LCRO 82/2011

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 3
BETWEEN	**MS AH** Applicant
AND	**MS ZP** Respondent

DECISION

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

Introduction

[1] In March 2011 the Auckland Standards Committee 3 made findings of unsatisfactory conduct against law practitioner, Ms AH (the Practitioner) following a number of complaints by another lawyer, Ms ZP (the Complainant). The original complaint concerned the Practitioner's alleged failure to release the files of her former client, N, and there was also a suggestion that the Practitioner may have failed to take proper steps to ascertain certain details about the client, particularly in respect of N's age which was alleged to have been misrepresented.

[2] Further complaints were subsequently added. These alleged that the Practitioner had breached Rule 2.5 of the Conduct and Client Care Rules (the Rules)[1] in respect of certifications made to the lender concerning both the borrower's capacity and confirming the identity of her client as the person authorised to lodge the instrument. Related to this was an alleged breach of Rule 2.6 in that the Practitioner should have taken steps to correct the certificate when she became aware that any part of it might have been inaccurate.

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[3] A significant additional complaint alleged conflict of interest in breach of Rule 6. The Complainant set out in some detail what she perceived to be the various conflicts that existed. She noted that the Practitioner acted from both N and her daughter, ED, whose interests conflicted, and at the time also acted for other parties associated with a number of financing transactions, in particular the mortgage brokers, C and C, their mortgage guarantee company DF Ltd, and on occasions the lenders, including a lending company owned by the brokers.

[4] There was a further allegation that the Practitioner had breached Rule 8.8 (the rule governing confidentiality) in having shared confidential information with a third party.

[5] The complaints identified by the Standards Committee for enquiry included the following:

1. Failure to act upon a written request to uplift documents without undue delay (Rule 4.4.1).

2. Conflict of interest (Rule 6).

3. Unauthorised disclosure of client information (Rule 8).

4. Negligence and incompetence (Rule 3).

[6] The Committee determined that all alleged breaches had been proven, and found that there had been unsatisfactory conduct on the part of the Practitioner.

[7] The Committee then called for submissions on the appropriate penalties. Submissions were sought in respect of any orders that could be made under s 156(1) of the Lawyers and Conveyancers Act 2006 (the Act), which include the power to order compensation of up to $25,000.00, and submissions on publication.

[8] At that stage the Practitioner sought a review of the Committee's determinations on the substantive issues, and further consideration of appropriate penalties and orders by the Committee was put on hold.

Grounds for review

[9] In her review application the Practitioner contended that the Standards Committee had made incorrect findings of fact, was influenced by those incorrect findings of fact, and had failed to provide reasons for its findings contrary to s 158 of the Act. She also considered that there had been a breach of natural justice insofar as she was not given an opportunity to respond to specific allegations of the Complainant. In particular the Practitioner considered the Standards Committee had erred in concluding that the

Practitioner had breached her professional obligations in regard to the alleged failure to release certain files to the Complainant and that the failure had lead to significant consequential damages and costs to the Complainant's clients. The Practitioner also considered the Committee to have erred in finding that she had acted for lender and borrower in 2006.

[10] It is not necessary to address the grounds concerning alleged incorrect 'findings of facts' where these are unrelated to the subject matter of the complaints, for example, the Committee's statement that the Complainant and her firm had acted for N and her family for many years. The findings made by the Committee that are relevant to the subject matter of the complaints and the Committee's conclusions will be addressed. The review particularly addresses the Committee's findings that the Practitioner failed to act on a request for documents and that her actions had led to a financial loss. In this matter the Practitioner contended that the Standards Committee had failed to comply with the rules of natural justice in not having given her an opportunity to respond to the allegations regarding costs incurred by the Complainant's family as a result of the alleged failures. The review will also particularly address the Committee's finding that the Practitioner had not dealt appropriately with the conflict of interest.

[11] A review hearing was attended by the Practitioner and her counsel. Also in attendance were the Complainant and a solicitor from her firm. At that time I heard from both parties and had the opportunity to question them further.

[12] I record at this juncture that the Applicant contended that some of the Complainant's submissions had not been forwarded to her for response. Any omission, if there was one, has been cured by the review process. The Practitioner's counsel also had an opportunity to provide submissions, and her counsel left written submissions which he confirmed were essentially a summary of matters discussed in the course of the review hearing.

