LCRO 278/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [X] Standards Committee 3
BETWEEN	**MRS AP** Applicant
AND	**MR ZG** Respondent

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

Introduction

[1] Mrs AP has raised a number of complaints relating to the administration by Mr ZG [the Practitioner] of the firm's nominee company (AZG Solicitors Nominee Company Limited), and his conduct following default by the borrower in payment of a loan in which Mrs AP had invested funds both personally and through her family trust. This review involves a consideration of whether compliance with the Nominee Company Rules (both before and after 1 August 2008) is one of strict liability, and the nature of the relationship between a contributor to a nominee company and the 'responsible lawyer'.[1]

Background

[2] Because the events giving rise to Mrs AP's complaints took place both before and after 1 August 2008 (being the commencement date of the Lawyers and Conveyancers Act 2006) it is important to record them in some detail.

[3] In June 2004, Mrs AP was employed as a legal executive by AZG, the law firm in which the Practitioner was a partner.

[1] As that term is defined in the Lawyers and Conveyancers Act (Lawyer: Nominee Company) Rules 2008. The Solicitors Nominee Companies and Contributory Mortgages Rules 1996 refer to the 'responsible practitioner'.

[4] Mrs AP was a trustee of her parents' trust, and advises that she was approached by the firm's accounts' section to invest in an advance to a company called MN 2 Limited. She was provided with a valuation of the proposed security which comprised two sections on [area] Hill.

[5] The Practitioner was the other trustee of the trust, and an authority was completed and signed by both trustees authorising an investment of $3,000 in a loan of $265,000 to the company.

[6] This was increased by a further $2,000 in October 2004 and a second authority was completed and signed by the trustees.

[7] In both authorities, the name of the lender was recorded as MN 1 Limited whereas the borrower was MN 2 Limited.

[8] In November 2005, these advances were transferred to the [F & H] Trust which was Mrs AP's family trust. No new authorities were completed at the time of transfer.

[9] A further advance of $2,000 was made on 9 June 2006 and on 30 June 2006 a new authority was completed and signed by the trustees of the F & H Trust recording total advances of $37,000. This authority again recorded the borrower as being MN 1 Limited.

[10] In December 2006 a further advance of $49,000 was made and the total loan increased from $265,000 to $365,000. This advance was authorised by a note on the earlier authority for $37,000 but the increase in the total advance from $265,000 to $365,000 was not amended.

[11] A further advance of $22,000 was then made in May 2007 and authorised in the same way as previous increases, by note on the original authority. This made a total investment of $108,000 for the F & H Trust. In addition, both Mrs AP and her husband also invested sums personally in this mortgage.

[12] An updated valuation was obtained in November 2006 from Z Valuers, which included a mortgage recommendation of $386,000, being two thirds of the value assessed by the valuer. It is noted, that this valuation in particular, included a statement that it was based on a GST zero rated basis, and consequently the mortgage recommendation was also made on that basis.

[13] The loan was due for repayment in June 2008, by which time Mrs AP had left the employ of AZG. The mortgage was not repaid and a Property Law Act notice was issued in July, expiring on 21 August 2008. Interest payments also ceased.

[14] Mrs AP and her son met with the Practitioner in October 2008. The Practitioner advised them that the sections needed to be cleared and that he was in the process of drafting a letter to contributors to gain permission for this. In the meantime, the sections were to continue to be marketed by an agent who was a friend of the director of MN 2 Limited. Mrs AP objected to that.

[15] In November, she wrote to the Practitioner, expressing her concern that the sections had not been cleared and requested again that a meeting of contributors be called, having made a similar request at the meeting in October.

[16] On 16 December 2008 the Practitioner wrote to the contributors, advising that the agent had been instructed to sell the sections with a deadline tender of 2 February 2009. The Practitioner also advised that authorisation had been given to the agent for the sections to be cleared. At that stage he pointed out that the borrower was registered for GST, and that consequently GST on the sales would need to be paid to the Inland Revenue Department, thereby reducing the amounts available to contributors. He noted that a shortfall was expected.

