the final line – what did you mean by that?---Well, it means that I can only use those documents – those transfer documents – to endorse stamp duty upon them, and then I can tender them at settlement. That's the only use I have of those documents."

[65] Further, this exchange occurred:

> "[HIS HONOUR:] You would agree, then, that you couldn't use the documents - - -?---I agree.
>
> - - - for settlement? So you would accept, then, that "settlement" must mean "settlement pursuant to the contract"? There's an argument about what that means under this binding agreement, but that's what the undertaking must mean?---It appears to be that's the argument, what – what is the definition of "settlement".
>
> Yes. Yes. But the definition of "settlement" must be "settlement under the contract"?---That I'm not sure of. I – I can't see any other interpretation - - -

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17 This extract has been faithfully reproduced notwithstanding the appearance of obvious errors.

Yes?--- - - - but I hadn't - - -

That must be what the undertaking means, and the question then is what is settlement under the contract?---Well, see, these undertakings are a – like, a convention. They're not a – you know, they're a rule or – not a law, so they do vary. They vary between real estate transactions – normal real estate transactions and these transactions.

But doesn't that just mean that settlement, under the undertaking, is dependent upon the transaction?---I'd agree with that, yeah.

So the real argument here is not so much the undertaking, in the sense that you understood that you could only use it for settlement pursuant to the binding agreement. The real issue here is what does that mean in the context of the binding agreement?---It appears so."

[66] As to the right of Biggs Fitzgerald Pike to hold the transfer documents:

"[HIS HONOUR:] Now, you give the undertaking in way back when so that you can have access to the transfer documents for specific - - - ?---Yes.

- - - purposes. Do you accept that the solicitor accepting the undertaking can withdraw the documents from you?---No, I don't. Not in this – in these circumstances.

Okay. Has it – just let's go back one. You – in your submissions you speak in terms of what the usual undertaking means and that the usual undertaking is a necessary part of conveyancing practice. In the ordinary sense – so I'll ask you some questions about the specifics of this contract in a minute. But in the ordinary sense surely if a solicitor says, "We'll transfer you the" – "We'll give you the transfer documents provided we get an undertaking." Surely, he could write to you and say, "Well, you've stamped them now, I want them back"?---In some circumstances. In this particular letter that you referred to on page 115 - - -

Yes--- - - - oh, no, it's not – on page 116 – on the second last paragraph Biggs Fitzgerald Pike say the transfers are held by you to our client's order. And I totally reject that. They're not held to their client's order; they're held pursuant to a binding financial agreement.

They're held pursuant to an undertaking, so the transfer documents are in effect documents which are theirs to the extent that their documents which are discharging their obligations under the agreement which are entitled to strictly at settlement. Is that right?---Partly? When you – the main reason for the undertaking is to protect the money. Once the money's been paid, you do lose absolute control over those transfer documents. You don't have a power of veto. You – you're there held pursuant to the – to the contract between the parties. They're not one party's documents or another party's, they're held pursuant to the contract."

[67] The assertion that Mr Healy believed that clause 4 had no operation seems to be inconsistent with the email Mr Healy sent to John,[18] but Mr Healy was not cross-examined on that apparent inconsistency. On clause 4, he gave this evidence:

> "[HIS HONOUR:] From both sides, really. And what I'm struggling with at the moment is that the contract provides that if there's not a settlement by a particular date, then the contract provides that clause 4 gives the parties an obligation to go to the market. So it's just in that context I'm not sure how clause 4 fits into your thinking?---But – except clause 5 says that if you pay the money, you can't use clause 4.
>
> Yes. Depending upon whether that's how you read clause 5, and I'd understand that is how you read it, and whether - - -?---Whether that's correct or not. Yep.
>
> Yes. Whether that's correct or not. Anyway – so you thought clause 5 oustered 4?---Yes.
>
> And, therefore, the only way for everybody to be out of this would be to go to court or alternatively - - -?---If they did – if they didn't want to complete - - -
>
> - - - enact a settlement?--- - - - the agreement. Yes.
>
> Yes. So it's settle the agreement or go to court?---Yes."

[68] I accept that Mr Healy was doing his best to give truthful evidence before me. I also accept that he was always attempting to fulfil his retainer with John to the best of his ability.

