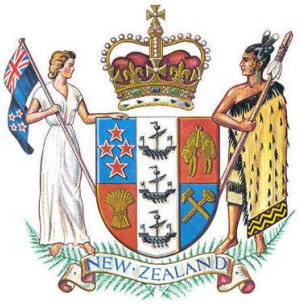


Report of the

LEGAL COMPLAINTS REVIEW OFFICER

For the 11 months ended
30 June 2009

Presented to the House of Representatives pursuant to Section 223 of the Lawyers and Conveyancers Act 2006

CONTENTS

INTRODUCTION

The position of Legal Complaints Review Officer (LCRO) came into being on 1 August 2008 with the commencement of the Lawyers and Conveyancers Act 2006 (the Act). This is the first Annual Report of the Legal Complaints Review Officer required by s 223 of the Act to be provided to the Minister of Justice, the New Zealand Law Society and the New Zealand Society of Conveyancers.

This report covers the eleven-month period 1 August 2008 to 30 June 2009 to coincide with the accepted annual reporting cycle.

NATURE OF OFFICE

The Legal Complaints Review Officer provides independent oversight of the treatment of complaints by the Standards Committees which are administered by the New Zealand Law Society and the New Zealand Society of Conveyancers. The Officer is appointed by the Minister of Justice after consultation with the New Zealand Law Society and the New Zealand Society of Conveyancers. The LCRO cannot be a lawyer or a conveyancing practitioner (s 190).

The primary function of the Legal Complaints Review Officer is to review determinations of Standards Committees. Additionally the LCRO is to provide advice to the Minister of Justice, New Zealand Law Society and the New Zealand Society of Conveyancers in respect of any issue which relates to the manner in which complaints are received and dealt with. Ancillary to these statutory functions the LCRO has also undertaken an educative role in speaking to legal practitioners and writing articles in professional publications about the role and the wider regulatory framework.

The New Zealand Society of Conveyancers is of a modest size and to date no applications for review from its Standards Committee have been received. As such this report relates primarily to applications for review from lawyers' Standards Committees.

The Legal Complaints Review Officer is Duncan Webb. The Deputy Legal Complaints Review Officer is Hanneke Bouchier. The office is administered by the Tribunals Unit of the Ministry of Justice and located in Auckland. As at 31 July 2009, one full time case manager is employed to provide support to the Officer and Deputy.

The Ministry of Justice also hosts a web-site for the Legal Complaints Review Officer (http://www.justice.govt.nz/tribunals). That web-site includes information on the role of the Officer, how to apply for a review, procedural guidelines, and full copies of a selection of decisions of the Officer which may be of interest.

OVERVIEW

The functions of the Legal Complaints Review Officer began relatively slowly in light of the fact that reviewable decisions first had to be made by Standards Committees. The first few months of the operation were therefore spent developing systems and guidelines for the office and in speaking to interested groups about the new regulatory regime. The Legal Complaints Review Officer became the focus for some dissatisfaction amongst some members of the legal profession regarding aspects of the new Rules of Conduct and Client Care.

Issues of workability were revealed by some of the early applications for review. The most problematic was the loss of a right to revision of costs for a small group of clients whose bills were rendered prior to 1 August 2008 but who complained after that date. The LCRO considered this issue in *Z v D* LCRO 4/08 and upheld the approach of the Standard Committee to the issue. The matter was also raised with the Minister.

Another issue is that of compliance with formal requirements in making applications for review. While there are few formal constraints on how complaints may be made to the Law Society, applications to the LCRO for review must be made on a prescribed form, with a prescribed ($30) fee and within a strict 30 working day time limit. There have been several occasions when applicants have failed in this regard, sometimes due to no fault of their own (for example where there have been postal delays). In considering these matters the LCRO has determined that the law requires strict compliance with such formalities and that because the statute confers no discretion there is no jurisdiction to relax the requirements or extend the time for making an application. These issues have been addressed in a number of reviews including *D v T* LCRO 36/09.

Applications for review have not been exclusively from clients disappointed about the way complaints against their own lawyers have been dealt with. Applications have been received from third parties who have complained against the lawyer of their adversary; lawyers complaining about another lawyer; lawyers seeking a review of a decision of a Committee against them; and third parties complaining on behalf of a person they consider to be aggrieved.

On some occasions the complaints and review process can be used by complainants for collateral purposes such as to revisit final decisions of other Tribunals. On rare occasions the complainants are vexatious and bring complaints to harass either a lawyer involved or a lawyer's client. The LCRO is aware of the need to ensure that the complaints and review process is not abused, while ensuring that every complainant is accorded a fair opportunity to be heard. In some cases this can be achieved by considering the matter on the papers or by hearing from the complainant without calling on the party complained against to determine whether a further hearing is appropriate.

Many of the decisions of the LCRO along with other information are posted on the web-site of the Officer. Decisions of note have also been reported in *Lawtalk* (the magazine of the New Zealand Law Society) and in the *Law Society Bulletin*, an electronic awareness bulletin of the Auckland District Law Society. The wider dissemination of the LCRO's decisions is considered a positive development. There is no appeal from a decision of the LCRO. However the exercise of the powers of the Officer are amenable to judicial review by the High Court. As of 30 June 2009, two of the decisions of the Officer (in relation to the same applicant) are currently under review.

A v Z: DEDUCTION OF FEES WITHOUT CLIENT CONSENT

Particular mention should be made of the decision of *A v Z* LCRO 40/09 in which it was found that the lawyer had taken fees from client funds held in trust improperly. It was held that lawyers may not deduct fees from funds held in trust without a direction of their client. The decision has caused consternation with some members of the legal profession who had long operated on the basis that provided an invoice was sent to the client immediately, fees could be deducted from client funds held in trust without a specific direction to that effect.

In concluding that lawyers may take fees from funds held in trust only at the direction of their client the LCRO noted that this does not affect the right of a solicitor to a lien (or set-off) in respect of assets or funds held. Such rights are expressly preserved by s 113(2) of the Lawyers and Conveyancers Act 2006. The right of set-off was found to exist by the Court of Appeal in *Shand v M. J. Atkinson Limited (in Liquidation)* [1966] NZLR 551. In reaching the decision he did the LCRO was of the view that he was following Chisholm J in *Heslop v Cousins* [2007] 3 NZLR 679.

It may be that the issue of the deduction of fees without authority does not arise particularly frequently in the future given the fact that the Rules of Conduct and Client Care require fee information to be given to a client in advance. In particular r 3.4 (a) requires lawyers to provide to clients in advance information as to "whether the fee may be deducted from funds held in trust on behalf of the client".