[13] I have independently considered all of the evidence and information contained in the Standards Committee's file, and that accumulated in respect of the review. The entire file was not available, but from such information as was provided the following sets out my broad understanding of the transactions in which the Practitioner acted, and the circumstances in which these transactions occurred.

Background

[14] When the Practitioner first met N in February 2006, N was an elderly widow on a pension, and the owner of a house that was mortgaged to ASB securing a debt of around $250,000.00. Prior to that time it appears that the Complainant's firm had acted for N and members of her family.

[15] Between February 2006 and June 2008, the Practitioner acted for N and at times for her daughter, ED, in a number of transactions that that began with the purchase (and financing) of a property in [road name] Road (the Q property) in February 2006, two subsequent loans for, inter alia, property renovation, the sale of the Q property in about March 2007, and finally a loan that consolidated all then-existing debt.

[16] N and ED were new clients to the Practitioner when she acted in the purchase of the Q property in early 2006. Although there is no clear evidence to show that they were referred to the Practitioner by brokers C and C, the information on the file suggests that this may have been the case. The Practitioner said that she had understood that the Q property would be purchased jointly by N and ED as an investment, but she then found that the Sale and Purchase Agreement recorded only ED (or nominee) as purchaser.

[17] ED had no funds of her own. The purchase was financed entirely with borrowings of $318,000.00 (the VU loan), a loan apparently brokered by C and C, and a mortgage repayment guarantee was provided by DF Ltd, a company owned by C and C. Both ED and N were recorded as debtors for the full amount, of which $213,000.00 and $43,000.00 were secured against ED's house as a first and second mortgage respectively. The balance of $62,000.00 was secured against N's house as a second mortgage (after the ASB mortgage). The Practitioner acted for both N and ED in respect of the purchase and the loans.

[18] In June 2006 the Practitioner acted for N in relation to further borrowing when a further loan of $37,000 was arranged by C and C. This was secured against N's home as a third mortgage. Fees and costs that were deducted included fees for brokerage and for the mortgage guarantee, and normal legal costs and fees were also deducted. In about February 2007 a further loan $85,000, also arranged by C and C, refinanced the June loan, included capitalised interest, paid the interest arrears that had accrued on the original VU loan ($18,000 had accrued at a default rate of 22 percent), and a note in the Practitioner's file indicated that the balance was for ED.

[19] As to the purpose of the additional borrowings, submissions made to the Standards Committee referred to these as loans made to both N and ED for property renovation. At the review hearing the Practitioner said that she believed that these advances were intended for the refurbishment of N's house. Such evidence as exists suggests that the additional borrowing was more likely for the benefit of ED and/or her property. In any event, the second loan covered mortgage arrears and it also provided more funds to ED.

[20] In around March 2007 the Practitioner acted in the sale of the Q property. The mortgages were cleared from that property, but this did not include the $62,000 that was secured against N's own home. Evidence given was that the sale of the Q property netted

a profit of some $80,000 which was paid to ED who subsequently lost it all in an unsuccessful business venture.

[21] The $62,000 of the original VU loan that remained outstanding fell due for repayment in early 2008. It seems that a mortgagee sale was avoided by a further (short-term) loan of $77,000 advanced in June 2008, again arranged by the brokers C and C. The lender was M Ltd, a company owned by C and C. This repaid the outstanding principal of the VU loan and met related fees and costs. The Practitioner acted for N in this transaction.

[22] Later in that same month all of the debt then secured against N's property (including the original ASB loan) was consolidated and refinanced in a further loan brokered by C and C. Loan documents signed by N on 25 June 2008 record two separate advances. One was a one year loan of $18,000 showing the lender as ABC Ltd. The other loan was for two years, in the sum of $446,000 which was advanced by GH Limited, a company for which Mr M (another lawyer) acted.

[23] There was also a further loan document dated 30 June 2008 recording an advance of $10,000 for one year. The lender was M Ltd. The file does not explain what this was for.

Subsequent Events

[24] Eventually a Property Law Act notice was served on N, which came to the attention of her son, G, who had returned from Australia and described having found his mother living in squalor. It seems that N was unable to explain the notice, and purported to have no recollection of any loan monies. It is understood that G contacted his sister, ED, but did not find her cooperative. In any event G consulted the Complainant's firm, as he suspected there may have been some fraudulent conduct in relation to the loans and the mortgages registered against his mother's house.

