LCRO 203/2010

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Canterbury - Westland Standards Committee 2
BETWEEN	**IR**
	Applicant
AND	**SF**
	Respondent

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

DECISION

Background

[1] In early 2008 Mr IR instructed Mr SF to act on his behalf in respect of relationship property litigation which was then underway.

[2] At the time he instructed Mr SF there had been one Family Court decision and two High Court decisions issued in respect of the matters in contention between Mr IR and his wife (Ms IS), as a result of which the matter had been returned to the Family Court for recalculation of the contributions of Mr IR and Ms IS to the marriage.

[3] The marriage was one of short duration and the fundamental issue at stake was whether relationship property should be divided equally or unequally. Mr IR contended that the values attributed to the properties that each of them had brought into the marriage were roughly equal after the effect of inflation was taken into account, and that therefore relationship property should be divided equally.

[4] In the first Family Court judgment, Judge Strettell determined that there should be unequal sharing in the proportion of 65% (Ms IS) and 35% (Mr IR).

[5] Mr IR appealed that judgment to the High Court, initially acting on his own behalf. Part way through proceedings however he instructed Mr IU, a barrister briefed on instructions from Mr IV.

[6] The appeal was only allowed in part, and the matter was remitted back to the Family Court for adjustments to the shares to be awarded to each party. The underlying finding of the Family Court Judge as to unequal sharing, remained.

[7] It was at this stage that Mr SF was instructed by Mr IR. At the time he was instructed, Mr SF was about to go on leave. The Family Court hearing was scheduled for mid May and following his return from leave, Mr SF undertook a review of the Family Court file. This took some time, after which he focussed on preparing for the hearing.

[8] Following the second Family Court hearing, Judge Strettell adjusted the proportions to 62% (Ms IS) and 38% (Mr IR). Mr SF had attempted to argue the principle as to whether there should be equal or unequal sharing but Judge Strettell disallowed argument to be presented on that issue on the basis that it had already been litigated on three previous occasions.

[9] Mr SF was instructed to appeal that decision and in a decision issued in December 2008, the appeal was disallowed.

[10] Mr SF then lodged proceedings for leave to appeal the earlier High Court decisions of Hansen J. That decision was issued on 3 June 2009 and leave to appeal to the Court of Appeal was granted.

[11] In the meantime, the parties were facing a mortgagee sale of a property which had been acquired by them at ADA, where Mr IR was living and growing crops.

[12] To avoid the mortgagee sale, Mr IR needed to refinance the existing borrowings. Ms IS was not prepared to execute any new loan documentation, and accordingly, it was necessary for the property to be transferred to Mr IR alone.

[13] At that time, as a result of the judgment of Judge Strettell, Mr IR was required to pay the sum of $36,250 to Ms IS. Ms IS was unwilling to transfer ownership of the property to Mr IR without either receiving that payment or alternatively securing the

payment together with costs awarded to her, pending the outcome of the appeal which was due to be heard in December 2008.

[14] Mr SF advised Mr IR not to make payment of the funds pending that appeal, and negotiated with Ms IS's counsel as to the terms on which this could occur.

[15] The resulting agreement was that Mr SF would retain the sum of $36,250 in his Trust account to be paid at the conclusion of the High Court appeal (unless the decision ordered otherwise). In addition, Mr IR was to execute an agreement to mortgage the property to ACZ (Mr SF's firm) together with a Power of Attorney. A caveat was to be lodged to protect the agreement to mortgage. The purpose of this documentation was to enable ACZ to call on the undrawn portion of the new TSB loan to enable the costs of $9,000 (and any further costs) to be paid to Ms IS.

[16] In addition, Ms IS was entitled to lodge a Notice of Claim against the property pending payment of these amounts. The agreement provided that this was to protect her "beneficial interests" in the property and also acknowledged that the Notice of Claim provided security for any further costs awards that may be made in Ms IS's favour.

[17] The terms of the agreement negotiated between Mr SF and Ms IS's counsel (Ms IT) were recorded in a memorandum and this was sent by Mr SF to Mr IR. The covering letter was brief and did not provide any comment on the terms. In addition, although the document was sent by letter dated 5 September 2008, it was not received by Mr IR by mail, and he first saw the document when he received it by fax mid afternoon on Monday 8 September.

[18] Mr IR responded by fax within approximately 70 minutes, noting that the amount to be advanced by the bank was $165,000 and not $140,000 as recorded in the memorandum. He also made the following comment:

> "I am uneasy about Point 7. This seems overkill as her interest is only in the sum to be held in the Trust account. In terms of Strettell's decision she does not appear to have a beneficial interest in the property itself only a debt from me to her. If you think this is a reasonable clause go ahead and sign, otherwise contact me".

[19] The consent memorandum was duly signed by Mr SF on Mr IR's behalf, without any further communication between them.

[20] Due to a misunderstanding, or an oversight on behalf of either Mr SF or Ms IT, the memorandum was not filed with the Court, and consequently no Consent Orders issued. However, the parties and their lawyers proceeded as if they had.

[21] Title to the property was transferred to Mr IR, the refinancing took place, the mortgagee sale was averted and Ms IS's Notice of Claim was interested. The caveat pursuant to the agreement to mortgage was also registered.

[22] Following the High Court decision declining the appeal from the Family Court decision, Mr IR then embarked on proceedings to appeal the two previous High Court decisions, leave for which had been obtained by Mr SF. To do so, he needed to borrow further funds from the bank on the security of its mortgage over the ADA property. However, he was unable to do so because of the Notice of Claim and caveat registered against the title.

[23] In the meantime, as required by the memorandum, Mr SF made payment of the sum of $36,250 to Ms IS, but not the sum of $9,000 which had been awarded to her in respect of costs.

[24] Numerous Court proceedings followed, but Mr SF was not instructed in respect of these and the facts as recorded above represent the facts giving rise to Mr IR's complaints about Mr SF. It is appropriate to note at this stage, that the Court of Appeal allowed the appeal and the declaration of unequal sharing of relationship property which had been made in the Family Court was set aside.

