

**LEGAL COMPLAINTS REVIEW OFFICER  
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 140

Ref: LCRO 189/2020

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the [Area] Standards Committee [X]

**BETWEEN**

**ZK**

Applicant

**AND**

**XM**

Respondent

**DECISION**

**The names and identifying details of the parties in this decision have been anonymised**

**Introduction**

[1] Mr ZK has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of the respondent, XM.

**Background**

[2] In May 2016, Mr ZK instructed Mr XM to represent him in respect of a number of criminal charges.

[3] The trial commenced on 11 December 2017 and resumed on 18 December 2017. Mr ZK was convicted on five charges. Sentencing was to proceed on 2 March 2018.

[4] Mr ZK raised concerns with Mr XM concerning the representation he had received on 19 January 2018 and reinforced those concerns in correspondence to his lawyer on 19 February 2018.

[5] Following sentencing, Mr ZK sought fresh representation and proceeded to advance an appeal to the Court of Appeal. His appeal against conviction was unsuccessful.

[6] Mr ZK settled invoices rendered by Mr XM for work completed in preparation for trial over a period of approximately 12 months. Final invoices for work undertaken during the trial remain unpaid.

### **The complaint and the Standards Committee decision**

[7] Mr ZK lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 7 June 2019. The substance of his complaint was that:

- (a) Mr XM had been advised at commencement that he did not have the financial means to meet his legal costs and would require a grant of legal aid; and
- (b) Mr XM had agreed to provide representation on the basis that an application for legal aid would be made; and
- (c) Mr XM had failed to action a claim for legal aid; and
- (d) Mr XM had failed to competently represent him at trial.

[8] In follow up correspondence to the Complaints Service of 23 May 2020, Mr ZK confirmed that his complaint was primarily about legal aid.

[9] In providing response to Mr ZK's complaint, Mr XM submitted that:

- (a) a letter of engagement provided to Mr ZK on 17 May 2016 confirmed the basis on which his fees would be charged; and
- (b) instructions received from Mr ZK were to the effect that Mr ZK was operating a small business, and that his wife was employed part-time; and
- (c) a tax invoice had been forwarded to Mr ZK on 12 October 2016 and had been responded to by Mr ZK with indication of his intention to settle the account; and

- (d) throughout the course of progressing Mr ZK's case over many months, Mr ZK had given no indication that it was his understanding that he would be legally aided; and
- (e) consent was sought from Mr ZK for approval to instruct expert witnesses, and no objection was raised by Mr ZK to payment of these witnesses, or suggestion made that costs would be covered by legal aid; and
- (f) Mr ZK had been provided with an estimate of costs for trial approximately a month prior to the trial commencing; and
- (g) Mr ZK first raised the issue as to whether an application for legal aid should have been made on 27 February 2018 at which time Mr ZK had advised him that he had returned a legal aid application form to Mr XM in June of the previous year; and
- (h) Mr XM had no recollection of having received a legal aid form back from Mr ZK but having had opportunity to check documentation from his office, was able to confirm that a legal aid form was sent to him (without note or covering letter) in late June or early July 2017.

[10] Mr XM's response to the complaint referenced other issues of concern raised by Mr ZK, but I have no need to reference those matters here.

[11] Amongst the issues identified by the Standards Committee as the focus for its inquiry, was the question as to whether Mr XM had breached any of his obligations under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), in not submitting a legal aid application for Mr ZK.

[12] The Standards Committee delivered its decision on 24 August 2020.

[13] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

[14] In reaching that decision the Committee concluded that:

- (a) whilst Mr XM had overlooked one email, that breach was not sufficient to constitute a breach of r 3.<sup>1</sup>

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<sup>1</sup> Rule 3 of the Rules states that in providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

- (b) it was satisfied that Mr XM had not breached any obligations owed to Mr ZK.

[15] In the course of progressing the conduct investigation, both Mr ZK and Mr XM filed a number of further submissions. All submissions filed have been given careful consideration.