[25] G held a power of attorney for his mother, and on his instructions the Complainant sought to have the files relating to the above transactions released to her firm. There was some delay while the Practitioner sought proper authority for the release. A copy of the Power of Attorney and the Certificate of Non-Revocation of Power was forwarded to the Practitioner but there was further delay when the Practitioner noticed that an amendment had been made on the Power of Attorney which had not been initialled.

[26] When responding to the complaint, the Practitioner informed the Standards Committee that she had also questioned whether G was in fact N's son, and whether N's signature (on the authority) was legitimate, having compared it with documents in her possession that had been signed by N. The Practitioner also questioned whether N had been properly advised in relation to the Power of Attorney.

[27] Questions also arose about whether there had been misrepresentation about N's age when an alteration of her passport was discovered. The Police commenced an enquiry concerning the alteration and at some stage it appeared that they might wish to access the files (still being held by the Practitioner) which also caused further delay, but even when that was cleared up (the Police no longer seeking the files) the Practitioner continued to retain the files, evidently being dissatisfied with the authorities that had been provided thus far.

[28] The Practitioner had proposed to the Complainant that the matter be resolved by the New Zealand Law Society but on receiving that letter the Complainant elected instead to lodge a formal complaint in respect of the Practitioner's failure to disclose the files.

[29] The matter gained some urgency because the mortgagee was meanwhile seeking to progress a managed sale of N's property. G was reluctant to accede to this, still suspecting that there may have been a fraud committed against his mother. He believed the answer was to be found in the files still held by the Practitioner. G's suspicions were to some extent fuelled by the alteration that he had discovered in his mother's passport. An urgent application was then made to the Court for G to be appointed as N's property manager, and when that document was served on the Practitioner she then released the files. The Order for Appointment of Manager is dated 1 October 2010, a copy of which was sent to the Practitioner who released the files on 4 October 2010. The mortgagee's sale was scheduled for 5 October 2010, and G instructed the Complainant to hurriedly seek an injunction to prevent the mortgagee sale from proceeding, an Order was granted by Asher J on that same day, 5 October 2010.

[30] The complaints emerge from the above events. I have noted that the Practitioner's file is not entirely complete and I am left to consider the complaints about the Practitioner's professional conduct on the basis of the information that is available, bearing in mind also that she has the responsibility of providing information sufficient to answer the allegations. I now turn to discuss the various allegations made against the Practitioner, having examined all of the information, and heard from the parties, and again reviewed information on the file after that hearing.

Considerations

A Refusal to Release Files

[31] Rule 4.4.1 of the Rules states:[2]

[2] Above n1.

> Subject to any statutory provisions to the contrary, upon changing lawyers a client has the right either in person or through the new lawyer to uplift all documents, records, funds, or property held on the client's behalf. The former lawyer must act upon any written request to uplift documents without undue delay subject only to any lien that the former lawyer may claim.

[32] Rule 4.4.4 states:[3]

> Subject to the former lawyer's legal rights to a lien, the interest of the client must be foremost in facilitating the transfer of the client's documents and records.

[33] The Practitioner provided a number of explanations for not forwarding the files to the Complainant, including that she was not confident that the client's interests would be served. In short, she explained that she had concerns about whether the Power of Attorney had been obtained fraudulently (having compared the signature of the donor, N, with her signature on other documents held on the Practitioner's files). However, the only concern raised in her correspondence to the Complainant was about the failure to provide a certified copy of the Power of Attorney as a reason for withholding the files.

[34] Her review application indicated that the Committee's errors in its finding of fact had influenced its decision. She denied having rejected the certified copy of a Power of Attorney accompanying the request, and disagreed with the Committee's finding of a connection between the delays in handing over the files with the Complainant's application for an injunction to prevent a mortgagee sale of her (former) client's property.

[35] The evidence shows that about nine weeks passed between the Practitioner having received the request for the files which were accompanied by a copy of the Power of Attorney and a certified copy of the Certificate of Non-Revocation. Rule 4.4.1 makes clear that the Practitioner must act upon a written request to uplift "without undue delay". The Practitioner was fully entitled to seek an authority from the Complainant (the first request had not been accompanied by an authority), but after the authority was provided, and notwithstanding that the Power of Attorney itself is not certified, I share the view of the Standards Committee who concluded that the Practitioner then had no reasonable cause to withhold the files from the lawyer requesting it.

