NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 53
LCDT 037/12

IN THE MATTER of the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982

BETWEEN **AUCKLAND STANDARDS COMMITTEE No. 3**

AND **EION MALCOLM JAMES CASTLES** of Auckland, Lawyer

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr W Chapman
Ms C Rowe
Ms M Scholtens QC
Mr P Shaw

HEARING at AUCKLAND

DATES 18-19 July, 19-21 August, 9-11 October, 18 October, 4 November 2013

COUNSEL
Mr J Katz QC, for the Standards Committee
Mr B Keene QC and Ms M Cole, for the respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] The hearing of this matter occupied 10 days over four separate occasions. Prior to it beginning in July it had been set down on two earlier occasions and adjourned to accommodate either change of counsel by the practitioner or in another case his illness.

[2] The practitioner faced eight charges one of which, Charge 4, was laid in the alternative to Charges 1, 2 and 3. The charges can be described as being in three categories. Charges 1 to 4 relate to allegations of gross overcharging, Charge 5 relates to the general conduct of the Court proceedings by the practitioner. Charges 6 to 8 allege serious failures in professional standards.

[3] The Charges also cross over the periods between the legislation previously in force in relation to the regulation of legal practitioners, and the current legislation. Charges 1 to 6 relate to conduct prior to August 2008 therefore, pursuant to the transitional provisions of the Lawyers and Conveyancers Act 2006 ("LCA"), (s 351) must amount to conduct which could have been subject to disciplinary action under the Law Practitioners Act 1982 ("LPA"). Charges 7 and 8 relate to events after 1 August 2008 and thus will be determined under the LCA.

[4] The Charges and Particulars are attached in full as Appendix I to this decision.

Background

[5] The complainants, Mr and Mrs W, had purchased a home which turned out to be a leaky building. They issued proceedings in the High Court in an attempt to recover the losses which they had suffered as a result of the remedial work and other related heads of damages. The total figure claimed was $318,890.

[6] At the time they were represented by McMahon Butterworth and subsequently, when he left that firm, by Mr Thornton. Unfortunately the proceedings were issued in the W's names personally as plaintiffs. This overlooked the fact that Mr and Mrs W had transferred their interest in their home to their family trust some years earlier. The proceedings ought properly to have been issued in the name of the trustees, (then being Mr and Mrs W and Mr B) as owners. When this error was pointed out by counsel for one of the multiple defendants, Mr Thornton very promptly and properly brought it to the attention of the W's and told them that he could no longer act for them and that they ought to seek further legal advice.

[7] The serious feature of this error resided in the fact that it could not be easily remedied because in the meantime the limitation period for the bringing of such proceedings had expired, and thus the proceedings were fatally flawed. It was too late for fresh proceedings to be issued.

[8] Not surprisingly Mr and Mrs W were distressed to learn this news because they had for almost two years been pursuing these proceedings and of course at the same time enduring the unpleasant experience of the remedial work to their home. Mr W spoke with a golfing companion of his, Mr Castles, whom he knew to be an experienced lawyer. Our impression is that initially Mr W was simply asking for advice about a referral or how best to handle the situation. Mr Castles immediately responded by telling Mr W to put all his files into his car and bring them to his home that evening. On the very next day, 17 November 2005, Mr and Mrs W met with Mr Castles at his office to speak with him about the possible options which they faced. The flawed proceedings have been referred to as the *Shoreham* proceedings and these proceedings were taken over by Mr Castles on the basis of some urgency because there was a scheduled judicial settlement conference on 22 November.

[9] Mr and Mrs W's recollection of the meeting was that Mr Castles expressed the preliminary view that the defendants, in advancing the wrong plaintiff issue, were probably on very strong ground and the *Shoreham* proceedings were unlikely to be saved. However he did offer them the hope that because of that, there appeared to have been a clear case of negligence on the part of their former solicitors so that the W's would be able to recover their losses in a claim against them.

[10] There is no file note of this meeting, despite the fact that at almost every other point Mr Castles appears to be an extremely conscientious note taker. Thus the first record of advice given to the W's appears in a letter to them of 6 December 2005, accompanying the first invoices. There is a dispute in the evidence between the W's as to what they were told at that meeting and Mr Castles. He says they were told that they would be charged on the basis of the time expended on their behalf, at particular hourly rates and that he went on to indicate that there was no real means of estimating costs. He says he explained the litigation risk. The W's do not recall any discussion about fees at this meeting.

[11] In the first of two letters to the W's of 6 December, Mr Castles reported on progress to date in the *Shoreham* proceedings, noting the instructions were urgent and involved "urgent and extensive attendances". He advised that the bill of costs had been rendered on a time and attendance basis, reflecting time expended of 62.2 hours for Mr Castles, 26.4 hours by Mr Tapsell and 12.1 hours by Ms Tracy. The letter enclosed the bill of costs for November attendances. A similar letter was sent to the W's as trustees in relation to proposed proceedings by the trust against McMahon Butterworth for loss of opportunity to claim damages against the responsible parties in relation to the leaky home (the M proceedings). That bill was also said to be rendered on a time and attendance basis, taking account of 14.5 hours for Mr Castles and 3.8 hours for Tapsell.

[12] As can be seen, Mr Castles and Mr Tapsell (who was an employee, and then a partner in the firm of Jamieson Castles) put a considerable amount of work into preparing for the settlement conference and researching the issue of whether the claim could be salvaged. One focus of their research was to establish whether the Court was likely to accept the wrongly named plaintiffs was merely a misnomer rather than a misdescription. This issue was one which had been previously researched by Mr Tapsell and he immediately knew that there was a recent case (*Farr v Shrimski*[1]) on the very point. Another was amending the claim to plead a transferred loss to the W's. At the same time Mr Castles promptly wrote to the previous solicitors, McMahon Butterworth to put them on notice that the W's would be claiming against them in negligence for the wrongly issued proceedings. Properly Mr Castles invited

[1] CIV 2004-404-3705,18 February 2005, Auckland High Court.

them to contact their indemnifier and he expected that he would hear from the solicitor for the indemnifier fairly quickly.

[13] Mr Thornton had already prepared the file for the judicial settlement conference in a manner which Mr Tapsell described in his evidence as “meticulous”.

[14] In the event because the defendants advanced the view that the proceedings were fatally flawed by the wrongly named plaintiffs, the judicial settlement conference did not proceed as such and further directions were simply made by consent. One of these directions was for a fifth amended statement of claim to be filed prior to Christmas. The preparation of this document came to be one of the more contentious pieces of evidence before us.

[15] While McMahon Butterworth replied, indicating that they had referred the matter to their indemnifiers, solicitor for the indemnifiers Mr R, did not make contact until February 2006. When contact was made it was to deny liability. One of the bases on which liability was denied was that the defect in the proceedings could be cured by either amendment or by persuading the Court that the W’s had issued their proceedings in their role as trustees rather than in their personal capacity. In relation to this latter approach, Mr Castles quite properly took the view that to do such would be tantamount to encouraging the W’s to give false evidence and thus was not a viable approach.

[16] However, somewhat confusingly Mr Castles also made an application to amend the *Shoreham* proceedings to add a third plaintiff who was a newly appointed trustee, Mr P. This application is conceded by both Mr Tapsell and Mr Castles to “fly in the face of” their own fifth amended statement of claim. The fifth amended statement of claim acknowledged the Trust as owners of the property, but not its status as a party, and pleaded that the W’s as plaintiffs suffered “transferred loss” via the trust.

[17] It is the practitioner’s contention that the work to prepare and file the fifth amended statement of claim was part of a “sophisticated strategy” to deflect or delay the defendants in a strike out application of the substantive claim and to assist in the exercise of costs minimisation on any discontinuance filed by the W’s.

[18] Mr Castles has throughout, contended that the W's were at risk of costs which were variously calculated from $90,000 to $156,000 on a straight discontinuance of the *Shoreham* proceedings. He indicated that the parties had said they would not forgo costs on discontinuance. The W's were not in a position to pay such costs, so Mr Castles said they instructed him (in accordance with his advice) not to discontinue and to resist a strike out. However, there is no demand for costs from any of the defendants, a number of whom were self-represented. When the proceedings were ultimately discontinued a year later, costs were waived.

[19] The other main reason Mr Castles has given for pursuing the *Shoreham* proceedings to the extent that he did (which eventually incurred costs of $341,684) was in order to demonstrate proper mitigation of loss by the W's to the indemnifiers for their previous solicitors.

[20] Mr Castles has placed heavy reliance on the influences or pressure he felt from Mr R, on behalf of the indemnifier, to pursue the *Shoreham* proceedings. However it is worthy of note that even before Mr R came on the scene, which is in mid-February 2006, the practitioner had already billed the W's $127,322,34 and recorded even further time. Whilst it appears he did, even at this early stage, have mitigation of damages in mind, it is the Standards Committee's case that the practitioner's lack of a sense of proportion is of serious concern.

[21] Furthermore the Standards Committee assert:

> "[It] was Mr Castles duty and obligation to stand up to firm X and not continue the *Shoreham* proceedings with a pointless and hugely expensive application for leave to amend. He knew or ought to have known that that application stood no chance of success. His efforts should have been put into extricating the W's from the *Shoreham* proceedings and then issuing and concentrating on recovering the W's wasted costs and the trustees' lost opportunity against McMahon Butterworth and Michael Thornton."

[22] The Standards Committee assert that Mr Castles pursued the application to amend the proceedings to join Mr P as plaintiff "against all odds" until August of 2006 when it met a predictable outcome of refusal by Associate Judge Gendell.

[23] As it turned out, when the proceedings were then discontinued on behalf of the W's, Mr Castles was able to negotiate that no costs would be sought by any defendant. These defendants were in a stronger position than they had been at the

time Mr Castles took over the case. This risk of significant liability for costs upon discontinuance, and the W's inability to pay them, was a strongly asserted plank of Mr Castles' defence, notwithstanding the likelihood of recovery of any such costs, particularly if ordered by the court, as part of the claim against McMahon Butterworth.

[24] Following the discontinuance Mr Castles then issued two sets of proceedings, one on behalf of the W's personally for their lost costs in the *Shoreham* proceedings which, even including experts fees of $28,000 in round figures, only totalled $74,332 (the W proceedings). However what had to be added to that was the further sum to recover the fees that the W's had incurred with Mr Castles for the *Shoreham* proceedings, being $341,684. It is to be noted that we understand that the earlier legal fees were incurred over a period in excess of two years. Fees with Jamieson Castles were incurred over approximately one year.

[25] The W's claim was initially filed as a summary judgment application and, the second proceeding, the lost opportunity claim filed by the trustees, (the M proceedings) as an ordinary claim, although there had been considerable time spent researching whether a summary judgment application ought to be brought in respect of that claim also. In evidence Mr Tapsell conceded that would never have been possible.

[26] Not surprisingly the indemnifier's solicitor had some difficulties with the quantum of the claim, particularly the legal fees incurred with Jamieson Castles.

[27] A further issue also arose shortly after the proceedings had been filed. The solicitors for the indemnifiers filed a Third Party Notice against Mr Castles firm (in relation to each proceeding). That notice alleged that Mr Castles himself and his firm had been negligent also, and therefore an apportionment of liability ought to occur.

[28] The Standards Committee contend that the issuing of such notice immediately raised issues of conflict for Mr Castles and ought to have led to him notifying his own indemnifiers and/or seeking independent advice for the W's.

[29] However neither occurred. Mr Castles alleges that the Third Party Notice was seen as a device to "drive a wedge" between him and his clients, the W's. This view

of the notice as merely a strategic device with no legal substance meant he elected to continue acting for them, he says on their instructions. He does not seem to have pondered whether he was the best person to make that election, or advise on it.

[30] Again the evidence about the advice as to conflict of interest is divergent. Mr W swore an affidavit in each of the High Court proceedings, defending the Third Party Notice, in which he deposed to having been advised to take independent advice, which advice he declined.

[31] In his evidence before us Mr W was unclear about having received any such advice. What is certainly apparent from the evidence is that Mr and Mrs W were never advised there was an option of simply having Mr Castles' indemnifier take over the matter, which would have inevitably involved them moving to another lawyer and the costs of the third party defence being met by the indemnifier. As it transpired Mr Castles charged Mr and Mrs W for the bulk of the firm's attendances in relation to the Third Party Notices despite these attendances being on behalf of his firm and not for the W's' direct benefit.

[32] The claim against Mr Thornton was settled reasonably promptly in April 2007 by a payment of $25,468.81 to the W's.

[33] The two claims relating to McMahon Butterworth in due course proceeded to mediation, the second mediation settled the basic claim for remedial and related expenses, and wasted (previous) legal costs at $225,000. Issues of actual solicitor/client costs incurred in the *Shoreham* proceedings, third party costs and interest did not resolve. It was however agreed as an outcome of the mediation, that arbitration would be undertaken.

[34] To complete the picture it should also be recorded that in about May 2006, prior to arguing the amendment to the intituling, and addition of the third trustee to the *Shoreham* proceedings, Mr Castles had consulted a barrister Mr P Finnigan on the issue of misnomer and as to the extent to which the W's would need to go to, to ensure that they were viewed as having properly mitigated their loss.

[35] While the Tribunal is not critical of this step, it demonstrates the uncertainty and indecision of Mr Castles, despite the many hours of research on what was not an especially difficult issue. He paid for Mr Finnigan's initial advice himself on his evidence (although this later transpired not to be the complete picture).

[36] Later, when the issue of arbitration arose, Mr Finnigan was again engaged because it was necessary for both Mr Tapsell and Mr Castles to give evidence about the extent of their work on the matter for the purposes of justifying the costs claimed and sought to be recovered by the W's.

[37] Thus it was Mr Finnigan who actually conducted the final negotiations which resolved the matter, settling both claims prior to the arbitration occurring.

[38] There is a missing piece of the narrative, which is a particularly significant one and although the first part of what occurred could not be said to reflect well on Mr W, it was submitted by Mr Katz QC on behalf of the Standards Committee to have been the absolute "game changer" in the context of resolving the dispute with the indemnifiers.

[39] Mr W, who was becoming increasingly agitated at the stalemate which appeared to have developed between Mr Castles and Mr R for the indemnifiers with the result that the matter was making no progress towards settlement, sent a letter to Mr R in which he threatened to expose Mr R's conviction for a poaching offence, if he did not forthwith settle the proceedings for a stated sum. Quite quickly, and following Mr Castles proper advice, this threat was withdrawn and an apology tendered to Mr R, however it had the effect of taking him out of the picture, because of the conflict of interest which resulted. This seemed to assist facilitation of the settlement which followed shortly after.

[40] The second action which Mr W took was to contact the underwriters of the indemnifier in London. Mr W was a former insurance agent and clearly understood how these processes worked. He wrote, describing his disappointment in the approach which had been taken by the indemnifiers to his claim in relation to a clear case of professional negligence. Mr Castles in his correspondence with the Standards Committee denied being a party to this action, indeed asserted to the

Standards Committee that Mr W's actions had "undermined" his own negotiations. As will be discussed later, the evidence disclosed that the assertion that Mr Castles was unaware of Mr W's approach and that it had undermined the negotiations were misleading.

[41] In the event another partner at firm X, acting for the indemnifier then took over the file and concluded the settlement for a further $405,000. Thus a total of $665,000 was ultimately achieved for the W's, including the $25,000 paid by Mr Thornton and the $225,000 partial settlement obtained in November 2007.