It is the view of the LCRO that for a lawyer to be entitled to deduct fees from funds held in trust s 110 of the Act requires not only that the client be informed of the intention to do so, but that a direction from the client is also required. There is no bar to such a direction being given in advance nor is there any requirement that the direction specify the amount of the bill to be deducted. In addition the requirements of both the Rules of Conduct and Client Care and the Trust Account Regulations will need to be adhered to.

STATUTORY REPORTING

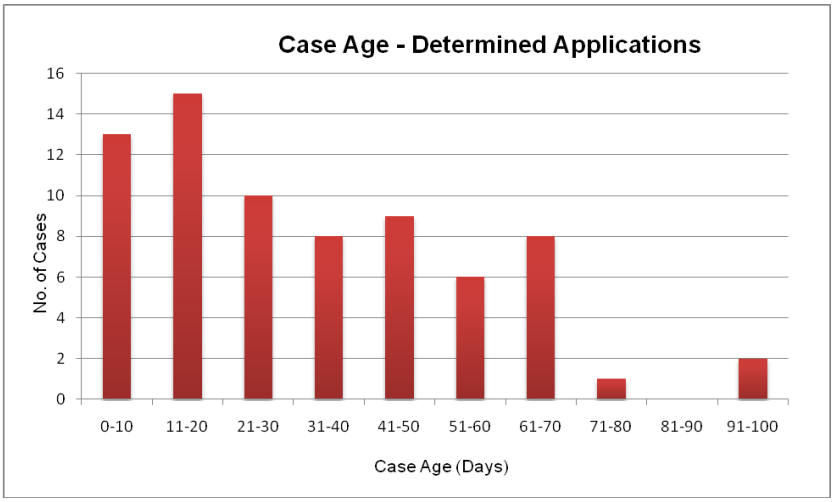
Section 224 of the Act requires the following information to be provided in the Annual Report of the Legal Complaints Review Officer:

Number and types of applications for review made
103 applications for review were made to the Legal Complaints Review Officer during the 11 month period 01/08/08 to 30/06/09.

81 of these applications for review sought reviews of determinations made by Lawyers Standards Committees in relation to complaints (pursuant to s 194 of the Act). The remaining 22 required the LCRO to exercise the duties and powers of Lay Observer (pursuant to s 355 of the Act). No applications for review were made in relation to inquiries, interventions or other matters (pursuant to ss 195 – 197 of the Act).

Whether the reviews have been completed / number of applications outstanding
As at 30 June 2009, of the 103 applications for review made, 72 reviews had been completed and 31 applications remain outstanding.

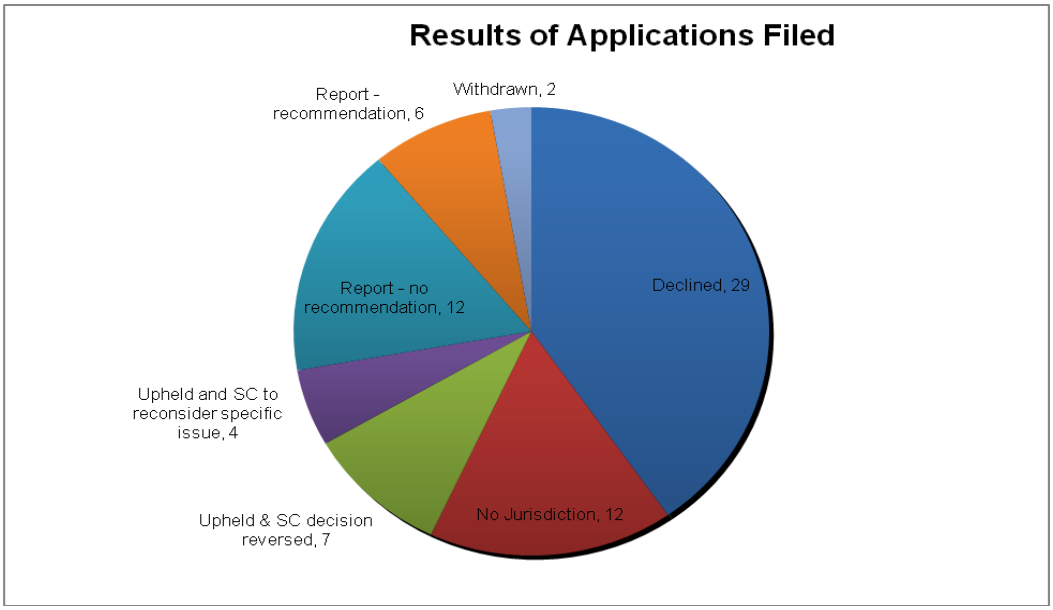
The timeliness with which the reviews have been completed
The LCRO has adopted a target of seeking to resolve 85% of applications for review within 60 working days. In fact 87.5% of applications for review were determined within 60 working days and 97% were determined within 71 working days. The average time for a review to be completed was 33 days. This target will be revisited should the volume of applications for review increase substantially.



The outcomes of the reviews
72 reviews have been finally determined. Of these 72 determined reviews, 2 matters were withdrawn.

An application for review could be considered unsuccessful if it is declined (29), if no jurisdiction to consider it exists (10), or if it was a Lay Observer's matter and the report made no recommendation (14). On this basis around 75% of applications were unsuccessful.

On seven occasions the Officer replaced the decision of the Standards Committee with his or her own decision and on four occasions the matter was referred back to the Standards Committee either generally or in respect of a specific matter. On six occasions the Officer made recommendations in the discharge of the function of the Lay Observer. Such applications could be considered successful and comprised 24% of applications.