[36] A good deal of the discussion surrounding this complaint involved the question of whether N had legal capacity which, in turn, raised a question about whether the attorney could act on the instrument of appointment. However, at the time that these events took place the Practitioner had no evidence that her former client lacked capacity, and I also

[3] Above n1.

note that she took no steps to contact N in relation to the matter (the Practitioner thought she might have been in Australia). It is also relevant that the request was made by a lawyer, so that if there was any question about the legal authority held by the person holding the Power of Attorney then that would have been a matter to be dealt with by the Practitioner seeking the documents.

[37] Having considered all of the information relevant to this matter and having considered all parties' submissions, it is my view that a delay of some nine weeks was unreasonable, and was a breach of the Rule that requires the files to be produced without delay.

[38] The Standards Committee found a direct link between the Practitioner's failures to provide the file in a timely manner, and the need for G to seek an injunction to prevent the mortgagee sale. The Practitioner objected to this finding. In my view, on the basis of information available it was open to the Standards Committee to have taken the view that the steps taken by G or on his instruction were the result of the delays in the files being made available to the Complainant or her firm. However, if the Practitioner were to provide further information to the Committee on this matter that should cause the Committee to reconsider its present conclusions, it is expected that the Committee would take these into account. The Practitioner has the opportunity to make further submissions to the Committee and she should place before the Committee all matters that she considers relevant.

[39] The Practitioner particularly objected to having had no opportunity to make submissions on consequential costs and damages, which had not been part of the original complaints. However, I noted that the Standards Committee had invited the Practitioner to make submissions on proper orders and costs, and this provided (and still provides) the Practitioner with the opportunity to make submissions on any matters that she considers relevant to the Committee's finding. The Committee particularly brought to the Practitioner's attention (in paragraph [23] of its decision) its power to award compensation of up to $25,000. The Committee had clearly indicated (at paragraph [22]) that it would consider the issue of costs relating to the injunction proceeding which it considered flowed from the Practitioner's breach. There is no breach of natural justice in relation to this matter.

Conflict of Interest- the applicable professional standard

[40] The complaint alleging conflict of interest concerned conduct that had occurred prior to the commencement of the Lawyers and Conveyancers Act 2006, and therefore the standards that applied under the Law Practitioners Act are relevant to this complaint. Under that Act the professional standards governing conflict of interest as between clients is to be found in Rule 1.04 of the Rules of Professional Conduct for Barristers and Solicitors which states:[4]

> A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties.

[41] Rule 1.07 sets out the steps to be taken in the event of a conflict or likely conflict, which include advising the clients of the areas of potential conflict, advising that they should take independent legal advice and making arrangements for this to happen, and to decline to act further for any party where to do so would likely disadvantage any of the clients involved.

[42] These Rules have since been replaced with the Conduct and Client Care Rules under the Act and this captures, in more detail, the principles underlying the above rule concerning conflict. Rule 6.1 of this Code states:[5]

> A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.
>
> 6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.
>
> 6.1.2 Despite rule 6.1.1, if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.
>
> 6.1.3 Despite rule 6.1.2, a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, given informed consent to the lawyer continuing to act for the client and no duties to the consenting clients have or will be breached.

[4] Rules of Professional Conduct for Barristers and Solicitors (7th ed) 2006.
[5] Above n1.

[43] Despite the lengthier provision in the later Rules, the principles governing conflict between clients remained essentially unchanged. The overarching principle is that a lawyer cannot act for more than one party if the lawyer is unable to discharge their fiduciary duty to each. The lawyer has the responsibility of demonstrating that he or she has done everything necessary to protect the separate interests of each client.

[44] It is not uncommon that parents may wish to assist their children in some way in acquiring property, and on occasions will advance loan monies or provide security for loans to family members. Lawyers are often asked to act for both sides to the arrangement, and there is no objection if the interests of all parties can be protected. In particular, lawyers need to be vigilant in ensuring that their professional obligations to each of their clients do not conflict. Where conflict does exist, or arises after commencement of the retainer, the lawyer is required to ensure that the informed consent of their clients is obtained, and has the responsibility of demonstrating that all proper steps have been taken in this regard. "Informed consent" requires that all risks and alternatives to the proposed course of action are explained to the client whose consent is required, and that the lawyer believes, on reasonable grounds, that the client understands the issues involved.

[45] The Rules governing conflict of interest identify the important responsibilities lawyers have in managing conflict of interest as between their clients. A lawyer acting for conflicted parties, must be able to demonstrate that the clients have been informed of the existence and nature of the conflict and have been advised to seek independent legal advice. If the clients decline to seek independent advice, this should be recorded. The Practitioner should also be able to demonstrate what steps were taken to ensure that the interests of each of the clients was protected.