[17] At that stage, Mrs AP instructed Ms S of XX to act for the AP interests in connection with the matter. On 19 January 2009 Ms S wrote to the Practitioner noting that as at 15 January 2009 the sections had not been cleared. She also advised that her clients had been given a cheaper quote for clearing the sites than had been quoted to the Practitioner. The Practitioner responded to Ms S advising that he had cancelled the contractor previously engaged and requested Ms S to obtain a written quote from the contractor consulted by Mrs AP, and to instruct that contractor to proceed once that written quote had been obtained.

[18] He also noted that the closing date for the tender had been extended to 20 February 2009 due to the holiday break and time constraints.

[19] The contractor engaged by Mrs AP was unable to carry out the work as it had rained heavily and his equipment was unsuitable for the site. The responsibility for clearing this site then reverted to the Practitioner and it would seem that this was carried out in early April 2009. Mrs AP advises that the agent did not receive any authorisation from the Practitioner prior to this.

[20] The sections were put on the market on 12 April 2009 with a tender close date of 30 April 2009.

[21] On 3 June 2009, the Practitioner sent a report to contributors, advising that that the tender process had been unsuccessful, with no interest having been shown in the

sections. He suggested that the contributors might like to assume ownership of the sections through a company to be established by them. He also proposed that a meeting of contributors be held on 15 June 2009.

[22] At that meeting it was agreed to take the sections off the market and to meet again in three months time to reconsider the situation. In the meantime, the Practitioner was to provide further information to the contributors which included a summary of the costs incurred to date. By that stage, the rates had fallen into arrears and funds were required from the contributors to meet outgoings.

[23] Mrs AP sought repayment of her funds from AZG who declined to make payment to her. Since that time, the sections have become inaccessible due to the earthquakes occurring in Christchurch and remain unsold.

[24] Mrs AP lodged her complaint in November 2011.

Mrs AP's complaints

[25] Mrs AP's complaints relate to:

- the errors in the investment authorities;
- the failure to conduct a credit check on the borrower and its directors;
- the lack of information about the borrower, particularly that he had approached AZG through a broker at a time when funding was relatively easily to come by;
- the failure to advise that the borrower was consistently late with interest payments;
- the fact that all decisions were made by the Practitioner alone;
- the failure to recognise that the value of the security was reduced by the obligation to account for GST on a sale; and
- the delays in the sale process.

[26] She summarised her complaints as being that:[2]

> The Practitioner has acted negligently in recommending the investment to me, my husband and my Family Trust and I also believe that he failed to take prompt action on the instructions from myself as the investor who holds a majority in value of the principal sum secured, to arrange for the sections to be cleared and sold and this has exacerbated the losses now faced by myself and the other contributors.

[2] Complaint to NZLS dated 18 November 2011.

[27] She sought recovery of her investment.

[28] The Standards Committee commissioned a report from [name], an NZLS Inspector, to report on compliance with the Nominee Company Rules. The Committee relied extensively on [this] report in coming to a determination to take no further action in respect of Mrs AP's complaints. I will address the content of this report in subsequent sections of this decision.

[29] Mrs AP has sought a review of the Standards Committee determination and states:[3]

> The Law Society's Notice of determination of 28 September 2012 contains inaccuracies pertaining to the complaint and appears to ignore many major aspects of my complaint against [the Practitioner]. There appears to be very little understanding of the timeline of events and in a number of cases misquotes my complaint in a way that someway belittles it.

[30] She then commented in some detail on the Standard Committee determination.

[31] In the application for review Mrs AP has abandoned her request for repayment of her investment and seeks instead "a greater level of penalty imposed on the Practitioner and AZG and a higher level of disciplinary action".[4]

Review

[32] A review hearing was scheduled in Christchurch for 9 October 2013. The Practitioner engaged Mr T to represent him. On 25 September 2013, Mrs AP wrote to this Office to "highlight previously provided information that is relevant to the LCRO's consideration of the matters that I raised in my original complaint to the law society".