The Complaint

[25] Mr IR lodged his complaints in January 2010. They comprised of general complaints and a number of specific complaints.

[26] The general complaints were that the legal advice and services provided by Mr SF had been below professional standards, and constituted professional misconduct and/or conduct unbecoming a lawyer in that he had failed to act in a competent and timely manner and had failed to take reasonable care.

[27] Mr IR alleged breaches of Rules 3, 5.3, 13 and 13.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. He also alleged that Mr SF had failed to protect his interests in breach of s 4 of the Lawyers and Conveyancers Act 2006.

[28] The specific complaints are as follows:

1. Trust account.
   (i) Failed to provide a full and clear accounting to Mr IR
   (ii) Disbursed funds contrary to instructions and without authority
   (iii) Applied funds to his own fees without authority
   (iv) Failed to hold the sum of $9,000 in trust as required.
2. Failed to report alleged misconduct of another Practitioner.
3. Failed to follow instructions and protect the interests of the client.
4. Failed to follow instructions on the conduct of an appeal.
5. Failed to effect a relationship property distribution.
6. Failed to progress an appeal.
7. Was unprofessional in attempting to find other ways (including securing family money) to facilitate payment of fees.
8. Failure to advise of breach of Court order by Ms IS in failing to pay share of accountant's invoices.
9. Failed to act on instructions to commence judicial review.
10. Failed to take prompt steps to remove notice of claim.
11. Overcharged.

The Standards Committee Determination

[29] The Standards Committee conducted a hearing on the papers following which it called for Mr SF's timesheets.

[30] In its decision, the Committee addressed each of the specific complaints made by Mr IR and came to the view that in all cases other than the complaint relating to deduction of costs, no further action was required.

[31] In respect of the unauthorised deduction of fees, the Standards Committee came to the view that Mr SF's conduct constituted unsatisfactory conduct but no orders were made in respect of that finding.

The Application for Review

[32] Mr IR has applied for a review of the Standards Committee determination. He considers the fact that the Standards Committee found no misconduct[1] defies commonsense in that Mr SF "took an award of $410,000 gross, about $250,000 net, and converted it to a $50,000 loss as a result of his failure to obtain the transfer of the

[1] A finding of misconduct can only be made by the Lawyers and Conveyancers Disciplinary Tribunal – refer s 242 LCA

property awarded to [Mr IR], instead arranging (without warning) for its transfer into [his] name as a trustee for [his] ex-wife's interest in that property, and imposing a Notice of Claim for her claimed interest in the property (which should have been extinguished by the payment ordered by the Court being made to her from the funds in [Mr SF]'s Trust account per my directions".

[33] The outcome sought by Mr IR is that charges be laid against Mr SF before the Lawyers and Conveyancers Disciplinary Tribunal alleging that Mr SF is a person unfit to practice law.

The Applicable Law

[34] Mr IR framed his complaints in terms of the Lawyers and Conveyancers Act 2006 and the Conduct and Client Care Rules 2008.

[35] The Lawyers and Conveyancers Act came into force on 1 August 2008.

[36] Mr SF was instructed by Mr IR in February 2008 and the hearing before Judge Strettell, being the second Family Court hearing before that Judge, took place in May 2008. The decision was issued in June 2008.

[37] In addition, Mr IR has complained that Mr SF has failed to provide an overall strategy to enable Mr IR to obtain his desired outcome. This alleged failure would have occurred on a continuous basis.

[38] Consequently, the conduct and service provided for the second Family Court hearing, and the general aspect of the complaints, fall to be considered in terms of the transitional provisions of the Lawyers and Conveyancers Act. All other aspects of the conduct complained of fall to be considered in terms of the Lawyers and Conveyancers Act and the Conduct and Client Care Rules.

[39] The Standards Committee determination did not include any consideration of the different tests to be applied in respect of Mr SF's conduct. However, I intend to correct that in this review.

[40] The transitional provisions are contained within s 351 of the Act. This section provides that if a lawyer is alleged to have been guilty before 1 August 2008, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made after 1 August 2008 to the Complaints Service established by the New Zealand Law Society.

[41] Section 352 of the Act provides that penalties may only be imposed in respect of conduct which could have been imposed for that conduct at the time the conduct occurred.

[42] The relevant standards which applied prior to 1 August 2008 are set out in ss 106 and 112 of the Law Practitioners Act 1982. Those sections provide that disciplinary sanctions may be imposed where a lawyer is found guilty of misconduct in his or her professional capacity, or of conduct unbecoming a barrister or solicitor. In addition, those sections provide that disciplinary sanctions may be imposed if a lawyer has been guilty of negligence or incompetence in his or her professional capacity of such a degree or so frequent as to reflect on his or her fitness to practice. Further guidance can be obtained from the Rules of Professional Conduct for Barristers and Solicitors which were the applicable rules at the time in question.

[43] The threshold for disciplinary intervention under the Law Practitioners Act 1982 was therefore relatively high. Misconduct is generally considered to be conduct of sufficient gravity to be termed "reprehensible", "inexcusable", "disgraceful", "deplorable", or "dishonourable" or if the default can be said to arise from negligence, such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on the lawyer's fitness to practice (*Atkinson v Auckland District Law Society*, NZLPDT, 15 August 1990; *Complaints Committee No. 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105).

[44] Conduct unbecoming has a slightly lower threshold. The test will be whether the conduct is acceptable according to the standards of "competent, ethical and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at page 811).

[45] Having noted the differing tests to be applied in respect of conduct prior to and after 1 August 2008, I observe that Mr IR has not made any complaint specifically about Mr SF's performance at the Family Court hearing. The general complaint that the standard of legal service provided by Mr SF was substandard, applies as much after 1 August 2008 as before, if not more so because Mr SF acted for Mr IR for a longer period after 1 August 2008 than before.

[46] Consequently, I intend to proceed to consider all conduct together rather than specifically identifying pre and post 1 August conduct. However, I have noted the different standards to be applied and noted this in my decision.