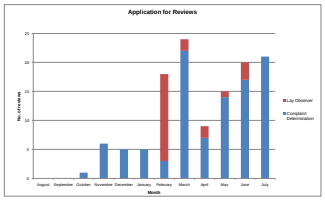


WIDER ANALYSIS

Case Volumes

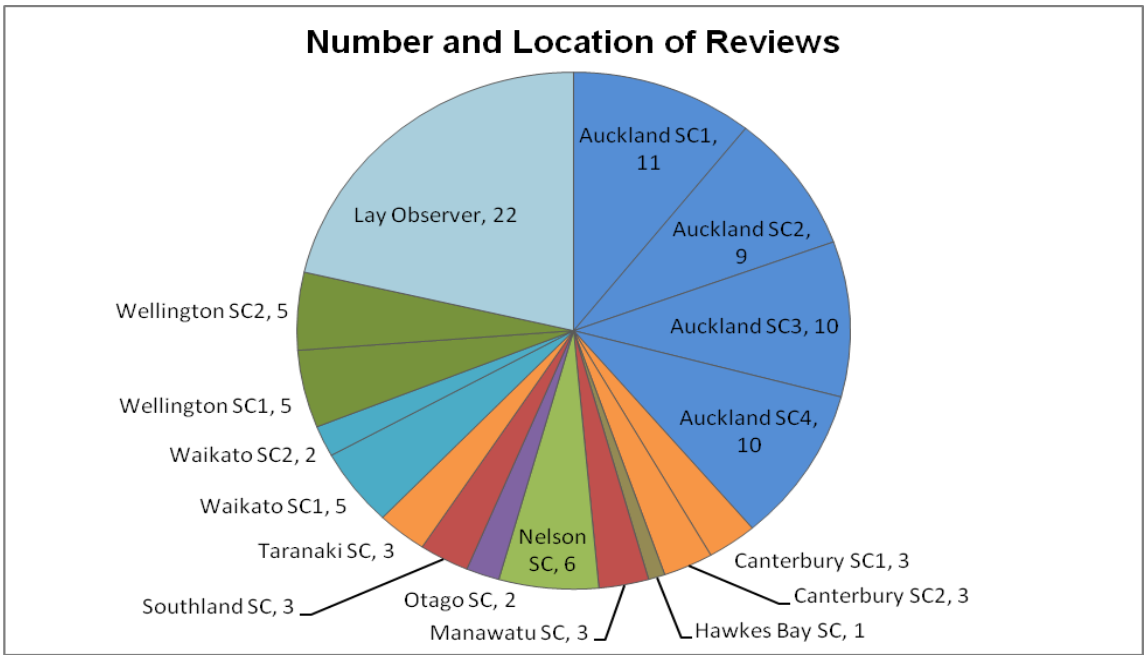
It is likely that in the ensuing year an increasing volume of applications for review will be received. The LCRO may only review determinations (and some other actions) of Standards Committees. Because those committees came into being only on 1 August 2008 there was a lag before any significant number of reviewable decisions were made. Using the months preceding 1 August 2009 a clear trend of increasing applications can be seen. Using that information as a guide a general projection can be made that in the ensuing year up to 200 applications for review will be made.

The following graph illustrates the number of applications for review filed each month (includes the 12th month).



Source of applications

The following diagram illustrates the numbers and origin of applications for review. As is to be expected a significant portion of applications came from Auckland where a significant portion of the population of both lawyers and clients are found. In general applications reflected the population distribution with the exception of Nelson. However, given that only six applications for review came from Nelson the sample is too small to be suggestive of any particular trend.



Lay Observer Reviews

Under the now repealed Law Practitioners Act 1982 regime Lay Observers discharged a review function in respect of the conduct of Complaints Committees of the various District Law Societies. On 1 February 2009 that office ceased to exist and any remaining Lay Observer reviews were to be undertaken (or completed) by the Legal Complaints Review Officer. The LCRO has undertaken 22 such reviews and 3 Lay Observer reviews remain outstanding. While there was no statutory time limit on seeking a review from a Lay Observer under the Law Practitioners Act 1982 regime, it is unlikely that a significant number of further applications for Lay Observer reviews of the decisions of Complaints Committees will be received.

Jurisdictional issues

A number of applications for review were not considered for jurisdictional reasons. In particular an application for review must be properly made and lodged within 30 working days after the date of the determination of the Standards Committee. A $30 fee must accompany the application which must also be made on the prescribed form (s 198).

There is no provision in the Act for the time for making an application to be extended or for the fee to be waived. In general where an application is sought to be made out of time the applicant will be informed of this by the registry staff and the application for review is not made. In some cases applicants wish to have the question of jurisdiction determined by the Officer. A number of such decisions have been made. The Officer has strictly construed the provisions of s 198 in accordance with the approach of the High Court in *Cahayag v Removal Review Authority* [1998] 2 NZLR 72; [1998] NZAR 145. For example see LCRO 62 / 2009 referred to below.

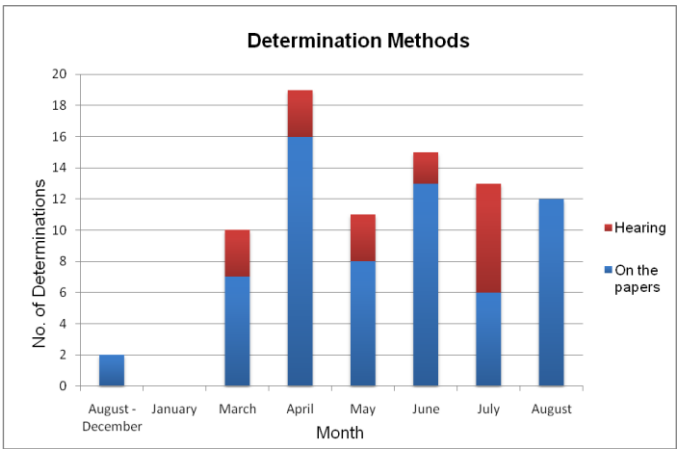
PROCEDURAL MATTERS

The Officer is obliged to conduct reviews with as little formality and technicality, and as much expedition as possible as is consistent with the Act, a proper consideration of the

review and the principles of natural justice.

Review on the papers

The Officer has provided some guidelines in respect of how reviews are likely to be conducted. The parties have a right to be heard in person on a review. Alternatively, with the parties' consent the matter may be disposed of by a review on the papers. In the 2008/09 year 18 reviews were conducted by a hearing in person and 52 reviews were conduct by a review on the papers (2 were withdrawn).



Case to Answer hearings

In some cases the Officer on reviewing an application is concerned that no prima facie grounds for re-examining the decision of the Standards Committee appear to exist. To deal with such cases the Officer has developed a "Case to Answer" procedure. Under that procedure the applicant is given the opportunity to be heard on the question of whether there is in fact a prima facie case for the respondent to answer. The respondent is entitled to attend such a hearing, but is not required to.

In the event that the applicant satisfies the Officer that there is in fact a case to answer the review will then proceed in the normal way. If the Officer concludes that there is no case to answer, a final determination confirming the decision of the Standards Committee will be made.