[33] Mr T expressed some concern that Mrs AP was "recasting" her complaint in this letter and indicated that he may be instructed to seek an adjournment. In response, I noted that Mr T would have the opportunity at the hearing to make submissions on matters that he considered Mrs AP was raising for the first time, and also indicated that the hearing was only part of the review and that, if appropriate, he would be provided with the opportunity to make comment on any issues following the hearing.

[34] In addition, I sought submissions from him following the hearing, on the nature of the duty (if any) owed by the Practitioner to the nominee company to assess the lending proposal and the ability of the borrower to meet its commitments under the mortgage.

[35] I also requested full details of what information the Practitioner sought and what enquiries he made when initially assessing this proposal, and later, when the principal sum was increased.

[36] Mr Tr provided submissions by letter dated 18 November 2013 which were referred to Mrs AP. On 22 November 2013, this Office then received somewhat unexpectedly, comments in response, from Mr G of [firm name], who had been instructed by Mrs AP.

[37] Mr T expressed concern at the lateness of these submissions which he considered contained elements which were being advanced for the first time. He also expressed concern that Mr G's letter had been sent to him by this Office "for his information", his concern being "a matter of process in natural law".[5] I infer from this, that he considers the letter from this Office should have sought comment from him, rather than being sent "for his information". Whilst I agree with that, he has nevertheless commented on Mr G's letter and I do not think that the Practitioner has been disadvantaged in any way.

The elements of the complaints

[38] The following issues require to be examined in this review:

i. What duties did the Practitioner owe to Mrs AP with regard to her investment in the loan to MN 2 Limited?
ii. Compliance with the Nominee Company Rules that applied before 1 August 2008.
iii. The consequences of any adverse findings in respect of i. and ii. above.
iv. Compliance with the Nominee Company Rules that applied after 1 August 2008.
v. The consequences of any adverse finding in respect of iv. above.

What duties did the Practitioner owe to Mrs AP with regard to her investment in the loan to MN 2 Limited?

[39] The Standards Committee has relied largely on the report from [NZLS Inspector] in reaching its determinations. In his report, [the NZLS Inspector] noted that he had:[6]

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[3] Application for Review to LCRO dated 2 November 2012.
[4] Above n3.
[5] Letter Mr T to LCRO (3 December 2013).
[6] Memorandum dated 20 January 2012 [NZLS Inspector] to Standards Committee at pg 1.

> restricted [his] commentary to the Nominee Company Rules framework and deliberately [did] not comment upon any ancillary issues such as whether correspondence was replied to promptly or similar 'professional' issues.

He went on to observe that "a central tenet of the Nominee Company Rules is that of *caveat emptor*, [and] that a relatively minimal volume of essential information is provided to the prospective investor."

[40] Prior to the review hearing I indicated to Mr T that at the hearing I wished to discuss the broader issue of whether a solicitor/client relationship existed between the Practitioner and Mrs AP (and the other contributors) in terms of the Conduct and Client Care Rules[7] with resulting obligations on the Practitioner. With regard to conduct prior to 1 August 2008 the Conduct and Client Rules did not exist, but the usual common law rules and the rules of professional conduct in force at the time applied.

[41] Mr T's response, is that the Practitioner had little, if any, duty of care to Mrs AP and the contributors. He referred to the comments of [the NZLS Inspector] noted above, and disputed the suggestion that the Practitioner and Mrs AP had a solicitor/client relationship. He noted[8] that Mrs AP had never contended that she was the Practitioner's client, but I am not of course restricted by how she viewed the relationship.