Review

[47] This review commenced with a hearing in Christchurch on 21 July 2011. Unfortunately, there was insufficient time to complete the hearing at that time. In addition, it became apparent during the course of the hearing that the District Court proceedings which were currently being pursued by the parties, had reached a stage where Mr IR had filed a defence and counterclaim alleging negligence on the part of Mr SF, such that I perceived that it was possible at that stage, that the Court may make observations in the course of its decision about Mr SF's conduct and the legal services provided which would be pertinent to this review.

[48] However, since that time, the District Court proceedings have progressed to the stage where Mr IR advises that there is likely to be a formal, unopposed hearing in respect of those proceedings as they now stand. Mr SF has not commented on this view but it is of little moment.

[49] The judgment of the High Court in *Dorbu v LCDT* CIV 2009-404-7381 makes it clear that the Tribunal (and by extension the LCRO) must come to his or her own conclusions as to the conduct in question, and not merely adopt the comments or decisions of the Court as his or her own. Consequently, any comment or decision that may be made in the District Court proceedings will have little bearing on the outcome of this review.

[50] The hearing continued in Christchurch on 29 February 2012.

[51] During the course of this review, Mr IR has provided extensive submissions and correspondence. In some cases, the material he has provided goes beyond the matters which are the subject matters of the complaint.

[52] At the commencement of the second day of the hearing, I drew the parties' attention to the fact that this is a review of all or any of the aspects of the inquiry carried out by the Standards Committee in relation to the complaints to which the Standards Committee determination relates. No matters other than those which were the subject of the complaint can be considered.

Procedural matters

[53] Mr IR's issue with the Standards Committee determination is that it has failed to properly investigate the matter and to use its investigative powers to obtain evidence where none is available. He considers that the Standards Committee has accepted the statements of Mr SF without seeking supporting evidence. Primarily, he considers that

the Standards Committee should have called for Mr SF's files. There is now a practical problem in that regard, in that the files are in the Christchurch red zone and it is unlikely that they will ever be available to Mr SF.

[54] This Office is obliged to conduct a review with as much expedition as possible, and I am concerned that already significant time has elapsed since the application was lodged, and of course much longer since the complaint was lodged. The effect on a lawyer of an outstanding complaint cannot be understated, and natural justice dictates that the review should proceed with the information and evidence available.

[55] I have before me a considerable amount of evidence and submissions, and whilst mindful that further information may be available in Mr SF's files, it is important to proceed and bring this matter to a conclusion.

[56] Mr IR also has another concern that the Standards Committee did not have before it the bundle of documents which he delivered by hand to the Complaints Service after he had lodged his complaint. These documents were referred to in his letter of complaint. Mr IR notes that the Standards Committee did not refer to these documents in its determination and it seems that they may not have been before the Committee. The case manager at this Office has been carefully through Mr IR's letter of complaint and identified the documents referred to in that letter. Other than perhaps the Consent Memorandum, all of the documents referred to in Mr IR's letter were provided to this Office by the Complaints Service. During the course of this review I have received several copies of the Consent Memorandum from various parties and that possible issue has therefore been dealt with. I do not therefore consider that the determination was procedurally flawed for the reasons suggested by Mr IR, and if it were, that has been rectified during the course of this review.

Competence

[57] In his letter dated 31 August 2011 to this office, Mr IR summarises his complaints in this way:-

> **"**In brief my complaint to the Law Society was that [Mr SF] had failed to properly analyse my relationship property issues, had failed to devise a proper plan to achieve my objectives, that is to obtain my lawful entitlement under the PRA, and failed to provide intelligible advice as to my legal entitlement and the potential risks, costs and benefits. Also that [Mr SF] has operated his Trust account unlawfully, including making unauthorised disbursements from the Trust account funds".

[58] The fundamental question to be considered in this review (and in the complaint) is whether the service and advice provided by Mr SF constituted conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer (s 12(a) Lawyers and Conveyancers Act).

[59] Mr IR advises that he retained Mr SF to obtain for him his statutory entitlement to relationship property and appropriate post-separation awards. By his "statutory entitlement" Mr IR means one half of the relationship property.

[60] At the time Mr SF was instructed he was about to go on leave for two weeks. A preliminary hearing had been held in respect of the Family Court proceedings following a referral of the matter back to that Court by Hansen J and a hearing had been scheduled for mid May.

[61] On 27 February 2008, Mr IR had written to Mr SF as follows:-

> "I understand that you will handle matters in the Family Court from now on at $250 hour, and that you will look at the HC appeal issues (including post-separation contribution) on your return in mid March.
>
> Meantime I will continue in the HC with filings as required.
>
> I see it as critical that at the FC hearing to come that the Court is required to considered the overall fairness of its findings per the CA decision in M v B details below".

[62] Mr IR remained firmly of the view that the first decision of Judge Strettell in which he held that there should be unequal sharing of relationship property, was wrong. His argument had been rejected by Hansen J on appeal, with the matter being referred back to the Family Court for a recalculation of the respective contributions of Mr IR and Ms IS, taking into account the matters addressed by His Honour in his decision.

[63] Mr IR wanted this matter, which he regarded as a matter of principle, to be raised again in the Family Court. As noted, he referred to the issue in his letter of 27 February when he said "I see it as critical that at the FC hearing to come, the Court is required to consider the overall fairness of its findings per the CA decision in M v B details below".

[64] In his decision, Hansen J had rejected that submission as unsustainable. He saw the issue as a matter of evidence. At [13] of his appeal judgment he noted:-

> "I do not see this as the high matter of principle that [Mr IR] does. I see it as a factual issue and I think Judge Strettell saw it in exactly the same light. There

> was simply a lack of specific evidence as to inflationary value of [ADB] Street – it was simply speculation as to what might have occurred and the simple fact is as [Ms IT] noted, the parties lived there, they determined to sell it and they determined to move on and they determined to do other things with the proceeds of sale of it".