[46] Conflict of interest between clients is, for the lawyer, essentially a conflict of duty. The professional conduct rules make clear that lawyers cannot act for both parties unless they are able to meet their fiduciary duties to both. Acting, or continuing to act, for all clients assumes that the lawyer is able to discharge his or her fiduciary duty to each.

[47] The Standards Committee found that the Practitioner had acted for the lender and the borrower in 2006, and noted the lack of documentary evidence to prove that the Practitioner had appropriately advised N as to the conflict of interest or obtained a waiver of the obligation to refer one of her clients for independent legal advice. The Practitioner denied having acted for the lender.

[48] My review shows that the Practitioner acted for the lender in relation to three different loans, but my review has found that the conflict issue was wider, and also extended to the Practitioner acting for both N and ED in the purchase and financing of the Q property.

Conflict of interest - between N and ED

Purchase of the Q property

[49] In relation to the Q property purchase the Practitioner acted for two parties whose interests were not congruent. The Practitioner said she had understood that this was to be a joint investment by N and ED, but found that the Sale a Purchase Agreement only included ED's name. Both N and ED were shown as joint debtors for the full amount of the loan ($318,000).

[50] In her affidavit to the Standards Committee the Practitioner acknowledged that that there was potential for a conflict in ED being the sole legal owner, and N's home providing security, and that consent of the clients should have been obtained prior to commencing to act for them. However, she did not accept that the failure to have done so compromised N's interests, she also expressed the view that a conflict of interest did not in fact arise.

[51] The Practitioner described N as being experienced in financial matters, and contended that N had understood the nature of the transaction and the risks involved in this matter. This conflicted with the evidence of the Complainant, who submitted that N was a woman of fairly low intelligence, limited education and very likely already suffering from early dementia. The Complainant provided psychiatric reports to support the contention that N may not have been in full command of her faculties. However, these are dated some time (two years) after these transactions and cannot offer much assistance. This review cannot resolve the matter of N's legal competency during 2006 and 2007, and nor is it necessary in respect of the review issue which focuses on the conflict of interest and whether the Practitioner discharged her professional obligations to N.

[52] The Practitioner acknowledged that no consent was obtained, but there is no record of the conflict having been explained to the parties or that either of them had been advised of a right to obtain independent legal advice and declined to do so. The Practitioner insisted that both parties were fully aware of the nature and risks of the transaction, and that she properly advised both clients, which included giving advice to N about the options to secure her position. The options she had outlined to N included adding N's name on the title, changing the loan documents, or if that was not agreeable, then a caveat could be registered against the title of the Q property to provide security for N. The Practitioner's evidence was that N declined to follow any of her suggestions or advice. However, that she provided advice about various options that were open to N is not, in itself, a sufficient alert to the existence of conflict. There is no record of nature of the conflict having been explained, or what risks were identified to the parties, and significantly, whether they understood the significance of the risks, particularly N whose position was especially vulnerable.

[53] A conflict existed in this case because as legal owner of the property ED was able to deal with it as any legal owner may deal with a property they own. Based on the Practitioner's account, the two parties had agreed that only ED would be recorded on the title, and that N would provide the additional security needed for the loan that enabled the purchase of the property, and also that ED would meet the interest payments on the loan.

[54] The position of N as a joint debtor for the full loan, part of which was secured against N's home, put her in vulnerable position, and necessitated a clear record of all relevant terms and conditions of the intended arrangement between N and ED as to their respective ownership interests, responsibility for repayment of debt and meeting interest payments, addressing general contingencies such as the possible need for renovations funds, and agreements concerning sale of the property. Of significant concern is that there is no record of these instructions, or of the intentions of the parties in relation to the purchase, or the debt. The Practitioner made no file notes of her advice to the clients, and the absence of any documentation makes it difficult to ascertain exactly what the agreements were between the parties on any matters.

[55] On the basis of the information before me, which includes the Practitioner's written and oral evidence, I gained the impression that the Practitioner very likely did not recognise the extent of the potential conflict between her clients, a failure that was compounded by no record having been made of the intention of the parties as to the legal arrangements and agreements concerning the Q property and the debt, or any other matters that were relevant to the purchase.

[56] In this case there is nothing to indicate that the Practitioner questioned whether she should continue acting for N in circumstances where N had declined to take her advice, and in circumstances where N's rejection of the Practitioner's advice placed her at some risk. The circumstances were such that the Practitioner ought to have questioned whether she was able to discharge her professional duty to protect N's interests.

