LCRO 204/2011

CONCERNING	An application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 2
BETWEEN	**MR AG** Complainant
AND	**MR ZQ** Respondent

DECISION

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

[1] Mr AG (the Complainant) sought a review of a decision by the Auckland Standards Committee 2 to take no further action on his complaint against law practitioner Mr ZQ (the Practitioner).

[2] The Standards Committee decision was based on the Complainant not having responded to its requests for further information. At paragraph [4] of its decision the Committee wrote, "Despite several reminder letters sent to Mr AG, no response was received to those issues raised.", and at paragraph [5] stated, "The Committee had due regard to all of the material before it and was of the view that there was insufficient information provided to substantiate the complaint that had been made."[1] Without this further information the Committee concluded that Regulation 8 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 had not been fully complied with and it would be inappropriate to take any further action in the matter.

[1] Standards Committee decision dated 5 August 2011.

[3] When seeking a review the Complainant wrote that he had been sick and unable to provide information prior to the matter going to the Committee, and also that he had asked for a meeting which had not occurred. In his view the complaint should not have been dismissed without his further information having been provided. He wrote, "All files were in [the] Complaint[s] office but no one would take time to read them."[2] He wanted an opportunity to present his material and have a meeting to discuss the complaint.

Considerations

The reasons for the Standards Committee decision

[4] Dealing first with the basis for the Committee's decision to take no further action, my first comment is that it is the responsibility of a complainant to provide information sufficient to support a complaint. In his original letter of complaint, dated 25 March 2011, the Complainant provided a background to, and nature of, "a series of complaints", and stated that he would "..... provide much more in depth information as required." A Legal Standards Solicitor of the New Zealand Law Society wrote to the Complainant on 31 March 2011 and sought clarification of 11 separate issues. A follow up letter sent on 27 April 2011 noted that no reply had been forthcoming.

[5] On 24 May 2011 the Complaints Service received a letter from the Complainant to say that he had been unwell, not yet fully recovered, and as "this matter cannot be discussed in a letter of a few words", he sought an opportunity to meet and present the material. At the conclusion of the letter he advised that Mr Y had already arranged delivery of three boxes of court documents to the offices of the Complaints Service, which needed to be read.

[6] On the same day the Standards Solicitor replied to say that while happy to discuss the complaint, he needed to know what the complaint was about, which only the Complainant could explain. Receipt of the three boxes of material was confirmed, but the Standards Solicitor advised that he had requested Mr Y to take them back. The Complainant was advised that it was not the role of the Standards Solicitor "to go through the boxes to find what is relevant or irrelevant to any particular complaint. I must have the complaint in more precise form than [it is] now."[3]

[7] On 13 June 2011 the Standards Solicitor again wrote to the Complainant to say that if there was anything he wished to add to his original complaint it should be sent

[2] Application for review dated 5 August 2011.
[3] Letter NZLS to AG (24 May 2011).

before 28 June 2011 after which time the matter would be forwarded to the Standards Committee. Mr AG was also advised that the boxes of documents had not yet been uplifted, and he was asked to ensure that Mr Y removed them as soon as possible.

[8] On 27 June 2011 the Complainant replied to say he was still unwell and unable to provide extensive detail within the timeframe, adding, "I am however certain what I have previously stated is correct and that the actions of [the Practitioner] contributed to financial difficulties forced upon us."

[9] The matter came before the Committee on 14 July 2011 which noted that there was insufficient information to support a complaint, and decided to take no further action, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006.

[10] In these circumstances the Standards Committee might be considered to have been somewhat hasty in reaching a final decision, given the health difficulties referred to by the Complainant. At the same time three months would seem to be a more than reasonable timeframe within which a complainant could reasonably be expected to respond to specific enquiries. The Complainant did not provide any medical certificates to support his advice, and was apparently able to arrange for boxes of documents to be delivered to the Complaints Service. If he had any hope or expectation that the Standards Solicitor would go through the material in the boxes to search for conduct issues, this was quickly corrected. He well knew that his original complaint letter was not considered to be sufficient to support professional conduct complaints.