### **Application for review**

[16] Mr ZK filed an application for review on 2 October 2020.

[17] His application is confined to challenging the Committee's conclusion that Mr XM's failure to lodge a legal aid application did not constitute a conduct breach.

[18] Mr ZK submits that:

- (a) Mr XM had provided him with a partly completed legal aid application; and
- (b) the application had been returned to Mr XM on 1 July 2016 together with request of him to check the documentation; and
- (c) his wife had forwarded further email correspondence to Mr XM on 22 January 2018 seeking clarification as to the status of the legal aid application; and
- (d) his financial circumstances at the time of instructing Mr XM were such that he (Mr ZK) would likely have qualified for a grant of legal aid; and
- (e) the Standards Committee failed to consider the importance of Mr ZK's follow-up email; and
- (f) previous Committee determinations have found lawyers to have acted unsatisfactorily as a result of failing to submit legal aid applications.

[19] Mr XM was invited to comment on Mr ZK's review application. He submitted that:

- (a) he acknowledged having forwarded a partially completed legal aid application to Mr ZK and accepted that he had overlooked an email Mr ZK had forwarded to him on 1 July 2016; and

- (b) at no time had Mr ZK raised the issue of legal aid with him prior to trial, this despite Mr ZK having paid a number of tax invoices both for fees and disbursements incurred; and
- (c) he had written to Mr ZK on 13 November 2017 providing an estimate of costs for trial and provided a further invoice for work completed prior to trial on 8 December 2017; and
- (d) his invoice of 8 December 2017 had been paid in full by Mr ZK; and
- (e) Mr ZK must have been aware that he had not acknowledged the application for legal aid, and that legal aid had not been applied for or granted.

[20] In summarising his position, Mr XM contended that a lawyer's omission in overlooking a single email, in circumstances where there had been no follow-up from the lawyer's client, could not properly constitute a breach of r 3.

### **Review on the papers**

[21] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[22] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

### **Nature and scope of review**

[23] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>2</sup>

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

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<sup>2</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[24] More recently, the High Court has described a review by this Office in the following way:<sup>3</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

[25] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

- (a) Consider all of the available material afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

## **Discussion**

[26] The single issue that falls for consideration on this review, is the question as to whether Mr XM breached any professional duties or obligations owed to Mr ZK as a consequence of overlooking an email which had been forwarded to him by Mr ZK. Accompanying the email was a legal aid application form that Mr XM had provided to Mr ZK to complete.

[27] It is Mr ZK’s contention that Mr XM’s oversight constituted a significant error as it denied him the opportunity to secure a grant of legal aid in circumstances where he considered he had an entitlement to aid and was not financially able to meet Mr XM’s costs.

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<sup>3</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[28] The Rules of relevance to the complaint are rr 3, and 9.5. Less directly engaged is r 3.4A.

[29] Rule 3 directs that in providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[30] Rule 9.5 provides that where a client may be eligible for legal aid, a lawyer must inform the client of this and whether or not the lawyer is prepared to work on legally aided matters.

[31] Rule 3.4A imposes obligation on a barrister sole to ensure, at the commencement of a retainer, that they provide to their client in advance information on the principal aspects of client service including the basis on which fees will be charged, when payment of fees is to be made, and whether fees may be deducted from funds held in trust.

[32] An examination as to whether Mr XM's omission, in overlooking (and failing to respond to) an email from his client, constituted conduct that is requiring of a disciplinary response, must be examined from:

- (a) the context of the arrangements that were agreed at the commencement of the retainer;
- (b) an examination of the communications between the parties during the course of the retainer; and
- (c) an assessment as to whether Mr ZK himself could properly be considered to have been partially responsible for, or at least contributed to, the apparent misunderstanding over the legal aid application.