[65] Again at [18] he notes:-

> **"**[Mr IU] argues that figure should be increased to account for inflationary value. That is because he submitted the value of [ADC] would have increased during the course of the marriage. He argues from that that both contributions should have been valued at the same time. From there he argues that in the relevant period [ABA] increased in value by 43.4%. He submitted this could be applied to the value of funds from [ADB], and they should be increased on this basis to $112,580".

[66] In the next paragraph, His Honour states:-

> "In my view such a submission is unsustainable".

[67] Mr SF considered that the submission had failed, at least in part, because there was a lack of evidence to support Mr IR's contentions. That is what Hansen J had said. Mr SF therefore advised Mr IR that without supporting valuation evidence, the principle that Mr IR held to could not be progressed.

[68] This presented a problem with regard to the potential appeals from the High Court decisions, as generally it is not possible to introduce new evidence on appeal. Mr SF therefore formed the view that the best option was to endeavour to provide the required evidence at the second Family Court hearing.

[69] Judge Strettell referred to this at [9] of his decision where he noted:-

> "It became apparent early on when the matter was returned to this Court, that [Mr IR] sought to raise other issues that did not fall within what might be seen to be the Court's power to reconsider its judgment".

[70] Judge Strettell declined to allow this argument to proceed. At [22] he noted:-

> "Clearly the matter has been considered by both the Family Court and the High Court. It is not open for this matter to be further relitigated for a fourth time. But in any case, even if evidence was admissible, given its general nature and lack of specificity it would have been of limited assistance".

[71] Mr SF therefore failed to convince Judge Strettell of the validity of this submission, and the Judge proceeded to provide for an adjusted unequal contribution.

[72] It required persistence on Mr IR's behalf, and a number of Court proceedings, to reach the stage where the Court of Appeal accepted Mr IR's contentions.

[73] Mr IR's complaint is two-fold:-

(i) That Mr SF did not provide him with considered and formal advice as to the strategy to follow to achieve Mr IR's objectives; and

(ii) That Mr SF did not comprehend that the evidence referred to by Hansen J and Judge Strettell was not required, and that in fact the law was such as that Ms IS should have been required to provide evidence in support of her claim for unequal sharing.

[74] When considering the first point, the lack of Mr SF's file is perhaps relevant. However, Mr SF did not dispute that he did not provide the formal advice that Mr IR suggests he should have. Instead, he points to the circumstances in which he was instructed, being immediately prior to his going on leave, and with the date for the second Family Court hearing already scheduled. His focus on his return from leave was to review the Family Court file, and to prepare for the hearing.

[75] He also advises that he met with Mr IR following his return, and discussed the way in which the matter was to proceed. That was reflected in Mr IR's letter of 27 February 2008 i.e. that Mr SF was to deal with the Family Court proceedings, while Mr IR was to continue with whatever was required to appeal the High Court proceedings.

[76] That separation of duties continued following Mr SF's return from holiday, and as it was proposed to argue the principle of equal sharing in the Family Court proceedings, the question of advancing the High Court appeals was put on hold.

[77] As it turns out, that decision was subsequently criticised by the Court of Appeal resulting in an award of costs being made against Mr IR. The question for this review is however, whether the manner in which the strategy was advanced fell below the level of competence and diligence which a member of the public is entitled to expect of a reasonably competent lawyer.

[78] I do not consider that the lack of formal advice as to the strategy to be adopted renders Mr SF's conduct unsatisfactory. Mr IR had demonstrated his ability by his earlier efforts on his own behalf. In addition, the die was cast to a large extent, when Mr SF was presented with a request to represent Mr IR at the second Family Court hearing for which a date had already been scheduled.

[79] The criticism of the Court of Appeal was that Mr IR had not pursued his application for leave to Appeal to the Court of Appeal after Hansen J declined leave.

As a consequence, further hearings took place in the Family and High Courts on the basis that the point that he still wished to argue had been determined.

[80] However, given that Mr SF was presented with a course of action which had been largely predetermined, and the fact that it was also intended to argue the point before the Family Court, it is difficult to suggest that the steps he took were other than those of a reasonably competent lawyer.

[81] The same comment also applies to the second part of this complaint. It was not until the matter went before the Court of Appeal having been before a number of lower Courts in differing ways, that the Court of Appeal took a different view of the matter. Again, it must be remembered that the test is whether Mr SF's conduct or advice fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[82] Mr SF's advice was no different from what the Family Court and High Court Judges before whom this matter had been argued considered to be the law. It can hardly be suggested therefore that Mr SF's advice fell short of the relevant standards.

[83] It is understandable that Mr IR is disappointed, and somewhat dismissive of the legal and justice systems, that it requires him to pursue the matter through numerous Court proceedings to reach this point. However, just because the Court of Appeal came to a different view, does not automatically result in an outcome that all of the counsel prior to this could be considered to be lacking in competence. This was a single point, on what would seem to be a difficult area of law, where different points of view can be argued, and Mr IR deserves credit for his persistence. It does not mean however that those who held a different view could be considered to be lacking in competence.

[84] In the above discussion, I have addressed the issue which Mr IR has described as his core complaint. It now remains to address the other matters raised by him.

Advice re consent memorandum

[85] I will deal with this aspect of Mr IR's complaint next, as it represents another of the main issues in his complaint, namely, that Mr SF failed to effect the property relationship agreement, failed to follow instructions and failed to protect Mr IR's interests by committing him to the terms of the consent memorandum.

[86] This aspect of the complaint relates to the actions of Mr SF in negotiating the consent memorandum to enable the property to be transferred to Mr IR while at the

same time retaining the funds otherwise payable to Ms IS in terms of the Orders made by Judge Strettell pending the decision on the appeal to be heard in December 2008.

[87] At the second review hearing, Mr IR advanced the proposition that Mr SF pursued the idea of holding the funds on agreed terms, in the face of a desire by Mr IR to implement the judgement by making the payment to Ms IS and obtaining a transfer of the property to himself. That is a proposition which is somewhat more forceful than previously advanced by Mr IR in his complaint.

