LCRO 130/2011

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee 5
BETWEEN	**ROSALIE J BERRY**
	Applicant
AND	**ROBERT J RONDEL**
	Respondent

All names and identifying details other than the parties in this decision have been changed.

DECISION AS TO PENALTY ORDERS AND PUBLICATION

[1] On 21 February 2012 I issued a decision as to findings in respect of Ms Berry's application for a review of the determination by Auckland Standards Committee 5 in respect of her complaint concerning Mr Rondel.

[2] In that decision I found that Mr Rondel's conduct constituted unsatisfactory conduct by reason of the definitions contained in sections 12(a),(b) and (c) of the Lawyers and Conveyancers Act 2006 particularised as follows:

1) That Mr Rondel was in breach of Rule 6.1 of the Conduct and Client Care Rules when he acted for Ms Berry and the AEJ Trust as vendor and purchaser in the sale and purchase of a property in Gisborne.

2) That Mr Rondel was in breach of Rule 6.1.1 in that, having determined to act for both parties, he did not obtain Ms Berry's informed consent.

3) That Mr Rondel was in breach of rules 3.4 and 3.5 in that he did not provide Ms Berry with the relevant information required by those rules.

4) That Mr Rondel was in breach of Rules 7 and 7.1 in that he proceeded without instructions to implement the Agreements in a way which was not reflected in the Agreements as drawn;

5) That Mr Rondel was in breach of Rule 6 by failing to register a caveat immediately following completion of the transaction to protect Ms Berry's advance to the purchaser.

6) That Mr Rondel was in breach of Rule 6 in that he did not protect Ms Berry's interests when making arrangements to insure the property.

7) That Mr Rondel was in breach of Rules 7 and 7.1 in failing to report to Ms Berry following completion of the transaction.

[3] In that decision, I requested that the parties provide submissions as to penalty orders and publication, which both parties have now done. Mr Rondel is now represented by Mr AK who has been appointed by Mr Rondel's insurer.

[4] Prior to reconvening the hearing, I issued a Minute in which I requested Mr Rondel and his counsel to consider what Orders could be made pursuant to section 156(1)(h) of the Act. I also invited submissions from the parties in respect of possible Orders pursuant to section 156(1)(j) of the Act. At the hearing Mr AK provided further submissions in this regard but unfortunately Ms Berry did not receive the Minute which had been emailed to her.

Settlement/Rectification

[5] In the findings decision, I indicated that I had given serious thought as to whether or not this matter should be referred to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal but had decided that the matter should remain in this jurisdiction. One of the factors which I took into account in coming to this decision was Mr Rondel's stated desire to assist Ms Berry and I noted at [94] that Mr Rondel was in communication with Ms Berry's current solicitor to endeavour to rectify matters. If the parties managed to reach a settlement of the matter the LCRO could either record this as part of a final determination, or otherwise incorporate into it into the Orders. Any settlement would be taken into account when considering what other Orders should be made.

[6] At the initial hearing, Ms Berry indicated that she was extremely upset that she had been deprived of her expectation that she would retain ownership of a share in the property until she was paid in full. The intention as evidenced by the second

Agreement, was that as each annual payment was made, she would transfer one tenth of her half share (or one twentieth of the property) to the purchaser.

[7] In addition, her remedies in the event of default by the purchaser were different if she had retained an interest in the property as an unpaid vendor instead of becoming a mortgagee of the property. This has some relevance, as the purchaser did default for a significant period of time in making the first payment.

[8] If Mr Rondel could persuade the trustees of the purchasing trust to cooperate, it was possible for Ms Berry to be put into the position that she would have been in if the Agreement was implemented as she had expected.

[9] In the submissions filed by the parties prior to this hearing, I received copies of correspondence between Mr Rondel, Mr AK, and Ms Berry's current lawyer, Mr NB of AEK Legal. The correspondence revealed that Ms Berry was seeking to have ownership of the whole of the property transferred back to her, to retain the sum of $77,000.00 (now $80,0000.00) paid to date by the purchaser, and to receive the sum of $35,000.00, made up of compensation of $25,000.00 and $10,000.00 costs.

[10] Unsurprisingly, this was not a settlement that Mr Rondel could agree to.

[11] At the penalty hearing, Mr Rondel and Mr AK confirmed that Mr WA (the trustee) was prepared to cooperate in transferring the appropriate share of the property (which is now nine twentieths) back to Ms Berry. I also confirmed to Ms Berry (as recorded in [95] of the decision of 21 February 2012) that Orders would still remain to be made in respect of the finding of unsatisfactory conduct.