[42] The nub of the complaint made by the W's as to overcharging is that in order to achieve a return of $665,000 they expended almost $1.1 million in fees, GST and disbursements. The precise figures have been the subject of detailed submissions by both counsel, but that reflects a broad descriptive view of the situation for the purposes of the background.

[43] Following their complaint, in July 2010 the Standards Committee sought a report from Costs Revisors, Mr Templeton and Mr Shand. Their process is described later in the decision; however it appears to have been protracted by the tardy provision of information by the practitioner, and at one point, his absence overseas. The Costs Assessment Report was provided to the Law Society on 3 May 2011.

[44] Later, after the matter had been referred to the Legal Complaints Review Officer (LCRO), further material was considered by the revisors and a further report issued on 22 May 2012. This led to a supplementary determination of the Standards Committee, on 28 June 2012, to refer the complaint to this tribunal.

How the legal costs were funded

[45] Mr and Mrs W are a retired couple, and while Mr W still had his insurance agency at the time Mr Castles began acting for him, it was sold not long after. It would seem that this couple have used all of their resources, even selling items in order to fund the early fees accounts for the litigation. They had borrowed in order to fund the remedial work for their home and without this having been recovered as expected through the litigation they were servicing high debt. As a result of this and

their need to meet the increasingly mounting fees that they owed to Mr Castles they decided to sell their home. This occurred in mid to late 2006. Although it was sold for $870,000, after their mortgage was repaid there was $332,337 available for distribution. Of that amount $273,270 was retained by Jamieson Castles for fees (including for the house sale), future disbursements and the remaining $59,067 was divided between the W's $17,154 and the M Trust $41,913.

[46] In his statement to the Law Society Mr Castles referred to $219,000 having been paid to the W's from their home sale proceeds. This proved to be a misleading statement to the Law Society, because although this sum was paid into the trust account in their name, the Law Society was not told that it was immediately diverted to fees which were owing to Jamieson Castles.

[47] However this was insufficient to fund the ongoing litigation and Mr and Mrs W received ongoing demands in order to meet the costs incurred from Mr Castles' firm. Charge 6 arises from some of these demands.

[48] Thus the W's were forced to approach friends and family to assist them financially. The third trustee Mr P contributed some $10,000 by way of loan to fund the litigation. In addition Mr T, Mrs W's brother-in-law, was approached in July 2008 to assist. He agreed to advance $50,000 on receiving an undertaking from Mr Castles that he would be repaid from the proceeds of successful litigation and that Mr Castles would *"take the matter through to arbitrated finality without a further demand for fees".*

[49] Leading up to this arrangement Mr T had met with Mr Castles and the W's to discuss the litigation and sought an estimate of the cost of proceeding through to the end of the arbitration phase. This was estimated at $10,000 for Mr Castles firm and $7000 for Mr Finnigan. The actual fees rendered for that period, despite the fact that the arbitration did not need to proceed, were for Jamieson Castles a little under $58,000 or almost six times the estimate.

[50] By October 2008 and leading up to the arbitration Mr Castles indicated that the costs had increased, the bank had made a further demand for payment and that a

further $40,000 would be needed to complete the matter. Mr T reluctantly agreed to advance this sum on the same basis as previously.

[51] The final chapter to the rather sad funding saga is that following the settlement Mr Castles sought to meet urgently with Mr T. It appears that his need to speak with Mr T was so urgent that Mr Castles was prepared to drive to Pipiroa, a half-way point between Auckland and Mr T's residence in Whangamata.

[52] Mr Castles did not tell Mr and Mrs W before or subsequently that he was meeting with Mr T or obtain their consent as to what was discussed. It is Mr T's evidence that Mr Castles sought a further $45,000, or at least that he agreed not to be repaid the full $90,000. Mr Castles' version of this was that if Mr T were to continue to provide a loan to the W's through his firm this would assist Mr and Mrs W by ensuring they got something at the end of the process. However the effect would have been, had Mr T agreed, to enable Mr Castles to recover his final $11,000 bill of costs. This was the amount by which Mr Castles' fees exceeded the final settlement figure. The W's would have received the balance of less than $30,000 but would have a debt remaining to Mr T of $45,000. As it was, after receiving this final bill and realising that they would have no funds to show for the overall settlement it was not paid by the W's (Mr T having refused Mr Castles suggestion) and the bill was ultimately written off.

[53] However in the course of the meeting Mr Castles made personal comments about Mr W's health and emotional fragility. The W's only learned of this in the course of the complaints investigation when Mr T wrote a statement and subsequently prepared his affidavits for these proceedings. On this basis they complain that there was a gross breach of confidence on the part of Mr Castles. Mr Castles protests that since Mr T was a family member, he assumed he was well aware of the W's situation.

[54] The final financial outcome for the W's has been that they now own no home, no business assets or savings. At the time of their complaint they stated that they had been house-sitting for some years and had moved (some four years ago) approximately 27 times, having put some of their items into storage. The overall outcome for them of these proceedings has been catastrophic and ruinous.

Credibility

[55] The Tribunal has been invited, quite properly we believe, to consider carefully the credibility of the witnesses but in particular to make an assessment of the honesty of the practitioner. The requirement for a practitioner to demonstrate openness and complete honesty in dealing with disciplinary matters has been the subject of comment in a number of decisions, for example *Parlane,*[2] where His Honour Cooper J held:

> "... There must also be a duty to act in a professional, candid and straightforward way in dealing with the Society and its representatives."

[56] It is submitted by the Standards Committee that Mr Castles has "singularly failed in this regard with respect to his professional obligations".

[57] In giving evidence Mr Castles' manner was cautious and demonstrated his minute attention to detail, (which was also evidenced by numerous lengthy file notes and detailed reporting letters). He did not answer any question without first referring to a document if such was available. We are not critical of such caution. However in this case we have seen it taken to an extreme; a pedantic focus on detail apparently without the necessary tempering ability to stand back and see the bigger picture. He did not give direct answers on many occasions unless pressed. Furthermore we consider he failed to make proper concessions such as in relation to the allegedly "discounted" fees to which we will refer.

[58] At no stage did Mr Castles accept any level of fault on his part or show any understanding of his client's position. He was belligerent in pressing the argument that he had done a thorough and sophisticated job for them. There was no regret demonstrated as to where the clients have found themselves.

[59] In this way we consider the practitioner demonstrated an inability to stand back and assess the situation, which in fact is one of the main failures complained of in his approach to the three sets of proceedings.

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[2] *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2)* High Court Hamilton, CIV-2012-419-1209, 20 December 2010, at [108].

[60] There were four examples of his evidence which we considered demonstrated a lack of credibility, two of which could be described as actively dishonest.

[61] The two more serious examples arise out of the statement made by Mr Castles to the Standards Committee in the course of the investigation. In his statement of September 2011 Mr Castles described the distribution of the proceeds of sale of the W's home as follows:

> "9. Following settlement Jamieson Castles in accordance with instructions received:
>
> 9.1 Applied funds in payment of outstanding fees owing by the trustees.
>
> 9.2 Transferred the balance owing to Mr and Mrs W of $219,000.
>
> 9.3 Credited the balance of funds to the trust's ASB account."

[62] Fairly read, that is a statement to the Standards Committee indicating the W's received $219,000 from the proceeds of sale, as well as the amount that was received by the trust. That was simply wrong, and Mr Castles must have known it.

[63] Under cross-examination Mr Castles conceded that in fact the $219,000, upon being paid into the trust account in the name of Mr and Mrs W, was promptly debited to pay further outstanding fees to Jamieson Castles. The settlement statement was adduced in evidence and demonstrated that Mr W's evidence that he and his wife had received "about $40,000 net" from the sale, and disputed by Mr Castles, was broadly correct. The balance in fact credited to the family trust was $41,913.12. In addition $17,154.65 was paid to Mr and Mrs W, after all outstanding accounts to the Trust were met by payment to Jamieson Castles, in the order of $202,000.

[64] The second example is found at paragraph 20 of the same statement to the Standards Committee. It reads:

> "At the time that Jamieson Castles were engaged in negotiations with the indemnifier's solicitors Mr W was engaged in conducting his own negotiations with the indemnifiers in London. His actions undermined Jamieson Castles position in that Mr W fully disclosed to the indemnifiers his financial position, placing the indemnifiers at an advantage in their negotiations."

[65] The clear inference to be drawn from this is that Mr Castles was not privy to these side negotiations and that they interfered with his own conduct of the proceedings.

[66] Mr Katz in cross-examination of Mr Castles put to him drafts of the letters Mr W had written to the London indemnifiers. Mr Castles conceded that his own handwriting appeared which demonstrated that he had made amendments to them which had subsequently been adopted by Mr W. He was clearly fully involved in this process but sought to present it as otherwise to the Standards Committee and effectively attacked his clients in so doing.

[67] The next example is a more minor one, but demonstrates the ability Mr Castles appears to have to persuade himself that he had gone beyond the call of duty in assisting the W's. He contended that he had involved Mr Finnigan to assist him in his deliberations at his own cost. It is correct that Mr Finnigan's modest account (in the order of $1500) was paid by Jamieson Castles and not the client. However what Mr Castles failed to disclose and conceded in cross-examination was that he had charged his client for reading the opinion provided by Mr Finnigan and for the subsequent advice given to the client.

[68] The final example is that which resides in the suggestion that Jamieson Castles had discounted its fees. This was stated in the affidavit of Ms Farrell, the firm's accountant, who began by saying that Mr Castles' hourly rate was always discounted. She then moved to the position of saying "the majority of Eion's bills were charged at $350" but in fact an examination of the bills show that only 11 out of some 57 were at that reduced hourly rate (from $380) and in some instances the reduction was clawed back in the following account as an error which had been rectified.

[69] But what emerged from cross-examination of the practitioner and Mr Tapsell and an examination of the time records of both practitioners was that, particularly on the part of Mr Tapsell, there was a significant amount of time spent on the W's files which was recorded as "non-chargeable". Instead of ignoring this non-chargeable time when it came to preparation of the fees accounts, the invoices noted the value of all time recorded, chargeable and non-chargeable, at the standard hourly rate for

the fee-earner. Each invoice stated, for example, “total time recorded, $14,406, our fee $11,500.” To the client this would appear to represent a discount of almost $3000 in the amount charged to them. Indeed, as noted below Mr Castles held firm to the submission that this did indeed represent a discount to the client. However when the non-chargeable time is taken account of the discount appears to be closer to $400. That pattern is repeated throughout the invoicing to these clients. The client did not have the time records, merely the narration in the fees account, so was none the wiser.

[70] Non-chargeable time can never be anything other than that. It was not the responsibility of the clients to pay for such time. To represent it as part of a discount offered to them is utterly misleading.

[71] While Mr Tapsell, in answer to a question from the Tribunal, properly conceded this to be the case, Mr Castles refused to do so. Indeed in both opening and closing submissions his counsel made considerable reference to the various discounts or additional time expended on behalf of the W’s but not charged. It would appear that Mr Castles is attempting to uphold the indefensible.

[72] Turning to other witnesses, we have referred already to Mr W’s memory difficulties, but that these difficulties are not particularly relevant in relation to the overcharging matters.

[73] The evidence of Mrs W was not really tested and in all of her affidavits simply confirmed the evidence of her husband. Mr P, the third trustee of the W’s family trust, was a straightforward credible witness particularly in relation to his understanding of his role as trustee.

[74] Ms Farrell who gave evidence for the practitioner we found to be hostile and partisan as well as argumentative and we did not consider her to be a particularly reliable witness as a result. Mrs Seymour’s evidence was also unreliable in the sense that it lacked credibility. For example she would recall what was said in a meeting eight years ago and about which, contrary to the firm’s usual practise, no notes had been kept.

[75] We found the expert evidence for the Standards Committee persuasive and undented by cross-examination. Importantly, there was no expert evidence called for the practitioner.

[76] Finally, we were reminded by Mr Katz for the Standards Committee in his opening that memory can be distorted or lost over a period of years. Mr Katz emphasised the greater reliability of contemporaneous documents from the time as "subsequent recall can be notoriously unreliable". Mr Keene for the practitioner also emphasised the importance of the contemporaneous documents. Mr Katz referred to the so called "Ocean Frost principle":[3]

> "Speaking from my own experience, I have found it essential in cases of fraud when considering the credibility of witnesses, all is to test their veracity by reference to the objective facts proved independently of their testimony, in particular my reference to the documents in the case, and also to pay particular regard to their motives and to the overall probability ..."

We have kept this counsel in mind.

Charges 1 to 4: Overcharging

[77] The evidence for the Standards Committee was given by lay witnesses, Mr and Mrs W, Mr P (the third trustee) and Mr T, Mrs W's brother-in-law, who sadly, died before the hearing took place.

[78] Expert evidence for the Standards Committee was given by Mr Templeton on behalf of the two cost revisors who were appointed by the Standards Committee to prepare a report on the bills of costs rendered by Mr Castles. Further expert evidence was given by Mr Keyte QC. Mr Keyte was originally retained by solicitors for the indemnifiers for McMahon Butterworth. He had been granted a waiver of privilege in order to give evidence about the level of charging and the conduct of the proceedings (Charges 1 to 5).

[3] *Armagas Limited v Mundogas* (the Ocean Frost) [1995] 1 Lloyds Report 1 at 57.

[79] In response evidence was given by the practitioner, Mr Castles, and by his former partner Mr Tapsell. An affidavit was also sworn by Mr Finnigan, however significant portions of this affidavit were redacted following a hearing on issues of privilege, and Mr Finnigan was not required for cross-examination. Two further persons gave evidence for the practitioner namely his former office accountant Ms Farrell and Mrs Seymour, a legal assistant/receptionist.

[80] No independent expert evidence was called on behalf of the practitioner.

[81] The evidence of the complainants and the third trustee is not overly helpful in the assessment of Mr Castles' charging in this case. However, there were certain important points made by them. Firstly although Mr W had real difficulty in remembering details during his evidence, he was clear that he had definitely not been told the practitioner's hourly rates at the first meeting with Mr Castles.

[82] It should be noted that Mr W is suffering from cancer and had been unwell for at least the four years leading up to the hearing, undergoing 54 chemotherapy treatments. He said that these treatments have affected his memory to some extent. Mr W thus disputed the evidence given by Mrs Seymour about what was covered with the clients at the first meeting. This was also refuted in very definite terms by Mrs W who was very clear that Mrs Seymour had not been at the first meeting but that she had come in at one stage to bring drinks. Mrs W said that Mrs Seymour's evidence (that this initial meeting covered such matters as litigation risk both in terms of outcome and cost/benefit, inability to estimate costs up front, basis of billing being time and attendance and monthly billing), was simply wrong.

[83] Throughout his evidence Mr W repeated that he and his wife had "*placed ourselves entirely in Mr Castles hands*" and that they had "*total faith in him*" and "*followed his recommendations implicitly"*. He pointed out that they were "*pretty knocked around by the whole thing and we had placed our total faith in Mr Castles to sort this out for us and we were prepared to do as he recommended to achieve some finality that would benefit us*". We record later in this decision how the dependence of the client on the firm's advice was recognised by Mr Castles.

[84] In relation to Mr W's recall at the time of the costs revision, Mr Templeton was able to assist; he confirmed that at that stage Mr W's recollection had been quite clear and although quiet initially, by the time of the joint meeting he "*asked some fairly forceful questions of Mr Castles*". The important evidence, from the Tribunal's perspective, that was given by the two expert witnesses, Mr Templeton and Mr Keyte respectively.