Costs

The Officer has the power to impose costs. The Officer has issued a guideline in respect of how that power will be exercised. Where a finding is made against a lawyer or conveyancing practitioner that practitioner will be expected to pay a substantial proportion of the costs of the conduct of the review. Those costs are payable to the respective society of the practitioner (which funds the LCRO by way of annual levy). The LCRO has indicated that in general costs will not be awarded as between the parties unless exceptional circumstances exist. One such order was made in *O v S* LCRO 35 / 09 where the LCRO was of the view that the application (and its management) was part of a course of action aimed at imposing costs and inconvenience on the other party.

Publication of names / naming conventions

The Officer has adopted a presumption of not publishing names of the parties to a review at this time in light of the fact that the regulatory framework which is being applied is new. That is an interim policy and will be reviewed shortly.

Some decisions were initially published using letters as names. However, following Priestley J in *Brown v Argyle* (2006) FRNZ 383; [2006] NZFLR 705 the decisions now replace actual names with fictitious names in order to make the reading of the decisions easier.

Alternative dispute resolution

The Officer has a power to postpone a review to enable the parties to seek to resolve the matter in issue by negotiation conciliation or mediation. Such a power is in practice rarely exercised. The Standards Committees have a similar power and where a complaint is amenable to resolution in this way it appears likely that this will occur at the Standards Committee level (or prior to a complaint being made to the Society). By the time the parties have received a decision of a Standards Committee and made an application for review it is generally the case that a settlement by negotiation, conciliation or mediation is no longer possible. In the preceding year one matter was resolved by a mediated settlement.

MINISTER OF JUSTICE

In the discharge of the function of providing advice to the Minister of Justice on any issue identified in the course of carrying out reviews the Officer has had occasion to correspond with the Minister's office. In particular it transpired that a serious anomaly in the transitional provisions of the Lawyers and Conveyancers Act resulted in clients being unable to seek a costs revision or assessment in respect of bills of costs rendered prior to 1 August 2008 but complained about after that date. A number of complaints in respect of costs were dismissed on this basis. The problem identified was a transitional one and as such is not an ongoing issue. For further details of this issue see decision LCRO 04/08.

NEW ZEALAND LAW SOCIETY

One of the functions of the Legal Complaints Review Officer is to provide advice to the New Zealand Law Society on any issue identified in the course of carrying out reviews. To facilitate this the Officer meets with officers of the Complaints Service of the Society on a quarterly basis. In the course of those meetings recent decisions are discussed and any matters concerning the manner in which Standards Committees or the Complaints Service are determining and handling complaints are discussed.

By section 124(g) and 125(g) of the Act the Complaints Services of the respective societies are obliged to provide to the Officer copies of any complaints about the operation of the complaints service. A number of such complaints have been received in respect of the New Zealand Law Society Complaints Service. Those complaints are reviewed by the Officer and should they indicate any particular matter which requires attention that matter would be raised by the Officer with the Society. I observe that no complaints have been referred that has led to any particular action or concern on the part of the LCRO.

WIDER ACTIVITIES

The LCRO has also undertaken various wider activities. In particular the Officer has been willing to speak to interested groups about his role and the new regulatory framework.

Speaking engagements have included:

- Professional Negligence and Liability Forum (Lexis Nexis, 20 August 2008),
- The Role of the LCRO (New Zealand Lawyers and Conveyancers Disciplinary Tribunal, 26 August 2008),
- Client Care and Crown Counsel (Crown Law, 16 September 2008),
- Handling Complaints (Wellington Branch NZLS 30 October 2008),
- Liability issues for Lawyers (NZ Insurance Law Association, 7 November 2008),
- Ethics Forum (Corporate Lawyers Association, 7 April 2009),
- The Lawyers and Conveyancers Act (Canterbury-Westland Branch NZLS 7 April 2009),

- Role of the LCRO (North Harbour Law Society 22 May 2009),
- Role of the LCRO (Otago Branch NZLS 9 July 2009)
- Role of the LCRO (Southland Branch NZLS 9 July 2009).

The Officer has also published information about his role and the relevant law and regulatory framework. Publications include:

- "Unsatisfactory Conduct" Lawtalk issue 717 (2008)
- "Those Engagement Letters" Lawtalk issue 723 (2009),
- "Liability issues for lawyers under the Lawyers and Conveyancers Act" 14 New Zealand Business Law Quarterly 291 (2008),
- "The Legal Complaints Review Officer" [2008] New Zealand Law Journal 405,
- The Solicitor's Duty [2008] New Zealand Law Review 685.

Some of these publications are available on the LCRO web-site.

The Officer also attended a Tribunal Leaders' Conference of the Council of Australasian Tribunals in Melbourne between 26 and 28 November 2008.

OPERATIONAL MATTERS

The Officer is administered by the Ministry of Justice and funded through a levy imposed on the respective societies pursuant to s 217 of the Act. The societies recoup that levy through levies on their own members.

The LCRO levy on the Law Society and the Society of Conveyancers for the 2008/09 year was $116.25 (incl GST).

Since commencement the costs of running the office of the LCRO have been lower than anticipated. The Trust Account at 30 June 2009 was predicted to have a surplus of $546,480.00. As agreed with the respective Societies, this amount has been deducted from the total original budget which leaves costs of $270,158 to be met by levies in the 09/10 year.

The budgeted costs of the LCRO for the 2009/10 year are $816,638 and were adjusted in accordance with a recalculation based on a range of income and expenditure issues that include:

- Actual income;
- Actual costs of function;
- Budgeted amounts;
- Interest received from Trust Account; and
- Costs awarded.

As a result of the above a new annual amount was set at $270,158 which is based on a levy of $28.13 (incl. GST) per practitioner.

In June 2009 the LCRO relocated its office from temporary offices to dedicated space in Albert Street.

By section 222 of the Act the Ministry of Justice is required to report in its own Annual Report in respect of funds received and expended in meeting the cost to the Crown of the performance of the functions of the Legal Complaints Review Officer.

CASES OF NOTE

LCRO 62 / 2009

When time begins to run for making application for review / no grounds exist for extending time

This decision concerned this issue of whether jurisdiction to conduct a review existed and in particular from what moment time began to run for the purposes of counting the 30 working day time limit.

A client complained to the New Zealand Law Society regarding the conduct of her lawyer. On 20 March 2009 the Standards Committee resolved to take no action on the complaint. That decision was notified to the parties by a letter sent on 26 March 2009. A letter seeking a review was sent by the Client to the office of the LCRO and was received on 21 April 2009. Through certain administrative failures within the registry the client was not informed that her application failed to meet required formalities until after the time for making an application had passed. A complying application was not made until 18 May 2009 (which was outside of the 30 working day time limit).

