In the Matter of Sean Vincent Nielsen-Brown

Case Number: SCT/59
Date of Hearing: 20, 21, 22 February 2002
18, 27 March 2002
Appearing Before: Mr P J Mullins (Chairperson)
Mr P Short
Ms E Jordan (Lay Member)
Penalty: Struck Off

Charge 1

In breach of s8 of the *Trust Accounts Act*, the practitioner withdrew funds held in trust on behalf of his client and loaned those funds to a third party.

Particulars

1.1 As at 30 June 2000

(a) the practitioner held in his trust account the sum of $367,500 on behalf of his client, WMMPL and the further sum of $230,000 on behalf of the trustees of the RWMRF;

(b) sums totalling $280,000 had been advanced by Law Partners Mortgages Pty Ltd ("LPM") to MPL on behalf of WMMPL (as to the sum of $250,000) and the trustee of the HUT (as to the sum of $30,000);

1.2 On or about 30 June 2000, RCPL completed the purchase from APHL of property at Rochedale. The purchase price paid by RCPL was $450,000;

1.3 Finance in connection with the transaction referred to in sub-paragraph 1.2 was provided by the practitioner's clients as follows:

(a) in the sum of $240,000 with the funds held on behalf of WMMPL;

(b) in the sum of $280,000 by treating the advance to MPL as having been repaid and the proceeds as having been advanced to RCPL;

(c) in the sum of $230,000 with the funds held on behalf of the trustees of the RWMRF;

1.4 On or about 28 September 2000, the practitioner transferred to RCPL the further sum of $20,000 from the funds held by him in trust for WMMPL;

1.5 The transactions referred to in sub-paragraphs 1.3 and 1.4 were not authorised by or on behalf of WMMPL or the trustees of the RWMRF or the trustee of the HUT.

Charge 2

By making the advances referred to in sub-paragraphs 1.3 and 1.4, the practitioner dishonestly mixed his financial affairs with those of his clients.

Particulars

The practitioner has at all material times been a director of and shareholder in RCPL and since January 2001 has been the sole director and shareholder.

Charge 3

The practitioner failed to maintain reasonable standards of competence in that the security taken for the loans referred to in sub-paragraphs 1.3 and 1.4 was inadequate to protect the interests of his clients.

Particulars

3.1 The price paid by RCPL to purchase the Rochedale property was $700,000 comprising $450,000 paid to APHL and $250,000 paid to SBPL;

3.2 The security given by RCPL to secure the loans referred to in sub-paragraphs 1.3 and 1.4 amounting to $770,000 comprised a first mortgage over the Rochedale property together with a charge over the assets of RCPL and the personal guarantee of the practitioner.

Charge 4

The practitioner failed to maintain reasonable standards of competence and diligence in that he failed to lodge for registration the mortgage referred to in sub-paragraph 3.2.

Charge 5

Omitted.

Charge 6

The practitioner:

(a) in a substantial way mixed his clients' affairs with his own;

(b) grossly preferred his own interests to those of his clients;

(c) failed to make any proper disclosure to his clients of his own interests;

(d) failed to advise his clients to seek independent advice.

Particulars

6.1 At all material times:

(a) Law Partners Mortgage Management Pty Ltd, ACN 073 264 481 ("Management") was a company of which the practitioner was the sole director and shareholder;

(b) law Partners Mortgages Pty Ltd, ACN 068 522 261 ("LPM") was a company of which the practitioner was the sole director and shareholder;

(c) Interlarken Pty Ltd, ACN 065 058 102 ("I") was a company of which the practitioner and his wife were the only directors and shareholders.

6.6.1 Advance to GC and MKC ("the C's")

(a) On or about 12 March 1999, LPM advanced to the C's its own funds as well as funds held on behalf of the following contributory lenders for whom the practitioner acted as solicitor:

The practitioner and his wife	$ 5,000.00
The practitioner	$ 4,000.00
ED	$ 1,000.00
JEH	$20,000.00
	$30,000.00

(b) The interest rate payable by the C's was 25% per annum increasing to 28% per annum in the event of default.

(c) Interest payments made by the C's were collected by Management which in turn made payment to the lenders referred to in sub-paragraph (a).

(d) Management paid interest to JEH calculated at the rate of 15% per annum.

(e) The practitioner failed to inform JEH that the C's were liable to pay interest at the rates set out in sub-paragraph (b).

(f) Management received and retained on its own account interest payments in excess of interest calculated at the rate set out in sub-paragraph (d).

(g) Management received, in addition to such interest payments, a mortgage management fee calculated at the rate of 4% per annum on the sum advanced.

(h) I charged the C's a packaging/brokerage fee in respect of the advance, calculated at 10% of the amount of the advance, ie $3,000.00.

(i) Security for the advance referred to in sub-paragraph (a) was a second mortgage over property situated at Cleveland which had been valued on 9 March 1999 by SH in the sum of $215,000 and which was subject to a first mortgage to St George Bank Ltd securing the sum of $160,663.46.

6.1.2 Advance to SBPL, and HOPL

(a) On or about 15 February 2000, LPM advanced to SBPL and HOPL the practitioner's own funds as well as funds held on behalf of the following contributory lenders for whom the practitioner acted as solicitor:

The practitioner	$60,000.00
RWMRF	$39,000.00
WMMPL	$36,000.00
	$135,000.00

On or about 31 March 2000, SEH advanced to SBPL and HOPL the sum of $15,000.00 which sum was applied in reduction of the contribution by the practitioner from $60,000.00 to $45,000.00.

On or about 27 March 2001, the loan made by **S**EH was repaid with funds in the sum of $15,000.00 advanced to **S**BPL and HOPL by KTOH and TYYH**.**

(b) The interest rate payable by SBPL and HOPL was 25% per annum increasing to 33% per annum in the event of default.