[11] In the event the Standards Committee confirmed this position in its decision, and in the circumstances I cannot criticise the Standards Committee dismissing the complaint for want of sufficient information.

Complaints

[12] For the review the Complainant provided more information relating to the various matters identified in his original complaint letter.

[13] The purposes of the Lawyers and Conveyancers Act 2006 is to maintain confidence in the provision of legal services and to protect consumers of legal services. The preliminary task for this review was to examine whether the information now provided by the Complainant disclosed conduct that would justify returning the matter to the Standards Committee for enquiry. This assessment has involved consideration

of a considerable volume of information provided by the Complainant, which included documents, submissions and information provided at the review hearing.

Background

[14] The complaints arise out of a long standing saga about development companies which were unable to repay or refinance significant loans borrowed from a Solicitors Mortgagee Company, lost a property to a mortgagee sale, and where personal guarantors (one being the Complainant) were eventually bankrupted. The Complainant has held grievances about how matters unfolded, and although for the most part the issues of which he complains have been dealt with through the Court, he has sought to draw the Practitioner into the grievances.

[15] The Practitioner's nominee company, HU and Co. Solicitors Nominee Company Limited, made a sizeable loan (around $6m) to two related property development companies. The loan was secured by first mortgages over three properties which together provided security for the loan well in excess of the required amount. Two of those properties owned by the companies appeared to have been properties involved in the development. The third property, that I refer to as the 'R' property, was a farm and residence occupied by the Complainant's family members, and this provided collateral security for the loan. The Complainant and a family member, S, were personal guarantors for the debt.

[16] The borrowers were unable to repay the amounts when they fell due, and were unable to repay or refinance the loan. The R property meanwhile had two further mortgages registered against it by another lender (which held second and third mortgages). This property was eventually sold by the second/third mortgagee, and proceeds applied to overdue interest and reduction of some part of the principal of the first mortgagee as had been agreed between the mortgagees.

[17] The Complainant and S were also called up on their guarantees, and at some stage the first mortgagee took steps to take possession of the development properties. I note that a large part of the loan remained outstanding at the time of the review hearing.

[18] Many of the matters complained of concerned the way that the Practitioner managed the defaults of the borrowers, in particular his response to a refinancing proposal, and alleged failures of the Practitioner to put these options to the investors, and overall the impact of the Practitioner's actions on the Complainant and his family. Other related complaints are as discussed below.

Complaints

[19] The Complainant's original letter of complaint signalled the scope of his grievances and that letter had provided a useful framework for discussing the issues he raised. At the outset I record that similar complaints were made against the Practitioner by another person, namely an aggrieved investor, who had been in contact with the Complainant, and with whom information and grievances were shared.

[20] The first matter raised in the complaint letter[4] contended that the Practitioner had failed to inform the investors of a loan offer from an alternative provider, to refinance the loan. The Complainant alleged that the Practitioner had insisted that all borrowing had to be from the solicitors nominee company. The alternative loan is understood to refer to a loan offer allegedly made by Prudential, but did not in the event proceed. It was understood that the Complainant held the Practitioner responsible for losing this refinancing opportunity.

[21] I have considered this specific matter in relation to the same complaint from the investor-complainant who sought a review by this office of a Standards Committee decision that did not uphold various complaints against the Practitioner. After having examined all of the evidence at that time I found that no offer had in fact been made by Prudential. What I found was evidence of preliminary steps having been taken by Prudential in relation to a loan of just over $2 million (noted to be well short of what was needed to refinance the loans), and which required first ranking securities over properties that were already mortgaged to the nominee company. The proposed loan does not appear to have progressed beyond the preliminary stage, and I concluded that there was no basis for the complaint. The explanation appears in the following extract from that earlier review decision. (The reference to "C" is the Complainant in this case):[5]

> [32] The terms of the 'Prudential loan offer' comprised 6 pages. The front cover is headed, "1st Mortgage Loan Offer", and records the details of the borrowers' solicitor. The borrowers are those recorded in the solicitors nominee company mortgage, and two of the properties that would provide first level security for the Prudential loans were those already securing the solicitors nominee company loan. The purpose of the Prudential loan was stated to be "to provide finance to refinance" the borrowers' loans. The document appeared to have been

[4] Letter of complaint to NZLS (25 March 2011).
[5] Unpublished decision LCRO 167/2011 *P v D*.

prepared around December 2006, and contained the usual conditions, including those relating to valuations of the secured properties.