The LCRO found

- The letter of 21 April did not meet the formalities required by s 198 and the application could not be considered to have been made by that letter.
- Failure of the registry staff to contact the client about the defective application did not have the effect of extending the time in which an application could have been made.

Result: The application was made out of time and consequently the LCRO had no jurisdiction to do so because the formalities prescribed by s 198 of the Lawyers and Conveyancers Act were not complied with.

LCRO 41/2009

When is it appropriate to issue statutory demand / acting against a former client

A company complained about the conduct of a lawyer in seeking to recover an outstanding debt from it for the lawyer's client. It complained that the lawyer had acted for it some time previously and should not now be permitted to act against the company. Secondly, it stated that the lawyer ought not have issued a statutory demand in light of the fact that the debt was disputed.

This review concerned conduct which occurred prior to 1 August 2008 and the standards found in the Law Practitioners Act and Rules of Professional Conduct applied.

The LCRO considered that there was no blanket prohibition on acting against a former client. The duty of loyalty owed to a client lasts as long as the retainer itself. However, the duty to keep information confidential and not to use it against a former client lasts forever The matter in respect of which the lawyer was previously retained by was the recovery of a commercial debt. The information held by the lawyer could not be seen to be able to be used to the detriment of the company in such a proceeding. The LCRO found that for the lawyer to accept the retainer could not reasonably be expected to be objectionable to the company.

In respect of the issuing of the statutory demand the LCRO considered that the lawyer used efforts which were reasonable in the circumstances to ascertain whether the debt was disputed. On the evidence available to the lawyer at that time the conclusion that the debt was not disputed was a reasonable one to reach.

Result: Decision of Standards Committee confirmed

LCRO 33 / 2009

Lawyer is obliged to honour promise to pay witness fees

The lawyer subpoenaed the complainant to attend as a witness at the High Court. A letter accompanied the subpoena as well as an amount for travel expenses and attendance fee for one day. The letter also stated that "If your attendance is required beyond Monday 19th May 2008 a further payment will be made". The complainant was required to attend at the Court on both Monday 19th May and Tuesday 20th May. The complainant sought payment of the additional day's witness expenses from the lawyer. The lawyer refused to pay.

The lawyer justified his refusal by asserting that the complainant was not entitled to payment under the Witnesses and Interpreters Fees Regulations 1974 and that he was "a reluctant and unhelpful witness".

The LCRO said that he did not consider that there has been a good faith difference of interpretation of the Regulations. Reference was made to (the old) r 7.03 which stated that lawyers have a professional obligation to meet the fees of expert witnesses in the absence of other specific arrangements. It stated further (in the commentary) that the rule will also apply in circumstances where a lawyer has made a personal commitment to be responsible for the fees and expenses of a non-expert witness.

The LCRO found that the conduct of the lawyer in failing to meet the payment was conduct unbecoming on the basis that a competent, ethical, and responsible practitioner would have found the lawyer's failure to honour the undertaking to pay the additional fee made in the letter unacceptable.

Result: The application for review was upheld and the decision of the Standards Committee was reversed.

The lawyer was ordered to pay the witness expenses, $150 in costs and expenses of the investigation of the Society and $300 in respect of the costs the review.

LCRO 04 /08

Grossly excessive legal fees / legislative gap relating to costs revisions

Clients complained about the level of fees charged by the lawyer. The Standards Committee declined to consider the reasonableness of the amounts charged by the lawyer on the basis that no jurisdiction to do so existed, and the fees were not so great as to amount to a professional breach.

This review concerned two bills of costs which were rendered prior to 1 August 2008. The complaint was made on 4 September 2008. Complaints made subsequent to 1 August about conduct prior to that date were dealt with under s 351 of the Lawyers and Conveyancers Act 2006. That section provided that a complaint could only be made about "conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982".

The LCRO observed that cost revision is not disciplinary in nature but an administrative review of the reasonableness of the fee. The LCRO noted that the absence of a power to revise fees of pre 1 August bills appears to be a flaw in the legislation, but was of the view that it was not possible to read a power into the Act which was not there.

The LCRO also considered whether the charging practices of the lawyer could amount to "conduct in respect of which proceedings of a disciplinary nature could have been commenced". If it could be said the bills were "grossly excessive" then this would be the case. The LCRO observed:

- It is often helpful to determine first what a reasonable fee would be.
- Where a fee is many times that of what is reasonable this is prima facie evidence that the fee is grossly excessive but fees may be grossly excessive even though this is not the case.
- For a fee to be grossly excessive it must bear no rational relationship with what would have been within the band of a fair and reasonable fee.

Result: The application for review was declined, the decision of the Standards Committee was confirmed.

LCRO 29 / 2009

Lawyer may not cease acting without good cause

A client (who was legally aided) wished to take action in respect of a refusal by the Law Society to issue to him a certificate of character to enable him to be admitted as a barrister and solicitor. He sought a lawyer's assistance in April 2008. The lawyer indicated that he was busy and could not attend to the matter immediately. The client agreed to wait. Several months passed in which the lawyer did a small amount of work, but did not finalise arrangements to transfer the grant of legal aid from a previous lawyer. In August the lawyer told the client he would not be acting for him further because he was too busy. The client complained about this conduct.

It was observed that the lawyer seemed to think that no lawyer client relationship existed and therefore there was no wrongful termination. The LCRO considered that a lawyer-client relationship existed and noted that whether a retainer exists is to be determined objectively. The question is whether a reasonable person observing the conduct of both parties would conclude that the parties intended lawyer-client relationship to subsist between.

The LCRO found that in this case a lack of available time was not a good cause for terminating the retainer within Rule 4.2 of the Rules of Conduct and Client Care. That rule provides that a lawyer must complete the services required by the client under the retainer unless there is good cause to terminate the retainer.

In this case the client wanted to adopt a course of action against the advice of the lawyer. It was noted that this was not relevant to whether the retainer could be properly terminated. It was also observed that neither the personal attributes of the prospective client nor the merits of the matter upon which the lawyer is consulted are proper grounds for terminating a retainer once instructions have been accepted.

Result: The application for review was upheld and the decision of the Standards Committee was reversed.

The lawyer was fined $600 and ordered to pay $900 in respect of the costs and expenses of the Legal Complaints Review Officer.

LCRO 57/2009

Reasons for decision to be given / were disparaging comments unprofessional

Former domestic partners were in dispute in respect of the division of relationship property. The lawyer of the woman in the relationship was of the view that the lawyer for the man was being obstructive. She wrote to her client by email the contents of which were disparaging to the other lawyer.