[85] Mr Templeton is a practitioner of over 30 years experience with broad litigation experience including leaky homes litigation and claims of the sort conducted by Mr Castles for the W's, namely professional negligence and loss of opportunity in litigation and had acted as a costs revisor for the Law Society for some 20 years prior to this particular costs revision. He prepared his report working jointly with Mr Shand, who specialised in leaky building litigation and who undertook the inspection of Mr Castles' files over two two-hour periods. The practitioner says that the time for inspection was shorter, but an inspection of a lengthy letter sent by Mr Shand to Mr Castles on 5 March 2011, as a result of his inspection, seeking copies of numerous documents, as a result of his inspection, strongly supports Mr Shand's reported time.

[86] In preparing their report for the Standards Committee the revisors undertook three meetings, one with the practitioner, one with the complainants and a joint meeting with the complainants and practitioner. Mr Castles was given the opportunity of providing any further material he considered to be of assistance.

[87] Mr Templeton described the task which had been assigned to him as costs revisor as attempting to assess each bill making up the three sets of proceedings to determine what a fair and reasonable fee for the three sets of proceedings would be. In doing so, they had been mindful of the issue of "gross overcharging" (under the LPA) and had been asked to comment, were the fee found to be not a fair and reasonable one, what would be the appropriate level of charge.

[88] The practitioner had provided time recording records to support each of the invoices rendered and the advisors were able to make their assessment having regard to this evidence and the classification of the work type that had been assigned to attendances by the practitioner. They then considered the issues facing the

practitioner at the relevant times when undertaking this work. Mr Templeton described the process as then *"... Having completed a fairly exhaustive exercise then sitting back and looking at the matter overall at the end"*. He went on to refer to the task as a two-part exercise "*one was looking at the attendances and the fees charged, but also having regard secondly to the question of whether the attendances were fair and reasonable at the material time*."

[89] Mr Templeton commented that the quantity of time spent and level of fees charged raised the question as to whether "*a lot of the Shoreham attendances were necessary or reasonable*". Under cross-examination, in commenting that in the "*first five weeks or so of Mr Castles attendance the fees totalled something like $72,000, ... that included a number of attendances, but in particular drafting the fifth amended statement of claim, which Mr Castles told us, and also his own affidavit, said he knew was unlikely to succeed, and was filed more as a tactical ploy.*" Mr Templeton went on to contrast this figure with the fact that "... *the previous solicitors I think had charged something like about $47,000 for the whole two years they had the files.*" The cost revisors took the view that many of the *Shoreham* costs were probably unnecessary if the proceeding had been withdrawn at an early stage.

[90] Mr Templeton was challenged in cross-examination as to issues of jurisdiction and the nature of the delegated task to the cost revisors. Mr Templeton was clear that the task was to assess whether the fees were fair and reasonable and if not, to suggest a fair and reasonable figure in the context of a complaint of gross overcharging. He was clear that it was not the task of the cost revisor to draw any conclusions as to misconduct or unsatisfactory conduct, that being the task, along with jurisdictional issues, for the Standards Committee.

[91] Mr Templeton also referred to their concern, as outlined in the initial complaint, that there was no cost benefit analysis provided to the complainants "*along the way as the proceedings unfolded and developed*".

[92] Mr Templeton conceded that it can be difficult for a practitioner to pick up a file from another lawyer, particularly when there is a Court event shortly thereafter. He was questioned about the concern that Mr Castles had had about discontinuance exposing the W's to costs. His response was this:

> "The concern we had, though, was that they ended up paying - I think the costs assessment as to their exposure was in the order of $150,000 tops, and they ended up paying $337,000 for that benefit at the end of the day by the time the proceedings were discontinued or abandoned a year later. So one of the troubling questions we had was if, or is whether those proceedings should have been abandoned earlier."

[93] It was put to Mr Templeton in cross-examination that in the type of situation which occurred in the *Shoreham* proceedings that it was "*well nigh impossible to give any overall idea of fees"*. That was rejected by Mr Templeton who said that:

> "Litigators are regularly asked to give estimate of fees on a particular piece of civil litigation. You can give a range of costs in your estimate, you can include contingencies as to what may happen at different stages along the way. Our investigation showed nothing like that was given at all in the *Shoreham* proceedings ... so I don't think it's fair to say you can never do that at all. It is possible to give an assessment of fees."

[94] Mr Templeton went on to point out that since Mr Castles assessed each invoice and made various adjustments before sending out that:

> "... it was surprising that at the time they got to month six or seven that a cost benefit assessment was not carried out when his own evidence, his practice was that they did that assessment before the invoices were sent out every month ... if it had been done the W's would have had a better idea as to where they were heading as time went on."

[95] It was Mr Templeton's view that the costs were mounting to such a significant point that it was puzzling that there was no analysis done as to likely future costs.

[96] Mr Templeton held to the view that none of the three sets of proceedings conducted for the W's was complex. The misnomer argument, and whether to run it, was a complicating feature but was the subject of recent High Court authority. Thus he was particularly critical about the component in the practitioner's recorded time and attendances for research and preparation. It should be noted that the analysis of the practitioner's time records was purely based on records provided by Mr Castles. Preparation and research is a category which Mr Castles said could cover a number of different tasks and was not necessarily accurate. However the costs revisors only have the practitioner's categorisations and have done their best to work within those. "Perusal" is a separate category as is "drafting", and in the costs reports and evidence in chief of Mr Templeton the attendances carried out under these headings are commented on.

[97] For example in the *Shoreham* proceedings of a total cost of $337,462 (inclusive of GST and disbursements), the time component was $295,274. The revisors highlighted of that time $40,411 was for "perusing" and $138,725 for "research and preparation". That was seen to be excessive.

[98] The reasonable fee fixed by the cost revisors in respect of the *Shoreham* proceedings was $112,000 inclusive of GST and disbursements. That figure had regard to the urgency and late instruction for the practitioner and the legal position faced by the practitioner in taking over. There was one correction which emerged from the evidence which is that in relation to the *Shoreham* proceedings one invoice was not rendered. Thus the overall figure of $337,462 should be reduced by $19,486 thus $317,976. This does not detract from observations made in Mr Templeton's evidence such as the perusal charge of $40,000 equated to some 14 days work which was referred to as "extraordinary and beyond comprehension". Similarly he commented that research and preparation at $138,000 equated to almost 50 days work. There is no expert evidence to support the necessity for such a time expenditure.

[99] The other major concern in respect of the *Shoreham* proceedings (putting aside the management of this file for discussion under the head of Charge 5) was the amount of time spent on drafting the fifth amended statement of claim. It will be remembered that this was a document in which both Mr Tapsell and Mr Castles expressed no confidence on a long-term basis and was seen as merely a strategic device.

[100] The evidence disclosed that over a five-week period Mr Castles and other members of his firm spent over 70.9 hours in the drafting, preparation and perusal of this document. That is almost two full weeks of work. Of the 50 paragraphs of the fourth amended statement of claim approximately two-thirds remained unchanged. A further cause of action of "transferred loss" was pleaded. There were 10 additional paragraphs in the fifth amended statement of claim but interestingly, despite the extraordinary time spent on the documents, the drafters failed to correct an error in the pleadings (which was an oddly expressed clause). They also did not pick up a Court of Appeal decision directly on point and delivered one week before the filing of this document.

[101] The costs revisors were highly critical of this process which involved 12 drafts of the fifth amended statement of claim. It was said by both Mr Castles and Mr Tapsell to be a strategy to be used to deflect the strike out application by the *Shoreham* defendants and/or a negotiating tool to reduce costs and to delay the proceedings while in negotiation with the indemnifiers in relation to the intended claim. We will refer to Mr Keyte's evidence on this strategy in due course.

[102] The W proceedings were referred to by Mr Templeton as "*a relatively straightforward professional negligence claim limited to a claim for wasted expenditure or costs thrown away*". As indicated, the previous solicitors' costs, which formed the primary basis for the claim, amounted to $74,760 including expert fees. (The Jamieson Castles fee of $341,684 was later added in relation to the *Shoreham* proceedings fees charged.)

[103] The fees in respect of the W proceedings totalled $153,977. Of that research and perusal totalled $86,685 or something in the order of 31 days work. We note that the number of days is calculated using Mr Castles high hourly rate even though Mr Tapsell did much of the work at a lower rate. So the time taken is even longer than that found to have been very excessive by the expert witnesses. In summary, the cost revisors could not see how a fee of almost $154,000 for the W proceedings could possibly be justified.

[104] However the cost revisors chose to assess the W and M proceedings (for lost opportunity) together. They did so because they suggested the issues were essentially the same, both dependent on the negligence of the previous solicitors. The only differences between the two claims was the type of damages sought and the identity of the plaintiffs.

[105] The M proceedings were brought by the trust, the true owners of the W's home. They sought to recover from the W's previous solicitors the remedial costs to the leaky home because the opportunity to do so from those directly responsible had been lost as a result of the errors in the *Shoreham* proceedings and the effect of the limitation period. The best part of the ground work for those proceedings had of course already been done in relation to the *Shoreham* proceedings, that is the expert reports and briefing of the evidence. It was largely a matter of connecting those

losses and potential claim to the professional negligence of the solicitor in naming the wrong plaintiffs. The total amount sought in relation to the remedial costs and related expenses was $317,436. This claim was partly settled at mediation as indicated in the background summary above.

[106] The expert evidence from Mr Templeton on the fees rendered for the two sets of proceedings, *W* and *M*, is clear:

> "... Both of these proceedings were conventional professional negligence proceedings. They were relatively straightforward. It was beyond our understanding how net fees in the aggregate in these two proceedings of $604,930 could possibly have been charged or justified. We regarded these as grossly excessive to the point of being outrageous. Further, this figure which does not take into account the *Shoreham* proceedings (costs) almost equates with the total settlement to the W's and the trustees which was $655,000. If one adds the *Shoreham* proceedings costs of $294,640, the total net fees of $899,576 defied any description of being fair and reasonable."

Mr Templeton went on in his affidavit to point out that:

> "... None of the three sets of proceedings went to a substantive trial. Some included defended interlocutory hearings. All were ultimately resolved by settlement and negotiation. The total net fees do not include counsel's fees (Paddy Finnigan Barrister), arbitrator's fees (Tony Lusk QC) or mediator's fees (Robert Fisher QC)."

[107] It is to be noted that all matters settled prior to arbitration.

[108] The fees were assessed by the cost revisors also having regard to the Client Care Rules current and previous editions. The factors set out also reflect those factors in the leading cases on overcharging.

[109] The cost revisors were also critical of the time taken to draft the respective statements of claim in the W and M proceedings respectively. An analysis of the actual cost of these to Mr and Mrs W was provided to us in the closing of the Standards Committee. Work in relation to the drafting to the statement of claim in the W proceedings (the least complicated of the two) was charged at $18,423 and work in relation to the preparation and drafting of the end proceedings (the lost opportunity proceedings) was charged in the sum of $51,802.

[110] The evidence in chief of Mr Templeton included the further following comments:

[111] That a review of the case law determined that they ought to "*step back at the end and look at the fee "in the round", particularly (but not exclusively) having regard to the importance of the matter to the client, the value to the client of the amount of work done and proportionality between the fee and the result of the legal work being carried out and the client's means ... we were of the strong conclusion that the clients had been overcharged by about $400,000*."

[112] Further, in the *Shoreham* proceedings a reasonable fee was assessed at $112,000 gross.

[113] In respect of the W and M proceedings the evidence follows: *"... we were unable to assess a reasonable fee for this (W) proceeding alone as this proceeding was closely intertwined with the M proceedings. We therefore aggregated those two proceedings together ... we assessed a reasonable fee when taken together ....as no more than $350,000 gross. ... thus, the aggregate gross fees (ie: profit costs plus GST plus disbursements)[*including for *Shoreham] should have been no more than $462,000 as against actual gross fees charged of $1,031,224.90 or an overcharge of $569,224 ... We took into account what seemed to us to be unnecessary work such as excessive work done and charges in relation to research and perusal of files and information."*

[114] Mr Templeton described how the second report was required following a review by the LCRO and a query raised with him by Mr Castles as to further documents which could be considered (despite a number of earlier opportunities having been given to provide this). These were forwarded to the assessors and included three volumes of material including further time records, some of which had not previously been seen. Having made a detailed inspection of this material the costs revisors provided a supplementary report indicating that nothing they had since discovered changed the views expressed in the original report.

[115] Mr Templeton also addressed Mr Castles' suggestion that a reasonable fee of $462,000 as against one in excess of $1 million was not sufficient to meet the "grossly excessive" standard. He commented as follows: *"... we did not consider a fee charged had to be many times a reasonable fee to be grossly excessive ..."* and *"... the overall fees charged by the practitioner were so surprising as to be very remarkable particularly when there were no extraordinary circumstances that could*

justify the [fees]." And finally the experts expressed the view to the Tribunal that *"... any fair and reasonably minded practitioner of the same background and experience of Mr Castles, would have regarded the fees charged by Mr Castles as strikingly disproportionate to the amount recovered and in all the circumstances. Standing back and looking at the matter in the round, including the lack of any realistic costs benefit analysis to the W's during the proceedings, the overall fees were in total outrageous."*

[116] The expert evidence took account of the overall amount charged to the W's including the period which followed 1 August. The amount pleaded to have been charged up to 31 July 2008 and excluding disbursements is $972,117.70, as against total actual expenditure by the W's and the trustees of $1,031,224.90.

[117] Since the costs assessors fixed the sum of $462,000 as a reasonable fee to the conclusion of the proceedings one would have to expect that a somewhat lower fee would have reflected the period up to 31 July 2008.

[118] Further evidence as to the lack of cost benefit analysis provided to the clients is contained in Mr Templeton's affidavit, in which he discusses a point being reached when it is uneconomic to continue with the pursuit of proceedings. He is of the clear view that the *Shoreham* proceedings were pursued for far too long by Mr Castles and was not able to see from the material considered by him and Mr Shand, any evidence that cost benefit analysis had been explained to the trustees. While he conceded that Mr Castles had faced a forceful opponent in Mr R for the indemnifiers he asserted *"... but the contested nature of their position and the lack of strong legal authority in support of the joinder application required an independent professional mind to be exercised in the best interests of Mr and Mrs W's position."* In other words he supported the submission of counsel for the Standards Committee that Mr Castles should simply have stood up to Mr R and conducted the case on the basis as he saw it.

[119] In relation to the retention of counsel, again Mr Templeton was somewhat critical saying "*none of the three sets of proceedings appeared to be of sufficient complexity or of an unusual nature to warrant retaining independent counsel of such seniority*."

[120] The second source of expert evidence for the Standards Committee was provided by Mr Howard Keyte. Mr Keyte is one of the most senior members of the Inner Bar having become a Queens Counsel in 1997.

[121] As indicated in the recorded background, Mr Keyte had originally been retained by the solicitors for the indemnifiers in relation to all three of the proceedings conducted by Mr Castles. He had been appointed to provide an opinion which had then been recorded in two statements prepared as evidence for the arbitration, and thus was familiar with the detail and background of the proceeding. We took into account the fact that Mr Keyte's background to this matter was sourced in the opposing camp. That said, we found his evidence to be firm, sometimes blunt but nevertheless considered and without partisan emphasis. We were very much assisted by his evidence.

[122] In his affidavit evidence he stated his firm view that the *Shoreham* proceedings were "*doomed to failure at the point where Mr Castles assumed the role of solicitor for the W's. I could not see then and do not see now how those proceedings could possibly have been rescued*."