(c) Interest payments made by SBPL and HOPL were collected by Management which in turn made payment to the lenders referred to in sub-paragraph 6.1.2(d).

(d) Management paid interest to the lenders calculated at the rates set out below:

RWMRF	12.5% per annum
WMMPL	12.5% per annum
SEH to 27 March 2001 and thereafter	
KTOH and TYYH	10% per annum

(e) The practitioner failed to inform the lenders referred to in sub-paragraph 6.1.2(d) that SBPL and HOPL were liable to pay interest at the rates set out in sub-paragraph 6.1.2(b)

(f) Management received and retained on its own account interest payments in excess of interest calculated at the rates set out in sub-paragraph 6.1.2(d).

(g) I charged SBPL and HOPL in respect of the advance a procuration fee calculated at 10% of the amount of the advance, ie, $13,500 and, in addition, a packaging fee of $1,500.

(h) Security for the advance referred to in sub-paragraph 6.1.2(a) was a second mortgage over property situated at Springwood which had been valued in February 2000 by SH in the sum of $1,300,000 and which was subject to a first mortgage to HMT securing the sum of $765,000.

6.1.3 Advance to BRPL and APSPL

(a) On or about 24 March 2000, LPM advanced to BRPL and APSPL its own funds as well as funds held on behalf of the following contributory lenders for whom the practitioner acted as solicitor:

WMMPL	$105,000.00
DM	$40,000.00
The practitioner	$10,000.00
	$155,000.00

(b) On or about 31 March 2000, LPM advanced to BRPL and APSPL the sum of $40,000 comprising the sum of $35,000 held on behalf of the practitioner and the further sum of $5,000 representing fees in the sum of $5,000 charged by I in connection with the establishment of the loan.

(c) The interest rate payable by BRPL and APSPL in respect of the loans referred to in sub-paragraphs 6.1.3(a) and 6.1.3(b) was 25% per annum increasing to 34% per annum in the event of default.

(d) Interest payments made by BRPL and APSPL were collected by Management which in turn made payment to the lenders referred to in sub-paragraphs6.1.3(a) and 6.1.3(b).

(e) Management paid interest to the lenders calculated at the following rates:

WMMPL	14.5% per annum
DM	15% per annum

(f) The practitioner failed to inform the lenders referred to in sub-paragraph 6.1.3(e) that BRPL and APSPL were liable to pay interest at the rates set out in sub-paragraph 6.1.3(c).

(g) Management received and retained on its own account interest payments in excess of interest calculated at the rates set out in sub-paragraph 6.1.3(e)

(h) I charged BRPL and APSPL fees in respect of the advance referred to in sub-paragraph 6.1.3(a) amounting to $15,000 inclusive of the fee of $5,000 referred to in sub-paragraph 6.1.3(b) and further charged BRPL and APSPL fees in respect of the advance referred to in subparagraph 6.1.3(b) amounting to $2,000.

(i) Security for the advances referred to in sub-paragraphs 6.1.3(a) and 6.1.3(b) were second and third mortgages respectively over property situated at Loganholme (registered in the name of BRPL) and property situated at Springwood (registered in the name of APSPL) which properties had been valued on 1 December 1999 and 3 September 1998 respectively by SH each in the sum of $1,000,000. The property at Loganholme was subject to a first mortgage to AML securing the sum of $650,000 and the property at Springwood was subject to a first mortgage to AIMPL securing the sum of $620,000.

Charge 7

The practitioner advanced sums held on behalf of his clients, HHPL, DM and MCC ("the contributors") to DCD, LHD and CDD ("the Ds") in circumstances in which he had a conflict between his duty to the contributors and his own interests.

Particulars

7.1 As at 16 February 2000, LPM had advanced to the D's from funds held on behalf of various contributory lenders sums then amounting to

$726,000.00 secured by first mortgage over properties at Dayboro.

7.2 On or about 16 February 2000, the practitioner advanced the following sums to the D's on the basis that they would also be secured by the first mortgage referred to in sub-paragraph 7.1:

HHPL	$50,000.00
DM	$50,000.00
MCC	$13,000.00
	$113,000.00

7.3 The sum of $113,000 loaned to the D's was applied as to $50,000 by payment to I.

7.4 The payment to I was made either:

(a) for the purpose of providing funding to the practitioner's legal practice; or

(b) for the purpose of repaying moneys owed by the Ds to Management arising from Management's having made payment to the contributory lenders to the Ds following default by the Ds.

Charge 8

In breach of r87(7) of the Rules of the Queensland Law Society Inc, the practitioner failed to obtain the prior written authority of the contributors in respect of the loans referred to in sub-paragraph 7.2.

Charge 9

In circumstances in which there was conflict between the interests of LPM in its capacity as trustee for the practitioner's client T, and the interests of the practitioner's clients, KTOH and TYYH, the practitioner acted for both LPM and T and for KTOH and TYYH and

(a) preferred the interests of LPM and T to those of KTOH and TYYH; and

(b) made advances of funds held by him on behalf of KTOH and TYYH other than in accordance with the terms of his authority.

Particulars

9.1 The practitioner acted as solicitor for LPM and for T in about April 1998 in relation to the making of a loan by T through LPM to MPCPL in the sum of $25,000.

9.2 In or about December 1999, MPCPL's debt to T was secured by second mortgage in favour of LPM over property situated at Kedron and was deferred in priority to a first mortgage debt to the National Australia Bank in the sum of approximately $122,000.

9.3 In or about November 1999, MPCPL contracted to sell the Kedron property to CKB for a consideration of $152,000, which figure was, on or about 2 December 1999, reduced by agreement between MPCPL and CKB to the sum of $136,000.