The other lawyer was provided with a copy of the email and complained. The Standards Committee found that the conduct complained of amounted to conduct unbecoming and censured the lawyer and ordered her to pay the in the sum of $600.00. The lawyer who had been found guilty of conduct unbecoming sought a review of the decision.

The decision of the Standards Committee did not set out the details of the complaint, or which aspects of the complaint it upheld. Nor did it provide reasoning as to the manner in which it reached its conclusion. It was therefore not possible for the parties to determine whether or how the issues had been dealt with by the Committee. It was concluded that the requirements of s 158 of the Lawyers and Conveyancers Act 2006 for the Standards Committee to provide reasons had not been met.

The LCRO declined to substitute his judgement for that of the Standards Committee in respect of whether the conduct complained against fell below acceptable professional standards electing to return the matter to the Standards Committee for reconsideration.

Result: The application for review was upheld and the decision of the Standards Committee was reversed.

- The Standards Committee was to reconsider the question of whether the amounted to conduct unbecoming.
- The order that the lawyer pay the costs of the investigation in the sum of $600 was reversed.
- The New Zealand Law Society was ordered to pay to the lawyer the sum of $600 in relation to her costs of the review.

LCRO 49/2009

Standard of care applicable: mistake in a "nice and difficult point of law "

A complaint was made against a barrister alleging that he had failed to identify a flaw in a rent review in respect of which he had been instructed to give advice. It was complained that as a result of that failure certain steps were instituted to recover money owing which ended up incurring an adverse costs order.

The flaw that was not detected was that the document presented was simply a notification by a valuer of the appropriate rental for the premises addressed the landlord. The Court later ruled that the notice needed to be "under the hand" of a person authorised by the landlord and this was not the case.

The LCRO considered that the bare fact that a court reaches a conclusion that differs from an opinion provided by a lawyer does not show negligence. The question is whether the opinion provided was one which a reasonable practitioner could have arrived at after competent and diligent research. The LCRO considered it would be reasonable to expect a competent barrister to consider whether the formalities of the rent review were properly commenced.

In this case the barrister did in fact consider the general question of whether the rent review had been properly commenced. However, the failure to detect the flaw was in part due to a failure of the complainant to give clear information to the barrister as to the steps that had been taken.

It was observed that a lawyer is not liable "for mistake in a nice and difficult point of law but he must measure up to the degree of professional competence which would be exercised by the reasonably competent and careful solicitor in the particular circumstances". Applying this standard the LCRO considered that a reasonably competent and diligent barrister could give an opinion on the overall merits of the rent review process which did not identify the particular flaw in this case.

Result: The application for review was declined. The decision of the Auckland Standards Committee was confirmed.

LCRO 47/2009

Obligations to self represented party in relationship property dispute

A complaint was made against the complainant's ex-partner's lawyer that the lawyer had failed to release trust funds, obstructed the resolution of relationship property issues, that the lawyer's communications had been defamatory, aggressive, bullying and intimidatory, and that the lawyer had failed to respond to communications.

It was also observed that in so far as the complainant considered he was entitled to funds held in trust by the lawyer these matters were to be properly resolved by the courts. The lawyer had no ability to release funds held in trust without the consent of all parties on whose behalf they were held or by order of the court.

The lawyer had stated in correspondence to the complainant that he constantly "bleated" was "untrustworthy", has "no thought or consideration to anyone else except yourself", was a "bully", had an "inability to be honest", stated "you lie", and he had "stolen" a credit voucher. The LCRO noted that the Standards Committee had considered the letters and reached the conclusion that nothing in the correspondence could be regarded as unprofessional conduct by the lawyer. On the material available the LCRO concluded that there was no basis for upsetting that exercise of judgement.

It was further noted that the lawyer had failed to communicate with the complainant despite repeated correspondence. It was observed that Rule 12 of the Rules provide that a lawyer must conduct dealings with self-represented persons, with integrity, respect, and courtesy. The LCRO was of the view that the lawyer's refusal to acknowledge the correspondence and communications may be in breach of obligation that obligation. It was appropriate that this aspect of the complaint be further addressed.

Result: The application for review was upheld and the Standards Committee was directed to consider the specific question of whether the conduct in refusing to deal with the complainant was a breach of professional standards.

LCRO 43 /2009

Lawyer pursing action against Real Estate Agent when own conduct in question

A client complained against his lawyer about the way certain property work was undertaken on his behalf. In particular he complained that the lawyer: failed to identify that a granny flat on a property did not have the proper consents; had been dilatory in pursuing a subsequent claim against a real estate agent; and had been negligent when assisting them with a purchase of a further property. The Standards Committee concluded that the complaint gave rise to no issues of a disciplinary nature. The client sought a review of that decision.

The LCRO considered that there were no grounds to overturn the findings of the Standards Committee that the conduct of the lawyer which might be categorised as negligent did not breach the professional standards applicable at the time.

The allegation that the lawyer was in a conflict of interest when pursuing an action against the real estate agent did not appear to have been considered by the Committee or clearly put to the Lawyer prior to the determination of the Standards Committee. The allegation is a serious one which could lead to a finding of a professional breach and was deserving of further consideration.

Result: The Standards Committee was directed to reconsider and determine whether it was a breach of professional standards for the lawyer to continue to act in respect of the property dispute given that he had undertaken the conveyancing on that property.

LCRO 35 / 2009

Costs ordered against applicant

A client complained against his lawyer about fees charged and the conduct of the work. The Standards Committee declined to investigate the matter. The client sought a review of that decision.

The LCRO upheld the decision of the Standards Committee in this regard. The lawyer sought an order of costs against the client who had applied for the review.

It was noted that the client had insisted that he be heard in person (as he was entitled to) rather than consenting to the matter being determined on the papers. However he failed to attend the scheduled hearing. It was also argued that the complaint was utterly without merit. The lawyer sought costs in relation to the attendance time for the lawyer and his advocate, the time spent in preparation for the review hearing and disbursements covering photocopying and parking in relation to the hearing. The client stated that he had not intentionally missed the hearing but had overlooked the hearing due to other pressures.

The LCRO noted that she had a general power to award costs pursuant to section 210 of the Lawyers and Conveyancers Act and that this may extend to an award of costs as between the complainant and lawyer in respect of the review. The LCRO noted that the fact that a complaint is not upheld is not alone a sufficient basis for assuming that it had no merit, and that the power to award costs between the parties should be exercised sparingly in this jurisdiction.