[33] An email dated 12 February 2009 sent to the borrowers by a Prudential employee identifying herself as "Senior Mortgage Manager" for Prudential described this document as the "initial draft of the loan offer", noting there were clerical errors, and adding that the security ought not to have been sought over one of the properties mentioned in the above document (this being the 'collateral' security). She wrote that it was "common for alterations to be made before the final document was produced or executed."

[34] The Practitioner had informed the Standards Committee that there had been an enquiry from the borrower's lawyers in December 2006, but had no further communication. When commenting on the information provided by the Applicants, the Practitioner also noted it was not an unconditional loan offer.

[35] If the Prudential loan document provided to the Standards Committee was the only refinancing proposal handed to the Practitioner, I do not accept that it amounted to any refinancing offer that he could act on. The loan proposal was in an early draft form, clearly incomplete, and while falling well short of refinancing the whole debt, on its face would have required first mortgage securities over two properties that secured existing larger loans to the nominee company. Materially, there is no evidence at all that any formal proposal was ever forwarded to the Practitioner by the solicitors acting for the borrowers, and all the indications are that the refinancing proposal did not proceed beyond this initial draft.

[36] The allegation here is that the Practitioner failed to protect the interests of the investors because he had not informed them about the borrower's refinancing proposal.

[37] I accept the evidence that the borrowers approached Prudential for a loan in December 2006 and that early steps were taken in relation to the matter; I also accept that C may have visited the Practitioner with a copy of the initial draft loan proposal by Prudential, referred to above. However, I could find no evidence of a loan offer having been made by Prudential, or presented to the Practitioner, in any form that could have given rise to any obligation on the Practitioner to consider it. No evidence was produced that a formal and unconditional refinancing proposal was made to the borrowers by Prudential. Or if such an unconditional refinancing offer had been made to the borrowers there is no evidence of it having been sent to the Practitioner, by the borrower's lawyer or anyone else. Moreover, it was not the role of the Practitioner to consider a 'loan offer' in the form which was included in the Committee's file, since any refinancing proposal would, in the normal way, have been sent to the borrower's lawyers who would have prepared the

> documentation (which would have very likely been extensive) after having communicated with the Practitioner that his client-borrower was intending to refinance the solicitors nominee company loan. There is simply no evidence of any such exchanges between the Practitioner and the borrower's lawyer. I conclude that no refinancing proposal was ever forwarded to the Practitioner. The Standards Committee was correct to decline taking any further action on this complaint.

[22] The second matter in the complaint letter concerned the R property. The Complainant stated that he had understood the R property had been given as additional (collateral) security and was not required as a general security to cover interests and other costs. This does not disclose a complaint. There is nothing to prevent a lender from seeking such additional security as may be considered prudent.

[23] The third matter set out in the complaint letter concerned the mortgagee sale of the R property. This action was taken by the second/third mortgagee of that property, and after the borrowers failed to remedy their defaults. The Complainant's view was that the R property ought not to have been sold, as it was only a collateral security, and he held the Practitioner responsible for the sale proceeding, on the grounds that his consent to the sale (for the Solicitors Nominee company) had enabled that sale to proceed.

[24] It is difficult to find any basis at all for a complaint against the Practitioner for having consented to a mortgagee sale by a second/third mortgagee against a mortgagor who had defaulted. The mortgagee sale was clearly conducted by the second/third mortgagee and necessarily required the consent of the first mortgagee. The matter of the mortgagee sale was later considered by the Court which found no irregularities in the procedures surrounding the sale. However, no wrongdoing is disclosed by the Practitioner having given the consent of the nominee company, as first mortgagee, to the mortgagee sale by a second/third mortgagee.