9.4 The practitioner held:

(a) an undated general mortgage investment authority from KTOH and TYYH which authorised him at his discretion to advance sums held by him as trustee on behalf of KTOH and TYYH to third parties on the security of a first or second mortgage to be held in the name of LPM and on the basis that moneys could be provided by two or more contributory lenders but that such loans were not to exceed 75% of a valuation obtained by the practitioner, and

(b) an undated general mortgage investment authority from KTOH alone on the same terms, save that moneys loaned were not to exceed 100% of a valuation obtained by the practitioner.

9.5 On or about 6 December 1999, the practitioner advanced to CKB on behalf of KTOH and TYYH the sum of $25,000 for the purpose of assisting CKB to complete his purchase of the property from MPCPL.

9.6 The loan referred to in sub-paragraph 9.5 was secured by second mortgage in favour of LPM on behalf of KTOH and TYYH, deferred in priority to a debt to AFSL in the sum of $106,252 secured by first mortgage.

9.7 The practitioner did not obtain a valuation of the property in connection with the advance by KTOH and TYYH.

9.8 The loan referred to in sub-paragraph 9.5 was:

(a) not authorised by KTOH and TYYH in that it was not supported by any valuation obtained by the practitioner,

(b) not authorised by TYYH in that, together with the first mortgage debt, it amounted to about 96.5% of the purchase price paid by CKB.

9.9 The total of the loans secured by the first and second mortgages over the Kedron property amounted to $131,252 which represented approximately 96.5% of the price payable by CKB, namely $136,000.

9.10 After payment of the first mortgage debt to the National Australia Bank on settlement of the sale referred to in sub-paragraph 9.3, the amount available to reduce the second mortgage debt due to T was only $1,458.08 and after payment of that amount to T, MPCPL remained indebted to T in the sum of $23,451.92 representing the balance of the loan of $25,000.

9.11 On or about 6 December 1999, the practitioner advanced to MPCPL from funds held on behalf of KTOH and TYYH the further sum of $17,000 to enable MPCPL to further reduce its debt to T. MPCPL's resulting debt to KTOH and TYYH in the sum of $17,000 was unsecured.

9.12 The loan referred to in sub-paragraph 9.11 was not authorised by KTOH and TYYH in that it was unsecured.

9.13 The making of the loan referred to in sub-paragraph 9.11 preferred the interests of T to those of KTOH and TYYH because:

(a) it enabled the debt due by MPCPL to T to be discharged in circumstances in which MPCPL was in default and T's second mortgage over the property was inadequate to secure the debt owed to him; and

(b) the resulting debt to KTOH and TYYH was unsecured.

Charge 10

The practitioner failed to maintain reasonable standards in relation to the settlement of the sale referred to in sub-paragraph 9.3.

Particulars

10.1 The amount payable by CKB on settlement of his purchase of the property was $136,508.35 but the practitioner required CKB to pay only the sum of $125,017.08, a shortfall of $11,491.27.

10.2 The effect of the shortfall was that the amount available from the settlement to repay the debt due by MPCPL to T was reduced by $11,491.27.

Charge 11

On or about 19 November 1998 the practitioner advanced the sum of $8,000.00 to DM from funds held by him on behalf of KTOH and TYYH in circumstances in which such loan was not authorised.

Particulars

11.1 Pursuant to contract dated 13 September 1998, DM purchased from PPAPL a unit situated at Aspley Brisbane ("the Unit") for a consideration of $176,000.00 reducible to $136,000.

11.2 The contract settled on 19 November 1998 on the basis that DM pay a purchase price of $138,000.

11.3 DM borrowed the sum of $134,000 from Suncorp-Metway Bank Ltd secured by first mortgage over the unit.

11.4 The practitioner advanced to DM the sum of $8,000 from funds held on behalf of KTOH and TYYH secured by second mortgage over the unit.

11.5 The loan referred to in sub-paragraph 11.4 was not authorised by KTOH and TYYH in that:

(a) it was not supported by any valuation obtained by the practitioner,

(b) together with the first mortgage debt, it represented more than 100% of the purchase price paid by DM.

Appearances

(a) For the Council of the Queensland Law Society Incorporated:
Mr B Bartley of Brian Bartley & Associates, solicitors

(b) For the practitioner:
Mr P Davis of counsel instructed by Gilshenan & Luton, solicitors.

Findings and Orders

1. The tribunal grants leave to the Queensland Law Society Incorporated to amend the notice of charge dated 15 October 2001.
2. The tribunal finds that charges 1, 2, 4, 6(a), 6(b), 6(c), 6(d), 8, 9 and 10 have been proven against the practitioner and that each charge constitutes professional misconduct. Charges 3, 7 and 11 have not been proven. The tribunal dismisses charges 3, 7 and 11.
3. The tribunal orders that the name of Sean Vincent Nielsen-Brown be struck from the Roll of Solicitors of the Supreme Court of Queensland.
4. The tribunal further orders that the costs of the Queensland Law Society Incorporated of proceedings before the tribunal be assessed by a cost assessor nominated by the society and agreed to by Sean Vincent Nielsen-Brown within 14 days.
5. The tribunal further orders that Sean Vincent Nielsen-Brown pay to the Queensland Law Society Incorporated 70% of the costs so assessed.
6. The tribunal further orders that Sean Vincent Nielsen-Brown pay to the Queensland Law Society Incorporated 70% of the cost assessor's fee for the assessment.
7. The tribunal further orders that payments in the last 2 preceding paragraphs be made by the practitioner to the trust account of the solicitors for the Queensland Law Society Incorporated within 3 months of the receipt by the solicitors for Sean Vincent Nielsen-Brown of the costs assessor's assessment and account.
8. The tribunal further orders that there be liberty to apply in relation to order 4 above.