[123] Mr Keyte's evidence was that a reasonable and competent litigator *"... of the experience and expertise of Mr Castles ...*" would have quickly familiarised himself with the proceedings, which Mr Keyte did not consider would have taken much time. He referred to them as *"straightforward leaky building proceedings raising no unusual or complex issues.*"

[124] In relation to the fifth amended statement of claim he considered that "*the application for leave to amend and the preparation of the fifth amended statement of claim were an utterly pointless exercise*." Further, that *"... the W's only duty to mitigate was to discontinue the Shoreham proceedings promptly thereby minimising exposure to costs."*

[125] Mr Keyte's evidence was that the *Shoreham* proceedings should have been discontinued by the end of January 2006, which was a time before the indemnifier's view was even known. There was clear negligence of the previous solicitor and any costs would have been recovered in that claim. When it was put to him that the fifth

amended statement of claim was a strategy to reduce costs Mr Keyte referred to that as being "*completely the wrong way around. The way to try and negotiate is to get out of there as quickly as you can and thereby reduce not only your own client's costs but the costs being incurred by all the existing defendants. They would all, for example, have had to file a defence to that fifth statement of claim for a start, make [sic] them less likely to agree to a reduction or seeking no costs wouldn't it*."

[126] When the difficulty posed by indemnifiers' counsel taking a different view was put to Mr Keyte his evidence was that *"... he should have simply been stood up to, in my view, that's what should have happened*."

[127] Initially Mr Keyte had given the view that a reasonable fee for the *Shoreham* proceedings would have been $25,000 plus GST and expenses, which he specified as allowing for something like 50 hours of Mr Castles' time and 19 hours for Mr Tapsell's time. He amended this to say that he had overlooked that Mr Castles had attended a judicial settlement conference and on reflection would allow a little more for that.

[128] Finally, in commenting on the practitioner's defence that he was attempting to protect his client's from a cost award arising out of early discontinuance he had this to say:

> "I have not checked his calculations but I was surprised at scale costs of $90,000 as that seemed to me to be very high. I cannot comment on the experts fee but, accepting Mr Tapsell's calculations, it is strikingly obvious that no reasonably competent litigator would have recommended continuing with the *Shoreham* proceedings and incurring for clients a liability in fees in that litigation to their own solicitors of some $340,000 (grossed up) when the maximum exposure to costs and disbursement orders to opposing parties was less than half that figure at $150,000.
>
> I am reinforced in this view as it seems that the negligence of McMahon Butterworth and Mr Thornton was clear. Whatever costs and disbursements had to be paid on a discontinuance early on, they would have been recoverable against McMahon Butterworth and/or Mr Thornton.
>
> To summarise, in my opinion, the only sensible course to take was promptly to discontinue the proceedings, negotiate the best possible outcome concerning costs, and then pursue the W's former solicitors for recovery of those losses. Had that course been followed the "die would have been cast' before Mr R's views became known later in 2006. None of the later manoeuvres, including those suggested by Mr R had any chance of success and should not have been pursued."

[129] Thus the expert evidence concerning both the strategies and the concern over the eventual costs to the clients is consistent in the view that the practitioner acted quite unreasonably.

Overcharging - The Law

[130] Charges 1 to 4 all relate to allegations of overcharging over the period 2005 to 2008. As noted earlier, because the complaint was made after the LCA came into force on 1 August 2008, the transitional provisions of the LCA applied. Section 351 of the LCA requires that if the complaint is in relation to conduct in respect of which disciplinary proceedings could have been commenced under the LPA, then the complaint must be made to the Complaints Service established under the LCA. However the complaint itself must be investigated and conducted as if the provisions of the LPA remained. Thus, the W's complaint was required to be handled under the procedural provisions of the LCA and as if the disciplinary provisions and potential charges under the old LPA were still in force. Accordingly the allegations of overcharging fall to be considered under the 1982 Act and applicable case law.

[131] Under the LPA 1982 the threshold for disciplinary intervention is relatively high. "Misconduct" would require the overcharging to be reprehensible, disgraceful, deplorable or repugnant in the eyes of a fair and reasonably minded lawyer. That was the test applied by the LCRO in *Client J v Lawyer A*.[4] "Conduct unbecoming" is a slightly lower threshold. The test will be whether the conduct is acceptable according to the standards of "*competent, ethical, and responsible practitioners*".[5]

[132] For a charge of negligence or incompetence under s 112(1)(c), the practitioner's conduct is generally scrutinised with respect to what a reasonable competent practitioner would do, having regard to the standards normally adopted in the profession.[6]

[133] The consideration of the charges is conveniently a two – step process.[7]

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[4] Cli*ent J v Lawyer A* LCRO 31/2009, 30 April 2009.
[5] *B v Medical Council* [2005] 3 NZLR 810, 811 per Elias J.
[6] *Bindon v Bishop* [2003] 2 NZLR 136 (HC).
[7] *NSW Bar Association v Meakes* [2006] NSWCA 340, [87].

(1) Were the fees charged so excessive as to constitute gross overcharging?

(2) If so, does the gross overcharging constitute a disciplinary offence?

[134] The jurisprudence on gross overcharging largely derives from Australia where there have over the years been a number of decisions of the conventional Courts or Tribunals on what type or extent of overcharging is sufficiently reprehensible to constitute professional misconduct or other disciplinary offences. The three leading cases are *Re Veron, D'Alessandro* and *Re De Pardo.*[8]

[135] In *Re Veron*, the Court of Appeal of New South Wales said:[9]

> "The Court does not sit as taxing officers dealing with individual items of costs. Nor is such an approach realistic in the present circumstances. We are guided by experience and a broad sense of what is reasonable and fair and not by any narrow approach to questions of mere overcharging.
>
> …
>
> It has long been recognised that the charging of extortionate or grossly excessive costs by a solicitor may amount to professional misconduct. All the modern text-writers treat such conduct as a head of professional misconduct.
>
> …
>
> In all the circumstances we should have little difficulty in concluding that the costs charged by the solicitor were exorbitant and grossly excessive and his general course of conduct in relation to them such as would be regarded as dishonourable by his professional brethren of good repute and competency.
>
> …"

[136] In *Client J v Lawyer A*, Duncan Webb sitting as an LCRO commented at [22]:

> "Where the charges are grossly excessive it is indicative that the lawyer in question knew that he or she was not entitled to the amount claimed or at the least was reckless as to whether they were entitled to the amount claimed."

And at [24]:

[8] *Re Veron* (1986) 84 WN (NSW) 136; *D'Alessandro v LPCC* (1995) 15 WAR 198: *De Pardo v LPCC* (2000) 170 ALR 709.
[9] At pages 142, 144 and 145.

> "For a fee to be grossly excessive and therefore amount to misconduct it must bear no rational relationship with what would have been within the band of a fair and reasonable fee."

[137] We agree with Mr Katz that there is no magic in the "fair and reasonable fee" approach – there are no fixed or immutable rules. It is no more than the view of a reasonable competent practitioner as to what in all the circumstances would be fair and reasonable. Relevant considerations as to a fair and reasonable fee have been determined by the New Zealand Courts in cost revision cases.

[138] In *D'Alessandro*, the Supreme Court of Western Australia said:

> "The inquiry into what amounts to grossly excessive or unreasonable costs would ordinarily involve, first, a determination of what, in the particular circumstances, would be a reasonable sum to charge. The resolution of that question would often turn on multiple factors, including the amount at which the costs in question was or would likely be taxed, the difficulty of the case, the novelty or complexity of the legal issues presented, the experience of the practitioner, the quality of his other work, the amount of time spent by the practitioner on the matter, the responsibility involved, the amount or value of the subject matter in issue, and any costs agreement that might have been entered into."

[139] What have been described as the "*D'Alessandro* factors" were applied by the Western Australia Tribunal in *LPCC v Mijatovic*[10] and largely reflect the relevant Rules of Professional Conduct as they were in force at the time.

[140] In the third of the trilogy of Australian cases, *De Pardo*, the Court said it is not necessary in every complaint of unprofessional conduct by grossly excessive overcharging to determine what a reasonable charge would be in the circumstances, although this assessment is helpful.

[141] In *Gallagher v Dobson*[11] the High Court adopted what was said by Donaldson J in *Property & Reversionary Investment Corporation Limited v Secretary of State for the Environment*[12] namely that:

> "The object of the exercise … is to arrive at a sum [for the fee charged] which is fair and reasonable, having regard to all the circumstances … It is an exercise in assessment, an exercise in balanced judgment – not an arithmetical calculation. It follows that different people may reach different

[10] *LPCC v Mijatovic* [2007] WSAT 111, [264] and following.
[11] *Gallagher v Dobson* [1993] 3 NZLR 611 at 620.
[12] *Property & Reversionary Investment Corporation Limited v Secretary of State for the Environment* [1975] 2 All ER 436 and 441-442.

> conclusions as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow.
>
> … In my judgment the proper approach is to start by taking a broad look at "all the circumstances of the case" and in particular the general nature of the business."

[142] When applying this in *Gallagher v Dobson*, Barker ACJ emphasised that whilst time records are kept in a modern law office, these should only be used as a guide to ascertaining a proper fee. In short, it would be wrong to apply a rigid policy of time costing.

[143] As Priestly J said In *Chean & Luvit v Kensington Swan*[13]:

> "A practitioner who is using time and attendance records to construct a bill [should] take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the client's means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out."

[144] Priestly J went on to consider the approach to proportionality between the fee and the interim or final result, where regular monthly bills are rendered. The Judge said:[14]

> "[24] A related problem which is recognised in some of the authorities cited to me by counsel is that, where bills are being rendered regularly on an interim basis, it is difficult if not impossible for the client in particular and possibly for the practitioner to make the type of assessment to which I have just referred. Certainly rendering regular interim fees is good practice. It assists the practitioner's cash flow and also enables a client to monitor the cost of the professional services he or she is engaging. A regular series of small bills are more palatable and indeed fairer than a bill delayed for many months at a level which may cause the client significant shock.
>
> [25] So this factor, of interim billing in an ongoing matter is a circumstance which I consider to be relevant."

[145] In *Veghelyi v Law Society of New South Wales*[15] the Court noted that for centuries it has in its protective jurisdiction exercised control over excessive fees. The Court noted also that clients may be in a vulnerable position as they place trust in their solicitor. The clients are not in a position to know, without investigation, what legal work must be done and hence what charges are fair and reasonable. Clients

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[13] *Chean & Luvit v Kensington Swan* CIV 2006-404-1047 at para 23.
[14] At paras 24-25.
[15] *Veghelyi v Law Society of New South Wales* [1995] NSWCA 483.

ordinarily assume that the solicitor will make only such charges as are fair and reasonable. Solicitors are however informed, unlike clients, and in a position of advantage and trust is therefore placed in them by their clients. A similar approach is seen in the decision of the New South Wales Court of Appeal in *NSW Bar Association v Meakes*.[16] The Court quoted from the High Court's decision:

> "[It] is, I think, relevant to consider first the reason why gross overcharging, as such, may be held professional conduct. The court has traditionally and for centuries exercised control over 'the excessive fees and other unnecessary demands' made by solicitors of the court … Clients are, or may frequently be, in a vulnerable position vis-a-vis their solicitors; the presumption of undue influence is, I think, based at least in part upon the fact that when making decisions, clients ordinarily or at least frequently place trust in their solicitors. They ordinarily are not in a position to know without investigation what work must be done and what charges are fair and reasonable; they ordinarily assume that the solicitor will make only such charges.
>
> Solicitors are, on the other hand, informed, or in a position to inform themselves, of what work may be required and what a fair and reasonable charge is. They are, in that sense, in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of such an advantage. It is, I am inclined to think, the fact that that advantage has misused which may, in a particular, warrant what the solicitor does being characterised as professional misconduct."

[146] The Court of Appeal upheld the High Court's approach to overcharging, but considered the facts warranted a finding of professional misconduct (rather than the lesser charge of unsatisfactory professional conduct that the High Court found proved).

[147] The commercial or business acumen of the client is largely irrelevant. So also are numerous and lengthy reporting letters. In *Law Society of New South Wales v Foreman*[17] Kirby J noted that clients look to the Court (or here, the Tribunal) to protect them from overcharging. As the Judge said, no amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charge and overcharging, where it goes beyond the bounds of professional propriety. The Judge further noted that charging on the basis of time has a distinct potential to result in overcharging.

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[16] *NSW Bar Association v Meakes* [2006] NSWCA 340, [27].
[17] *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 422-423.

[148] Vulnerable, in this context, does not mean untutored, inexperienced or suffering from any disability. It can include financially emasculated clients who have become beholden to their lawyer.

[149] A further factor that has been identified in the authorities is the final or overall result in the context of best/worst case scenarios. Asher J considered this in *Vallant Hooker v Tootill*[18] where he said:

> "[26] … If Vallant Hooker had fully and accurately set out the risks and possible worst case financial scenarios to Ms Tootill at the outset, it may well be that she could not complain. The issue really is this: in assessing the reasonableness of a fee, should a practitioner who has not properly explained to a client the risks of the proceeding, and the realities of best case and worst case scenarios, adjust any ultimate fee to reflect a poor final result of which the client should properly have been warned?
>
> [27] I conclude that the answer must be yes. A reasonable practitioner would make such an adjustment. It is part of the process of reaching a reasonable fee. It is not so much a question of compensation for negligence, but rather of the fixing of a fee that fairly takes into account the dilemma now faced by the client, caused in part by the practitioner's inadequate explanation of risk."

[150] In *Quinn v Law Institute of Victoria*[19] the Court accepted the costs expert's evidence that it is wrong to charge on a pure time basis with each and every attendance recorded and charged. In *Quinn* the Court also commented on the exacerbating features of excessively recorded time and doing unnecessary work, which incurred a greater expense for the client.

[151] Whilst not having the force of a statute or regulation, the Tribunal, in a disciplinary context, can also properly have regard to the Rules of Professional Conduct as they were in force at the relevant time. Attached as Appendix 2 to this decision is a copy of Rule 3.01, which addresses fee charging. As can be seen the Rule mandates that a lawyer shall charge a fee no more than what is "fair and reasonable", echoing the case law. The commentary elaborates upon the Rule.

[152] In *Hart*[20] a Full Court of the High Court agreed with this Tribunal's approach to the charge of overcharging and the finding of professional misconduct, in that case

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[18] *Vallant Hooker & Partners v Tootill*, CIV 2009-404-1895, 4 September 2009 at paras 26-27.
[19] *Quinn v Law Institute of Victoria.*
[20] *Hart v Auckland Standards Committee No. 1 of the New Zealand Law Society* [2013] 3 NZLR 103 (FC).

under the 2006 Act. While a very different fact situation from the instant, there are some principles to be noted:

(1) the Court accepted that a focus on time recording is inappropriate if it pays "… insufficient regard to the value of the task done and to the steps available to a responsible practitioner to achieve the task in a reasonably economical fashion" [176];

(2) attempts to manage the costs, and failure to manage the costs, will be relevant [179];

(3) the importance of not exploiting the client, and in particular the need to assist the client to ensure that funds remain for the ultimate defence campaign, rather than exhaust resources during early skirmishes [180].

Discussion of Charges 1-4

[153] Two preliminary points arise: first, should the fees be assessed excluding GST and disbursements or not? And secondly, does the available expert evidence preclude separate findings on Charges 2 and 3, as submitted for the practitioner?

[154] Some of the evidence and submissions put to the Tribunal addressed fees net of disbursements and GST. We do not accept this as a valid approach. Rather than address the individual components of fee accounts we prefer to take a view in the round of the total amount that a client is required to pay.