It was also observed that the client's behaviour in a number of jurisdictions had been marked by him conducting proceedings so as to escalate the costs to the other party, failing to meet deadlines or to comply with directions, and providing information only at the 11th hour. The behaviour in the present case appeared to be of the same nature.

Result: The application for review was declined and the decision of the Standards Committee was confirmed. Costs in the sum of $350.00 were awarded against the client in favour of the lawyer.

LCRO 31 /2009

Unacceptable billing practices

A client complained about the amount charged by his lawyer in respect of certain rural property work he undertook. The Standards Committee referred the matter to a specialist costs assessor who recommended that the bills be approved. The Committee then resolved to take no further action on the complaint. The client sought a review of that decision.

The LCRO considered whether there was any misconduct in the billing practices of the lawyer. In light of the findings of the costs assessor it could not be said that the costs were "grossly excessive". The LCRO was, however, critical of the lawyers billing methods as lawyer had kept no time records and the client was not made aware of the basis upon which the lawyer was charging. This resulted in an understandable dissatisfaction with the bills rendered.

In the bills of costs under consideration the lawyer claimed that his fees had been reduced by the use of phrases such as "My fee for the purchase – reduced to" and "My fee for the above substantial [ly] reduced to". There was no evidence of the bills actually having been reduced.

The LCRO considered the conduct of the lawyer (in stating that he had reduced bills) as unacceptable. A competent, ethical, and responsible practitioner would not assert the existence of fictitious discounts and would not consider such conduct acceptable in a fellow practitioner. However the LCRO concluded that the conduct of the lawyer, while unacceptable, did not reach the threshold required for disciplinary intervention (for conduct prior to 1 August 2008).

However, in light of the poor conduct involved the making of the complaint was justified and it was appropriate to order costs against the lawyer.

Result: The application for review was declined and the decision of the Standards Committee was confirmed.

The lawyer was ordered to pay to the New Zealand Law Society the sum of $300 in respect of the costs and expenses of the Legal Complaints Review Officer incurred in the conduct of the review.

LCRO 56/2009

Extensive delays in replying to correspondence unsatisfactory conduct

A complaint was made against a lawyer that he had repeatedly not replied to correspondence sent to him by the complainant's solicitor. The correspondence related to a debt of $89,000 said to be owed to the complainant by an estate that the lawyer was acting for. The complainant's lawyer had written on a number of occasions with regard to repayment of the debt, and when no response was forthcoming, the complainant wrote to the Law Society complaining about the failure to respond.

The LCRO noted that rule 10 of the *Lawyers: Conduct and Client Care Rules 2008* requires a lawyer to treat other lawyers with respect and courtesy. It was stated that the requirement of respect and courtesy encompasses timeliness in responding to communications from a professional colleague.

The LCRO considered that the Committee failed to address the matter of delay that was the substance of the complaint. In total the delay in providing any response was several months. The LCRO also considered the lawyer's explanation (that he was awaiting a valuation, and that he was guided by his client's instructions) as inadequate.

It was concluded that professional courtesy reasonably envisages that a colleague will, within a reasonable time, respond to a letter, even if only to acknowledge receipt and to explain any delay in addressing substantive matters. In this case the delay was unreasonable and fell short of the obligation of respect and courtesy envisaged by the required standard and amounted to unsatisfactory conduct.

Result: The application for review is upheld and the decision of the Standards Committee was reversed.

LCRO 02/2009

Nature of vexatious complaint / collateral attack on decision of the Court

The complainant was engaged in a relationship property dispute with her former husband. She complained to the Law Society about the conduct of the lawyer of her former husband in the proceedings alleging that he had been party to a misleading statement made to the Court. The Standards Committee had dismissed the complaint as vexatious.

The LCRO noted that "vexatious" has assumed a specific meaning in the law and that any tribunal should be cautious before finding that a litigant's action (or complainant's complaint) is vexatious. It was not considered necessary that the action must be brought with the intention of "vexing" or annoying the defendant. Rather it is the fact that it is clearly baseless and therefore has the sole effect of annoying the defendant that makes it vexatious. Where a complaint is brought which is in fact wholly groundless it may be vexatious even though the complainant mistakenly thinks it has merit.

In this case the complainant did not accept that the consent order of the Court was properly made and does not consider the issues in relation to the relationship property to be finally closed. She seeks to reopen the matter notwithstanding an unsuccessful application to the Family Court to vary the consent order. It is improper to use the complaints process as means to undermine or attack a decision of another court or tribunal. The proper route for challenge of a decision of another tribunal is appeal. Where proceedings are brought for a collateral purpose this will weigh in favour of them being found to be vexatious.

The LCRO also noted that a finding that a complaint is vexatious or frivolous or not made in good faith is a significant finding that should not be made lightly. In particular, it deprives the complainant of a full investigation of the complaint. Such a finding should therefore only be made where there are clear grounds. However in the present case it was proper to find that the complaint was vexatious.

Result: The application for review was declined and the decision of the Standards Committee was confirmed.

LCRO 58 / 2009

Lawyer obliged to pay invoices of other lawyer or promptly dispute them

Mr N retained Mr W (a junior barrister) in April 2008 to assist him with some legal work. The nature of the work and rate of remuneration was agreed. No written record of instructions or any terms of retainer or rate of remuneration was made. In early May, Mr N expressed some dissatisfaction with the quality of the work of Mr W and ceased providing him any further instructions.

Mr W submitted two invoices for $1510 and $585 under cover of a letter dated 29 May 2008. On 10 June duplicate invoices were again provided marked "this invoice is significantly in arrears" and seeking prompt payment. On 22 July 2008 Mr N wrote to Mr W objecting to the quantum of his bills on the basis that his work was of inadequate quality and querying the terms of payment. An offer to pay a reduced amount was made. The parties could not reach an agreement on the matter. Mr W complained to the New Zealand Law Society on 11 December 2008. That complaint was forwarded to Mr N for comment on 16 December. Mr N emailed the New Zealand Law Society on 27 January 2009 seeking a costs revision of Mr W's bills.

The LCRO observed that barristers are unable to recover their fees by recourse to the courts. For this reason the professional rules place an obligation on instructing lawyers to be professionally responsible for the payment of the fees of lawyers they instruct. The LCRO found that the near eight-week delay before indicating that a dispute existed is not sufficiently prompt. It was noted that if a bill was to be disputed (or further details sought) then the dispute should be raised within a few days of when it fell for payment in the ordinary course of business.

The onus was on a lawyer who disputed the bill to initiate dispute resolution procedures. It was not proper for Mr N to wait for Mr W to litigate the matter.