[12] Ms Berry however indicated that she intended to pursue her remedies through the Court as she is entitled to do, and that too much had happened since the transaction had been effected, such that she did not wish to consider continuing with the transaction in any form.

[13] As a result, the option of implementing the transaction in the manner expected by Ms Berry is not possible. The fact that this is largely because Ms Berry does not wish to proceed with the transaction in any form is taken into account when considering the level of fine to be imposed.

Section 156(1)(h) Lawyers and Conveyancers Act 2006

[14] Pursuant to section 156(1)(h) of the Lawyers and Conveyancers Act 2006, a Standards Committee or the LCRO may order a practitioner:

i) To rectify, at his or her or its own expense, any error or omission; or

ii) Where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission.

[15] When forwarding the Minute on 30 March, I had in mind that as an alternative to Mr WA agreeing to transfer ownership of the interest in the property back to Ms Berry, she could otherwise be protected from the consequences of the different form of the transaction if Mr Rondel were to ensure payments were made. Of course he could not guarantee that the payments were made by Mr WA's trust, but he could have agreed to make payments himself and be subrogated to Ms Berry's rights against the trust.

[16] That was not a course of action which Mr Rondel showed any desire to pursue. In addition, Mr AK submitted that any Orders pursuant to section 156(1)(h) were constrained by the same cap of $25,000.00 which exists in respect of compensation orders. I do not share Mr AK's view but in the circumstances it is not necessary to make a finding in that regard.

[17] Given Ms Berry's stated intention to pursue Court proceedings it is not appropriate to consider any possible orders under this section.

Offers by Mr Rondel

[18] During the course of the hearing, Ms Berry alleged that Mr Rondel was refusing to honour offers of compensation made by him at the hearing on 26 January. Her view is that Mr Rondel had agreed to compensate her to the extent of $25,000.00 being the maximum amount which could be ordered by a Standards Committee or the LCRO.

[19] I accept Mr AK's submission that even if that had been offered, it was offered as part of an overall settlement which had not been accepted and that therefore Mr Rondel was not reneging on an agreement. There was no agreement.

[20] In addition, it is not open to the parties in the course of disciplinary proceedings, to negotiate a settlement that is not adopted by the Standards Committee or the LCRO as part of the outcome, and any arrangement such as Ms Berry asserts existed would therefore need to be endorsed by me. That has not occurred.

[21] However, I did undertake to Ms Berry that I would listen to the audio of the hearing and record the statements made by Mr Rondel.

[22] Mr Rondel asked during the course of the hearing whether it was open to me to make a compensatory order. At a later time during the hearing the following exchange took place: -

> Mr Rondel: "is there an ability to suggest compensation to Ms Berry?"
>
> LCRO: "yes - up to $25,000.00"
>
> Mr Rondel: "I would like that to be entertained"

[23] At another stage in the hearing Mr Rondel stated:

> I should be offering to Rosalie to cover her legal costs out of my own resources in having to pursue this

[24] Costs incurred in Court proceedings are dealt with by the Court. They are not part of any compensation that could be ordered by a Standards Committee or the LCRO. Whether Mr Rondel fulfils his stated intention or not will be up to him.

[25] It therefore remains to consider what Orders should be made in the circumstances. The relevant Orders to consider are as follows:

a) Censure or reprimand
b) Apology
c) Compensation
d) Reduction or cancellation of fees
e) Fine
f) Inspection of practice

In addition, the costs of the review and publication require to be addressed.

Censure or reprimand

[26] In *B v The Auckland Standards Committee 1 of the New Zealand Law Society & Others* High Court CIV 27010-404-8451 24 May 2011, the High Court discussed the difference between a censure and a reprimand. At [36] the Court stated "it is clear that a censure will convey a greater degree of condemnation than a reprimand". At [38] the Court noted that:

> to censure a practitioner is to harshly criticise his or her conduct. It is the means by which the Committee can most strongly express its condemnation of what a practitioner has done, backed up, if it sees fit, with a fine and remedial order.

[27] Mr AK submits that my decision does not harshly criticise Mr Rondel's conduct or strongly express condemnation for what he has done. If that is the impression that the decision gives, then it is misleading. I have found that Mr Rondel has breached numerous Conduct and Client Care Rules. I have noted that I seriously considered referring this matter to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. If I have not harshly criticised Mr Rondel's conduct or expressed strong condemnation, it is because those sorts of comments are usually made in the context of penalty decisions.

[28] To avoid any impression that Mr Rondel's conduct deserves strong condemnation, I refer to [31] of my findings decision where I have noted ten instances in the course of this transaction where Mr Rondel's conduct can be criticised.