[155] The invoices that were raised by the Practitioner for the three sets of litigation totalled $1,031,224.91.

[156] Three of the invoices that were raised were apparently not issued to the clients but were substituted with other invoices also included in the total. The three were:

(1) Invoice 3034 $19,486.13, 11 August 2006 for the *Shoreham* matter;

(2) Invoice 3035 $2,898.00, 11 August 2006 for the W matter and;

(3) Invoice 3036 $6,012.00, 11 August 2006 to the Trustees of the M Trust.

[157] It is accepted that these withdrawn invoices totalling $28,396.13 were not paid by the W's or the M Trust.

[158] Charges 1 to 4 all relate to events occurring prior to 31 July 2008 being the last date to which the provisions of the Law Practitioners Act 1982 applied. The W and M proceedings were not finally settled until early December 2008 and invoices were issued by the Practitioner to the Trustees dated 29 August, 30 September and 30 November. The respective amounts were $24,778.41, $22,786.19 and $11,542.63; totalling $59,107.23. The final invoice has not been paid by the Trustees.

[159] Thus the total of all invoices raised in the three matters was $1,002,828.78. The W's paid all but the final invoice, so $991,286.14. When stepping back and considering the "fee or fees in the round" the Tribunal recognises that this was the total of all charges for the matters considered by the expert cost assessors.

[160] Having said that, Charges 1 to 4 relate only to that portion of the fees rendered prior to 1 August 2008 totalling $943,721.54, and we consider the particulars pleaded and the substance of the charge in relation to that figure, and the services to that date.

[161] As to the second matter, it is correct that the costs assessors were unable to separate out the two later proceedings and have provided evidence as to overcharging on the combined fees.

[162] It is also correct that there is authority[21] to the effect that even at this late stage the Tribunal could amend the charges to accommodate this evidence. We do not consider it is proper or indeed necessary in this matter to do so, given that there is the alternative "compendium charge".

[163] Thus we propose to dismiss Charges 1 to 3 and consider the alternative Charge 4, while preserving the particulars which are pleaded in paragraphs 1 to 39 of the

[21] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 (FC).

charges and incorporated into the fourth charge. This charge alleges that the *"... expenditure on an overall basis and having regard to the likely outcome and actual outcome was grossly excessive. A fair and reasonable fee in relation to all three proceedings would have been $462,000, inclusive of GST and disbursements. As a result the practitioner is guilty of professional misconduct.*"

[164] While there is authority for the proposition it is not necessary to fix a fair and reasonable fee before determining whether there has been grossly excessive charging, it is a useful starting point. We find that there is independent expert and reliable evidence to support a proper fee in the region of $462,000 all inclusive. There is no independent evidence to rebut that figure. Despite there having been some four-and-a-half years between the making of the complaint and the hearing, the practitioner has not sought to call any such independent evidence.

[165] We find that, in relation to the actual amount charged to and expended by the W's, grossly excessive overcharging has been made out. We have regard to a number of factors in addition to the expert evidence and the specialist expertise of the Tribunal itself. We have had the opportunity to consider lengthy evidence in relation to the work actually done, the practitioner's time records and his billing practices.

[166] We also have regard to the practitioner's approach to charging, whereby time recording appeared to have been relied on at the relevant charge out rate, with some zeal. There was little if any regard to the other factors relevant to charging, as set out in Rule 3.01 of the relevant rules. Furthermore, it would seem every person in the firm was charged for, even to the extent that clerical services appeared to be charged and a regular, but random "bureau" fee imposed, which overall amounted to some hundreds of dollars.

[167] We were unimpressed by Mr Castles' attempt to minimise the amount paid by his former clients, in his submissions and evidence attempting to deduct GST and disbursements and suggesting that time had been discounted significantly. We have already referred to that under the heading of credibility. The evidence was particularly shaken by a demonstration both from Mr Castles and Mr Tapsell that the "original" or full time recorded, and shown to the client as such on the bill, included

non-chargeable time, and that some items properly belonged on other accounts and were subsequently billed.

[168] We accept the evidence of the costs assessors in relation to the "outrageous" level of charges for the drafting for the fifth amended statement of claim and for the two statements of claim in relation to the W and M proceedings respectively.

[169] We record that in the first two weeks Mr Castles had charged the W's more than they had been charged by their former solicitors over a period of two years (and four statements of claim).

[170] The finding of grossly excessive charging is also supported by a comparison with the fee of Mr Finnigan who had the carriage of the proceedings from February to November 2008 and conducted all of the settlement negotiations, for which he charged $30,339 GST inclusive.

[171] Mr Castles has not persuaded us that there was any basis for the extraordinary level of charging which occurred in this matter and we echo the comments made by the costs assessors in this regard.

[172] Charging for the third party proceedings against Jamieson Castles, notwithstanding that it might have been recovered as part of the settlement, is an aggravating feature of the practitioner's behaviour in this regard. Had Mr Castles simply notified his indemnifiers there would have been no question of these costs being met by the W's.

[173] We do not consider that the eventual recovery of a portion of the costs assists the practitioner. If anything, it is an indication of the extent of the ultimate loss to the W's – the end cost to them, in dollar terms, of engaging with the legal process to seek some recompense for their leaky home. It is this tribunal's assessment of the level of charging for the work done which is relevant.

[174] The next issue to consider is whether this level of charging represents professional misconduct. Having regard to the tests set out above in paragraphs [98] to [120] we can consider that misconduct has been made out. We consider that the charging in this case has been so far from what could be regarded as reasonable

that any "competent, ethical and responsible practitioner" would regard it as disgraceful, deplorable or repugnant.[22]

[175] The level of charging was not only unjustifiable by any standards, the effect of the charging on the clients rendering them virtually destitute, even after the full proceeds of their claims were paid, must also be relevant.

Charge 5: Improper conduct of the proceedings

[176] The particulars in support of this claim are summarised in the opening submissions of counsel for the Standards Committee as follows:

> "157.1 Mr Castles failed to advise the W's from time to time of their total legal costs when compared with the financial outcome they could reasonably expect.
>
> 157.2 Mr Castles failed to advise the W's that, at some point in time, the further conduct of the proceedings was uneconomic.
>
> 157.3 Mr Castles failed to carry out any proper assessment of the proceedings to determine their likely success and whether their continuation was in the best interests of the W's.
>
> 157.4 Mr Castles pursued strategies which were ineffective and increased unnecessarily the overall costs to the W's.
>
> 157.5 Mr Castles carried out unnecessary work thereby increasing the costs.
>
> 157.6 Mr Castles carried out repetitive work.
>
> 157.7 Mr Castles continued to act and charge the W's in relation to the third party claims in the W and M proceedings when such third party claims were brought against Jamieson Castles and Mr Castles in particular and he failed to advise the W's of the conflict and in continuing to act and charging the W's in respect of this own attendances in defence of the third party claims.
>
> 157.8 Mr Castles retained Paddy Finnigan, Barrister, at the cost of the W's in 2006 without advising them that they would be liable for his fees."

[177] Much of the evidence supporting this charge has already been traversed in relation to Charges 1 to 4. We wish to make it clear that it is not this Tribunal's role to

[22] See footnotes 4 and 5.

closely analyse and second guess every move of counsel during each piece of litigation. We consider our role is to take an overview, and to look at patterns of behaviour. However we do have expert evidence from both Mr Keyte and Mr Templeton, of some glaringly poor decisions and mismanagement which simply cannot be ignored by the Tribunal.

[178] In closing submissions counsel for the practitioner submitted as follows:

> "It is axiomatic that a solicitor is a creature of his/her client's instructions. The solicitor can advise. The client instructs. There is no shadow of a doubt that the client's instructed Jamieson Castles not to file a discontinuance. That necessarily entailed the fifth amended statement of claim. It took time as it was complex. It had to be settled in a form that gave it credibility and would make the *Shoreham* defendants pause. Without that strike out might have succeeded anyway."

[179] The Tribunal places this client blaming submission against the following statement made by Mr Castles in a file memorandum dated 24 August 2006:

> "11. I discussed these matters with A and M W on Thursday 24 August 2006. **It is clear that the W's are entirely reliant upon our advice. It is further clear that although they profess to understand these latest developments they are finding it difficult to grasp the legal implications. In the end the W's instructions to me were that they would agree to follow whatever my advice was to them."** (emphasis added).

[180] This memorandum entirely accords with the evidence referred to earlier in this decision of Mr W who repeatedly told the Tribunal that he and his wife had placed themselves in Mr Castles' hands and "followed his recommendations implicitly". The Tribunal's impression of the W's was as very intelligent and involved clients. However like all clients, they were seeking expert legal assistance that they did not themselves possess. They relied on Mr Castles to navigate them through their legal issues. Mr Castles did not point to any examples of the W's electing not to follow his advice.

[181] The prime examples of the poor conduct of these proceedings are as follows, in no particular order of importance:

(1) The failure to abandon the *Shoreham* proceedings, or at least do minimal work until the strike-out was tested. Instead of seeking an adjournment of the judicial settlement conference which occurred

only five days after the practitioner had received the file he agreed to a timetable which required a further statement of claim (and the enormous cost which that carried).

Mr Castles prepared for the judicial settlement conference on an urgent basis and charged $15,819 despite the fact that the previous solicitor had prepared for this "meticulously". While we acknowledge that the practitioner had to "come up to speed" with the file, this would appear to be another example of complete "overkill"

(2) The fifth amended statement of claim itself was of serious concern. We have already detailed the time (70.9 hours) spent in drafting this document and the nature of the amendments made earlier in this decision. Given that both Mr Castles and Mr Tapsell who worked on this document acknowledged that the *Shoreham* proceedings were doomed and that this document would not ultimately survive, beyond its strategic purposes, this is an outrageous expenditure of time at the W's costs. While the practitioner has sought to justify the enormous amount of work which took place to continue the *Shoreham* proceedings on the basis of a duty to mitigate he himself, in a letter to McMahon Butterworth of 28 November 2005, said:

> "A plaintiff need only take steps that are reasonable, and the standard of reasonableness is not high as it is the defendant, who is the wrongdoer. In every case it is a question of fact whether the plaintiff has satisfied the standard [and acted] reasonably. The duty to mitigate does not require the plaintiff to embark on complicated and difficult litigation."

And yet this is precisely what the practitioner did in this case.

Mr Castles charged between $350 and $390 per hour during 2005 to 2008. That hourly rate carries with it an expectation of a reasonably competent and experienced litigator who can draft documents efficiently and promptly. Thus the expenditure of two working weeks (even allowing for Mr Tapsell's somewhat lesser experience) is completely unacceptable.

(3) Failure to stand up to opposing counsel and the enormous additional costs that generated, as identified by both expert witnesses.

(4) In relation to the third party proceedings, we consider that there was a clear conflict of interest which was not handled adequately by the practitioner. We refer to the comments earlier in this decision. Exacerbating this was that the W's were charged for the attendances on behalf of Jamieson Castles in relation to these two third party proceedings, one on each of the W and M proceedings respectively.

We also note that at mediation the third party issue was to be part of the mediation agreement although this was subsequently withdrawn on the day of the mediation as an issue. It was confirmed by Mr Castles that no independent advice was given to the W's in relation to the mediation.

(5) The joinder of Mr P was a further step which lacked logic and was a complete waste of time and money. Once again Mr Castles said this was done to satisfy the indemnifier's solicitor. Mr Tapsell agreed in evidence with counsel for the Standards Committee that the filing of this document *"flew in the face of the Fifth Amended Statement of Claim"*.

(6) The W proceedings were first brought as a summary judgment application. This would appear to be wasteful but would not necessarily have been the subject of particular criticism except that summary judgment was also researched as a possibility for the M proceedings. In respect of this loss of opportunity claim with unspecified damages, summary judgment was never a potential option. This was acknowledged by Mr Tapsell in evidence, however the firm still charged for this research.

(7) The failure to advise the new trustee Mr P, of his potential liability is a further significant flaw. In respect of this evidence which is disputed by the practitioner, we prefer the evidence of Mr P. It is more likely

> that he would remember something so significant as a liability for costs not only legal costs for the trust but also potential costs awards of the Court. Mr P is clear that he was never given this advice as to liability. If he had been, he would not have agreed to become a trustee.

[182] In relation to the alleged particular that the W's were not informed about the engagement of Mr Finnigan, we do not find this particular has been proved to the requisite standard.

Decision on Charge 5

[183] In summary, the Tribunal finds proved on the balance of probabilities, having regard to the gravity of the allegations made, that Charge 5 is made out and the practitioner is *"... guilty of negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practice as a barrister and solicitor or as to tend to bring the profession into disrepute"*.

Charge 6: Unprofessional Dealings and Inappropriate or Improper Pressure on Clients

[184] This charge of misconduct in his professional capacity, or in the alternative of conduct unbecoming a barrister or solicitor, relates primarily to an email sent from Ms Farrell on behalf of Mr Castles to Mr W on 8 August 2007 in the following terms:

> "The delay in resolution of both High Court cases (the cause of which we acknowledge and accept is outside both your and our control), is causing extreme difficulties with our bankers. As you are aware they continue to fund the litigation at a significant cost to us. Our bankers have demanded that a payment on account of your outstanding invoices be made immediately. We are anxious to maintain our relationship with our bankers who have been and continue to be understanding of the circumstances. We are cognisant and sympathetic of your position however, to maintain the bank's goodwill a payment must be made. Should payment by way of internet banking be more convenient for you, we attach a copy of our trust account details."

[185] The salient facts are not in issue.

[186] Ms Farrell, the legal accountant at the firm at the time, gave evidence that she would have typed the email on Mr Castles' instruction. Neither Ms Farrell nor Mr Castles produced any documents that verified the content of the email**.**

[187] The W's were having difficulty paying the invoices because of their dire financial circumstances. By mid 2007, according to the cost assessors' first report, Jamieson Castles had rendered bills totalling $567,000 net of GST and disbursements. Monthly statements showed that, as at 30 June 2007, Jamieson Castles were owed an overdue amount of $200,426.08 by the W's.

[188] The practitioner was well aware of the W's financial predicament, and of the W's continuing endeavours to meet their liabilities. About a year earlier, the W's had sold their house and had freed up other available assets. Upon settlement of the sale of their house, almost all of their remaining equity went towards payment of outstanding fees. Mr W gave evidence of the stress of vacating their home in October 2006 and, over the following 28 months, enduring a series of 27 house-sitting moves; living out of suitcases and Countdown shopping bags and with the uncertainty of future accommodation opportunities. The W's were parted from their personal possessions and treasures, and paying $600 per month for storage. Both were depressed and on medication.

[189] However, as the practitioner formally admitted, the W's did not borrow any money nor seek or incur any credit with the practitioner's firm in relation to outstanding fees. The practitioner also admitted that the W's did not know what arrangements the practitioner and his firm had with their own bankers regarding cash flow and overdraft facilities. He admitted that at no time did the W's ask, nor did he offer, that the firm's bankers provide or extend credit facilities to assist with the funding of the litigation whether as a general credit facility or by extension or as part of the firm's general overdraft facility. We note below that some of the submissions made by the practitioner were inconsistent with these admissions, but no documents were produced to support Mr Castles' propositions.

[190] Finally, by the relevant date, 8 August 2007, the *Shoreham* proceedings had been discontinued and the W and M proceedings were continuing through the High Court. The W's previous solicitor had paid $25,000 in April in settlement of the claim

against him personally. The (first) mediation between the parties was scheduled for 27-28 November, some 16 weeks away. The summary judgment application in the W proceedings had been allocated a fixture for 21 September 2007, just five weeks away.