[25] A fourth matter alleged that the property had been undersold, which the Complainant contended had been established in Court. This appears to have been a reference to High Court proceedings relating to the sale of the R property by the second/third mortgagees. The mortgagee obtained judgment but a stay of execution was granted to allow the Complainant to purse a claim based on breach of duty by the mortgagee to exercise good faith in exercising the power of sale. The Court concluded that the solicitors nominee company was not the mortgagee exercising its power of sale, and therefore the Property Law Act obligations did not apply.

[26] The Complainant also alleged that there had been underhanded dealings. His allegations of collusion with the mortgagee vendor led the Court to also consider the involvement of the nominee company in the sale process. The Court concluded that there was insufficient evidence to show that there had been bad faith on the part of the nominee company such as could support an allegation of breach of equitable duty. The Court had the benefit of examining all of the evidence, and the cross examination of the evidence. If the Complainant disagreed with the Court's judgment, the proper step would have been to seek an appeal. It is not appropriate to revisit this matter again here.

[27] A fifth matter alleged that the Practitioner had verbally abused the Complainant when he went to his lawyer's office to sign an agreement. The Complainant explained he was on medication for stress and a heart condition, adding that the Practitioner had threatened that failure to sign the agreement would result in the Complainant's sister being forced out of her house within weeks. The Practitioner denied the allegation.

[28] The event apparently took place when the Complainant was attending at the offices of his own solicitor. It may well be the case that the Complainant felt himself under pressure to sign an agreement, and may also have been informed of the consequences of not doing so. A letter on file that the Practitioner had written to the Complainant's lawyer had clearly set out the consequences of default, and it is not surprising that these circumstances would have caused stress. However, that in itself does not amount to wrongdoing. There is nothing improper about a lawyer outlining his client's legal position and/or options, even in very firm terms, and not infrequently this may cause upset to a third party. Had the Practitioner made any improper threats it is to be expected that the Complainant's lawyer would have intervened, or provided supporting evidence. I find no evidence of the Practitioner having breached any professional conduct rule in this matter.

[29] A sixth matter referred to a remedial proposal that was presented to investors by the Practitioner, but which the Complainant's lawyer advised his clients against. The fact that a proposal made by one lawyer is rejected by another is not indicative of professional wrongdoing on the part of either. This does not disclose any wrongdoing on the part of the Practitioner.

[30] In the seventh matter the Complainant alleged that the Practitioner lied to the Court when he denied his involvement in the sale of the R property. The Complainant claimed to have evidence of such involvement. This complaint appears to overlap with the fourth matter, since I noted that there was some discussion in the High Court

decision about the Practitioner's role (or rather that of his nominee company) in the sale of the R properties. The Court made no adverse comment about the Practitioner, and if the Complainant had evidence that contradicted that given by the Practitioner, he had the opportunity to have presented it to the Court at that time. The regulatory processes should not be used as vehicle to revisit matters that have been the subject of the considerations of the Court. It is inappropriate to consider this complaint further.

[31] However, it may be that the Complainant intended this complaint to relate to the Property Law Act notice (which is by no means clear from his correspondence) since among the correspondence he expresses his grievance about being "unlawfully bankrupted as a result of an invalid Property Law Act Notice". He alleged that the Practitioner had deliberately misled the Court in an affidavit he had sworn, and which led to the Court granting the first mortgagee possession of one of the mortgaged development properties. The Complainant explained[6] that his own lawyer had not picked up an error in the PLA notice, which was discovered by a newly appointed lawyer, and the defendant (presumably referring to himself) had immediately made the Court aware of the invalid PLA notice, and opposed costs being awarded to the plaintiff. He wrote, "Despite numerous requests the plaintiff (i.e the Solicitors Nominee company) has still not provided the court with any evidence to disprove the defendants' claim that the PLA notice is invalid." This matter is clearly before the Court, and that is the proper place for the Complainant to obtain any remedy he seeks in relation to this matter. There is no evidence before me that the Practitioner breached his professional obligations in respect of this matter.