[29] Given the number and nature of Mr Rondel's breaches of the Rules, and the Act, I have no hesitation in coming to the view that a censure is warranted.

Apology

[30] In previous decisions I have observed that a voluntary apology carries more weight that one which is ordered. In addition, a person receiving an ordered apology will not consider that it carries much meaning.

[31] During the course of the findings hearing, Mr Rondel apologised to Ms Berry on a number of occasions for his conduct.

[32] I note that Mr AK's submissions do not either refer to an ordered apology or confirm a personal apology by Mr Rondel. This is somewhat surprising, and may serve to reinforce Ms Berry's view that Mr Rondel is not sincere in his statements during the hearing. On the other hand, it may reflect the fact that Mr AK has been appointed by Mr Rondel's insurers and has not turned his mind to non-monetary issues. Nevertheless, I did expect that Mr Rondel's various apologies would have been confirmed voluntarily in writing.

[33] Ms Berry has heard the apologies offered by Mr Rondel during the course of the findings hearing and will make of them what she will. I do not intend to order any formal apology as I consider it will be of little value and treated as such by Ms Berry.

Compensation

[34] Compensation is provided for by section 156(1)(d) of the Lawyers and Conveyancers Act. This sub section provides as follows:

> Where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner...[the Standards Committee may] order the practitioner to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding [$25,000.00].

[35] Professor Duncan Webb in his text titled Ethics, Professional Responsibility and the Lawyer (second edition) commented that:

> The disciplinary procedure is not a route by which a disgruntled client may seek effective redress for loss suffered at the hands of a lawyer. However, when the client has suffered loss a compensatory order may be made. For such an order it is necessary for the client to have suffered actual loss, therefore, a payment for humiliation or a payment for distress, seem beyond the jurisdiction of the tribunal. If an order for compensation is made against the practitioner it will not affect the right of the client to sue in the ordinary Courts. However, the Court must take the compensation paid into account in any award.

[36] Those comments were made in respect of the previous legislation, which, although the same terminology was used, was limited to compensatory orders of $5,000.00. The present Act has raised the limit significantly to $25,000.00 (regulation 32 Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008). Consequently, a compensatory order assumes greater relevance in the range of Orders which can now be made.

[37] Ms Berry has provided details of expenses which she considers were incurred as a result of Mr Rondel's actions. Each of these will be considered in turn:

Trips to Auckland

Ms Berry has made four trips to Auckland to consult with lawyers at an approximate cost of $600.00 each. Mr AK argues that it was not necessary to instruct lawyers in Auckland.

Ms Berry has provided further information as a result of Mr AK's submissions. She advises that Mr NC had acted for her for over 20 years and had also acted for her late mother. He was someone in whom she had confidence and it does not seem unreasonable that she should be reimbursed the cost of a visit to Auckland to consult with him and the other member of his firm, Mr AK.

Mr NC instructed Mr SF although Ms Berry also advises that Mr SF was recommended by Mr Rondel. Although Mr Wiles provided advice on other

matters, it would still nevertheless been necessary to attend at his offices for advice concerning this matter.

Ms Berry has advised that she consulted Ms EW because she offered expertise in this area of law. Ms Berry is entitled to consult whoever she wishes. The question is whether the cost of travelling to Auckland to meet with Ms EW is a cost which Ms Berry has incurred as a result of Mr Rondel's conduct. I consider that this is not a cost which Mr Rondel should be required to meet.

Mr AK has not questioned the amount claimed for each trip to Auckland. The cost of three trips to Auckland ($1,800) will therefore be allowed.

Legal Fees

Ms Berry has claimed Mr NC's fees of $388.54 relating to advice concerning the Gisborne property. This fee is accepted by Mr AK and will be allowed.

The narration to Mr SF account refers to "obtaining detailed instructions regarding estate and other issues, conducting legal research regarding potential Family Protection Act claim and obligation of trustees to provide documents" as well as the matters relating to Mr Rondel. Ms Berry has advised that his attendances on matters other than those relating to Mr Rondel were minimal, and has requested Mr Wiles to communicate with this Office as to the detail of his account. As at the date of this decision he had not done so.

Given the matters identified in the narration to the bill, it seems to me that a fair assessment is that he has spent equal time on each matter, and in the circumstances I propose that Ms Berry be reimbursed for one half of Mr SF's bill. There will be an order therefore that Mr Rondel pay $876.77 to Ms Berry in this regard.

Travel to [...]

This claim is for $200.00 for trips to and from lawyers in [...]. Ms Berry records that the distance each way is 65 km. Mr AK objects to this claim because he says there is no explanation of why the trips were necessary when the files could have been sent direct to the [...] lawyers.