[88] Mr IR and Ms IS faced the immediate prospect that the property would be sold by the mortgagee. In a letter dated 3 September 2008, the solicitors for the mortgagee advised Mr SF that if repayment of the loan was not completed by Thursday 11 September 2008, they were instructed to proceed with a sale by the mortgagee.

[89] Mr IR wished to retain the property, not least because a valuation that had been obtained placed the value of the property higher than the figures adopted by Judge Strettell.

[90] However, he also wanted to pursue an appeal of the Family Court decision, which, if successful, would have meant that minimal, if any, payment would be required to be made to Ms IS. Mr SF therefore advised that rather than paying over the funds, they should be held pending the issue of the decision.

[91] This therefore meant that an agreement had to be negotiated with Ms IS. Mr IR had a loan from TSB but Ms IS did not wish to enter into any new loan agreement. Consequently, in order to draw down on the loan, it was necessary for the property to be transferred to Mr IR. Ms IS did not wish to transfer the ownership of the property to Mr IR without securing the payments ordered to be paid to her by Judge Strettell.

[92] To achieve Mr SF's recommendation that the funds be held, and to meet the requirements of Ms IS, it was necessary to negotiate terms on which the funds would be held in the trust account of ACZ.

[93] There ensued a series of correspondence between Mr SF and Ms IT, from at least 7 August 2008, in which the basis on which this could be achieved was addressed. Mr IR was included in this correspondence and Mr SF advised (and this was not disputed by Mr IR) that a number of telephone discussions took place in respect of that correspondence.

[94] It is clear from the correspondence that Ms IS required to ensure that not only the amount payable to her in terms of the Family Court judgement was secured, but

also the costs awarded to her, as well as any further costs awards (see letter 13 August 2008 IT to SF).

[95] At any time during the course of those negotiations, it would have been open to Mr IR to instruct Mr SF to make payment of the funds and dispense with the idea that they be retained in Mr SF's trust account.

[96] I do not accept the contention that he seemed to advance at the second review hearing, that these were in fact his instructions. That is not something that he had advanced in his complaint or at any time up until then. If he had intended to include that in his complaints, then it was not said in such a direct way.

[97] I do however accept that his complaint was that he was not properly advised as to the implications of the agreement.

[98] I put to one side the fact that he received the agreement by fax only a short while before it was required to be completed. As noted, there had been ongoing correspondence and negotiations in which he had been involved for approximately one month prior to this, and the consent memorandum as finally sent to him incorporated all of the terms that had been included in that correspondence.

[99] The question is whether, in recommending this course of action, Mr SF's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[100] Mr IR argues that the Standards Committee (and the LCRO) must make its own evaluation of this, and is not entitled to rely upon the comments of French J in her decision of 4 October 2010 concerning Mr IR's application to have the Notice of Claim discharged. That is the effect of the *Dorbbu* decision (ibid). In this regard, I am not at all sure that the Committee has relied upon the decision of French J. It has not made reference to it in its determination, but observes that "[Mr IR] had seen the proposal set out in the memorandum and agreed to be bound to this by his fax to [Mr SF] of 8 September 2008. The necessity for the arrangement was due to the appeal by Mr IR, which had not been heard at the time of the refinancing, and [Mr IR']s wish not to sell the property".

[101] In his fax of 8 September 2008 Mr IR expressed unease about the provisions of the clause in the memorandum which provided that the transfer of the property was not to be taken as a complete transfer of Ms IS's beneficial interest in the property. The

property remained security for the costs already and potentially to be awarded, as well as for any further sum that Ms IS was awarded.

[102] Mr IR left the decision up to Mr SF. If Mr SF thought the clause was reasonable, then he was authorised to sign the consent memorandum.

[103] Mr IR asserts that he was not fully aware of the implications of these provisions, and that Mr SF provided no advice to him in this regard. By signing the consent memorandum Mr IR alleges that Mr SF modified the order of Judge Strettell to his detriment. He asserts that this was later compounded when Mr SF made payment of the sum of $36,250 and interest without obtaining a release of the Notice of Claim.

[104] I acknowledge there is no evidence to support Mr SF's contentions that he did provide advice to Mr IR as to the implications of the arrangements. However, similarly, there is no evidence to support Mr IR's contentions that he did not. I do not expect that Mr SF's file would be conclusive in this regard either were it available.

[105] What is clear is that Mr IR left it to Mr SF to make the decision. If Mr SF considered the clause was reasonable, then his instructions were to sign the memorandum. Having left that decision to Mr SF, Mr IR now asserts that Mr SF's conduct was below the standard of competence that a member of the public is entitled to expect of a reasonably competent lawyer.

[106] In this regard, it is in order to take note of the opinion expressed by French J as an indication that Mr SF's actions were what could be expected of a reasonably competent lawyer. At [54] of her decision of 24 May 2011, she described the consent memorandum as "a sensible and fair solution to a difficult practical problem".

[107] The issues which Mr IR has raised with regard to Mr SF's signing the document correct for the purposes of the Land Transfer Act are the subject of further complaints, and do not affect the decision as to whether the consent memorandum was a sensible and fair solution.

[108] Inherent in this view, is an acceptance of the objectives as understood by and recommended by Mr SF, namely to avoid paying over the funds before the appeal was determined, but at the same time allowing the refinancing to proceed.

[109] Having found that there was no direct instruction by Mr IR to make the payment as ordered by Judge Strettell, I consider that the recommendations made by Mr SF were logical and, the terms of the consent memorandum did not include terms that would not have been agreed to by a reasonably competent lawyer.

[110] It is somewhat difficult to accept that the terms of the memorandum were responsible for the loss that Mr IR has suffered. It seems to me that the losses have been caused by the fact that he defaulted in payment of the TSB loan and it was sold by the mortgagee at a loss. If Mr IR had maintained loan payments, the property would have remained in his ownership, and, following the decision of Fogarty J, the payments anticipated by the memorandum could have been made, and that would have been the end of the matter. Mr IR could still then have pursued his further appeals.