[32] In the eighth matter the Complainant was critical of the Practitioner's alleged failure to have negotiated with the mortgagor or its agent, and the alleged failure of the Practitioner to respond to the Complainant or their solicitor. This was understood to concern the sale of the R property. It was apparent from this correspondence that the main object of the Complainant's grievance was a in relation to a third party who eventually purchased the R property. As noted, the mortgagee sale was under the control of the second/third mortgagee through a real estate agency, and the procedures involved in the sale have been thoroughly scrutinised by the Court. The Practitioner had no duty towards the Complainant or his companies who were represented by their own lawyer. I have seen no part of the Practitioner's conduct that raises professional conduct issues.

[6] In an attachment to his email to this Office (24 September 2012).

[33] In a ninth matter the Complainant contended that when the Practitioner sought a third mortgage from X lender, he had led X to believe the funds were for roading developments whereas in fact it was to finance interest arrears on the solicitor nominee company mortgage. It is difficult to make sense of this complaint. Any mortgage would have been sought by the Complainant or his development company, not by the Practitioner. However, if this is an allegation of misrepresentation to a potential lender, I have seen no evidence to support the complaint. A lender seeking information in relation to the purposes of the prospective loan would have needed to obtain that information from the prospective borrowers or their solicitor, or if this is an allegation that the Practitioner failed to secure, or assist the Complainant and/or his companies to secure, further funding for development or refinancing, I can see no basis for such a complaint. The Practitioner owed no duty to the Complainant or his companies.

[34] A tenth matter concerned the fees charged by the Practitioner for arranging the loans. I noted that the level of fees and commissions charges were before the High Court when the solicitors nominee company applied for summary judgment on the debt. The Complainant raised oppression and sought to have the loan contract reopened. This raised a question about whether any provisions in the loan contract brought the arrangements within s 118 of the Credit Contracts and Consumer Finance Act 2003. This matter is being pursued through the Court which has significant procedural advantages over Standards Committees and this Office, as well as the power to grant remedies, and that reason would alone be sufficient to not undertake any parallel enquiry.

[35] However, it is unlikely that the complaint would be considered in any event, since it appears to fall short of the jurisdictional threshold set by s 351 of the Lawyers and Conveyancers Act 2006. This section applies because the conduct complained of occurred prior to the commencement of that Act, and the professional standards which apply are those that applied under the Law Practitioners Act 1982. That section prohibits Standards Committees from considering any such complaint unless the conduct complained of could have led to proceedings of a disciplinary nature being commenced against the practitioner under the Law Practitioners Act 1982. The threshold for disciplinary intervention under the 1982 Act was relatively high. 'Misconduct' under that Act is conduct sufficiently serious to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable'), or if the default can be said to arise from negligence such negligence must be either reprehensible or be of

such a degree or so frequent as to reflect on his fitness to practise[7].[8] The alternative test for 'conduct unbecoming' is whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners".[9]

[36] In my view the conduct complained of, even if the Court did grant a remedy to the Complaint in this matter, would not be likely to have led a disciplinary proceeding against the Practitioner. There would need to have been some ethical or blameworthy conduct on the part of the Practitioner which is not present in this case. It would be difficult to find any egregious conduct by the Practitioner, given that the borrowers were represented by their own lawyer in relation to those loans.

[37] An eleventh matter was that the Practitioner had not acted in the best interests of the Complainant or the investors in that he had not responded to potential buyers of another of the secured properties which, he contended, would have provided sufficient funds to complete the power and roading requirements thereby making the properties more saleable without further subdivision. The short answer is that the Practitioner had no duty to protect the interests of the Complainant or his mortgagor companies. It was open to the Practitioner to assess where the interests of the investors lay, and indeed it was his duty to make such decisions. Such correspondence as there is on the file does not disclose any evidence to support the complaint. Rather, it shows that the Practitioner took careful steps to evaluate the various refinancing proposals, and that his rejections followed his judgment about the viability of those proposals. The Practitioner's obligation was to protect the position of the investors, and this did not require him to respond to all proposals put to him.