Given that the amount claimed is minimal, I do not intend to pursue Ms Berry for further explanations and will allow this claim.

Mr Rondel's accounts

These are dealt with in [38] – [42].

Insurance instalments

This claim is for instalments not paid by Mr WA's trust when, as owner, it was responsible for payment of these. Mr AK objects to this claim because it is unconnected with Mr Rondel's conduct. If the transaction had proceeded as intended, Ms Berry would have been responsible for half (at least for the first year) of the insurance premium.

In the form that the transaction proceeded, the purchaser is liable for the insurance premium and Ms Berry is able to claim this from the trust pursuant to the terms of the mortgage.

This claim is disallowed.

Mr NB's accounts

Ms Berry has claimed $2,763.00 for costs incurred to date in consulting Mr NB. Mr NB has rendered three bills of costs: -

3.10.2011	$687.50,
6.1.2012	$680.50,
26.2.2012	$1,027.00
	$2,395.00.

Ms Berry has mistakenly included a further $368 shown as due in the statement dated 17 February 2012.

Mr AK asserts that these costs more properly sit with the proposed Court proceedings and that Mr NB's attendances have sought to improve Ms Berry's position. He notes also that a portion of the costs relates to advice with regard to potential Court proceedings.

Ms Berry has advised that she intends to pursue Court proceedings with a view to cancelling the sale altogether. That is her choice. However, it is hard to see how any act or omission by Mr Rondel gives rise to a right of cancellation by the

vendor. I presume therefore that there are other grounds on which the proposed proceedings will be based.

It cannot be said that all of the fees incurred with Mr NB arise directly from the issues arising out of Mr Rondel's conduct. Without more information this cannot be accurately calculated. In the circumstances, I propose to allow one half of Mr NB's costs.

The allowed claim is therefore $1,197.50.

The costs of proposed Court proceedings are costs that will be dealt with by the Court.

Stationery/stamps

Mr AK submits the amount of this claim ($200.00) seems excessive and there is no evidence to support the claim. I am prepared however to allow Ms Berry the benefit of the doubt in this regard and allow the claim.

Registration of caveat

This claim for $262.50 is accepted by Mr AK and is allowed.

Trips for the LCRO hearings ($1,200)

This claim is accepted. However, Mr AK points out this claim relates to the costs incurred in relation to the LCRO hearings, and submits that it is properly ordered pursuant to section 156(1)(o) of the Act. That subsection refers to costs incurred by the complainant in respect of the Standards Committee inquiry or hearing, and do not cover the costs of the LCRO hearings. They are strictly speaking, costs which should be ordered pursuant to section 210(2) of the Act, and therefore payable by the New Zealand Law Society to Ms Berry. If this is correct, then the costs ordered to be paid by Mr Rondel to the New Zealand Law Society would be increased by the sum of $1,200. Given that Mr Rondel is to make other payments to Ms Berry, I propose that the order to pay these costs be made pursuant to section 210(1) of the Act and that they be paid directly to Ms Berry. If there are any difficulties with this approach, the parties or the New Zealand Law Society may refer this matter back to me.

Anguish and distress

Ms Berry has not specifically claimed for anguish and distress, but she should not be deprived of that element of compensation because she is unaware of it.

Orders in the nature of general damages for anguish and distress have been made by this Office in the past (refer for example *Ms Sandy v Faiyam Khan* LCRO 181/2009). This was an Order by Professor Webb (who was then the LCRO) notwithstanding the comments made in his text and quoted above in [34].

In *Ms Sandy v Faiyam Khan* the LCRO cited *Heslop v Cousins* [2007] 3 NZLR 679 as providing authority to compensate for anguish and distress. He also referred to section 3 of the Lawyers and Conveyancers Act as providing authority for such awards. However, he also noted that such orders "should be modest (though not grudging) in nature". The LCRO found little guidance from the decisions he referred to and ordered the sum of $2,500 be paid to the applicant in that case.

There is no specific evidence before me as to what degree of anguish and distress this matter has caused Ms Berry. However it would have been apparent to all present at both hearings and primarily at the first hearing, that there is no doubt that she has been affected by the events involved in this matter.

Ms Berry has a different view of the reasons for Mr Rondel's conduct than I have found, and this would no doubt add to her distress.

Mr AK accepts that Ms Berry will have suffered distress and anxiety and submits that an award of $1,000 is appropriate in the circumstances.

I can see little reason to depart from the level of award made in the *Ms Sandy* decision and in the circumstances, I consider that an award of $2,500.00 for Ms Berry's anguish and distress appropriate in the circumstances.

Reduction or cancellation of fees

[38] Sections 156(1)(e) and (f) empower a Standards Committee or the LCRO to order a practitioner to either reduce or cancel his fees.