[111] Mr IR's claim therefore that Mr SF is responsible for turning an award of $410,000 gross in to a $50,000 loss is not an indisputable outcome.

Failure to pursue appeal

[112] Following the second Family Court proceedings, Mr SF then successfully pursued an application for leave to appeal both of the earlier High Court decisions to the Court of Appeal. That decision was issued on 3 June 2009.

[113] As I understand it, this was not part of Mr IR's complaint, but subsequently was the subject of some criticism by the Court of Appeal. I have addressed this above in [77] to [82].

[114] Mr IR's complaint relates to the disagreements which then arose between him and Mr SF as to how the appeal should proceed. Mr SF identifies the issues in this way:

> "(a) There were significant differences between Mr [IR]'s approach and our approach to the appeal;
> (b) Significant differences over settling the basis of the appeal (Mr [IR] wished matters to be included in the basis of appeal which I did not consider would succeed and would become counter-productive, particularly on post-separation contribution;
>
> (c) Mr [IR] became unwilling to accept that the most he could hope to gain from the appeal was somewhere around the mid $40,000 mark. Also, Mr [IR] was unwilling to accept a wide approach to the appeal might well reduce the focus so as to risk watering down the likely amount to be received;
>
> (d) It became apparent that Mr [IR] had then incurred debts and that the crops that he was growing on his farm were going to be a failure (again) and he was facing judgement(s) enforcement action"

[115] The Standards Committee in this regard noted that "any perceived failure to progress the appeal to the Court of Appeal was due to Mr SF encouraging (unsuccessfully) Mr IR to settle his claim (as also encouraged by the Court of Appeal), differences as to the basis on which the appeal would proceed, and the inability to

reach agreement going forward about payment of costs in circumstances where it had become apparent that [Mr IR]'s financial position was tenuous. Any reasonably competent practitioner would be concerned with these matters".

[116] Mr IR complains that Mr SF did not pursue the appeal on the basis that he wanted him to and that therefore he was not following Mr IR's instructions. If Mr SF had followed Mr IR's instructions without offering any view of the likely outcome, he could similarly have been criticised, as indeed Mr IR has with regard to the consent memorandum. It seems therefore somewhat unreasonable for Mr SF to be criticised for offering his view as to what form the appeal should take. Any delays caused by this debate are reasonable.

[117] Primarily however, Mr SF was entitled to be sure that he was going to be paid for any further work which he carried out for Mr IR. By September 2009, Mr IR was indicating that lack of access to funds was causing a major problem and that he was facing the possibility/likelihood of a mortgagee sale of the property and bankruptcy. Fees outstanding to ACZ totalled approximately $24,000 and significant costs had been occurred since the last account in May. In addition, some $7,000 had been advanced by the firm to pay various Court fees.

[118] Mr IR had no proposals for payment of fees. The potential recovery was less than what would be due to ACZ in fees. In the circumstances, it was not unreasonable for Mr SF to defer incurring further costs. Although Mr SF did not terminate the retainer, Rule 4.2.1 (b) of the Conduct and Client Care Rules provides that good cause to do so is an inability or failure of the client to pay a fee or a reasonable fee at the appropriate time. Consequently, it was reasonable for Mr SF to defer incurring further costs until the basis on which his fees would be paid was determined.

[119] I therefore concur with the Standards Committee determination in this regard.

Failure to act on instructions to commence Judicial Review

[120] In his submissions for this review, Mr IR notes that his complaint in this regard has been misstated. At number 6 of his complaint to the Complaints Service he recorded his complaint in these terms:-

> **"**[Mr SF] has also failed to respond to my request to take this matter to the High Court by way of an application for judicial review although acknowledging that the outcome in my case had been irrational."

[121] In his submissions to this review, he restates his complaint as being that Mr SF failed to consider and advise on the option of applying for Judicial Review. His

complaint with regard to the Standards Committee determination is that the Committee failed to use its powers to inquire into the evidence.

[122] This has largely been covered above in the discussion relating to the general advice provided by Mr SF and nothing further can usefully be added.

Failure to take prompt steps to remove the caveat

[123] In his complaint, Mr IR refers to a failure by Mr SF to take steps to remove the caveat. The caveat was lodged by ACZ to ensure access to funds to pay the costs awarded to Ms IS and was therefore within the control of ACZ. Primarily therefore, Mr IR is referring to the Notice of Claim lodged pursuant to the consent memorandum which was intended to become a consent order. In his submissions provided on the second day of the review hearing, Mr IR refers to subsequent complaints that he has made concerning the lodgement of these documents for registration. Those are matters which I cannot take into account in this review.

[124] The present complaint therefore, relates to an alleged failure to act on verbal instructions issued in June 2009 by Mr IR to Mr SF to take steps to have the Notice of Claim removed. The Notice of Claim was preventing Mr IR from using the property as security for further borrowings.

[125] Mr IR refers to his request for copies of correspondence on the removal of the claim (Tab 8 SF bundle) as evidence that he had "clearly instructed [Mr SF] to take steps to remove the claim no later than March 2008".

[126] I do not see that letter provides evidence to support that contention at all. It is a request for copies of correspondence relating to removal of the claim. That is not evidence that Mr SF was instructed to take steps to have it removed by filing an application in the Court.

[127] In the complaint, Mr IR states that he gave verbal instructions in June 2009 to attend to this. Personal events intervened, but the application was filed on 11 August. It did not appear to the Committee that this represented an unduly lengthy period of time between the time of receiving instructions and the time of filing, and I concur with that view.

Fees / over charging

[128] In his complaint, Mr IR takes exception to the total costs incurred of $59,592.10. He does not consider that these fees are reasonable in order to recover a maximum of

$45,000. The essence of his complaint with regard to fees is that in establishing a "fair and reasonable" fee, a lawyer must take into account a number of factors which are set out in Rule 9.1 of the Conduct and Client Care Rules. These include "the importance of the matter to the client and the results achieved".