[42] Following the review hearing, I also requested Mr T to address what duties (if any) the Practitioner had to the nominee company itself in terms of assessing the request for funding from MN 2 Limited. Mr T argued that:[9]

> Strictly speaking, the usual directors' duties under the Companies Act 1993 will apply in respect of a director's obligations to a solicitors' nominee company. However, given that a nominee company itself is acting only in a very narrow capacity as bare trustee, these obligations will be limited.

[43] Mr T also submitted:[10]

> Because Mrs AP was not a client of [the Practitioner], he did not owe an over-arching fiduciary duty to her which would otherwise arguably include a duty to assess a mortgagor's ability to repay the advance, particularly if there was uncertainty on the sufficiency of the security; and a duty to obtain the best lending terms reasonably possible.

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[7] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[8] Letter Mr T to LCRO (18 November 2013) at [10].
[9] Above n8 at [3].
[10] Above n8 at [19].

[44] In short, Mr T's position is that the Practitioner had little, if any, duty to Mrs AP whether through the nominee company or otherwise.

[45] I do not agree. In the first instance, I note that [NZLS Inspector] was specifically (and only) requested to comment on compliance with the Nominee Company Rules. At the commencement of his report, he made a point of noting that he made no comments on "professional issues". Secondly, paragraph 1 of the "Office Procedures and Controls" section of the Notes for Guidance of Practitioners to the Nominee Company Rules 1996 states:

> All partners in a firm are, in the end result, individually responsible to ensure that the firm's nominee company is operated in a manner which complies with all statutory provisions, the solicitor's Nominee Company Rules and the Trust Account Rules, **as well as in accordance with the duties owed by the partners to investor clients".** (Emphasis added)

[46] This comment confirms that while the Rules are directed to the operation of the nominee company and include what information is required to be given to an investor, they recognise that there are duties owed by the partners to investors, independently of the requirements of the Rules.

[47] Mr T argues that Mrs AP was not the Practitioner's client. However, she had worked for AZG for some time. The Practitioner was a trustee of her parents' trust and presumably the trust and her parents were his clients. She herself had established a trust through the firm, of which the Practitioner's partner was a trustee. It is difficult to accept that Mrs AP did not place some measure of reliance on the Practitioner. She has also advised that she specifically asked The Practitioner about the wisdom of investing in the mortgage and advises that the Practitioner confirmed that it was a good investment for the trust.

[48] Mr G has referred me to the case of *Hole v Snedden*.[11] Whilst I do not accept Mr G's contention that this case is an authority for the premise that it was the Practitioner's obligation to ensure that there was always adequate security available to meet the borrowing, I do note the following comment by the Associate Judge:[12]

> Arguably it was unwise to advise **(and in this context an invitation from a lawyer to his client to invest with the lawyers' nominee company must amount to the lawyer having given those clients 'advice')** (emphasis added) his clients when the valuation provided no more than a hypothetical value of the land at some future time.

[49] The Associate Judge makes it quite clear by this comment, that when a lawyer puts an investment proposal to a potential contributor, the lawyer is giving advice to the client, and the potential contributor is a client for those purposes.

[50] I also refer to *Canterbury District Law Society v W.*[13] I acknowledge that I have not referred this case to the parties for comment, but I use it to reinforce my views, rather than relying on it as a sole authority on this aspect of the complaint.

[51] The facts out of which *W* arose, took place prior to 1 August 2008 and fell to be considered under the Law Practitioners Act 1982 and the same Solicitors Nominee Company Rules as are applicable to the present matter. In that case the District Tribunal, the Law Practitioners Disciplinary Tribunal and the Court, all considered that as a result of a breach of the Nominee Company Rules in not supplying a valuation, the lawyer was negligent. The degree of negligence was not agreed on by all, but that is not relevant to this matter.

[52] A lawyer can only be negligent if there is a duty of care and it is quite clear from this judgment that both Tribunals and the Court considered that the lawyer had a duty of care to the contributors.