Additional borrowing

[57] The Practitioner acted for N when she took out two further loans. At the review hearing the Practitioner said she believed these were for renovation for N's home; information given to the Standards Committee was that the loans were to N and ED and intended for renovation, without further specifying which property. There is no evidence on the file to show that the purpose of the loan was clarified, but the evidence indicates that the additional borrowing transactions were very likely connected with the Q property.

[58] The Practitioner may have considered she was acting only for N, but in any event it was the Practitioner's responsibility to ensure that N clearly understood the risks of the

extra borrowing and especially the possibility of losing her home if the debt was not repaid. There is no evidence of advice having been given to N. There is no record of N having been informed about ED's interest payment defaults or that a significant part of the additional loan was to meet the arrears. There is no record of any advice or discussion surrounding these matters, so whether N was aware of, or fully understood, all of the risks involved in adding to the existing debt is not known.

[59] The first additional loan for $37,000 seems to have been for renovation. The second loan ($85,000) refinanced the first additional loan, increasing it to cover the interest arrears that ED had not paid on the loan for the Q purchase ($18,000), and making the balance of funds available to ED. These factors were known to the Practitioner who could have had little doubt that the further debt that N was incurring was for the benefit of ED, if not entirely, then to a considerable extent.

[60] The Practitioner denied having failed to promote the interests of N to the exclusion of the interests of any third party. There is nothing on the file to indicate that the Practitioner gave consideration to loans being connected to the Q property, or that she considered the implications for N of the additional borrowing in the light of ED's defaults on interest payments. There is nothing to indicate that the Practitioner gave any consideration to the wider interests or position of her clients, and again nothing to show that the Practitioner questioned whether she was able to discharge her professional obligation to protect N's interests in relation to these transactions.

Sale of the Q property

[61] The Practitioner acted in the sale of the Q property. The sale netted a profit of $80,000 which was paid to ED who subsequently lost it in an unsuccessful business venture. Of significance is that when it was sold, only that part of the SK loan secured against the Q property was repaid, this being necessary to transfer a clear title. The portion of the original loan secured against N's home ($62,000) was not repaid. Also, there was no repayment of any part of the additional borrowings that N had taken on.

[62] The Practitioner's evidence was that she acted for both N and ED in the sale transaction. At paragraph [43] of her affidavit to the Committee, the Practitioner stated that she had encouraged both ED and N to repay the (SK) loan and that N had been reluctant to take her advice. At paragraph [45] of the affidavit the Practitioner again referred to N having declined to take her advice at the time of the purchase, and she continued:

> The fact that (N) chose not to take my advice in this regard and that subsequently the proceeds from the sale of the Q Road Property could not be paid to (N) or applied to the lending on (N's home) did not occur as a result of a

> perceived conflict but as a result of (N's) reluctance to take my advice with regard to the purchase of the Q property." (sic)

[63] The Practitioner considered herself to be acting for both N and ED in the sale transaction, but the above explanation to the Standards Committee indicated that the Practitioner took a view that N was responsible for the situation that had arisen. In any event, it is difficult to follow her analysis, because there could have been no barrier to fully repaying the SK loan, of which both N and ED were debtors, regardless that it was secured over two properties. I do not accept what is suggested by the Practitioner, that the remaining $62,000 applied to a separate loan. N's property had simply provided additional security for the initial loan, and this prevented its full repayment on sale of Q.

[64] At the review hearing the Practitioner said that the parties had agreed that the loan would be for two years, and had also agreed that the loan monies secured against N's house would remain in place. The evidence shows that the term of the SK loan was two years, but this cannot be taken as indicative of repayment arrangements as between N and ED in the event that the Q property was sold earlier, as indeed was the case. As already noted, there was no record made of any agreement between N and ED as to what would happen in the event of an early sale of Q.

[65] The payment to ED of surplus funds resulted in the debt remaining secured against N's property. The Practitioner had said she 'encouraged' both parties to apply the sale proceeds to discharging the mortgage on N's home, and that N had not followed that advice. The difficulty for the Practitioner is that there was no evidence of N's instructions concerning the retention of part of the loan repayment, and no evidence to show contact having been made with N at the time of the sale. The non-payment of the debt associated with the Q property, left N with a debt and no real prospect of discharging it, and little assurance offered in the light of ED's defaults in payments. Given the risk to N in these circumstances, it was incumbent on the Practitioner to have made a clear record of instructions that were clearly not in her clients' interests, and were given against her own advice.