[129] Mr IR focuses on the fact that the results achieved in his view have been to his disadvantage. It must be noted however that Rule 9.1 (c) also includes a reference to the importance of the matter to the client.

[130] There is no doubt that this matter was very important to Mr IR. The importance of pursuing the matter was such as to overcome the very clear indications in the judgements of the Court of Appeal that the matter should be settled between the parties. Mr SF also urged Mr IR to adopt a pragmatic approach to the matter.

[131] Mr IR accepts that while Mr SF advised him that his expectations were unrealistic, he did not offer any advice as to what he could expect to recover. Settlement negotiations need to have reference as much as to what the other party will accept, as to what the respective parties think they are entitled to. There is often no legal basis for a settlement, other than it is what the parties agree to accept to bring the matter to a close. Factors other than legal entitlements have a bearing on what is eventually agreed. To a large extent therefore the question of what it would take to settle the matter could be answered by Mr IR himself.

[132] Mr IR did not want to entertain any settlement with his ex wife. He chose to pursue the matter on principle. Mr SF, or his firm, cannot be expected to bear the costs of that decision. On that basis therefore, Mr IR's focus on the results achieved and the potential return to him are similarly as unrealistic as his expectations from the litigation.

[133] In addition, there is always a risk in undertaking litigation and that would have been apparent to Mr IR from the time of the first Family Court decision. ACZ should not have to fund Mr IR's decision to pursue the matter on principle.

[134] Separately, it must be considered whether the fees charged by Mr SF are otherwise fair and reasonable. The Standards Committee called for Mr SF's timesheets and noted that he had charged some $10,000 less than the time recorded. To that extent, Mr SF has taken cognisance of the minimal amounts involved and the outcomes.

[135] The Standards Committee includes practitioners who are familiar with the area of work which is the subject matter of the complaint, and after viewing Mr SF's timesheets formed the view that the fees charged were fair and reasonable for the work that had been carried out. To that extent the decision of the Standards Committee reflects the market.

[136] Mr IR's complaint is a general complaint as to the costs of legal services. He refers to Ms IS's costs also as being excessive. His view of what constitutes a fair and reasonable fee is not an objective consideration and is viewed from a personal perspective.

[137] Mr IR, in his submissions for this review, points to the fact that the Standards Committee did not include the fees that were deducted without authority referred to subsequently in this decision. Including those fees deducted the total fee amounts to $66,647.96. On this basis, he asserts that the Standards Committee decision is invalid. Those total fees of course include the fees charged for effecting the refinancing.

[138] Mr IR also notes that although the timesheets have been provided, no detail of the work undertaken is identified. He takes the view, that because Mr SF adopted a wrong course of action, all work from the second Family Court hearing onwards excluding the leave application to the Court of Appeal was unnecessary. Given that there has been no finding of unsatisfactory conduct against Mr SF in respect of the work undertaken, it follows that this statement cannot be supported.

[139] I do have some reservations that the timesheets have not been subjected to some more in depth scrutiny by a costs assessor rather than being accepted as they were by the Standards Committee. If there were nothing further, then I may have been minded to return this aspect of the complaint to the Committee for further consideration of the accounts.

[140] However, I take note of the fact that Mr SF made an offer to Mr IR to reduce his fees to $35,000 providing they were paid by December 2009. This was rejected by Mr IR, and even taking into account his poor financial situation, there is no indication that he made any further attempts to agree payment terms with Mr SF in a manner that would be acceptable to both parties.

[141] Given my rejection of Mr IR's assertion that all work from the second Family Court hearing was unnecessary, and the fact that Mr IR did not engage in any meaningful way with Mr SF to endeavour to reach a settlement in respect of costs, I am

reluctant to prolong this matter any further by referring any aspect back to the Standards Committee.

[142] Taking all of these factors into account, I am not prepared to take a view different from that of the Standards Committee in connection with these matters.

Deduction of fees/reporting

[143] The Committee has found that Mr SF's conduct constituted unsatisfactory conduct due to the fact that fees had been deducted from funds held for Mr IR without authority. However it declined to make any orders following that finding.

[144] Mr IR had given instructions that the balance of the funds left over after repaying the existing loan and making provision for the payments to Ms IS, were to be held in ACZ's trust account. Instead, following completion of the refinancing, the staff member who attended to this deducted the outstanding fees and remitted the balance to Mr IR.

[145] When Mr IR pointed out to Mr SF that this was not in accordance with his instructions, Mr SF readily acknowledged this was correct, and appropriate credits were made following receipt of a cheque from Mr IR in payment of the outstanding costs.

[146] I note that the letter and statement provided to Mr IR following completion of the refinancing were sent by the legal executive in the firm who had carried out the work. It is arguable that the finding of unsatisfactory conduct against Mr SF in this regard has been somewhat unfair. I have not noted however any submissions from Mr SF to this effect and it would seem that he has accepted responsibility for this conduct.

[147] In the circumstances, the finding, coupled with the fact that no orders have been made, will stand.

[148] Mr IR has also complained that Mr SF failed to provide him with a full and clear accounting of funds received into and paid out for and on behalf of Mr IR. The particular matter which arose was that in November 2009 Mr IR needed to know whether Ms IS had been paid the interest to which she was entitled pursuant to the consent memorandum. This occurred immediately prior to Mr IR informing Mr SF on 14 November 2009 that he would be acting for himself from then on.

[149] I have noted that ACZ provided a statement in September 2008 following completion of the refinancing. The payments to Ms IS in February and March 2009 and were included in the September statement.

[150] Mr IR argues that a report in November 2009 for a payment made in May (although it seems the interest was paid in March) does not comply with the Lawyers and Conveyancers Act (Trust Account) Regulations 2008. Regulation 12(7) provides as follows: -

> **"**Each practice must provide to each client for whom trust money is held a complete and understandable statement of all trust money handled for the client, all transactions in the client's account, and the balance of the client's account, -
>
> a) in respect of ongoing investment transactions, at intervals of not more than twelve months; and
>
> b) in respect of all transactions that are not completed within twelve months, at intervals of not more than twelve months; and
>
> c) in respect of all other transactions, promptly or after or prior to the completion of the transaction."