[53] The second issue addressed in that case, was whether, in acting for both the borrower and the nominee company, the lawyer had a conflict of interest. A conflict of interest can only exist if it is accepted that the lawyer is acting for both parties. I acknowledge that lawyers often act for a borrower and a nominee company when advances are made through a nominee company, but the relevance of this matter is that there was a clear acceptance by the Tribunals and the Court that the lawyer was acting for the contributors to the nominee company.

[54] I am quite satisfied that in putting a lending proposal before contributors, a lawyer cannot disclaim all responsibility for ensuring the proposal is sound. I agree that contributors must carry some responsibility for their own decisions. However, I consider that the Practitioner had a duty to at least provide the contributors with sufficient information to enable them to make an informed decision and in this regard, I do not think he met his obligations.

[55] The relevant facts that I consider impacted on the proposal to advance funds to MN 2 Limited are:

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[11] *Hole v Snedden* [2012] NZHC 1907.
[12] Above n11 at [99].
[13] *Canterbury District Law Society v W* CIV 2007 - 485 - 2648.

- the request for funding had been submitted by a broker, the relevance being that funding was reasonably available at the time and if it was necessary for a borrower to engage the services of a broker it was an indicator that the borrower may not have been a good risk;

- the limited inquiry about the borrower made by the Practitioner (limited to a telephone call to another solicitor whose firm had previously been involved with lending to the borrower);

- the fact that the director of the company had been adjudicated bankrupt previously;

- from the inception of the loan to the due date, the borrower made payment on time on only two occasions (this information being relevant when further funds were contributed to the loan); and

- that the nominee company would be obliged to pay GST on any funds realised from the sale of the property.

[56] A reasonably prudent lender would have been reluctant to commit funds (or more funds) if any one of these factors had been known.

[57] I do not seek to impose an unreasonable duty of care on a lawyer who puts a proposal before contributors to a nominee company advance, but I do not accept that a lawyer can disclaim all responsibility. I consider that the Practitioner did not meet this limited duty of care to Mrs AP. I therefore disagree with the Standards Committee in this regard.

Compliance with the Solicitors Nominee Company Rules 1996

[58] Although I have separated out events before and after 1 August 2008 in respect of compliance with the Nominee Company Rules in force at the time, there was little change between the sets of Rules applying before and after that date. The real relevance is the consequences flowing from a breach of the Rules.

[59] Rule 6.1 of the 1996 Nominee Company Rules provided:

> A responsible practitioner must not permit an investment to be made in the name of a solicitors nominee company by an investor unless the investment is made in accordance with a specific authority.

[60] Rule 6.1 required a separate authority in the form provided in Appendix E to the Rules in each case where funds were contributed to a loan. This was not followed by

AZG when the investments were transferred to the F & H Trust and when further funds were contributed to the loan. The authorities did not refer to the correct borrower, and by using an existing authority when further advances were made, they became inaccurate in recording the total loan. In addition, there were irregularities over the provision of a valuation when further advances were made in 2006 and some doubt that a valuation was specifically provided to Mrs AP when the additional advance was made in 2006.

[61] In its determination, the Standards Committee has reflected [NZLS Inspector's] comments in a number of places in his report where he comes to the view that the irregularities were excusable:

- The lack of a specific authority for the transferred entitlements appears to be an administrative lapse rather than an action taken without Trustees' consent;[14]
- That the trustees initialled an acknowledge[d] that they were in agreeance with the accumulating investment argues again that the failure to complete and secure specific authorities were again an administrative lapse rather than an introduction of funds into the security without trustees' consent;[15]
- If however Mrs AP was already aware of the valuation (as it appears she was through her employment) then I expect she is estopped from arguing any loss;[16]
- If there was any breach this would be relieved when the loan was re-advanced in December 2006 pursuant to a current valuation;[17] and
- In conclusion, there are a number of lapses and apparent breaches of the Nominee company rules in the catalogued events. In most instances those breaches have been rectified by subsequent events or may be of little overall consequence. That the Complainant (Mrs AP) was intimately involved in the setting up of the loans in the course of her employment may act to affix her with information that had she been arms length from the firm, would have been major failings. Without in any way usurping the Committee, the core Nominee Company Rule issue at play in this matter is whether the complainants (Ms SP and F & H Trust) were aware of and authorised the increase in the principal sum from $265,000 to $365,000.[18]

[14] Above n6 at pg 4 para 1.
[15] Above n6 at pg 4 para 2.
[16] Above n6 at pg 4 para 3.
[17] Above n6 at pg 4 para 4.
[18] Above n6 in summary section.