Reasons

Charge 1

Sean Vincent Nielson-Brown ("the practitioner") is charged that in breach of s8 of the *Trust Accounts Act* he withdrew funds in trust on behalf of his client and loaned those funds to a third party. The practitioner admits that the withdrawal of the funds from his trust account was without the written authority of his clients. Section 8 of the Act requires that there be a written authority and accordingly the withdrawal of funds made from trust was in breach of the *Trust Account Act*.

The practitioner says that he believed he had actual authority of the clients through the agency of SU and KU on behalf of LIPL (the investment agent of his clients).

It is not necessary for us to decide whether he had actual authority. The absence of written authority is sufficient for the charge to be proved. However we note that at page 176 of the transcript the practitioner said he didn't turn his mind to the question of authority at settlement of the transaction on June 30.

The particulars recite that an amount of $240,000 was withdrawn from trust being monies held on behalf of WMMPL. A further sum of $230,000.00 was paid from trust monies held on behalf of RWMRF. A further $20,000 was later transferred to RCPL from funds held on trust for WMMPL. On the basis of the practitioner's admission, we find the charge proven.

Given the significant amounts involved we are of the view that the practitioner's admitted conduct as particularised in the charge, constitutes professional misconduct.

Charge 2

This charge is that the practitioner dishonestly mixed his financial affairs with those of his clients. The charge flows from the transaction mentioned in charge 1 where the practitioner admits he had had an interest in the borrower company RCPL, admits that company borrowed from clients without their written authority, admits he thus mixed his financial affairs with those of his clients but says he did not do so dishonestly. The practitioner entered into the transaction deliberately and knowingly and after a great deal of planning over a long period of time. It was not a spur of the moment decision taken on 30 June under the pressure of a financial year end. The practitioner had prepared a number of drafts of the explanatory memorandum and circulated those to a number of people, and gave evidence that he wanted the project to succeed as it could be the precursor of other property syndicate schemes to follow, and thus a source of work and thus profits to the practitioner.

We invited both the law society and the practitioner's counsel to state what they understood our test for dishonesty should be. We accept that the charge if proven could lead to the practitioner being struck from the Roll with the consequent presumption of permanent unfitness for him to earn a living as a practising solicitor, so the standard of proof is consequently very high. We find the practitioner acted dishonestly, and did not have

any reasonable belief that he was entitled or authorised, to enter into the transaction that mixed his financial affairs with those of his clients.

Given the amounts involved in the transaction, the calculated way in which the transaction was planned and the absence of the necessary authorities that are notoriously known as an important part of such a transaction, we find the conduct amounts to professional misconduct.

Charge 3

This charge in substance alleges that the security given by the practitioner's company, RCPL, to secure the loans was inadequate. The purchase price was $700,000 and the loans were $770,000 but there was evidence to suggest the site purchased from APHL was a development site that had environmental and development problems, and as there is no evidence of value at the time the risk was assumed, the time of settlement of the transaction 30 June 2000 it is possible that the solving of those environmental and development problems may have enhanced the value to cover the proper prudent loan to debt ratio.

Given the seriousness of the charge and the correspondingly high standard of proof we have sufficient doubt to find the charges unproven.

Charge 4

The practitioner is charged that he failed to maintain reasonable standards of competence and diligence in that he failed to lodge for registration the mortgage given by RCPL to secure the loans amounting to $770,000 made by the practitioner's company LPM on behalf of WMMPL and RWMRF (his clients) in relation to the RCPL purchase.

The practitioner admitted that the mortgage was not registered and that accordingly the failure to register the mortgage proves charge 4.

Submissions were addressed to us on behalf of the law society by Mr Bartley that following the settlement on 30 June 2000 the practitioner knew that the advances had been unauthorised by his clients, WMMPL and RWMRF. Mr Bartley further made submissions that there were aggravating factors in relation to the non-lodgement.

It is not necessary for us to deal with those submissions. The practitioner is charged with failing to maintain reasonable standards of competence in relation to the non-lodgement and he admits that charge and we find the charge proved. The practitioner's state of knowledge as to whether or not the advances were in fact authorised is not relevant to this charge nor are considerations of any aggravating factors.

However, given the amount of the advances made with the client's funds, we take the view that the practitioner's admitted conduct as particularised in the charge in never lodging the mortgage for registration is a failure to maintain reasonable standards of competence. It is conduct which might have had very serious consequences and accordingly we are of the view that the practitioner's admitted conduct constitutes professional misconduct.

Charge 6

This charge was amended during the hearing to set out 4 specific allegations of misconduct, which the practitioner admits, save that he does not admit, sub-paragraph 6.2 , which alleges the practitioner grossly preferred his own interests to those of his clients. The practitioner therefore is in a position where his duty to his client conflicts with his interest in the transaction.