The LCRO found that the Standards Committee was correct to find that the conduct of Mr N amounted to a professional breach.

Result: Decision of Standards Committee confirmed. Mr N ordered to pay $1200 in costs.

LCRO 72/2009

Breach of Undertaking

Ms L provided a solicitor's undertaking to Mr B by which she undertook that she would "forthwith following settlement complete and file the share transfers for all [H] companies". Settlement occurred on 28 November 2008.

On 21 January 2009 Mr B became aware that no company transfers had been registered and notified Ms L. In doing so he identified six companies which he considered were covered by the undertaking and in respect of which share transfers should be registered. This included two additional companies wholly owned by Mr H which were not subject to the refinancing and had not been previously identified.

The registration of the share transfers in respect of four companies was effected on 21 January 2009 – the day the oversight was brought to Ms L's attention. However transfers were not effected in respect of the two further companies. Ms L stated that those companies had not been included in the refinancing and were not part of the undertaking.

The LCRO considered that in determining what the words of an undertaking mean an undertaking should be read sensibly and in light of the commercial context in which it is given. It was concluded that the undertaking referred only to those companies in respect of which the refinancing was being undertaken. Therefore there was no breach of undertaking in respect of the failure to file share transfers relating to the two other companies.

The LCRO noted that the terms of the undertaking were that the transfers were to be filed forthwith. While in the circumstances this might not have meant the same day, or perhaps even the next day the delay of several weeks is clearly outside of what was contemplated by the undertaking. Accordingly the Standards Committee was correct in its conclusion that Ms was in breach of her undertaking and that this amounted to unsatisfactory conduct.

Result: Ms L was censured, ordered to pay a fine of $500 and $450.00 in respect of the costs of the review.

LCRO 61 / 09

Bankruptcy notice not motivated by improper purpose

Mr A complained to the New Zealand Law Society about the conduct of three lawyers of the firm M Law. The conduct complained about was the service of a bankruptcy notice. That notice was served on the basis that Mr A had not satisfied a judgement of the Family Court for a very significant sum made against him in favour of his former wife. He complained that in arranging for that bankruptcy notice to be issued and served M Law intended to cause him embarrassment and distress and therefore had not acted for a proper purpose.

It was observed that 2.3 of the Rules of Conduct and Client Care provide that a lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

The LCRO observed that on the facts it was unlikely that a Court would have adjudicated Mr A bankrupt as Mr A had significant assets and was in the process of selling land to meet the judgment sum.

The following matters were also considered to be relevant in determining whether M Law had been motivated by an improper purpose: Mr A appeared to be entering into another high value property transaction for a holiday home, information was not forthcoming from Mr A as to the details of the sale transaction from which funds were to be provided, the judgement had been sealed on 17 June 2008 and required that payment be made "forthwith" but had not been satisfied some two months later. It was also observed neither Mr A nor his advisors were open and frank with Ms A and her advisors even though he was seeking a significant indulgence as regards deferring payment of the judgment sum. Mr A was also given some weeks notice of the intention to commence bankruptcy proceedings. This was evidence that there was no improper motive on the part of M Law. In the circumstances it was determined that there had been no professional breach by M Law.

Result: The application for review was declined. The decision of the Standards Committee was confirmed.

LCRO 92 / 2009

Standard of competence and diligence

K Ltd complained in respect of the work of S (a firm) undertaken in respect of proposed litigation to recover unpaid debts. It transpired that the proposed defendants were bankrupt. The essence of the complaint was that if S had acted diligently they would have discovered the bankruptcy prior to undertaking the drafting of proceedings in the matter. If that had been the case the amount charged would have been considerably less.

The LCRO considered that whether or not a lawyer should take a particular step is a matter to be determined on the facts of each case. Ascertaining whether or not two named individuals were bankrupt is a straightforward administrative task which takes only a few minutes. In this case the litigation contemplated was in respect of people whose solvency was clearly in question. The proposed litigation itself in respect of loan obligations that had been defaulted on, and the parties were actively discussing whether or not the proposed defendants were worth suing. The LCRO considered that had that been the end of the matter there was a strong argument that it was incumbent on S to ascertain whether or not the defendants were bankrupt.

However it had been agreed that K Ltd was to undertake at least some of the investigative work in respect of the solvency of the proposed defendants. K Ltd undertook the various electronic searches through the Personal Property Securities Register and Land Information New Zealand. It was also the case that limitation was running and it was important that proceedings were filed in a timely way to ensure that they were not statute barred.

The LCRO noted that the question is not whether S did an exemplary job but rather whether in all of the circumstances in failing to do so it fell short of the standard of competence and diligence that is to be reasonably expected of a lawyer. The LCRO did not consider that the threshold was reached to warrant disturbing the Standards Committee's finding that S was not negligent in failing to determine that the proposed defendants were bankrupt.

Result: The application for review was declined. The decision of the Standards Committee was confirmed.

LCRO 40 / 2009

Lawyers may deduct fees from funds held in trust only at the direction of client

Client A complained that when a property transaction was completed Lawyer Z deducted his fees from the proceeds of the sale without authority. The LCRO found that there had been no direction by the client that fees were to be paid from funds received. Lawyer Z relied upon Regulation 8 of the Solicitors Trust Account Regulations 1998 as authorising the deduction of fees from clients without the client's consent.

Citing *Heslop v Cousins* [2007] 3 NZLR 679 the LCRO concluded that a lawyer may only deal with trust funds pursuant to s 89 of the Law Practitioners Act 1982 (or now s 110 of the Lawyers and Conveyancers Act 2006). That is by either paying those funds to the client, or paying them at the direction of the client. He found that if a lawyer wishes to deduct his or her fees from the funds of a client held in trust he or she must obtain the direction of the client to do so.

It was held that Lawyer Z did not have the authority of his client to deduct his fees from funds held in trust in this case. In light of this the deduction of his fees was in breach of his professional obligations.

Even if the client had directed payment to be made the lawyer had also breached his obligations in failing to send a bill to the client immediately in accordance with reg 8 of the Solicitors Trust Account Regulations.

It was found that the conduct complained of would not be acceptable according to the standards of "competent, ethical, and responsible practitioners" and therefore amounted to conduct unbecoming.

Result: The practitioner was censured and ordered to pay costs $900.00 in respect of review and $250 in respect the investigation of the Society.

In making those orders (and not imposing a fine) the LCRO noted that the breach was due to an error made based on a widespread misapprehension that a lawyer was entitled to deduct fees from money held on trust. It was observed that there is no reason why that misapprehension should continue within the legal profession.