[62] Mr T has advised that [NZLS Inspector] is:[19]

> a very experienced Law Society inspector in respect of trust account and nominee company compliance requirements placed on practitioners. His experience and expertise informed the decision of the Standards Committee and underlines the integrity of the decision they made in relation to the complaint by Mrs AP against [the Practitioner].

[63] I do not question [NZLS Inspector's] expertise. What I do question is whether this is the right approach to breaches of the Nominee Company Rules, whether major or minor, and whether causative of loss or otherwise. If, as Mr T contends, there is little or no duty of care by a lawyer to contributors to a firm's nominee company, then there is no room to excuse errors or lapses in compliance with the Rules however minor.

[64] I consider that Standards Committees should insist on strict compliance with the Rules. The history of lawyers' nominee companies has been troubled and the Rules have been developed in a prescriptive manner to protect contributors as much as possible. I do not consider that there is any room for the exercise of a discretion in determining whether or not the Rules have been breached. A discretion can clearly be exercised when determining penalty, but breaches should otherwise result in a finding of unsatisfactory conduct (in the present regime) in the majority of cases.

[65] This leads to a consideration of what consequences should follow from the findings above.

Consequences

[66] Section 351(1) of the Lawyers and Conveyancers Act 2006 provides that if a lawyer is alleged to have been guilty before 1 August 2008 of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made to the New Zealand Law Society Complaints Service.

[67] The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high. Misconduct is generally considered to be conduct of sufficient gravity to be termed 'reprehensible' or 'inexcusable', 'disgraceful,' '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 a lawyer's fitness to practice.[20] Conduct unbecoming is perhaps a slightly lower

[19] Letter Mr T to LCRO (22 November 2012) at para [9].
[20] *Atkinson v Auckland District Law Society* NZLPDT 15 August 1990.

threshold. The test will be whether the conduct is acceptable according to the standards of "competent, ethical and responsible practitioners".[21]

[68] As noted in *W*, breaches of the Nominee Company Rules resulted in a finding of negligence, but before there could be an adverse disciplinary finding, that negligence had to be of such a degree or so frequent as to reflect on the lawyer's fitness to practice or such as to bring the profession into disrepute.

[69] I do not consider that the irregularities identified by [NZLS Inspector] in complying with the Rules could be considered to reach this threshold.

[70] However, I do not consider that the same can be said of the breach of the duty to contributors referred to in [38] to [56] above. I consider that a lawyer acting responsibly towards the contributors, would have at least advised them of the known facts so that they could take these into account in coming to a decision as to whether to invest or not. I therefore consider that the Practitioner's conduct in this regard constituted unsatisfactory conduct by way of conduct unbecoming, particularly in that I do not consider that the Practitioner has acted responsibly towards Mrs AP.

[71] Mrs AP asserts that she would not have proceeded with the loans if this information had been made available to her. To accept this assertion would involve assessing what she would have done at the time, taking into account all of the context and the information that was known to her. I am not in a position to do this. I do not dismiss her assertion out of hand, but in determining penalty, it would be unreasonable to proceed without the appropriate degree of certainty.

[72] In addition, s 352 of the Lawyers and Conveyancers Act provides that any penalty imposed in respect of conduct which occurred before 1 August 2008 must be a penalty that could have been imposed in respect of that conduct at the time when the conduct occurred.