[39] Mr Rondel has billed Ms Berry $650.00 plus GST and disbursements with regard to the sale, and a further $80.00 plus GST and disbursements in respect of the discharge of the BNZ mortgage.

[40] A consideration of the first invoice cannot be made without mention of the narration to the account, which includes reference to the sale of a one half share of the property, preparing the agreement for sale and purchase, and arranging for signatures by Ms Berry. It also refers to other properties mortgaged to the bank which I believe may be properties owned by Mr WA's trust.

[41] None of these references are correct and are misleading as to the work carried out by Mr Rondel. In addition, it cannot be said that Mr Rondel represented Ms Berry at all. He acknowledges that he did not at any stage communicate with her or provides any advice to her even when forwarding documents with Mr WA for her to sign. At most, Mr Rondel provided what could be referred to as the "mechanics" to effect the sale, and then attended to that in a manner which was contrary to Ms Berry's instructions. In the circumstances, I consider that Mr Rondel should be required to cancel his fee relating to the sale, being the sum of $650.00 plus GST. As this fee has been paid by way of deduction that amount is to be refunded to her.

[42] The remainder of that account, being the disbursements, and Mr Rondel's fee relating to the BNZ discharge are to remain.

Fine

[43] Section 156(1)(i) of the Act provides for a maximum fine of $15,000.00.

[44] Mr AK refers to the LCRO decision *Workington v Sheffield* LCRO 55/2009. In that decision the LCRO noted at [68] that in cases where unsatisfactory conduct is found as a result of a breach of applicable rules (s12(c)) and a fine is appropriate, a fine of $1,000 is the proper starting place in the absence of other factors.

[45] In this case I have found multiple breaches of multiple rules. I have also found unsatisfactory conduct in terms of sections 12(a), (b) and (c). These findings place this matter in a different category from the *Workington* decision, and I do not consider the starting place in that decision to have much relevance to the present circumstances.

[46] At [65] in the *Workington* decision, the LCRO stated:

> [65] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573, as to punish the practitioner, as a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct. It is important to mark out the conduct as unacceptable and deter other practitioners from failing to pay due regard to their professional obligations in this manner.

[47] At [66] the LCRO also stated:

> [66] .....s156(1)(i) of the Lawyers and Conveyancers Act provides for a fine of up to $15,000 when unsatisfactory conduct is found. For a fine of that magnitude to be imposed it is clear that some serious wrongdoing must have occurred. In allowing for a possible fine of $15,000 the legislature has indicated that breaches of professional standards are to be taken seriously and instances of unsatisfactory conduct should not pass unmarked. This is a significant change from the earlier Act.

[48] In that case, the practitioner failed to honour an undertaking to apply funds in payment of an account due by his client, and instead maintained a lien over the funds for payment of his account. There is no comparison between that case and the present circumstances.

[49] Mr Rondel's conduct in this case does reflect a degree of serious wrongdoing which caused me to give serious thought as to whether the matter should be referred to the Tribunal. The starting point for my considerations must be at or near the maximum fine. In the circumstances, I fix this at $12,000.00.

[50] Mr AK refers to mitigating factors and refers to the degree of acknowledgement by Mr Rondel of his wrongdoing. This acknowledgement only arose after the matter was referred to this Office. There was no acknowledgment of unsatisfactory conduct to the Standards Committee.

[51] Mr AK also refers to the remorse shown by Mr Rondel in his submissions to the Standards Committee and the apologies and regrets expressed in those submissions. The remorse, regrets and apologies in those submissions are somewhat conditional.

[52] To avoid any suggestion that comments have been cherry picked, I have incorporated the whole of section 7 of Mr Rondel's submissions to the Committee:

> **7.0 <u>REGRETS, APOLOGY AND CONCERNS</u>**
>
> 7.1 I sincerely regret that Rosalie considered herself to be so adversely affected that she felt obliged to obtain separate legal advice which resulted in her making the formal complaint to the NZ Law Society. I imagine that it would not have been easy for her to take that step.
>
> 7.2 I would like to express my sincere apologies to Rosalie if I have breached my obligations to her. I hasten to assure the Committee that any such breach, if it exists, would certainly have been unintentional.