[191] It was in these circumstances that the W's received the email indicating the firm's bank had demanded payment in circumstances which were creating extreme difficulties for the firm. However, as at that date, there was no direct funding by the firm's bank and there was no "demand" by the bank that the W's pay outstanding fees immediately. The email misrepresented the position. As the practitioner acknowledged in evidence, all the firm had done was, as most businesses do, to utilise the firm's arranged overdraft facility with its bank, no doubt at an interest cost to the firm, albeit a deductible one. That overdraft was used to finance the firm's day to day running expenses in relation to all its business.

[192] Two further, similar, emails were sent by the firm to Mr W on 24 June 2008 and 20 October 2008, again formally making demand for payment.

[193] Charge 6 pleads that the practitioner is guilty of professional misconduct (or an alternative charge), particulars of which are:

(1) in breach of Rule 1.01 of the Rules of Professional Conduct for Barristers and Solicitors, the practitioner breached his obligations of trust and confidence.

(2) the practitioner acted in breach of Rule 1.06 of the Rules of Professional Conduct for Barristers and Solicitors in using the firm's overdraft facilities for the benefit of the client and thereby extending credit to the client in circumstances where the practitioner failed to act as an independent adviser in the client's best interests; and

(3) the practitioner failed in his general professional obligations as between solicitor and client to act professionally and at all times only in the best interests of his client and, in particular, put unfair and

unreasonable pressure on the W's before being prepared to continue to act.

[194] The practitioner referred to documents that showed a pattern of delay in payment of fees, and that the W's attempts to make arrangements for funding were an issue from as early as January 2006. This is true. The documents serve to underscore the fact that the W's had real liquidity problems, and that Mr Castles was well aware of these.

[195] The practitioner submitted there was no real pressure on the W's to arrange funding to meet the outstanding fees until June 2008. Prior to that, the practitioner submitted, the only requests for payment were to the effect that the W's reimburse Jamieson Castles for out of pocket expenses. The Tribunal does not accept this. The email of 8 August 2007 was a clear demand for payment on account, sent at a time when Mr Castles was well aware of the W's circumstances and expressed in terms that would have caused the W's to experience pressure to somehow arrange funding. That said, a solicitor is entitled to seek payment for his services. Was the email a breach of Mr Castles' professional obligations to the W's, as referred to above?

[196] In the Tribunal's view it was.

[197] The email represented to the W's a position which was not true. The practitioner argued that the fact that over $200,000 was overdue to the firm clearly meant that credit was being extended by Jamieson Castles to the W's. He submitted they knew they had invoices to pay which were not paid on time, and that this impacted on the firm's overdraft facility with a consequential cost to Jamieson Castles. Contrary to his formal admission in the pleadings, the practitioner submitted that to request time to pay necessarily entails the extension to the W's of credit. Counsel for the Standards Committee replied, accurately, that there was no evidence of any impact on the firm's overdraft facility.

[198] The Tribunal accepts the practitioner's submission that he is fully entitled to call for his bills to be paid according to credit terms and to point out any adverse costs that might be caused by the W's not meeting their obligations. However this is not

what Mr Castles did. This was notice of a 'demand' for payment on account made by the bank.

[199] Mr Castles also submitted that the firm would have been well within its rights to have simply ceased work for the W's. Had it done that, he submitted, the effect on the W's ability to retrieve the situation would have been severe. To exert pressure of the sort complained about, yet continue representation is, the practitioner submits, not a breach of the trust and confidence obligations. On the contrary, he submitted, it is a business-like way of dealing with the W's breaches of their obligations to Jamieson Castles. The practitioner submitted he was simply insisting upon his right to be paid and, in the meantime, at no cost to the client, the firm itself was bearing the burden of interest on its credit facilities which it would not have suffered if the client has paid the bills in a timely fashion.

[200] The Tribunal agrees that the practitioner is fully entitled to call for his bills to be paid. We also recognise that the outstanding sum was significant and, while the Tribunal was not provided with any documentary evidence to support the fact, we are prepared to accept that outstanding sums of this magnitude may place strain on a firm's overdraft arrangements.

[201] However, that was not the situation that was represented to the W's in the email. In circumstances such as these, the Tribunal would have expected the practitioner to work with the client to first, and clearly set out preferably agreed terms for both charging and payment (which might have included deferral of some payments until conclusion of the matter, or possibly a conditional fee agreement) in the event that the W's were unable to comply, then to assist them in transitioning to alternative arrangements. These are the sort of obligations now spelt out in Chapter 4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[202] Most relevantly in the circumstances, the W's eligibility for legal aid ought to have been discussed. Mr Castles was not a legal aid provider and surprisingly, and unacceptably, the subject was not raised until 2 July 2008.

[203] Moreover, if it was the intention of the firm and Mr Castles to use the firm's overdraft facility as a form of litigation funding, at a cost to the firm, and therefore implicitly at a cost to the clients, Mr Castles did not make that clear to the W's. Although he maintains, contrary to his formal admission, that the W's knew this, there is no evidence that shows he explained this alleged arrangement to the W's.

[204] If Mr Castles had put in place credit arrangements for the W's benefit, he did not comply with Rule 1.06 of the Rules of Professional Conduct requiring a practitioner who advises a client on borrowing to act as an independent adviser, in the client's best interests. There is no evidence to show that the W's understood and agreed to the alleged arrangement.

[205] In summary, the Tribunal finds that the email of 8 August 2007 misrepresented to the W's the position of the firm in relation to bank funding, and in particular there is no evidence that the bank made any demand for payment towards the outstanding fees. Receipt of such a demand at this time would have placed the W's under more stress, at a time when their situation was extremely difficult. Here was another lost opportunity for an open and frank discussion about the litigation costs and benefits of proceeding down the path that eventually cost the W's a further $ 368,820.17

[206] However we do not consider Mr Castle's conduct in this instance to be a serious failure of his professional obligations sufficient to warrant a finding of professional misconduct. The amount owed was very significant. It is possible the firm's overdraft position was affected. Nevertheless the email misrepresented the position to the W's and as such was unacceptable when measured against the standards of competent, ethical and responsible practitioners.

[207] We accordingly find the lesser charge of conduct unbecoming proved.

Charge 7: Breach of confidence/Privilege

[208] Charges 7 and 8 are discrete charges and both relate to a meeting on 3 December 2008 between the Practitioner and Mr T, brother-in-law of Mrs W. Charge 7 is that, at this meeting, Mr Castles, improperly and without authority, disclosed to Mr T highly confidential and sensitive personal information concerning

the health and mental stability of Mr W. This charge is to be determined under the LCA.

[209] The affidavits of both Mr Castles and Mr T included detail about the meeting. Mr T swore his affidavit on 19 January 2012 but died before his evidence could be tested at the hearing of these matters. Mr Castles was cross-examined in some detail about it. Because Charge 7 needs to be seen in the overall context for the meeting we begin the discussion of it by setting out some background information to both charges 7 and 8.

[210] Mr T had previously made two advances to the W's totalling $90,000 that were to be utilised to meet fees accounts from the firm Jamieson Castles. The first advance of $50,000 was made by him on 11 July 2008 in terms of the email undertaking from Jamieson Castles that it ... *would enable the proceedings to be taken to conclusion of the arbitration* and that *there would be no further demand for legal fees*. Mr Castles also undertook that the advance would be repaid from any settlement monies.

[211] The second advance of $40,000 was made on or about 28 October 2008 and was to be applied against outstanding legal fees and disbursements charged by Jamieson Castles. Mr Castles undertook to repay the further advance and the initial advance from the proceeds of settlement or award.

[212] The circumstances surrounding the further advance of $40,000 were recorded quite differently by Mr T and Mr Castles. Mr T had deposed that he had been called to a meeting in late October at which he had been told that the costs had been much higher than expected and a further $40,000 was required to enable the W's to complete their arbitration hearing. He commented on Mr Castle's manner at the meeting and stated that he "*felt trapped because if I did not advance the further $40,000 requested, it appeared as if my original investment of $50,000 would be lost.*"

[213] Mr Castles on the other hand said that "Mr T proposed and offered a further $40,000 toward outstanding legal fees. "*I did not initiate that and only became aware of it at the time the offer was made*." When cross-examined on this matter

Mr Castles claimed that Mr T was incorrect: that there had not been another meeting at this time and he did not accept what Mr T had said in his affidavit. We note the evidence that a further email demand for payment, similar to that discussed in charge 6 and citing pressure from Jamieson Castles' bankers, was sent to the W's on 20 October, a week before the further payment was made.

[214] Mr Castles admits that he initiated a meeting with Mr T on 3 December. It was arranged in a telephone call the previous day to Mr T. The meeting was held at the Pipiroa Country Café on Highway 25 to Coromandel. Mr Castles said under cross-examination the meeting was necessary because Mr T was not coming to Auckland. He said Pipiroa was an agreed meeting place because it was about half-way between Auckland and Whangamata where Mr T then lived.

[215] Mr Castles accepts that he did not seek the W's approval for the meeting and that he did not disclose to them afterwards that it had taken place.

[216] Mr Castles explained that the reason for asking for the meeting was to explore with Mr T whether he would be prepared to extend part of the loan of $90,000 which would enable some small distribution to the W's.

[217] Mr T deposes in his affidavit that at this meeting Mr Castles mentioned between 15 and 30 times his concerns about Mr W's mental health. Mr T goes on to say that it was the number of times this matter was mentioned which surprised him. Mr T's recall of the meeting was disputed by Mr Castles. He could not recall referring 15 or 20 times to Mr W's mental health but conceded "*I may well have referred to the stress of Mr W and the difficult financial position.*"

[218] We accept that some of Mr T's recollection and impression of the meeting may have been incorrect, and of course we were unable to test this with Mr T because he has since died. We are nevertheless persuaded by the submissions of Mr Katz that mentioning Mr W's state of health numerous times, or at all, was more likely than not to have been part of Mr Castles' efforts to persuade Mr T to extend part of his loan.

[219] As we discuss in the following section about Charge 8, it is our conclusion from the evidence and the cross-examination of Mr Castles that an extension of part of the

loan by Mr T would have allowed Jamieson Castles to have completed settlement with the W's having cleared all outstanding fee accounts and paying to the W's a relatively small sum. (This did not eventuate because Mr T declined to alter his arrangement with Jamieson Castles).

[220] We find that Mr Castles was severely conflicted in meeting secretly with Mr T and draw the conclusion on the balance of probabilities that Mr Castles was motivated to obtain agreement from Mr T to take less from the settlement than he was entitled to so that the practitioner could recover all his fees and there would be no obvious shortfall to the W's in the final settlement statement.

[221] In summary, in relation to Charge 7, we find that:

(1) The meeting was arranged and took place without the W's instructions or consent.

(2) Mr Castles never did disclose to the W's that a meeting between him and Mr T had taken place.

(3) Whatever the reasons for the meeting with Mr T, and without being able to establish the detail of what was said, Mr Castles disclosed personal and sensitive information which was unauthorised and improper.

(4) The unauthorised disclosure of personal and sensitive information was more likely than not to have been part of Mr Castles' attempt to persuade Mr T to extend his loan to the W's, in circumstances where Mr Castles was likely to benefit.

[222] We find that Mr Castles breached each of the rules set out in the particulars to the charge and is guilty of misconduct.

Charge 8: Unprofessional Dealings and Lack of Propriety in Third Party Dealings

[223] This is a discrete charge that alleges that the Practitioner placed inappropriate pressure on Mr T to obtain further funding for the legal fees of the practitioner. It is to be determined under the LCA.

[224] We have already found that there was a meeting initiated by Mr Castles with Mr T without the knowledge or approval of the W's or the Trustees. That is not in dispute.

[225] The evidence surrounding events at that meeting can only be provided by the two participants. Both have provided affidavits but Mr T has since died. Accordingly only the evidence of Mr Castles could be tested in cross-examination.

[226] Mr T clearly stated that a further advance of $45,000 was sought by Mr Castles to ensure that the W's would receive something out of the settlement. He was concerned *"that unless this further funding was made available by me I would receive absolutely nothing of my original investment of $50,000 and my second tranche of $40,000.*"

[227] That should not have been the case and we accept that Mr T had misunderstood the situation at the time of the meeting.

[228] Nevertheless Mr T felt under pressure. The very fact that he was asked to attend a secret meeting in the circumstances inferred some urgency. He was given personal information relating to the stress and finances of Mr and Mrs W and was asked to agree to change the terms of advances already agreed to in the form of written undertakings from Mr Castles. Quite justifiably he expected to be repaid in full from any settlement received in the proceedings.

[229] Mr Castles could not specifically recall what was said at least in some of the discussion with Mr T but acknowledged that one of the reasons for meeting with Mr T was that they (the W's) were not going to receive any money from the settlement. In fact Mr Castles acknowledged under cross-examination that the W's would be in deficit by $11,000.

[230] Mr Castles resisted the allegation in Mr T's affidavit that at the meeting he (Mr Castles) had mentioned his concerns about Mr W's health between 15 and 20 times. The Tribunal found Mr Castles' answers under cross-examination on this matter to be equivocal at best.

[231] Mr T clearly felt pressured at the meeting with Mr Castles in Pipiroa. We think he was entitled to feel that pressure due to the urgency with which the meeting was arranged; the unusual nature of the venue; the personal information that was disclosed and the request in those circumstances for further funding or possibly only a partial repayment of previous advances.

[232] In the event Mr T refused what was put to him and Jamieson Castles have never been paid the final invoice rendered by that firm.

[233] In summary, in relation to Charge 8 we find that:

(1) The meeting was arranged and took place without the W's instructions or consent.

(2) Mr Castles never did disclose to the W's that a meeting between him and Mr T had taken place.

(3) Whatever the reasons for the meeting with Mr T, and without being able to establish the detail of what was said, Mr Castles disclosed personal and sensitive information which was unauthorised and improper.

(4) The actions of the practitioner amounted to inappropriate pressure on Mr T; and were more likely than not to have been designed to obtain further funding for the legal fees of the practitioner.

(5) Mr Castles dealings with Mr T were in breach of Rules 10 and 12 Client Care Rules; were not in accordance with proper professionalism and amounted to a failure to conduct his dealings with Mr T with integrity, respect and courtesy.

[234] Accordingly we find charge 8 proved and the practitioner guilty of misconduct.

Summary of decisions on charges

[235] Accordingly the tribunal finds as follows:

Charge 1:	Dismissed
Charge 2:	Dismissed
Charge 3:	Dismissed
Charge 4:	Guilty of professional misconduct (1982 Act)
Charge 5:	Guilty of negligence and incompetence (1982 Act)
Charge 6:	Guilty of conduct unbecoming (1982 Act)
Charge 7:	Guilty of misconduct (2006 Act)
Charge 8:	Guilty of misconduct (2006 Act)

DATED at WELLINGTON this 29th day of November 2013

M. T. Scholtens QC
Member on behalf of Tribunal

Appendix 1

CHARGES:

The Auckland Standards Committee Number Three of the New Zealand Law Society ("**the Standards Committee**") charges **EION MALCOLM JAMES CASTLES** of Auckland, Solicitor ("**the Practitioner**") with:

(a) First Charge (the *Shoreham* proceedings)

In relation to events occurring on or before 31 July 2008

(i) misconduct in his professional capacity, or

(ii) negligence or incompetence in his professional capacity and that negligence or incompetence has been of such a degree as to reflect on his fitness to practice as a barrister or solicitor or as to tend to bring the profession into disrepute.