[73] The penalties that were available to a District Disciplinary Tribunal (accepting that strike off or suspension need not be considered) as provided in s 106(4) were:

- Censure;
- Order to cease accepting work in specific areas;
- Order to carry out specific work;
- Compensation not exceeding $5,000;

[21] *B v Medical Council* [2005] 3NZLR 810 at 811.

- Reduction of fees;
- Order to make practice available for inspection;
- Order to make reports on practice;
- Order to take advice in relation to management of practice; and
- Costs

[74] In her complaint to the Law Society, Mrs AP sought repayment of her contribution to the loan. Any compensation to be paid to a complainant in terms of the Lawyers and Conveyancers Act was limited to $5,000. Such an award would clearly come nowhere near meeting Mrs AP's request. In addition, I refer to my reservations expressed in [70] above and I also note that Mrs AP no longer seeks this outcome in her review application.

[75] I do not consider this is a case where a fine or censure is called for and in this regard I take into account the advice by Mr T at the review hearing that the Practitioner has not been the subject of complaint in over 40 years of practice and that the firm's nominee company has been wound up as a result of this experience.[22] He also advised that the Practitioner is to retire at the end of this month. The findings against him will therefore assume some greater significance than may otherwise have been the case.

[76] Having considered the various options, I have come to the view that the only relevant order that can be made is to require some payment of compensation for the anxiety and distress that Mrs AP has suffered as a result of these events. In her letter of 30 May 2012 to the Complaints Service, Mrs AP refers to the "considerable stress" that these events have caused her and the "considerable effects'" "both financially and emotionally". I do not doubt the veracity of these comments.

[77] In *Wandsworth v Ddinbych & Keith*[23] the LCRO noted that "there is..... no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory". He also noted that such orders should be "modest in nature".[24] In all of the circumstances I consider that an award of $2,500 in this regard is appropriate.

[78] Mrs AP's level of distress and anxiety is of course incapable of assessment in monetary terms and I acknowledge that the payment ordered here (and subsequently)

[22] Although it must still be the holder of this mortgage.
[23] *Wandsworth v Ddinbych & Keith* LCRO/149 and LCRO 150/2009.
[24] Above n23 at [21].

is nominal. It is imposed to cause The Practitioner to reflect on the effects that this matter has had on Mrs AP.

Conduct post 1 August 2008

[79] Conduct after 1 August 2008 coincided with the default by the borrower and the steps taken by the Practitioner to effect a mortgagee sale of the sections.

[80] The following Rules are applicable:[25]

> 13.1 Each responsible lawyer must ensure that written notice in accordance with sub-rule 13.3 is given to each investor in a security as soon as is reasonably practicable on the occurrence of any of the following events:
>
> (a) default by the borrower for 30 days in payment of—
>
> (i) interest; or
>
> (ii) any part of the principal sum; or
>
> (iii) any other moneys due under the security; or
>
> (b) any other default by the borrower under the security unless the default does not materially affect the investors or the security.
>
> 13.2 Default by a borrower in payment of interest, principal, or other moneys due under the security must be notified, notwithstanding that the investors have received payment of the interest or other moneys by a guarantor or indemnifier, or a lawyer.
>
> 13.3 The notice under sub-rule 13.1 must—
>
> (a) specify the action the responsible lawyer is taking or proposes to take in respect of the default; and
>
> (b) request each investor forthwith to advise the responsible lawyer if the investor does not agree with the action or proposed action specified.
>
> 13.4 The responsible lawyer must determine the appropriate action to be taken in respect of any default, taking into account (as far as it is reasonable so to do having regard to the responsible lawyer's responsibility to all the investors in the security) the advice or instructions of each investor. Where the advice or instructions from investors conflict, the responsible lawyer must have particular regard to the advice or instructions of those investors who hold a majority in value of the principal sum secured.
>
> 13.7 Each responsible lawyer must keep the investors reasonably informed as to the progress and results of the action taken by the responsible lawyer.