> 7.3 I hope that the exchanges of correspondence resulting from Rosalie's complaint will have clarified the position for her. Further, I hope that Rosalie will know that I bear her no animosity as I realise that she must have been under considerable stress to have taken the action she did.
>
> 7.4 However, I do regret that Rosalie did not have the faith in me and in our professional relationship to contact me first, and let me know her concerns.
>
> 7.5 Had Rosalie done so, I would like to think that I could have answered her concerns or, if I could not, I would certainly have referred her to another Solicitor.
>
> 7.6 I must record that I am concerned that the Solicitor whom Rosalie consulted did not have the courtesy to contact me to discuss Rosalie's concerns before he advised her to make the formal complaint.
>
> 7.7 It would appear that the same (or another Solicitor) has failed to advise Rosalie properly in relation to the nature of the security which I detailed in my first letter to Mr BX (which he copied to Rosalie).
>
> 7.8 I honestly believe that the security I obtained for Rosalie was far better than the unregistered security which she had intended to have for herself.

[53] The general tenor of the expressions of remorse and apology, are conditional upon adverse findings being made by the Standards Committee. It does not indicate an acceptance or acknowledgment that he had not fulfilled his obligations to Ms Berry.

[54] I acknowledge that Ms Berry's stance has meant that remedial action is not possible. I also acknowledge that Mr Rondel had indicated a willingness to assist and cooperate in this regard. However, I have not noted any response other than to reject the proposal put forward by Mr NB which does give me some doubt about his stated desire to assist.

[55] I acknowledge and take into account Mr Rondel's previously unblemished professional record.

[56] Finally, the fact that Mr Rondel had no self interest in this matter is reflected in the fact that the matter has not been referred to the Tribunal for consideration.

[57] Taking all of these factors into account, I have come to the view that a fine of $10,000.00 is appropriate in these circumstances.

Inspection of practice

[58] Section 3 of the Act provides that the purposes of the Act include the maintenance of public confidence in the provision of legal and conveyancing services and the protection of consumers of legal and conveyancing services.

[59] Mr Rondel is a practitioner who has been in practice for some 25 years during which I am advised by Mr AK that there have been no other complaints made about him. His lack of judgement and shortcomings in this matter are out of character for a person of Mr Rondel's experience and history. This gives more reason for concern.

[60] Events occur during the course of a practitioner's life, whether work related or otherwise, which cause a practitioner to lose the ability to exercise the necessary degree of judgement that is required to fulfil the practitioner's obligations to his or her client.

[61] The focus of the disciplinary process is the protection of the public. In addition, the Lawyers and Conveyancers Act includes significant consumer protection provisions that were not present in the previous Act. Mr AK argues that before an order under section 156(1)(j) is made, there must be grounds for considering that inspection of a practitioner's practice is necessary. Using a measure of the number of complaints about a practitioner in the past is not necessarily an indicator as to whether circumstances exist which would have caused a practitioner to lose the appropriate degree of judgement. In addition, how many instances of the kind identified in this review must occur before such an order is made?

[62] Professor Webb in an article published in Lawtalk 2008 (717) 9 - 13 and on the LCRO website, noted that this provision in the Act is "intended to provide a more rigorous and proactive check on the conduct of a practitioner than merely waiting for complaints". It would be remiss of this Office not to use the provisions of the Act in this way.

[63] As noted in the findings decision, one of the most troubling aspects of this complaint is that Mr Rondel proceeded without instructions to implement the transaction in a way which was not reflected in the Agreements as drawn, and without instructions from Ms Berry. In addition, he did not recognise a clear conflict of interest in not only acting for both parties, but then continuing to act for Ms Berry as a lender to a trust of which he was a trustee. The form of the loan agreement entered into did not provide any guarantee from Mr WA and Mr Rondel entered into the loan agreement as a trustee without identifying and being in control of a source of funds from which payment could be made. A reasonably competent lawyer needs to be alert to these

issues and the fact that Mr Rondel did not identify them as matters to be concerned about indicates that there is a need to be satisfied that the affairs of other clients for whom Mr Rondel has acted, or is presently acting, are being handled in a competent manner.

[64] In order to address this concern, I propose to make an order that Mr Rondel make his practice available for inspection by a practitioner appointed by this Office for a period of 1 year from the date of this decision. That person will be requested to carry out an initial inspection of Mr Rondel's files to identify whether there are any other instances where Mr Rondel has evidenced a lack of judgement, proceeded without instructions, or generally acted in a manner which is in breach of the Lawyers and Conveyancers Act or the Conduct and Client Care Rules. He or she is to use his or her discretion as to the degree of investigation required to enable him or her carry out these instructions.

[65] If, during the period of 12 months after the date of this decision, this Office or the Complaints Service are made aware of any circumstances which give cause for concern about Mr Rondel's practice, Mr Rondel shall also make the files to which those matters relate available to the appointed person for review.

[66] Following completion of the initial inspection and any other inspections, the appointed person will be required to report to this Office and the Complaints Service of the New Zealand Law Society. Any such report will be provided to Mr Rondel for comment.