[66] The risks to N would have been obvious to the Practitioner. Rather than viewing N as the author of her own situation, the Practitioner ought to have reflected on whether she was able to discharge her individual duties to each of her clients at that time. In the circumstances it is difficult to see how the Practitioner could have discharged her professional duty to both clients.

[67] The Practitioner might also then have reflected on her own role, and questioned how matters had reached the point where N's position had become so risky. There is nothing to indicate that the Practitioner reviewed her management of the purchase transaction,

particularly in relation to recording the parties' agreements as to ownership, debt servicing, renovation funds, term of loans and repayments, and what would happen on sale. The potential risks and difficulties that eventually arose were foreseeable by any competent lawyer, and it was the responsibility of the lawyer to ensure that the interests of both clients were addressed at the outset. The original failure to have taken adequate steps to protect her clients' interests was later compounded when she also failed to record the arrangements surrounding the additional loans.

[68] It is clear from the above discussion that I have viewed the various transactions as being interrelated, not only because they occurred within a relatively short timeframe, but also because the evidence clearly pointed to the inter-relationship between the transactions, the parties and the Practitioner's knowledge of relevant and related matters.

[69] While it is arguable that the Practitioner could have discharged her duty to both at the outset when the property was purchased, this would have required a clear record of the arrangements between N and ED, which reflected the separate positions of the parties on all relevant issues. There is no evidence that the Practitioner gave any thought to the inter-relatedness of the various transactions, but of concern is that at no stage does she appear to have questioned whether N fully understood the implications and risks of the extra borrowing.

[70] The full implications of the conflict of interest were most obvious at the time of the sale, when the sale proceeds were not applied to discharging the full debt incurred in relation to the Q property, which would have fully repaid the original principal (of which a part was secured against N's home), and also repaid a good portion of the extra borrowing. The Practitioner recognised that the difficulties arising at that time related to matters not having been resolved at the outset, but she does not seem to have perceived her own role in this matter. Instead the Practitioner placed the responsibility on N who she saw as the author of her own situation in not having heeded her advice in the first place.

[71] A conflict of interest is, in essence, a conflict in duty owed by a lawyer to different clients. The circumstances were that the Practitioner had two clients to whom professional duties were owed. She acted in various related transactions, and failed throughout to recognise, or manage, the existing conflicts, and as a result compromised the interests and position of a vulnerable client.

Conflict of interest involving other parties?

[72] A further question was whether conflict existed as between N and other parties, in particular whether the Practitioner had assumed professional duties towards the finance brokers, their guarantor company, and on occasions, their lending company, M Ltd.

Acting for the Lenders

[73] When the Practitioner acted for the lender in regard to the second (BB) loan she prepared a waiver that was signed by N. The waiver recorded N's acknowledgment that the Practitioner also acted for the mortgagee, and included a waiver (by N) of her right to independent legal advice. I noted that it was signed on the same day that N executed the mortgage documents. This waiver is inconsistent with her contention that she did not act for the lender. There is no evidence of any advice having been given by the Practitioner in relation to the loan

[74] When the Practitioner acted (on two occasions) for lender M Ltd the Practitioner also arranged for N to sign waivers. The copy of the waivers on the file again showed that N had signed it on the same day as executing the mortgage documents. In this case, however, the waiver made no mention of the Practitioner also acting for the lender. The waiver simply records N's acknowledgement that she is entering into a loan agreement, had been advised of her right to, and recommended to obtain, independent legal advice and waiving that right. Again, there is no information to show what advice, if any, was given to N.

[75] The Practitioner submitted that it was "common practice"[6] for a lawyer to act for both borrower and lender. While this is so in respect of trading banks in general, I do not agree that the various loans arranged in the circumstances existing here were standard loan arrangements. They involved significantly higher interest and default rates than is usual in a standard financing transaction for a residential property. While accepting that it is common practice for lawyers to act for both the borrower and the lending bank in standard conveyancing transactions, these were by no means standard transactions, and nor could the number of lending transactions be considered usual.

[76] The waiver I have seen was wholly inadequate and made no sense in its terms. The Practitioner considered that adequate advice had been given and that N declined to follow advice to seek independent legal advice, and contended that N understood, and was willing to accept, the risks associated with the transaction. That these were signed by N apparently without question inevitably adds to the questions surrounding whether N had any meaningful understanding about the documents she was signing, and the implications for her.