(b) Second Charge (the W proceedings)

In relation to events occurring on or before 31 July 2008

(i) misconduct in his professional capacity, or

(ii) negligence or incompetence in his professional capacity and that negligence or incompetence has been of such a degree as to reflect on his fitness to practice as a barrister or solicitor or as to tend to bring the profession into disrepute.

(c) Third Charge (the M proceedings)

In relation to events occurring on or before 31 July 2008

(i) misconduct in his professional capacity, or

(ii) negligence or incompetence in his professional capacity and that negligence or incompetence has been of such a degree as to reflect on his fitness to practice as a barrister or solicitor or as to tend to bring the profession into disrepute.

(d) Fourth Charge (the *Shoreham*, W and M proceedings together)

In relation to events occurring on or before 31 July 2008

(i) misconduct in his professional capacity, or

(ii) negligence or incompetence in his professional capacity and that negligence or incompetence has been of such a degree as to reflect on his fitness to practice as a barrister or solicitor or as to tend to bring the profession into disrepute.

(e) Fifth Charge (Conduct of the Proceedings Generally)

In relation to events occurring on or before 31 July 2008

(i) misconduct in his professional capacity, or in the alternative

(ii) conduct unbecoming a barrister or solicitor, or in the further alternative

(iii) negligence or incompetence in his professional capacity and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

(f) Sixth Charge (Unprofessional Dealings and Inappropriate or Improper Pressure on Clients)

In relation to events occurring on or before 31 July 2008

(i) misconduct in his professional capacity, or in the alternative

(ii) conduct unbecoming a barrister or solicitor.

(g) Seventh Charge (Breach of Confidence/Privilege)

In relation to events occurring on and after 1 August 2008

(i) Misconduct, or in the alternative

(ii) Unsatisfactory conduct that is not so gross, wilful or reckless as to amount to misconduct, or in the further alternative,

(iii) Negligence or incompetence in his professional capacity and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practice or so as to bring the profession into disrepute.

(h) Eighth Charge (Unprofessional Dealings and Lack of Propriety in Third Party Proceedings)

In relation to events occurring on and after 1 August 2008

(i) Misconduct, or in the alternative

(ii) Unsatisfactory conduct that is not so gross, wilful or reckless as to amount to misconduct, or in the further alternative,

(iii) Negligence or incompetence in his professional capacity and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practice or so as to bring the profession into disrepute.

The facts and matters relied upon and the particulars of the charges are as follows:

(a) First Charge (the *Shoreham* proceedings)

1. At all material times the Practitioner held a practising certificate as a barrister and solicitor issued under the Law Practitioners Act 1982 and since 1 August 2008 under the Lawyers and Conveyancers Act 2006.

2. At all material times the practitioner acted for A G W and R A W (together "the W's") and the trustees of the M Trust ("the trustees") in the manner and in relation to the matters set out below.

3. On or about 16 January 2005 the W's retained the practitioner. The scope of the retainer was to advise the W's on a claim against Airey Consultants and others ("the *Shoreham* proceedings") in relation to a leaky home owned originally by the W's but sold by them to the M Trust and situated at K Street, Remuera, Auckland.

4. The *Shoreham* proceedings had been conducted prior to 16 January 2005 by the W's former solicitors, McMahon Butterworth, Solicitors of Auckland and were prosecuted by a senior staff solicitor in the firm, Michael Thornton.

Those proceedings had been commenced by McMahon Butterworth in the names of the incorrect plaintiffs, namely in the names of the W's personally and not in the names of the trustees. Upon leaving McMahon Butterworth to practice on his own account Mr Thornton took the W's with him. The limitation period had expired as a result of which the W's were unable to save the *Shoreham* proceedings from being struck out on the grounds that the wrong plaintiffs had brought suit. Mr Thornton advised the W's of these matters and that he could no longer continue to act for them.

5. The practitioner was aware, upon taking over from McMahon Butterworth and Mr Thornton, of these matters and that the *Shoreham* proceedings were likely to fail, in which case the W's would be left without legal recourse against Airey Consultants and other defendants in the *Shoreham* proceedings and would also be liable for an adverse costs award against them.

6. The practitioner was aware that the primary reason the *Shoreham* proceedings were bound to fail was the negligence of the former solicitors McMahon Butterworth and Mr Thornton.

7. The practitioner took steps to seek to amend the *Shoreham* proceedings by seeking to obtain leave of the Court to add in another or other plaintiffs as trustees of the M Trust so that the correct plaintiffs brought suit. The defendants in the *Shoreham* proceedings defended the application and in a judgment dated 8 May 2006 Associate Judge Gendall dismissed the application.

8. Thereafter the practitioner negotiated a resolution of the *Shoreham* proceedings on the basis that all costs would lie where they fell.

9. For his legal services provided to the W's in relation to the *Shoreham* proceedings the practitioner charged $295,646 for profit costs, and a total of $337,462.64 inclusive of GST and disbursements. The *Shoreham* proceedings were of a type where a fair and reasonable fee in all the circumstances would have been $112,000 inclusive of GST and disbursements.

10. The W's paid to the practitioner the fees charged. Had they abandoned or discontinued the *Shoreham* proceedings soon after the practitioner was

retained the W's would have had a potential costs liability to the defendants in the *Shoreham* proceedings of between $72,000 and $92,280, on the practitioner's estimate.

11. Of the pure time component of the total fees of $295,646, some $40,411 was charged for perusal and some $138,725 for research and preparation.

12. The *Shoreham* proceedings were of a type where the practitioner should have advised the W's and ensured they understood that:

    (a) They were inherently likely to fail.

    (b) The prospect of saving the proceedings by amending them was unlikely.

    (c) If the W's abandoned or discontinued the proceedings shortly after the practitioner was retained by them the W's would have incurred a costs liability to the defendants of no more than $92,280, and in all probability much less.

    (d) On a costs/benefit analysis the W's would have been better off abandoning or discontinuing the *Shoreham* proceedings soon after the practitioner was retained.

13. The practitioner failed to carry out any analysis for the W's and fully and properly advise them from time to time of the matters in (a) – (d) above.

14. The practitioner failed to advise the W's from time to time that there would be no or minimal financial benefit to them in continuing with the *Shoreham* proceedings.

15. As a result the practitioner is guilty of professional misconduct.

    <u>Particulars</u>

    (a) The practitioner charged the W's on a strict time cost basis or substantially so. In doing so he failed to adopt an approach to charging of what was a fair and reasonable fee.

    (b) The practitioner failed to advise the W's at the earliest possible opportunity to abandon or discontinue the *Shoreham* proceedings

thereby extricating themselves from them at a maximum cost to them of $92,280 together with the practitioner's reasonable costs incurred to that point.

(c) The practitioner failed to advise the W's of a likely outcome of the proceedings and in accordance with realistic and plausible expectations before committing them to unnecessary liability for fees.

(d) The practitioner pursued strategies that were neither effective nor in the best interests of the W's and/or the trustees in that they were inappropriate, unnecessary and had the effect of simply increasing the costs to the clients. In particular the pursuit by the practitioner in the *Shoreham* proceedings of a claim at the suit of the W's personally when such should have been a claim at the suit of the trustees and the continued pursuit in the *Shoreham* proceedings of the claim at the suit of the W's was inappropriate, unnecessary and ill-fated and incurred for the W's and/or the trustees unnecessary expense and the risk of exposure to the defendants in the *Shoreham* proceedings of an award of costs against the W's and/or the trustees.

(b) Second Charge (the W proceedings)

Paragraphs 1 – 8 of the first charge are repeated.

16. On or about 5 December 2006 the practitioner was retained by the W's who issued proceedings against the W's' former solicitors McMahon Butterworth and Mr Thornton for negligence and wasted costs incurred by the W's in the *Shoreham* proceedings ("the W proceedings"). The wasted costs were those incurred by the W's with McMahon Butterworth ($33,863.81) and Mr Thornton ($12,457.57) being a total of $74,332.10 for profit costs, disbursements and experts fees, together with those incurred with the practitioner in relation to the *Shoreham* proceedings in the sum of $337,462.64. The total actual amount sought by way of recovery in the W proceedings was $416,016.35.

17. The practitioner advised the W's to file the W proceedings and seek an order for summary judgment. Such a step incurred additional costs for the W's than had the proceeding been commenced in the ordinary way.

18. The defendants opposed summary judgment and a defended hearing of the application took place on 20 September 2007 but no judgment was ever delivered.

19. During the course of the W proceedings the solicitors acting for the indemnifiers of McMahon Butterworth gave notice that they would seek to join in as third parties the practitioner's firm on the grounds, inter alia, of that firm's negligence. Third party notices were filed and served on the practitioner. The solicitors for Mr Thornton concurred in the taking of that step.

20. Thereafter and notwithstanding the joinder of the practitioner and his firm as third parties, the practitioner continued to act for the W's including applying to the Court for an order setting aside the third party notices. That application went to a defended hearing but no judgment was delivered.

21. From the time when the former solicitors gave notice of third party proceedings against the practitioner he had a conflict of interest and should have declined to act but continued to do so, charging the W's for his attendances.

22. The W proceedings were settled in part at a mediation on 27 November 2007, particulars of which are set out below (the M proceedings).

23. For his legal services provided to the W's in relation to the W proceedings the practitioner charged $153,997 for profit costs, and a total of $177,648.31 inclusive of GST and disbursements. Of the pure time component of the fees of $153,997 some $11,716.50 was for perusal and $74,967.50 was for research.

24. The W's paid to the practitioner the fees charged. Had the practitioner not commenced the proceedings by way of summary judgment and not continued to act when his own conduct was in issue the W's would not have been charged the total sum of $153,997 for profit costs.

25. The W proceedings were of a type where the practitioner should have advised the W's and ensured they understood that:

    (a) Summary judgment was not appropriate.

(b) The amount to be recovered was $416,016.35.

(c) The costs of seeking to recover $416,016.35 had to be balanced against the amount to be expended to recover that figure.

(d) The practitioner had a conflict of interest in continuing to act when the solicitors for the indemnifiers of McMahon Butterworth had issued a third party notice against the practitioner and his firm.

26. The practitioner failed to advise the W's of the matters in (a) – (d) above.

27. As a result the practitioner is guilty of professional misconduct.

Particulars

(a) The practitioner charged the W's and/or the trustees on a strict time cost basis or substantially so. In doing so he failed to adopt an approach to charging of what was a fair and reasonable fee.

(b) The fees or proportion of fees in relation to the third party proceedings should not have been incurred and charged at all.

(c) The practitioner failed to advise the W's and/or the trustees of a likely outcome of the proceedings and in accordance with realistic and plausible expectations before committing them to unnecessary liability for fees.

(d) The practitioner pursued strategies that were neither effective nor in the best interests of the W's and/or the trustees in that they were inappropriate, unnecessary and had the effect of simply increasing the costs to the clients. In particular the pursuit by the practitioner in the W proceedings for wasted expenditure incurred in the course of the *Shoreham* proceedings, the practitioner applied for summary judgment when such an application should have been seen as inappropriate and inherently unlikely to succeed. In applying for summary judgment the practitioner incurred for the W's and/or the trustees unnecessary expense and the risk of exposure to the defendants in relation to that application of an award of costs against the W's and/or the trustees.

(c) Third Charge (the M proceedings)

Paragraphs 1 – 8 of the first charge are repeated.

28. On or about 5 December 2006 the practitioner was retained by the trustees to issue proceedings against the W's former solicitors for negligence for lost opportunity, being the loss of the opportunity or chance by the trustees to recover damages from the defendants in the W proceedings ("the M proceedings").

29. In the statement of claim in the M proceedings the practitioner sued to recover for the trustees the sum of $247,813.51 for remedial work to the K Street property, $39,081.83 for financing costs for the remedial works and $30,541.36 for expenses incurred in a forced sale of the K Street property, necessitated for the purposes of freeing up capital to pay for legal expenses.

30. In the M proceedings the defendants, McMahon Butterworth, issued third party proceedings against the practitioner. The practitioner applied to have the notices set aside. That application was heard by an Associate Judge but no judgment was ever delivered. The practitioner billed the W's $65,834 for the third party proceedings.

31. From the time when the former solicitors gave notice of third party proceedings against the practitioner he had a conflict of interest and should have declined to act but continued to do so, charging the W's for his attendances.

32. At mediation on 27 November 2007 concerning the W proceedings and the M proceedings the W's and the trustees entered into a partial settlement with McMahon Butterworth whereby the indemnifiers of McMahon Butterworth agreed to pay to the W's and the trustees the sum of $225,000. Such sum was to settle:

(a) The W proceedings in relation to:

(i) Costs of remedial work

(ii) Interest on money borrowed to effect remedial works.

(iii) Expenses incurred on a forced sale.

(b) The M proceedings in relation to:

(i) Wasted legal costs with McMahon Butterworth.

(ii) Expenses incurred with McMahon Butterworth.

33. The partial settlement did not settle:

(a) In relation to the W proceedings.

(i) Actual solicitor and own client costs and disbursements incurred in the *Shoreham* proceedings in the sum of $341,684.25.

(ii) Interest in the sum of $25,275.28.

(iii) Legal fees incurred with the practitioner on a 2B scale basis in the sum of $50,718.

(iv) Costs arising from the third party notice in the sum of $8,110.43.

(b) In relation to the M proceedings:

(i) Solicitor and own client costs and disbursements arising from the third party notice in the sum of $65,834.74.

(ii) Interest in the sum of $2,259.23.

(iii) Legal fees incurred with the practitioner on a 2B basis in the sum of $69,978.00.

34. The matters not resolved in the mediation were ultimately referred to arbitration. Prior to the arbitral hearing the W's and the trustees settled the outstanding matters set out in para 33 above whereby the indemnifiers for McMahon Butterworth agreed to pay to the W's and the trustees the total sum of $405,000.

35. In or about February 2007 the W's settled a separate claim against Michael Thornton (formerly a senior solicitor with McMahon Butterworth) for the sum of $25,000.

36. The M proceedings were of a type where the practitioner should have advised the W's and their co-trustee Mr P and ensured they understood that:

(a) The amount to be recovered was $516,113.96.

(b) The costs of seeking to recover $516,113.96 had to be balanced against the amount to be expended to recover that figure.

(c) The practitioner had a conflict of interest in continuing to act when the solicitors for the indemnifiers of McMahon Butterworth had issued a third party notice again the practitioner and his firm.

(d) They were not in the circumstances liable for his fees in defending the third party proceedings.

(e) He was required to cease acting for them upon a conflict of interest arising.

(f) They, together with the other trustee, Mr P, in suing as trustees were incurring a personal liability jointly and severally for the practitioner's fees together with any liability for costs awarded to other parties in the proceeding.

37. The practitioner failed to advise the W's of the matters in (a) – (f) above.

38. For his legal services provided to the W's and the trustees in relation to the M proceedings the practitioner charged $450,953.50 for profit costs, and a total of $516,113.96 inclusive of GST and disbursements. Of the pure time component of the fees of $450,953.50 some $60,021 was for perusing and $214,598 was for research. The W's/trustees paid to the practitioner the fees charged.

39. As a result the practitioner is guilty of professional misconduct.

<u>Particulars</u>

(a) The practitioner charged the W's and/or the trustees on a strict time cost basis or substantially so. In doing so he failed to adopt an approach to charging of what was a fair and reasonable fee.