[67] I must stress that this Order is made with the prime purpose of fulfilling the purposes of the Act as referred to above, and not for any other reason.

Costs

[68] In accordance with the LCRO costs guidelines, costs are payable by Mr Rondel as a result of the findings. The matter is of average to above average complexity and has involved two hearings. Mr Rondel is therefore ordered to pay the sum of $2,000.00 by way of costs to the New Zealand Law Society within one month of the date of this decision.

[69] In addition, the costs of the person appointed to inspect Mr Rondel's practice must be provided for. Section 156(1)(j) of the Act does not refer to the costs which such an Order will attract. However, section 210(1) of the Act provides that "the Legal Complaints Review Officer may, after conducting a review under this Act, make such

order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit". Pursuant to section 210(1) Mr Rondel is ordered to pay the costs of any such inspections as directed by this Office as and when such costs are incurred.

Publication

[70] Section 206(1) of the Lawyers and Conveyancers Act establishes that every review conducted by this Office must be conducted in private.

[71] To publish details of a review in which the parties are identified therefore requires a specific order providing for this. This is in contrast to the provisions of the Act relating to the proceedings of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, which provides that proceedings of the Tribunal are to be held in public (section 238(1)). Consequently, the principles applied by the Tribunal relate to suppression, whereas the LCRO must determine that the reasons for publication of the identities of the parties outweigh the presumption of privacy.

The LCRO publication guidelines identify the factors that will be taken into account when considering whether it is in the public interest to publish a decision with identifying details. These are:-

a) the extent to which publication would provide protection to the public including consumers of legal and conveyancing services;

b) the extent to which publication will enhance public confidence in the provision of legal and conveyancing services;

c) the impact of publication on the interests and privacy of -

   i) the complainant;

   ii) the practitioner;

   iii) any other person;

d) the seriousness of any professional breaches; and

e) whether the practitioner has previously been found to have breached professional standards.

[72] Section 206(4) of the Act identifies that the primary issue for the LCRO must be whether publication is necessary or desirable in the public interest.

[73] There is no question that it is in the public interest to publish the facts, the findings, and the penalties contained in this decision and the findings decision, to firstly

alert the public to matters which they should be aware of, and to remind lawyers of their obligations to clients.

[74] It is rare that identifying details of a complainant client are published. However, in this instance, Ms Berry has made a specific request that her name be published. The reasons provided by her are that:

a) she wishes to be of assistance to others who may have found themselves in a similar situation to her and to provide an empathetic ear; and

b) that publication of her name will make it easier for those interested in the complaint to contact her.

[75] I must note at this stage that no contact details for Ms Berry will be included in any publication Order.

[76] At the penalty hearing, Ms Berry advised that she had consulted with a number of lawyers about her position, and publication of her name would be a means of ensuring that all of the lawyers she had consulted with were advised as to the outcome of her complaint.

[77] This is a somewhat unusual request, and even though Ms Berry waives her right to privacy, I must still be satisfied that it is necessary or desirable in the public interest that Ms Berry's name be published. It is again relevant to refer to the purposes of the Act, which are to maintain public confidence in the provision of legal services and to protect the consumers of legal services.

[78] Ordinarily, these purposes would not be furthered in any way by publication of an Applicant's name. However, Ms Berry specifically requests to have her name published and is willing to provide an empathetic ear to people who find themselves in similar circumstances to herself. In the circumstances, I see no reason not to accede to Ms Berry's specific request that her name be published.

[79] Mr AK is concerned that Ms Berry will communicate to people who make contact with her as a result of this Order, her own views as to Mr Rondel's motives for taking the action which he did, and will communicate untruths which have not been found proven.

[80] Ms Berry will of course be able to speak to whoever she wishes about this matter whether her name is published or not. I acknowledge that publication may mean that

she may talk to a greater number of people about the matter but she is of course bound by the laws of defamation and she acknowledged that at the penalty hearing.

[81] The reasons for Mr AK's objections to Ms Berry's name being published are not sufficient to counter her specific request to do so.

[82] Ms Berry also argues for publication of Mr Rondel's name. Her most forceful argument is that the LCRO has a duty to ensure that clients of legal practitioners are able to make an informed choice as to who they wish to engage to conduct their affairs, and that publication will be in the interests of Mr Rondel's clients.

[83] I specifically reject her submissions that publication will act as a deterrent to other lawyers, and that publication would in effect be part of the penalty against Mr Rondel. These are not reasons to be taken into account when considering whether to publish Mr Rondel's name or not.