The practitioner called evidence from KTOH and TYYH, WMMPL and RWMRF and who were each fulsome in their praise of the practitioner and said they accepted his apology but their evidence only serves to enforce the fact that they were not told the nature and extent of his interest in the transactions, and even as their evidence was being given they still did not know the nature and extent of the practitioner's interest. They apparently still have not been advised by the practitioner to get independent advice on their remedies. The practitioner admits mixing his affairs and admits that he did not make proper disclosure of his interest in the transactions to the clients. He also admits not advising them to seek independent legal advice before allowing them to enter into the transactions with him. There was evidence from KTOH that the practitioner advised him in an earlier transaction to get independent advice and that he did see a lawyer in Singapore, which indicates that at some time he was aware of his duty but had chosen to neglect that duty in later transactions. The practitioner simply asserts that the paperwork was sufficient to authorise the withdrawal of fees and expenses. There are two reasons why that explanation is insufficient; first he is acting as a fiduciary in these transactions and with out informed consent the authorities are insufficient authority; second the documents are vague to the point of being meaningless, let alone constitute authority to deduct fees and charges to the extent and at the times as

the evidence shows. We find the charge in sub-paragraph 6.2 also proven. Clauses 17 and 23 of the practitioner's affidavit and his evidence show he regarded the entitlement to money coming under his control as a matter of discretion or policy, not a serious matter of strict accounting as trustee, to the true owner of those funds. He was so blasé about form and obligation of a solicitor who is acting in a position of conflict as to make those matters professional misconduct.

Charge 7

The practitioner is charged that he advanced sums held on behalf of his clients, HHPL, DM and MCC, to DCD, LHD and CDD, in circumstances in which he had a conflict between his duty to the contributors and his own interests. The practitioner denies the charge.

However, he admits the particulars set out in the charge save and except for the particular which alleges that the $50,000 paid to I was for the purpose of providing funding for the practitioner's practice. He says it was an advance to the borrower on account of interest owed on the loan, such monies then being paid to the loan account. This is particular 7.4(a).

It is not necessary for us to decide whether or not the $50,000 paid to I was for the purpose of providing funding to the practitioner's practice or not. $50,000 of the $113,000 advance was applied to I which was the practitioner's service company associated with his practice.

There was a dispute as to whether the $113,000 was properly secured. It was said that the $113,000 was to be added to a further amount already loaned to the Ds and secured by first mortgage over certain properties at Dayboro.

The practitioner alleged that it was no breach of duty to advance the $113,000 to a "well credentialled borrower on proper security to pay interest".

Mr Bartley on behalf of the society conceded in his submissions that he did not think the charge had been proven but he indicated the society was not withdrawing the charge.

The charge of advancing monies in circumstances in which the practitioner had a conflict between his duty to the contributors and his own interests is a most serious charge. If the tribunal is to find the charge proven, then we must be satisfied on the balance of probabilities of the elements of the charge. By reason of what Mr Bartley referred to as "confusing and equivocal" aspects of the documentary evidence, we are unable to be satisfied on the balance of probabilities on the issue of whether or not the advance of $113,000 was properly secured by way of first mortgage.

We cannot therefore be satisfied as to proof of one of the elements of the charge and accordingly we find that that charge is not proven against the practitioner. We therefore dismiss charge 7.

Charge 8

The practitioner is charged that in breach of r87(7) of the Rules of the Queensland Law Society Incorporated, he failed to obtain the prior written authority of contributors in respect of the loans referred to in sub-paragraph 7.2 of the particulars.

The practitioner admits the particulars set out in charge 8 and admits that the charge is proven against him.

Although he admits that signed authorities were not obtained prior to the advance, he says that actual authority had been obtained from the contributories prior to the advance being made. However, it seems to us that that is irrelevant.

Rule 87(7) requires a prior written authority and that was not obtained. We find charge 8 is proven against the practitioner. We view the practitioner's conduct in advancing monies of contributors without their written authority in breach of r87(7) as a circumstance of professional misconduct.

Charge 9

It is alleged that the circumstances of this charge are that there was a conflict of the interests of LPM (the company vehicle by which the practitioner carried on his mortgage lending practice), his duty in capacity as trustee for his client, T and the interests of his clients. The practitioner acted for both Law Partners Mortgages Pty Ltd and T and for KTOH and TYYH. It is alleged that in so doing he preferred the interests of Law Partners Mortgages Pty Ltd and T, to those of KTOH and TYYH, and that he made advances of funds held by him on behalf of KTOH and TYYH other than in accordance with the terms of his authority from KTOH and TYYH. The practitioner denies the charge.

There are two aspects of the charge, first is the advance of $24,000 of KTOH and TYYH's money allegedly without valuation. In this respect the society relies solely on the evidence contained in the section 31 report which is exhibit A to the affidavit of Mr Hughes sworn 17 October 2001 and filed on behalf of the society.

We are not satisfied that there is evidence that $24,000 of KTOH and TYYH'S money was lent or advanced without a valuation of the property. There is no evidence to that effect in the s31 report. In that respect we find the charge not proven.

The second aspect of the charge is that the practitioner advanced a further $17,000 unsecured against real property in breach of the authority he had received from KTOH and TYYH. In respect of this $17,000, the evidence is and we are satisfied that the $17,000 was used to enable T to be paid out. The evidence from the practitioner was that he had no other commercial alternative.

Whether or not he had no other commercial alternative, the alternative he chose to take in paying out T with $17,000 of KTOH and TYYH's money demonstrates a clear conflict of his duty to KTOH and TYYH and his own interests, that of LPM, and his other client T. In respect of the second aspect, we find the charge proven.

In defence of himself the practitioner suggested that the loan from KTOH and TYYH was repaid in full and that therefore KTOH and TYYH's interests were not compromised. It may be that KTOH and TYYH were ultimately repaid in full but we reject the submission that KTOH and TYYH's interests were not compromised. KTOH and TYYH's interests were compromised when the practitioner departed from the terms of the authorities which he had from them. We view the practitioner's conduct as proven with respect to charge 9 as a serious matter that amounts to professional misconduct.

Charge 10

The practitioner is charged that he failed to maintain reasonable standards in relation to the settlement of the sale referred to in paragraph 9.3 of the particulars.