(b) The fees or proportion of fees in relation to the third party proceedings should not have been incurred and charged at all.

(c) The practitioner failed to advise the W's and/or the trustees of a likely outcome of the proceedings and in accordance with realistic and plausible expectations before committing them to unnecessary liability for fees.

(d) The practitioner failed to advise the W's and the other trustee, Mr P, that in suing as trustees they were incurring a personal liability jointly and severally for the practitioner's fees together with any liability for costs awarded to other parties in the proceeding.

(d) Fourth Charge (the *Shoreham*, W and M proceedings together)

Paragraphs 1 – 39 are repeated.

40. The total fees charged by the practitioner in the *Shoreham* proceedings, the W proceedings and the M proceedings were $1,031,224.90 (excluding counsel's fees, arbitrators and mediators costs). The gross fees charged were $1,081,454.70. Such fees include the net figure of $59,107.23 (inclusive of GST and disbursements) charged for services rendered 1 August 2008 through 30 November 2008. The total fees charged by the practitioner down to 31 July 2008 were $972,117.70 (excluding counsel's fees, arbitrator's and mediator's costs).

41. The W's and trustees received by way of settlement a total sum of $655,000 as follows:

(a)	From Michael Thornton	$ 25,000.00
(b)	From McMahon Butterworth following mediation	$225,000.00
(c)	From McMahon Butterworth after reference but prior to arbitration	$405,000.00

42. The W's and the trustees expended the sum of $1,031,224.90 (excluding counsel's fees, arbitrator's and mediator's costs) or $972,117.70 up to and

including 31 July 2008 to recover the total sum of $655,000. Such expenditure on an overall basis and having regard to the likely outcome and actual outcome was grossly excessive. A fair and reasonable fee in relation to all three proceedings would have been $462,000, inclusive of GST and disbursements. As a result the practitioner is guilty of professional misconduct.

Particulars

(a) In breach of Rule 3.01 of the Rules of Professional Conduct for Barristers and Solicitors the practitioner charged the W's a fee which was much more than a fair and reasonable fee for the work done having regard to the interests of the W's and the practitioner.

(b) The fees charged were grossly excessive in all the circumstances and would be so regarded by solicitors of good repute.

(c) The practitioner charged the W's and/or the trustees on a strict time cost basis or substantially so. In doing so he failed to adopt an approach to charging of what was a fair and reasonable fee in all the circumstances.

(d) The fees or proportion of fees in relation to the third party proceedings should not have been incurred and charged at all.

(e) The practitioner failed to advise the W's and/or the trustees of a likely outcome of the proceedings and in accordance with realistic and plausible expectations before committing them to unnecessary liability for fees.

(f) The practitioner pursued strategies that were neither effective nor in the best interests of the W's and/or the trustees in that they were inappropriate, unnecessary and had the effect of simply increasing the costs to the clients. In particular the pursuit by the practitioner in the *Shoreham* proceedings of a claim at the suit of the W's personally when such should have been a claim at the suit of the trustees and the continued pursuit in the *Shoreham* proceedings of the claim at the suit of the W's was inappropriate, unnecessary and ill-fated and incurred for the W's and/or the trustees unnecessary expense and the risk of exposure to the defendants in the *Shoreham* proceedings of an award of costs

against the W's and/or the trustees and by way of further particulars, the pursuit by the practitioner in the W proceedings for wasted expenditure incurred in the course of the *Shoreham* proceedings, the practitioner applied for summary judgment when such an application should have been seen as inappropriate and inherently unlikely to succeed. In applying for summary judgment the practitioner incurred for the W's and/or the trustees unnecessary expense and the risk of exposure to the defendants in relation to that application of an award of costs against the W's and/or the trustees.

(g) The Mr P, that in suing as trustees they were incurring a personal liability jointly and severally for the practitioner's fees together with any liability for costs awarded to other parties in the proceeding.

(e) Fifth Charge

Paragraphs 1 – 8 of the first charge are repeated.

43. In his conduct of the *Shoreham* proceedings, the W proceedings and the M proceedings the practitioner:

(a) Failed to advise the W's from time to time of the total or aggregate costs they were incurring when compared with the likely outcome in financial terms that might accrue to them.

(b) Failed to advise the W's that the further conduct of the proceedings or any one or more of them was uneconomic.

(c) Failed to carry out from time to time any or any proper or adequate assessment of the various proceedings as to their likely success, viability, purpose and whether or not such proceedings or their continuation was in the best interests of the W's.

(d) The practitioner pursued strategies that were neither effective nor in the best interests of the W's and/or the trustees in that they were inappropriate, unnecessary and had the effect of simply increasing the costs to the clients. In particular the pursuit by the practitioner in the *Shoreham* proceedings of a claim at the suit of the W's personally when

such should have been a claim at the suit of the trustees and the continued pursuit in the *Shoreham* proceedings of the claim at the suit of the W's was inappropriate, unnecessary and ill-fated and incurred for the W's and/or the trustees unnecessary expense and the risk of exposure to the defendants in the *Shoreham* proceedings of an award of costs against the W's and/or the trustees and by way of further particulars, the pursuit by the practitioner in the W proceedings for wasted expenditure incurred in the course of the *Shoreham* proceedings, the practitioner applied for summary judgment when such an application should have been seen as inappropriate and inherently unlikely to succeed. In applying for summary judgment the practitioner incurred for the W's and/or the trustees unnecessary expense and the risk of exposure to the defendants in relation to that application of an award of costs against the W's and/or the trustees.

(e) Carried out unnecessary or non cost effective work thereby increasing the solicitor and own client costs of the W's and their liability to the defendants in the various proceedings on a party and party basis (in particular in seeking summary judgment in the W proceedings).

(f) Carried out repetitive work or work for which no proper records were kept including proper time records to enable the hours charged to be accurately verified as having been properly incurred and chargeable.

(g) Continued to act and to charge the W's/trustees for work done by him following the filing and service of third party proceedings against the practitioner and his firm thereby creating a conflict of interest but failed to advise the W's/trustees accordingly.

(h) Retained as counsel Patrick Finnigan of Auckland, Barrister without advising the W's and the trustees that on doing so they would be liable for Mr Finnigan's fees.

44. As a result the practitioner is guilty of professional misconduct or an alternative charge.

Particulars

(a) In breach of Rule 1.01 of the Rules of Professional Conduct for Barristers and Solicitors the practitioner breached his obligations of trust and confidence.

(b) The practitioner failed in his general professional obligations as between solicitor and own client to act professionally and at all times only in the best and genuine interests of the clients.

(c) The fees or proportion of fees in relation to the third party proceedings should not have been incurred and charged at all.

(f) Sixth Charge

Paragraphs 1 – 8 of the first charge are repeated.

45. From time to time the practitioner through his firm rendered accounts to the W's and/or the trustees. Such accounts were paid by the W's and/or the trustees generally in a timely manner but on occasions after some delay due to cash flow issues they were experiencing. Nevertheless and apart from the funding provided to assist them from Mr T and Mr P and also their bank the ASB Bank the W's and the trustees did not borrow any money nor incur or seek any credit with the practitioner or his firm in relation to outstanding fees.

46. The W's and the trustees do not and did not know at any time what arrangements the practitioner and his firm had with their own bankers regarding cash flow and overdraft facilities. At no time did the W's or the trustees ask nor did the practitioner offer that the firm's bankers provide or extend credit facilities to assist with the funding of the litigation whether as a general credit facility or by extension or as part of the firm's general overdraft facility.

47. On 8 August 2007 the legal accountant to the firm sent to Mr W an email as follows:

> "The delay in resolution of both High Court cases (the cause of which we acknowledge and accept is outside both your and our control) is causing extreme difficulties with our bankers. As you are aware they continue to fund the litigation at a

> significant cost to us. Our bankers have demanded that a payment on account of your outstanding invoices be made immediately. We are anxious to maintain our relationship with our bankers who have been and continue to be understanding of the circumstances. We are cognisant and sympathetic of your position however, to maintain the banks goodwill a payment must be made. Should payment by way of internet banking be more convenient for you, we attach a copy of our trust account details."

48. The W's and the trustees are and were not aware of any demand or requirement from the bank other than the claim as set out in the email. The W's and the trustees never at any time requested the bank or the practitioner or his firm to extend to them any credit facility whether directly, by way of the firm's overdraft facility or otherwise.

49. The email was sent to Mr W in an attempt to put pressure on Mr W to pay outstanding invoices by a statement, contrary to the fact, that the firm's bank had demanded this and the failure to pay in some way created a risk to the goodwill between the bank, the firm and the W's or the trustees.

50. The sending of the email was improper or inappropriate and an abuse of the relationship of trust and confidence between the practitioner and Mr and Mrs W or the trustees.

51. As a result the practitioner is guilty of professional misconduct or an alternate charge.

Particulars

(a) In breach of Rule 1.01 of the Rules of Professional Conduct for Barristers and Solicitors the practitioner breached his obligations of trust and confidence.

(b) The practitioner acted in breach of Rule 1.06 of the Rules of Professional Conduct for Barristers and Solicitors in using the firm's overdraft facilities for the benefit of the client and thereby extending credit to the client in circumstances where the practitioner failed to act as an independent adviser in the clients' best interests.

(c) The practitioner failed in his general professional obligations as between solicitor and client to act professionally and at all times only in the best interests of his clients and in particular put unfair and unreasonable pressure on Mr W/the trustees before being prepared to continue to act.

(g) Seventh Charge (Events after 1 August 2008)

Paragraphs 1 – 50 are repeated.

52. On or about 3 December 2008 the practitioner asked to meet and met with Mr T, brother-in-law of Mr W. Mr T had previously assisted the W's with funding their proceedings brought by the practitioner on their behalves and on behalf of the trustees.

53. The meeting took place without the knowledge or consent of the W's or the trustees or either of them and the practitioner knew that.

54. At the meeting the practitioner disclosed to Mr T:

(a) That he was of the opinion Mr W was suffering from stress.

(b) That he was concerned for Mr W''s mental stability.

(c) A considerable financial award was due from an anticipated settlement of the proceedings in favour of the W's and the trustees.

(d) Mr T would have to provide a further $45,000 of funding to enable the proceedings to be continued in the expectation of achieving through them the anticipated settlement.

(e) The $45,000 additional funding was not a loan as the W's and the trustees would still owe legal fees to the practitioner even after any settlement.

55. The actions of the practitioner were unauthorised and unknown to Mr W and a breach of confidence and privilege.

56. As a result the practitioner is guilty of misconduct or an alternative charge.

Particulars

(a) In breach of Rule 5.4 Lawyers & Conveyances Act (Lawyers: Conduct and Client Care) Rules 2008 ("Client Care Rules") the practitioner acted or continued to act in circumstances where there was a conflict or risk of conflict between his interests and the interests of the W's and the trustees.

(b) In breach of Rule 5.4.1 Client Care Rules the practitioner failed to disclose to the W's and the trustees that he had approached Mr T in circumstances where the practitioner's interests as discussed with Mr T touched upon the ongoing provision of legal services.

(c) In breach of Rule 5.4.2 Client Care Rules the practitioner failed to decline to act further when his own interests in securing funding or further funding for the ongoing costs conflicted with his obligation to the W's and the trustees and his obligation to complete the retainer.

(d) In breach of Rule 7 Client Care Rules the practitioner failed to disclose promptly to the W's and the trustees the fact that he had met with Mr T and the matters discussed with Mr T, being matters relevant to and in respect of which the practitioner was engaged to act.

(e) In breach of Rule 8 Client Care Rules the practitioner failed to protect and hold in strict confidence all information concerning Mr W and his personal and financial circumstances.

(h) Eighth Charge (Events after 1 August 2008)

Paragraphs 1 – 50 are repeated.

57. On or about 3 December 2008 the practitioner asked to meet and met with Mr T, brother-in-law of the wife of Mr W. Mr T had previously assisted the W's with funding their proceedings brought by the practitioner on their behalves and on behalf of the trustees.

58. The meeting took place without the knowledge or consent of the W's or the trustees or either of them and the practitioner knew that.

59. At the meeting the practitioner disclosed to Mr T:

(a) That he was of the opinion Mr W was suffering from stress.

(b) That he was concerned for Mr W''s mental stability.

(c) A considerable financial award was due from an anticipated settlement of the proceedings in favour of the W's and the trustees.

(d) Mr T would have to provide a further $45,000 of funding to enable the proceedings to be continued in the expectation of achieving through them the anticipated settlement.

(e) The $45,000 additional funding was not a loan as the W's and the trustees would still owe legal fees to the practitioner even after any settlement.

60. The actions of the practitioner amounted to inappropriate pressure on Mr T to obtain further funding for the legal fees of the practitioner.

61. As a result the practitioner is guilty of misconduct or an alternative charge.

Particulars

(a) In breach of Rule 10 Client Care Rules the practitioner in his dealings and discussions with Mr T put undue or inappropriate pressure on Mr T to contribute a further $45,000 funding in circumstances or in a manner which was not in accordance with proper standards of professionalism.

(b) In breach of Rule 12 Client Care Rules the practitioner in his dealings and discussions with Mr T put undue or inappropriate pressure on Mr T to contribute a further $45,000 funding in circumstances or in a manner which amounted to a failure to conduct his dealings with Mr T with integrity, respect and courtesy.

And upon the grounds appearing in the affidavits of Mr W, Mrs W, Mr P, Mr T and Ms O filed herein.

Appendix 2

Rules of Professional Conduct for Barristers and Solicitors

Chapter 3

Relations: Practitioners and Clients

3.01 Rule

A practitioner shall charge a client no more than a fee which is fair and reasonable for the work done, having regard to the interests of both client and practitioner.

Commentary

(1) Charges must be fair and reasonable in all the circumstances. Practitioners are referred to the Society's Property Transactions Practice Guidelines. The "Principles of Charging" set out in the guidelines include:

Charges by a lawyer for professional work shall be calculated to give a fair and reasonable return for the services rendered, having regard to the interests of both client and lawyer. Charges shall take account of all relevant factors, including:

(a) the skill, specialised knowledge, and responsibility required;

(b) the importance of the matter to the client and the results achieved;

(c) the urgency and circumstances in which the business is transacted;

(d) the value or amount of any property or money involved;

(e) the complexity of the matter and the difficulty or novelty of the questions involved;

(f) the number and importance of the documents prepared or perused;

(g) the time and labour expended;

(h) the reasonable costs of running a practice.

The relative importance of the factors set out above will vary according to the particular circumstances of each transaction.

(2) A practitioner must bear in mind at all times the provisions of Part VIII of the Act dealing with the revision of costs.

(3) A client who expresses dissatisfaction about the amount of a fee and continues to do so after having the matter explained, must be advised of his or her rights under Part VIII of the Act.

(4) This rule is drafted in terms, which contemplate the possibility of charging a contingency fee. The following points should, however, be noted in that regard:

(i) It may be that, in some circumstances at least, the common law rules against maintenance and champerty may still apply, so as to invalidate an agreement for a contingency fee. In the absence of clear and current authority on the point, the Society draws the possibility of invalidity to the attention of practitioners.

(ii) If, however, a practitioner assumes the validity of a contingency fee arrangement in a particular case, then the quantum of the fee would, nonetheless, be subject to revision under Part VIII of the Act and the provisions of this rule.

(iii) Rule 18 of the International Code of Ethics (see APPENDIX I) provides a point of comparison.

The attention of practitioners is drawn to *Mills v Rogers* [1899] 18 NZLR 291 (CA).