[38] A twelfth, and final, matter alleged that the Practitioner had failed to respond or report to investors, following information he had obtained from the other mortgagees. This complaint rests on information given to him by the other complainant who was, as noted, an unhappy investor. It is difficult to see any basis for a complaint being made by the Complainant. Other than relying on hearsay evidence, there is no evidence that the Practitioner failed to report to his investors as appropriate.

[39] In conclusion, the Complainant held the Practitioner responsible for the loss of their investment properties, the loss of their home and all of the personal funds they had invested in the development. He also held the Practitioner responsible for his bankruptcy, and repeated his complaints that the Practitioner had failed to act in the

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[7] *Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990.
[8] *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105 HC.
[9] *B v Medical Council* [2005] 3 NZLR 810 HC at 811.

best interests of the investors and the Complainant. To this he added the additional complaint that the Practitioner had not responded to suggestions he had made for the way forward. The Complainant wrote, "We the public rely on solicitors to be totally honest and doing the best for everyone but in recent years I feel we can no longer trust many of the legal profession".[10]

[40] The Complainant is mistaken in his views if he believes that a lawyer's responsibility is to the world at large. The Practitioner had no duty and no professional responsibility to protect the interests of the Complainant or the borrowing companies. Although the Complainant wrote that they believed at all times that the Practitioner was acting for them, the correspondence on the file shows that the Complainants and or his companies were represented by EE Law. While I accept that from time to time the Complainant made direct contact with the Practitioner with enquiries, there is nothing to show that the Practitioner acted for the borrowers or the Complainant personally, or that he gave legal advice to them. I do not accept the Complainant's assertion that he only used "the services of a legal secretary at EE Law.... to verify the signing of documents, etc..."[11], having found items of correspondence to him signed out by two different partners of that firm. There are also copies of correspondence sent by the Practitioner to that firm. There is evidence on the file to show that EE acted for the Complainant and his companies at least from mid 2006, and probably earlier. Documents prepared by Prudential (for loans to the Complainant's companies, and guaranteed by the Complainant) in 2006 recorded the borrower's solicitors as EE Law. I conclude that the Complainant and his companies had their own legal representation, and must be taken to have been advised as to the loans, and the implications of acting as guarantors of substantial loans to their companies.

Concluding comments

[41] I have not addressed each and every aspect of the complaints or allegations, but simply note that many efforts were made by the borrowers over an extended period of time to try and resolve the financial issues, ultimately to no avail. In the course of these efforts there was at times frequent contact or overtures made by the Complainant to the Practitioner, but there can be little doubt that the Practitioner made clear at all times that his duty and responsibility lay with the investors of the Nominee company. The resolution of the financing issues was squarely the responsibility of the Complainant and the borrowers, and any hopes or expectation they may have had that the

[10] Above n4.
[11] Letter to Auckland District Law Society (21 July 2008).

Practitioner would come up with solutions was misplaced. In light of the ongoing defaults by the borrowers the Practitioner had to make assessments throughout as to where the interests of the investors lay, and this he made clear to the Complainant. It was the Practitioner's responsibility to ensure that the investments were protected, and this may well have included dialogue or contact with others involved or having a potential interest, in the properties.

[42] That his decisions as to the most prudent way forward did not align with the suggestions of the borrowers or guarantors is not indicative of any failure on the Practitioner's part. There is insufficient evidence to support the many and various allegations against the Practitioner, and consider it highly unlikely that this will alter if further enquiry was undertaken. In these circumstances there is no justification for referring these matters back to the Standards Committee for enquiry.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Standards Committee decision is confirmed.

DATED this 14th day of February 2014

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Hanneke Bouchier
Legal Complaints Review Officer

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

Mr AG as the Complainant
Mr ZQ as the Respondent
Mr X as the Respondent's Counsel
The Auckland Standards Committee 2
The New Zealand Law Society