In or about November 1999 MPCPL contracted to sell a property to CKB for a consideration of $152,000 which figure was on or about 2 December 1999, reduced by agreement between MPCPL and CKB to the sum of $136,000. Notwithstanding that, and notwithstanding that on settlement CKB was to pay $136,508.35, the practitioner required CKB to pay only the sum of $125,017.08 which amounted to a short fall of $11,491.27.

The effect of the short fall was that the amount available from settlement to repay the debt due by MPCPL to T was reduced by $11,491.27. In effect, the practitioner short settled the transaction.

In cross-examination the evidence of the practitioner was that the property had in fact been valued at $105,000 and that he had to accept whatever the purchaser could pay, otherwise the bank which held a mortgage would sell the property up and T would not be paid at all.

It is common ground that T as a result of the short settlement received only about $1,500 immediately post-settlement, and that the payment he was due had been reduced by some $11,491.27, being the amount of the short fall in the settlement.

Mr Bartley on behalf of the society submitted to us that there was no substance in the practitioner's position that there was no commercial alternative but to accept the reduced amount on settlement. The charge here is of a failure to maintain reasonable standards in relation to the settlement.

We take the view that a competent solicitor maintaining reasonable standards of practice would not have accepted the lesser amount on settlement on behalf of his or her client. We find the charge proven against the practitioner.

We believe the conduct particularised in the charge which we find to be proven against the practitioner, amounts to professional misconduct because we reject the suggestion made by the practitioner in evidence that he had no commercial alternative. Rather, our view is the practitioner knew that to accept the lesser amount on settlement was not conduct maintaining reasonable standards and he chose nonetheless to do just that. Such conduct is indicative of professional misconduct. There is simply no plausible or reasonable explanation excusing the practitioner's conduct as proven.

Charge 11

The practitioner is charged that on or about 19 November 1998 the practitioner advanced the sum of $8,000 to DM from funds held by him on behalf of KTOH and TYYH in circumstances in which such loan was not authorised. The practitioner denies the charge.

He admits particulars 11.1, 11.2, 11.3 and 11.4 but denies particular 11.5. The denial is to the effect that he denies that the loan was not authorised by KTOH and TYYH in that it was not supported by any valuation obtained by the practitioner or that together with the first mortgage debt it represented more than 100% of the purchase price paid by DM.

The practitioner alleges that he had a valuation of the property at $176,000. He also alleges that he had a current authority given by KTOH to lend at 100% of valuation.

In submissions Mr Bartley indicated that the society accepted that there was the 100% authority and therefore that the practitioner was entitled to act upon the basis of that authority and that the society's position therefore was that the charge was not proven.

We agree that the charge is not proven for the reasons advanced in submissions by Mr Bartley and we dismiss the charge.

Reasons for Decision in relation to Penalties and Costs

The Charges

In a decision already published we have found charges 1, 2, 4, 6(a), 6(b), 6(c), 6(d), 8, 9 and 10 proven against the practitioner and have dismissed charges 3, 7 and 11 against the practitioner.

The matter came on before us to hear argument in relation to penalty and costs on 18 March 2002. In relation to penalty most of the arguments centred around charges 2 and 6, namely dishonestly mixing of the practitioner's clients' financial affairs with the practitioner's own financial affairs and of grossly preferring the practitioner's interests to those of his client.

The remaining charges, namely charge 1 (a breach of s8 of the *Trust Accounts Act*), charge 4 (failing to maintain reasonable standards of confidence or diligence in relation to the non-registration of a mortgage), charge 8 (a breach of r87(7) of the Queensland Law Society Rules), charge 9 (being in a conflict of interest situation and preferring the interests of one client over another client in circumstances where advances were made without authority) and charge 10 (a failure to maintain reasonable standards which resulted in the short settlement of a client transaction) are charges proven against the practitioner which we consider serious. Mr Davis on behalf of the practitioner in fact submitted that charges 4, 8, 9 and 10 would not warrant an order striking the practitioner from the Roll. Considered separately and in isolation from each other we agree that those charges may not warrant a striking off order. We cannot consider any of the charges in isolation. Considered together they constitute a course of conduct we must consider as a whole. To do otherwise would be failing to carry out our responsibility to protect the public.

Mr Davis conceded that charges 1 and 2 should be considered together and in relation to charge 2 he conceded that if it were not for the psychiatric evidence charge 2 as proven would justify a striking-off order. He made no such concession in relation to charge 6.

As to the appropriate penalty to be imposed Mr Bartley's comments in his submissions on behalf of the society were restricted in the main to charges 2 and 6 although he referred to charges 9 and 10 as examples of conduct of the practitioner, which he submitted, were inconsistent with any notion that the solicitor remained fit to practice.

Queensland Law Society Submissions on Penalty

Mr Bartley referred us to para.38 of the joint judgment of Justices Moynihan and Atkinson in *Queensland Law Society Incorporated v Carberry*; *Attorney General and Minister for Justice v Carberry* [2000] QCA 450 where their Honours referred to the primary role of proceedings such as these as being to protect the public from persons not fit to be held out as officers of the court or as proper persons to be entrusted with the duties and responsibilities of a solicitor. Their Honours also there referred to the subsidiary purpose in the public interest of deterring other practitioners who might otherwise engage in professional misconduct. Mr Bartley invited us to consider all of the available evidence and submitted that on the basis of that evidence there was no other conclusion to be drawn that the practitioner was not fit to be held out as a solicitor or officer of the court.

He referred us to the following:

- Paragraphs 17 to 23 of the practitioner's first affidavit filed 17 December 2001.
- The practitioner's benefiting from the differential interest rate and charging of fees without having made proper disclosure to his clients.

Mr Bartley submitted that this had been the practitioner's general practice over a period of some 6 years involving some 120 loans.

Mr Bartley submitted that the practitioner's course of conduct in this regard was not excused either by his marriage troubles or by the psychiatric evidence, which had been put before the tribunal.