[151] The "transaction" in this case was the refinancing which occurred in September 2008. The payments due to Ms IS were accounted for and included in the September statement although the dates on which these payments were to occur was sometime in the future.

[152] There is some doubt in my mind that the payments to Ms IS constituted a further "transaction" in terms of the Regulations. There was no payment due to or from Mr IR and all that was required was to advise him of the date on which the payment was made and the amount of interest. In this regard, Mr SF may have been remiss in not advising Mr IR when the interest was paid, but that is not an oversight which would result in any disciplinary finding against him.

[153] Thereafter, the only trust account entries were bills as invoiced by Mr SF in December 2008 and May 2009. As Mr IR notes, bills, when invoiced, are debited to the client's ledger in the Trust Account, resulting in that ledger going into debit if there are no funds in the account. Mr IR asserts that this constitutes a breach of the Trust Account Regulations which do not allow a solicitor's Trust Account to go into debit.

[154] What Mr IR would not be aware of, is that all trust accounting systems are programmed so that all credit and debit balances in the Trust Account are totalled and a sum sufficient to cover any debit balance in the Trust Account as a whole is retained in a firm ledger within the Trust Account. In this way, the Trust Account as a whole is

kept in credit. Each individual client ledger does not constitute the Trust Account for the purposes of the Regulations. Consequently the claim by Mr IR in this regard is not correct.

[155] Following termination of Mr SF's instructions he provided a full statement to Mr IR on 19 November 2009 showing the balance due and owing to ACZ.

[156] In summary, I do not consider that Mr SF's conduct breaches the Trust Account Regulations in respect of the matters complained of.

Remaining Matters

[157] The remaining matters are as follows: -

- Failing to report misconduct of another practitioner
- Unprofessional conduct in attempting to find other ways to facilitate payment of fees
- Failing to advise Mr IR that Ms IS had not paid a share of accountant's fees in breach of the Court Order.

[158] These matters have all been dealt with in the Standards Committee determination.

[159] Mr SF had no duty to report the fact that Mr IU may have appeared without instructions. A duty to report conduct of a lawyer is mandatory only in respect of suspected misconduct (Rule 2.8). Rule 2.9 provides discretion to a lawyer to report suspected unsatisfactory conduct. Mr SF chose not to and he was entitled to make that decision. In any event, Mr IR could himself have made his own complaint about this.

[160] While Mr SF acknowledges that he discussed ways and means of enabling Mr IR to pay his outstanding costs, none of the family members themselves have provided any evidence that Mr SF attempted unprofessionally to persuade them to meet these obligations. This was a matter that Mr IR could readily have provided evidence in support of his complaint, but no such evidence has been provided.

[161] Judge Strettell recorded in his second Family Court judgement, the agreement between the parties that accounting fees in respect of the ADA partnership were to be paid equally by Mr IR and Ms IS. This was referred to in Mr IR's letter of 28 September

2009 to Mr SF. Copies of letters sent by Ms IT on behalf of her client to the accountant had been copied to Mr SF.

[162] Mr SF's response to the Complaints Service concerning this complaint was that it was not accepted. No reasons were provided by him.

[163] This is one of the complaints that Mr IR asserts the Standards Committee should have pursued by calling for Mr SF's file. Instead, it noted that there was no evidence to support the complaint. I agree with Mr IR that the Standards Committee could have investigated this matter further. However, when this issue is looked at in the context of the numerous, and in some cases more serious, complaints, this is a matter which the Committee exercised a discretion not to pursue and I have no issue with that approach.

Summary

[164] Mr IR has pursued his complaints against Mr SF with the same degree of completeness and persistence as he has shown in pursuing the litigation out of which the complaints have arisen. That is no criticism of him as he is entitled to both lodge and pursue his complaint and this review.

[165] His approach is driven by his view that Mr SF has turned an award of $410,000 gross, about $250,000 net, and converted it to a $50,000 loss.

[166] As noted in this decision, this view does not take account of the many factors which have combined to leave Mr IR in this position. These factors include the various Court judgements, his precarious financial position which led to the mortgagee sale and his ex wife's opposition to his claims. Whilst it is understandable, that faced with this outcome, Mr IR seeks to lay blame, it is simplistic and unfair to place responsibility for the consequences of all of the many and varied factors on Mr SF.

[167] The definition of unsatisfactory conduct must be remembered. It is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, or conduct which breaches any of the Client Care Rules or Trust Account Regulations.

[168] Looked at objectively, it cannot be said that Mr SF lacked the necessary competence or diligence in the provision of legal services to Mr IR other than in circumstances where a lack of diligence was justified.

[169] The determinations of the Standards Committee are therefore confirmed.

Decision

[170] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed, save that it is specially recorded that the conduct and services provided prior to 1 August 2008 are not such as would render them able to be the subject of complaint in terms of section 351 of the Act.

Costs

[171] At the conclusion of the hearing, Mr SE requested that I consider making an award of costs against Mr IR should the Standards Committee determination be confirmed. I record my comment to Mr SE and Mr SF at the hearing, that although section 210 provides the LCRO with a discretion to make an order of costs to any person to whom the proceedings relate, that discretion is rarely exercised to order payment of costs to the respondent. In this regard the parties are referred to the Costs Orders Guidelines published by this Office. Mr IR exercised his statutory right to request a review of the Standards Committee decision, and although that determination has been confirmed, none of the circumstances exist in which an order for costs would be made against him.

DATED this 9th day of March 2012

O W J Vaughan
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

IR as the Applicant
SF as the Respondent
The Canterbury - Westland Standards Committee 2
The New Zealand Law Society
SE as representative for the Applicant
Secretary for Justice (redacted)