[81] Following the failure to repay the mortgage in June 2008, the Practitioner took prompt action, issued a Property Law Act Notice and notified contributors.

[82] Mrs AP and her son met with the Practitioner in October 2008 and requested prompt action, which included (on the Practitioner's advice) clearing the sections.

[83] While the Practitioner advised contributors promptly of the fact that he had issued a Property Law Act Notice in July 2008, there was no further advice to contributors until

the letter of 16 December 2008 to advise of the proposed course of action. This does not comply with the requirements of Rule 13.1 to give notice in accordance with Rule 13.3 "as soon as is reasonably practicable" of the proposed course of action.

[84] Mrs AP, through her trust and personally, was the major contributor to this advance. She requested the Practitioner to call a meeting of contributors and requested that he act promptly because she perceived the market was falling. There were significant delays in arranging for the sections to be cleared and the agent advises that he did not receive any authorisation from the Practitioner to instruct the contractor until late March 2009.

[85] The tender closed on 30 April 2009 but the Practitioner did not communicate with contributors until 3 June 2009. This was not conduct which complied with Rule 13.7 which requires the responsible lawyer to keep investors reasonably informed as to the progress and results of the action taken by the responsible lawyer. At the review hearing, the Practitioner himself accepted that "things did not move as quickly as they might have".

[86] I am mindful however that none of the provisions of Rule 13 oblige a lawyer to act in accordance with the wishes of the majority contributor, and the ultimate decision as to what steps to take rested with him. The obligation is only to have particular regard to the advice or instructions of the majority contributor.

[87] Adopting the views expressed earlier however, that a contributor to a nominee company loan is a client of the responsible lawyer, it follows that the provisions of the Conduct and Client Care Rules apply equally in this situation. This includes a requirement to act competently and in a timely manner.[26]

[88] I therefore consider that the Practitioner's conduct following the default by the mortgagor breached Rules 13.1, 13.4 and 13.7 of the Nominee Company Rules and Rule 3 of the Conduct and Client Care Rules. By virtue of s 12(c) of the Lawyers and Conveyancers Act 2006 this constitutes unsatisfactory conduct.

Penalty

[89] In considering what penalty to impose as a result of this finding, it must be noted immediately that it cannot be considered that the failure of the sections to sell at tender, and subsequently, resulted from the identified breaches. It follows that there will not be an order for the Practitioner to repay Mrs AP's contributions to this loan. In any event,

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[25] Lawyers and Conveyancers Act (Lawyers: Nominee Company Rules) 2008.
[26] Above n7 at Rule 3.

this Office has jurisdiction to the sum of $25,000 only and the loss has yet to be quantified.

[90] In the circumstances, I again consider that the most appropriate result that can follow from these findings is an award of compensation for the stress and anguish that Mrs AP has suffered in this process.

[91] I reiterate the comments made in this regard in [75] to [77] above and consider that the sum of $2,500 is an appropriate award to make in favour of Mrs AP in respect of these breaches. She of course retains the option of pursuing the Practitioner and/or AZG through the Courts which is the proper forum to consider Mr T's submissions as to contributory negligence on Mrs APs part.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

i. the determination of the Standards Committee is reversed.

ii. the conduct of the Practitioner constitutes unsatisfactory conduct by way of conduct unbecoming and by virtue of breaches of the various Rules, as referred to in this decision.

iii. Pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act 2006 (taking into account the provisions of s 352 of the Act) the Practitioner is ordered to pay the sum of $5,000 to Mrs AP by no later than 11 April 2014.

Costs

Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 and in accordance with the Costs Orders Guidelines of this Office, the Practitioner is ordered to pay the sum of $1,600 by way of costs to the New Zealand Law Society by no later than 11 April 2014.

DATED this 14th day of March 2014

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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 AP as the Applicant
Mr ZG [the Practitioner] as the Respondent
Mr M Tr as Counsel for the Respondent
Mr K as a related person of entity
The [x] Committee 2
The New Zealand Law Society