Mr Bartley also relied upon the practitioner's evidence at the hearing (see p256 of the transcript and at an earlier point at p253 of the transcript) where Mr Bartley submitted that the practitioner did not resile from the position that his practice in relation to negotiation of interest rates with his lender clients was perfectly proper.

Mr Bartley relied upon the practitioner's evidence in this regard as evidence that the practitioner had really no understanding of the inconsistency between his practice in relation to the negotiation of interest rates paid to his lender clients and the nature of the solicitor/client relationship, which he had with them.

Mr Bartley submitted that this alone was sufficient to justify an order striking the practitioner from the Roll.

Mr Bartley referred us to pp275-281 of the transcript and submitted that the practitioner's evidence pointed to an inconsistency between the reality of the commercial transactions with his clients and his continuance in practice as a solicitor. Mr Bartley submitted that the practitioner's course of conduct was that he would enter into commercial deals with his clients in circumstances where those clients did not know what was going on. Referring us to p281 of the transcript, Mr Bartley submitted that the practitioner had suffered from a failure to understand the error of his ways and suggested that this was evidence of his unfitness to practise. Mr Bartley also submitted that the evidence of the clients who were called, namely KTOH (at pp146-148) and JEH (at p87), demonstrated that even as late as the time when those witnesses gave evidence they had no real understanding of the full circumstances under which their funds were invested on their behalf by the practitioner.

Mr Bartley's central submission related to the RCPL transaction. He said that in substance and effect the practitioner had dishonestly used his client's money (and a very substantial sum at that) to purchase property from which the practitioner stood to gain. He submitted that the tribunal had made a finding that the practitioner had acted in a calculated way and it was the culmination of the practitioner's plans to diversify into property syndication deals. Mr Bartley submitted that there were two aspects of the RCPL transactions which stood out in relation to a consideration of whether the practitioner remained fit to practise, namely:

- That after RWMRF and WMMPL had retained solicitors the practitioner's response was to attempt to have RWMRF and WMMPL sign authorities. Mr Bartley submitted that the practitioner had tried to cover up and to avoid ASIC finding out the true facts of the matter. We will refer to p226 of the transcript in that regard.
- Secondly, the practitioner's attitude to the transaction when questioned about it before the tribunal. Mr Bartley referred us again to the transcript at p226 and to the practitioner's answer that the transaction was "a whole or nothing game".

Practitioner's Submissions on Penalty

Mr Davis, on behalf of the practitioner, referred us to Dr C**'s** evidence at p190 of the transcript and following. Mr Davis submitted that Dr C's professional opinion was based heavily on factual information provided to him by Mr L who Mr Davis argued had not been cross-examined before the tribunal. Mr Davis suggested that Mr Bartley had not seriously attacked Dr C's opinion but rather suggested that even if Dr C was right, that did not help the practitioner and he suggested that Mr Bartley had simply attacked the factual data on which Dr C had reached his opinion without cross examining Mr L.

In his submissions Mr Davis conceded that there were certain elements about charge 6 as proved which were disturbing but he submitted that the circumstances were not as "bad" as those in *Harvey v Law Society of New South Wales* (1975) 49 ALJR 362. Mr Davis submitted in relation to charge 6 as proved that there was no finding of dishonesty and submitted that the practitioner thought he was acting honestly albeit that the practitioner apparently misunderstood his obligations to his clients. Mr Davis submitted that the practitioner's conduct in relation to that charge was that he was acting without realising that what he was doing was improper. Mr Davis submitted that the practitioner's misunderstanding of his role could be overcome by education. Mr Davis submitted that there had been no economic loss established on the evidence as a result of any of the matters proved against the practitioner except perhaps for an amount of some $50,000, which was said to be owing to RWMRF and WMMPL. Mr Davis submitted that in fact there had been no capital loss to any of the clients involved in the matters in respect of which charges had been proved. Mr Davis submitted that the circumstances as proven against the practitioner did not warrant a striking off order but rather orders that the practitioner be suspended from practice for a period of 2 years from today on condition that:

- he continue counselling with Counselor D on at least monthly sessions; and

- at the end of 2 years the practitioner lodge with the society a report by Counselor D as to the practitioner;
- the practitioner not be issued with a principal's practising pertificate for a further period of 2 years after the end of the period of suspension;
- the practitioner undergo a Practice Management Course at the end of his period of suspension.

Mr Davis submitted that an order striking off a practitioner was a most serious step and that the tribunal should only take it as a last resort and only if the tribunal was satisfied that there was no other way of protecting the public. He submitted that that position had not been reached. He submitted that the orders, which he proposed should be made, afforded the tribunal an alternative to striking off which the tribunal should adopt. In relation to charge 2 as proved, Mr Davis submitted that the dishonesty was a one-off affair and was complicated by the practitioner's psychiatric condition. He submitted to us that we should rely on Dr C's evidence in relation to the effect of the practitioner's psychiatric condition and he submitted that we could be satisfied that the dishonesty proved in relation to charge 2 was a one-off affair complicated by the psychiatric condition and was not demonstrative of a permanent unfitness to practise as a solicitor. Rather it was something that occurred explained by temporary circumstances and a temporary psychiatric condition.

Dr C's Evidence

The evidence of Dr C and Mr D is not offered as an excuse for the conduct but relied upon to indicate that the conduct is a result of extreme stress flowing from a marriage breakdown not typical, and not likely to be repeated after a long period of treatment, said to be perhaps two years. The point being that the public interest will be adequately protected if the practitioner is suspended for perhaps 2 years and has a further period of limited practice.