[69] I find that in so doing he acted as he honestly thought that he should, but was badly mistaken. He understood his authority to deal with the transfer documents as being non-revokable. That was wrong. He thought that he was authorised to deal with the transfer documents provided Jane had, in his opinion, no option but to complete her obligations pursuant to clause 2 of the BFA. That was wrong, as was his understanding of the construction of clauses 3, 4 and 5, although that was understandable, given the typographical error in those clauses.

[70] Further, I find that had Mr Healy realised that he had no authority to deal with the transfer and that to proceed to settle the transaction would constitute a breach of his professional undertaking, he would not have proceeded to use the documents in the way that he did.

[71] I find that Mr Healy dealt with the transfer documents contrary to the undertaking, firstly, because he misunderstood the true construction of the BFA. He thought that clause 5 operated so that once John paid the money due to Jane, clause 4 had no operation. A proper detailed analysis of the contract shows that not to be its proper construction.

[72] Having misunderstood the true construction of the BFA, Mr Healy became sidetracked on a wrong issue. He believed that the real issue was whether Jane had a right to rescind the BFA. He thought that as she had no right of rescission and no

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18 Set out in paragraph [18] of these reasons.

right to pursue the alternative path of clause 4, he was entitled to use the transfer documents for settlement. He was wrong about that, but I find that his belief was genuinely held.

Charge 2

[73] As previously explained, charge 2 is just a different categorisation of the conduct alleged in charge 1. It follows that it must be found, given what I have already said, that taking the actions to unilaterally effect settlement was conduct which fell short of a standard of competence and diligence expected of a reasonably competent legal practitioner. However, in assessing the gravamen of charge 2 it must be recognised that Mr Healy was labouring under the mistaken beliefs that I have already identified in relation to charge 1.

Professional misconduct or unsatisfactory professional conduct?

[74] For many years prior to the enactment of the *Legal Profession Act 2007* various jurisdictions, including Queensland, recognised two levels of professional failing, namely professional misconduct and unprofessional conduct.[19] That distinction now manifests itself in concepts defined by the *Legal Profession Act* as "unsatisfactory professional conduct"[20] and "professional misconduct".[21]

[75] Sections 418 and 419 of the *Legal Profession Act 2007* provide:

> "**418 Meaning of *unsatisfactory professional conduct***
>
> ***Unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
>
> **419 Meaning of *professional misconduct***
>
> (1) ***Professional misconduct*** includes—
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
>
> (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability

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19 *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498.
20 Section 418.
21 Section 419.

matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate."

[76] As Martin CJ observed in *Legal Profession Complaints Committee v Detata*:

"48 The importance of legal practitioners performing their undertakings cannot be overstated. The practice of giving, and relying upon, undertakings given by legal practitioners is widespread and serves an important public purpose. The circumstances in which undertakings are given and relied upon are many and varied. In some cases an undertaking will be proffered and received as a substitute for strict or timely performance of an obligation, perhaps arising under a contract or under a statutory provision. In other cases, the undertaking might be given in order to provide a form of security to the person to whom it is proffered - for example, an undertaking that an executed document will be held in escrow until certain conditions are met, or that legal proceedings will not be instituted if certain conditions are met, or that funds or other property will be retained by the practitioner until certain conditions are met. In all of these circumstances, the usual effect of the proffer and acceptance of the undertaking will be to obviate the need to commence or to continue legal proceedings. This serves the public interest by preserving the limited resources of the parties and the courts.

49 Undertakings will often be proffered and received in the course of legal proceedings - for example, in relation to interlocutory procedures. The provision of undertakings in those circumstances serves the public interest by reducing or averting interlocutory disputes.

50 Undertakings by legal practitioners are a common feature of commercial and property transactions in which legal practitioners are engaged. In some cases, a party might complete a transaction before all relevant conditions are satisfied in reliance upon an undertaking by a practitioner to the effect that he or she will cause a particular condition to be satisfied. In this context, the proffer and acceptance of undertakings by legal practitioners improves the efficiency and expedition of commercial and property transactions and thereby serves to lubricate the wheels of commerce, trade and finance: see ***Rubik Financial Ltd v Herskope*** [2010] WASC 343; ***In the Matter of a Solicitor 'L'*** (Unreported, VSC, LPA 3 of 1989, 17 - 21 June 1989).