[84] Mr AK opposes publication of Mr Rondel's name. He refers to sections 131(f) and 142 of the Lawyers and Conveyancers Act as the applicable sections. These sections relate to the powers of the Standards Committee to order publication, whereas the powers of the LCRO in this regard derive from section 204(4). That does not however detract from the general submissions made by him.

[85] Mr AK refers to the decision of *S v Wellington District Law Society* [2001] NZAR 465 and the obligation to weigh the public interest factor against the interests of other persons including Mr Rondel when exercising the discretion.

[86] In opposing publication Mr AK submits that Mr Rondel does not pose a risk to the public. He advises that the respondent has learned from the complaint and is unlikely to fall into the same error in the future. He submits that publication would have a significant effect on the interests and privacy of Mr Rondel and put into question his overall competence which would be unjustified in light of his previous record and reputation. He also submits that publication would have a negative impact on the interests and the privacy of Mr Rondel's other clients, Mr WA, the trust and other trustees.

[87] Whilst Mr Rondel readily acknowledged his mistakes at the LCRO hearings, his responses to the Standards Committee following receipt of the complaint did not show the same degree of understanding. I note the position adopted by him and his comments in a somewhat aggressive letter in reply to the initial Standards Committee letter following receipt of the complaint:

- "I totally refute Rosalie's allegations and the issues you have listed"

- He argued that he was faced with a fait accompli as to the terms of the Agreements, yet then proceeded to vary the terms without instructions from at least one party.

- "I considered that there was no conflict of interest with regard to the transaction in my acting for Rosalie (as vendor) and the trust (as purchaser) and I took steps to protect the interests of both parties"

- He decided what he thought was best for Ms Berry's interests and acted without reference to her.

- He speculated as to what he thought were Ms Berry's reasons for complaining.

[88] This was a considered response to the Complaints Service and Mr Rondel maintained this approach throughout the Standards Committee investigation.

[89] Mr AK's submission that Mr Rondel has learned from the complaint and is unlikely to fall into the same error in the future must be taken at face value. However, given the breaches of the Rules which have been identified, and Mr Rondel's subsequent denial of any shortcomings, it cannot be said with any certainty that there is any foundation for Mr AK's submissions. Assurances such as these cannot override the public interest and the right of the public to be protected.

[90] In his verbal submissions, Mr AK also referred to the fact that publication would have a negative impact on Mr Rondel's practice. Mr Rondel will have the opportunity to address any concerns that existing or potential clients may have. They will be able to make their own assessment of Mr Rondel from their personal knowledge of his performance when handling their affairs. It is only right that they are made aware of the issues that have arisen in this matter and make their own assessments of Mr Rondel's performance with this knowledge. If Mr Rondel has represented these people to their satisfaction, there is every likelihood that they will remain clients.

[91] Given the purposes of the Act, it must be that the public interest outweighs the objections raised by Mr AK and I intend therefore to order publication of this matter including the names of both parties. There will however be an order that identifying details of all other persons referred to in the decision are removed.

Orders

[92] Pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act 2006 Mr Rondel is censured.

[93] Pursuant to section 156(1)(d) Mr Rondel is ordered to pay the sum of $7,425.31 by way of compensation to Ms Berry within one month of the date of this decision.

[94] Pursuant to section 156(1)(f) and (g) Mr Rondel is ordered to cancel his fee of $650.00 plus GST invoiced on 10 May 2010. Such fee having already been paid, this order is to be effected by Mr Rondel paying the sum of $731.25 to Ms Berry within one month of the date of this decision.

[95] Pursuant to section 156(1)(i) Mr Rondel is ordered to pay the sum of $10,000.00 by way of fine to the New Zealand Law Society within one month of the date of this decision.

[96] Pursuant to section 156(1)(j) Mr Rondel is ordered to make his practice available for inspection by a practitioner appointed by the LCRO for a period of 1 year from the date of this decision such person to carry out inspections as required by [64] of this decision.

[97] Pursuant to section 210(1) Mr Rondel is also ordered to pay the costs of any inspection of his practice as directed by this Office, as and when such costs are incurred.

[98] Pursuant to section 210(1) Mr Rondel is ordered to pay the sum of $2,000.00 by way of costs of this review to the New Zealand Law Society and the sum of $1,200 to Ms Berry, such payments to be made within one month of the date of this decision.

[99] Pursuant to section 206(4) this decision, including the names of Mr Rondel and Ms Berry is to be published. The identifying details of all other persons are to be removed.

DATED this 26th day of April 2012

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O W J Vaughan
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms Berry as the Applicant
Mr Rondel as the Respondent
Mr AK as Counsel for the Respondent
Auckland Standards Committee 5
The New Zealand Law Society