We have an understanding of the stress of sole practise and the stress that Mr Nielson-Brown was under after his marriage breakdown in September 1999. Mr L's evidence is an indication of the impaired functioning that Dr C said was a typical symptom of the condition he called "adjustment disorder".

This medical evidence might excuse or explain an isolated incident or oversight or even a group of events .The events here were over a longer period of time and involved significant preparation and organisation, and the preparation of procedures and paperwork that involve planning and thought.

We are however not prepared to accept the submission that this condition is sufficient explanation for the conduct, first because the systems put in place for the acts occurred over too long a period of time, and second even while giving evidence Mr Nielson-Brown was not able to grasp the full impact of his lapses and sought to justify his behaviour by commercial benchmarks, not professional standards.

The Role of the Tribunal

It is clear that the tribunal's role in these matters is to protect the public from persons not fit to be held out as Officers of the Court or as persons entrusted with the duties and responsibilities of the solicitor (see Moynihan SJA and Atkinson J in *Queensland Law Society Incorporated v Carberry*; *A-G v Carberry* [2000] QCA 450 at para [38]).

In Carberry Justices Moynihan and Atkinson found that "once it has been determined that a solicitor is unfit for practice, a suspension, even coupled with an order to satisfactorily complete a Practice Management Course, could only apply in exceptional circumstances". Their Honours then referred to a number of authorities supporting that proposition. Their Honours also pointed out that "an order for suspension should be based on a view that, at the termination of a period of suspension, the practitioner will no longer be unfit to practice". They also refer to a number of authorities in support of that proposition at para[40].

Reasons for Decision as to Penalty

The circumstances of these charges as proven against the practitioner demonstrate that he was involved in a course of conduct in his practice as a solicitor which had the following features:

- He dealt with lender clients in circumstances where he made no prior disclosure to them of the interest rate at which he would be on lending their funds.
- In such circumstances the practitioner made no proper disclosure to his lender clients of the amounts, which he stood to gain from the transactions by which he on lent their funds.
- The practitioner at all times considered the practice to be perfectly proper.
- The practitioner's conduct as referred to above demonstrates that throughout the period of the transactions which were the subject of the charges he lacked any understanding that his conduct was conduct inconsistent with the proper relationship which ought to have existed between a solicitor and a client where a duty to fully inform the client is respected

and where client monies are to be dealt with strictly in accordance with client's instructions which instructions can only be given upon the client being fully informed.

- The practitioner entered into commercial transactions with his lender clients in circumstances where in truth they really did not know what was going on or what was happening with their funds.
- In relation to the RCPL transaction the practitioner dishonestly used a substantial amount of his client's funds to purchase a property from which he stood to gain considerably and by which he carried into culmination his long pursued plans to diversify his practice into the offering of property syndication deals to clients.

Mr Bartley made a submission that the practitioner's response once RWMRF and WMMPL had retained solicitors was indicative of an attempt to cover up what had gone before and to hide the true facts from the ASIC. We are not satisfied that the practitioner actively sought to cover up the facts or to hide them from ASIC.

However, the features of the conduct which we have found proved which we have summarised above lead to the conclusion that the practitioner embarked on a course of conduct throughout the transactions the subject of the charges which fell seriously short of the conduct which the community would expect to be adopted by a solicitor conscientiously honouring his/her obligations to his/her clients. We also conclude that the practitioner lacked the knowledge and understanding that what he was doing constituted serious breaches of his duties as a solicitor. His failure to comprehend his duties as a solicitor persisted right up to the time he gave evidence before us.

It seems to us that he was at all times more interested in the commercial aspects of arrangements with his clients than any recognition of any duty which he owed to them. Because this failure to understand his duties has persisted for so long, we are satisfied that it will persist indefinitely.

Our principal focus in imposing a penalty must be to protect the public. The public must be protected from solicitors who are ignorant of or oblivious to the special duties and responsibilities of a solicitor to his/her clients.

We view the practitioner's conduct as summarised above to be so fundamentally inconsistent with conduct to be expected of a solicitor as to demonstrate that the practitioner is permanently unfit to practise.

The imposition of orders for suspension can only apply in exceptional circumstances and we do not regard this practitioner's circumstances as exceptional. Further an order for suspension should only be made where the tribunal is confident that at the end of the period of suspension the practitioner will no longer be unfit to practise. We cannot be confident of that.

We do not regard the circumstances of these charges as proved as being ones which justify the sort of orders proposed by Mr Davis.

In the interests of preserving proper standards of professional practice in order to protect the public from persons not fit to practise as solicitors, we think that there is no other course open to us but to order that the practitioner's name be struck from the Roll of Solicitors. We will make an order in those terms.

The order striking off the practitioner may serve as a deterrent to other solicitors involved in contributory mortgage lending activities from acting improperly, but that effect was not central to the conclusion to which we have come. It will be a secondary but not unwelcome consequence.

Costs

Mr Bartley made an application for costs of the proceedings before the tribunal. Mr Davis indicated he could say nothing in relation to costs.

In total there were 11 charges brought against the practitioner. One of those charges was withdrawn right at the outset of the hearing leaving 10 charges, which were pursued by the society. The society was successful in securing a conviction in relation to 7 of the charges and 3 of the charges were dismissed. Of the 3 charges that were dismissed Mr Bartley in his submissions at the conclusion of the hearing accepted that 2 of those charges had not been made out against the practitioner. In relation to the other charge (charge 3) we could not be satisfied that the charge had been proven.

The hearing of the charges went a full 3 days.

Because the society was not successful in securing convictions on all 10 charges proceeded with, we do not think it appropriate that the society recover the whole costs of the proceedings. Rather, we think it reasonable and appropriate that the society recover 70% of its assessed costs of the proceedings.