51 Undertakings can only serve these purposes and thereby further the public interest if they are accepted and relied upon. In some circumstances, a practitioner may proffer an undertaking in terms which makes it clear that the undertaking is only that of the client and not the practitioner. In such a case, the obligation of

> performance will fall upon the client, not the practitioner. However, this is not such a case. In this case, the undertaking was expressly and unequivocally given in terms which bound both Mr Detata's client, Mr Detata and the firm by which he was employed.
>
> 52 The proffer of an undertaking binding upon a legal practitioner and his or her firm can be expected to enhance the reliability of the undertaking, and thereby the prospect that it will be accepted and relied upon by the party to whom it is proffered. In this way, the proffer of an undertaking binding upon a legal practitioner enhances the achievement of the various purposes to which I have referred, and thereby enhances the public interest. It is therefore vital that legal practitioners perform their undertakings, regardless of whether the undertaking was proffered in error or oversight, irrespective of any change in circumstances, no matter how radical, and irrespective of any hardship to the legal practitioner concerned (see ***Bhanabhai v Auckland District Law Society*** [2009] NZHC 415 [59] - [64] (Priestley, Heath and Winkelmann JJ).
>
> 53 Further, it is vital for the maintenance of public confidence in the integrity of the legal profession and its practitioners, and for the maintenance of the confidence which practitioners have in dealing with each other, that performance of their undertakings be enforced: see (***Rubik Financial Ltd***).
>
> 54 For these reasons, the obligation of a legal practitioner to perform his or her undertaking is a solemn obligation of the utmost importance. Failure to perform that obligation will generally be regarded as professional misconduct, and depending on the circumstances, will often be regarded as serious professional misconduct."[22]

[77] The present case shows that even a simple property transaction could not be completed without the giving of an undertaking so that the transfer documents could be stamped.

[78] As undertakings are a fundamental feature of practice it is imperative that the solemnity of solicitors' undertakings is preserved. Otherwise, confidence in undertakings will be eroded with inevitable adverse consequences for the ability of solicitors to effectively conduct their clients' legal affairs.

[79] It is for this reason that a breach of an undertaking will usually amount to professional misconduct, although, ultimately, that judgement must be made upon consideration of all the relevant circumstances.[23]

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22 [2012] WASCA 214 at [48]-[54].

23 *Legal Services Commissioner v Wrightway Legal* [2015] QCAT 174 at [22].

[80] As previously observed, the LSC submitted that charge 1 should be categorised as professional misconduct if the breach of undertaking was deliberate, and should be categorised as unsatisfactory professional conduct if deliberateness was not proved. Also, as already observed, deliberateness was not charged or particularised. I have made positive findings that Mr Healy did not proceed to settlement knowing and understanding that to do so would breach the undertaking. In those circumstances, charge 1 should be categorised as unsatisfactory professional conduct even though his error of judgement was serious.

[81] The LSC submitted that charge 2 should be categorised as unsatisfactory professional conduct. As I have already explained, charge 2 is very closely related to charge 1 and is really just a different categorisation of the same conduct. Logically then, it also should be categorised as unsatisfactory professional conduct.

Formal findings

[82] For the reasons explained I find:

(a) charge 1 is proved and constitutes unsatisfactory professional conduct; and

(b) charge 2 is proved and constitutes unsatisfactory professional conduct.

Sanction

[83] Submissions on sanction and costs have not been heard as the parties wished to formulate their submissions with the benefit of findings. It is appropriate then to make directions for the exchange of material and submissions.

Final orders

[84] I order that:

1. **Charge 1 is proved and unsatisfactory professional conduct is established.**
2. **Charge 2 is proved and unsatisfactory professional conduct is established.**
3. **The LSC shall file and serve any material and written submissions on sanction and costs by 4.00 pm on 14 May 2025.**
4. **The respondent shall file and serve any material and submissions in reply by 4.00 pm on 21 May 2025.**
5. **Each party shall have leave to file and serve a notice requesting to make further oral submissions by 4.00 pm on 28 May 2025.**
6. **In the event that no notice pursuant to order 5 is given by 4.00 pm on 28 May 2025, the issue of sanction and costs will be determined on any written submissions received without further oral hearing.**
7. **Costs reserved.**