Other parties

[6] Submissions from Ms Orr to NZLS (1 February 2011).

[77] I have also considered the Practitioner's position vis a vis the brokers and their mortgage guarantor company. The evidence on the file indicated that the brokers arranged the various loans, and also the mortgage guarantees by their company. There is some suggestion that the brokers may have referred N and ED to the Practitioner at the beginning, and clearer evidence of their referrals in regard to each subsequent loan to N. While the brokers' communications were directly with the Practitioner, the available evidence indicated that these were in the nature of referrals.

[78] In her affidavit to the Standards Committee the Practitioner acknowledged that she variously acted for the brokers, the mortgage guarantor company and identified lenders. Except to the extent referred to above, I have found little to suggest that this was the case, and my observations are also consistent with a letter provided (by the Practitioner) to the Standards Committee, authored by lawyer D who wrote that he had acted for DF Ltd and C and C for about 25 years, and understood that the Practitioner had never acted for these parties. He added that from his discussions with C and C, as far as they were concerned the Practitioner had never acted for them or their companies. Mr D also wrote that the mortgage documentation prepared by the lending company M Ltd was in fact prepared by that company.

[79] On occasions the Practitioner witnessed waivers signed by C and C, and by their mortgage guarantor company, in respect of the guarantees. The circumstances in which these waivers were signed do not indicate that the Practitioner was representing the legal interests of those parties.

Independence

[80] The larger circumstance of the background to the complaint gives rise to one further matter which has not hitherto been considered, and that is the question of whether there were any factors that may have impacted on the Practitioner's independence. This particularly concerns whether the business advantage to her in her receiving ongoing referrals from the brokers may have compromised her independence in her duties towards her client. This question arises because in circumstances where significant benefits accrued to those parties, and where I am unable to find any reasonable explanation for the Practitioner having continued to act for N in various transactions that were clearly placing N in situations of ever increasing risk.

[81] The Practitioner expressed concern that there had been a suggestion that she had colluded or wrongfully benefited from the transaction, which she strongly denied. I have found no evidence of dishonesty on the Practitioner's part. Nevertheless, I am troubled by her lack of insight into her professional responsibilities.

[82] The failures identified above were sufficiently serious to have led to disciplinary proceedings against the Practitioner under the Law Practitioners Act 1982, and therefore met the jurisdictional bar of s 351 of the Lawyers and Conveyancers Act. They were serious and I conclude that the Committee was correct to have found unsatisfactory conduct on the part of the Practitioner.

Unauthorised Disclosure

[83] The Practitioner did not specifically seek review of the Committee's finding that there had been unauthorised disclosure, but for the sake of completeness I have also considered this matter. The complaint alleged that information had been provided by the Practitioner to Mr M, in breach of the Practitioner's duty to maintain confidentiality breaching Rules 8.7 and 8.8 of the Rules. The particular document involved was a copy of a disbursement statement regarding the June 2008 refinancing.

[84] The information at issue was provided by the Practitioner to Mr M in 2010, and was not disclosed in relation to any current transaction involving them professionally. The Committee described the contact as "inappropriate",[7] but made no specific finding of breach of the Rules.

[85] The Practitioner explained that she had originally but erroneously, relied on a privacy waiver that she then discovered applied only to DF Ltd, and not to any other party. She nevertheless denied any wrongdoing, noting that Mr M stated that the information provided was on a solicitor to solicitor basis, and was intended to clarify the financial position of N in June 2008. The Practitioner considered that this fell within the exception of Rule 8.4 of the Rules. Alternatively she submitted that the disclosure had not compromised N's interests in any way, and was not motivated by anything other than "a desire to attempt to resolve any misunderstanding with regard to the fact that the GI loan was simply a refinancing transaction".[8]

[86] It appears that the disclosure was made for reasons relating to the Practitioner herself, and not in connection with any professional transaction. The Committee was right to have been critical. While it would have been open to the Committee to have found unsatisfactory conduct, I see no reason to interfere with the exercise of its discretion to not do so.

Decision

[7] Standards Committee decision (3 March 2011) at [20].
[8] Above n7.

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

The matter is now referred back to the Standards Committee for penalties and orders to be considered.

DATED this 7th 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:

Ms AH as the Applicant
Mr X as the Representative for the Applicant
Ms ZP as the Respondent
Ms Y as a related person or entity
The Auckland Standards Committee 3
The New Zealand Law Society