[33] Mr XM received instructions from an [Town] solicitor on 17 May 2016 to act for Mr ZK. Mr XM says that his time records indicate that he first spoke with Mr ZK (telephone) on the day he received instructions to act.

[34] On 17 May 2016, Mr XM prepared a letter of engagement for Mr ZK.

[35] That letter confirmed the basis on which Mr XM's fees would be charged (by reference to the factors set out in r 9.1 of the Rules), and recorded his hourly charge out rate.

[36] Mr XM wrote immediately to his instructing solicitor advising that unless otherwise agreed he would be responsible for arrangements concerning costs and disbursements. He confirmed that he would be making request of Mr ZK to pay costs directly into the instructing solicitors trust account.

[37] These initial arrangements give clear indication of Mr XM's intention that Mr ZK would be paying his costs.

[38] Mr ZK says that he did not sign the letter of engagement and the document accordingly carries no weight. I have no need to address here the consequences that may arise from a lawyer's client not attaching their signature to a letter of engagement, but I am satisfied that Mr ZK received the letter of engagement (he does not suggest otherwise) and that Mr XM met his r 3.4A obligations.

[39] Whilst it was clear that Mr XM commenced the retainer with expectation that Mr ZK would be responsible for meeting his fees, I do not consider that those initial expectations have particular significance for the conduct issue that is at the heart of this review.

[40] Mr XM says his time records indicate that he first met "face to face" with Mr ZK on 2 June 2016. Mr ZK was accompanied by his wife. Whilst Mr XM says that he had no specific recollection of Mr ZK questioning him about the possibility of making an application for legal aid, he accepts that "at some stage of things, probably at the end of that meeting, Mr ZK was provided with an application for legal aid".<sup>4</sup>

[41] Mr XM thinks it probable that he printed a legal aid form out and provided it to Mr ZK. He acknowledges that the form had been completed "to the extent that my details were included on the form".<sup>5</sup>

[42] Mr XM accepts the legal aid application was returned to him under cover of an email from Mr ZK dated 1 July 2016.

[43] Mr XM, when providing responses to the complaint, in my view understates the significance of his oversight in failing to retrieve Mr ZK's application. In emphasising the terms disclosed in his letter of engagement and Mr ZK's failure to raise the legal aid issue with him, Mr XM reduces his oversight to that of a minor error of little consequence.

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<sup>4</sup> Mr XM, correspondence to Complaints Service (20 April 2020) at p [14].

<sup>5</sup> Mr XM, correspondence to Complaints Service (26 June 2020) at p [18].



[44] I do not consider it probable that discussions concerning the possibility of Mr ZK advancing a legal aid application would have been addressed at the meeting of 2 June with the degree of casualness or afterthought that Mr XM appears to suggest occurred.

[45] The decision made by Mr XM to provide Mr ZK with a partially completed legal aid application form would not have occurred in a vacuum.

[46] It is entirely reasonable to conclude that Mr ZK had raised concerns with Mr XM that he would likely have difficulty paying his fees. I think it probable that Mr XM sensibly advised Mr ZK that he could make application for legal aid and that the discussion proceeded to the point where Mr XM completed the parts of the application form that he needed to complete, and Mr ZK was instructed to go away and complete the form and send it back.

[47] Mr XM, as he was entitled to, had formed a view that Mr and Mrs ZK's combined income would likely render them ineligible for a grant of aid, but he properly would have left that decision to the body responsible for assessing the ZKs' eligibility. But in providing the partially completed form to Mr ZK with advice to complete and return, Mr XM must have had his attention drawn to the possibility of Mr ZK receiving a grant, and him then continuing with the retainer on the basis of his client being legally aided. Certainly there is no indication of Mr XM informing Mr ZK of his unwillingness to continue with the retainer if legal aid was granted.<sup>6</sup>

[48] Mr XM's omission was not limited to his error in failing to open the email which had attached Mr ZK's legal aid application. His oversight extended to his apparent losing track of the fact that he had discussed a legal aid application with his client and taken no steps to advance that application.

[49] Whilst Mr XM emphasises that Mr ZK should have followed up with him to ascertain progress on the application, this criticism could equally and fairly be levelled at Mr XM. He appears to have lost sight of, or overlooked as the retainer progressed, the fact that Mr ZK had clearly wished to lodge a legal aid application.

[50] With respect to the Committee, I do not consider that the conduct issue (email) engaged a simple consideration of the question as to whether overlooking an email constituted a breach of r 3. The issues engaged by the oversight, extended beyond mere failure to open an email.

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<sup>6</sup> Rule 9.5 requires a lawyer to inform their client if they are prepared to work on legally aided matters.

[51] That said, I agree with both Mr XM and the Committee, that Mr ZK himself bore a degree of responsibility in following up with Mr XM to check progress on the legal aid application.

[52] As has been noted, in the course of advancing both his complaint and review application, Mr ZK filed a number of submissions. Inevitably as time progresses, it can become increasingly difficult for parties when advancing a complaint, to precisely recall events which occurred some months, or even years, previously.

[53] There is a degree of contradiction in the explanations provided by Mr ZK for his apparent failure to follow up with Mr XM.

[54] I do not consider that Mr ZK's argument, that Mr XM had agreed to work on legal aid at commencement, sat comfortably alongside an examination of the interactions between the parties which had taken place in the early stages of the retainer.

[55] Mr ZK says that Mr XM had indicated on 25 May 2016, that it was his (Mr XM's) expectation that Mr ZK would be legally aided.

[56] Mr XM says, and I accept his evidence, that his time records give no indication of him having spoken with Mr ZK on 25 May 2016.

[57] Suggestion that Mr XM was labouring at commencement under the impression that his fees would be met by legal aid, is entirely inconsistent with both the initial letter of engagement forwarded to Mr ZK on 17 May 2016, and correspondence of that same date forwarded to Mr XM's instructing solicitor.

[58] I am satisfied that the issue of a possible legal aid grant was first raised and discussed at the meeting of 2 June 2016.

[59] I think it likely that at that meeting it was agreed that a legal aid application would be filed and it was discussed that in the event that the legal aid application was unsuccessful, Mr ZK would be required to meet Mr XM's fees in accordance with the arrangements set out in his letter of engagement.

[60] In providing response to argument that he had received accounts from Mr XM and settled those accounts and must have been aware that he was responsible for his fees, Mr ZK submits that he had been advised by Mr XM that his application for legal aid had been declined, hence he had raised no objection to accounts received.

[61] In correspondence to the Complaints Service of 12 February 2020, Mr ZK says that “I was led to believe from Mr XM that my application was declined. To save cost, as he was already involved, we continued with Mr XM”.

[62] In correspondence to the Complaints Service of 30 July 2019, Mr ZK says that “Mr XM instructed us (Mrs ZK and I) on 2 June 2016 that we couldn’t get legal aid, as he mentions in [75] of his response”.

[63] Suggestion that Mr XM advised Mr ZK on 2 June 2016 (the initial meeting) he could not get legal aid, is inconsistent with other accounts Mr ZK provides of what took place at the 2 June 2016 meeting, and is at odds with the uncontested fact that Mr ZK was provided with a legal aid application on that date to take away and complete.

[64] In correspondence to the Complaints Service of 2 June 2020, Mr ZK states that, “I was already under the understanding that my legal aid application was declined, as a result of communications by phone where it was brought to my attention that I will have to pay”.

[65] There is no evidence to support Mr ZK’s contention that Mr XM had advised him that his legal aid application had been declined. Such suggestion is also inconsistent with the explanation provided by Mr ZK when first filing his complaint.

[66] I think it probable that the account of events provided by Mr ZK when first filing his complaint provides most accurate account of Mr ZK’s position. It can be reasonably expected of a complainant when first articulating their complaint, that they identify and emphasise the factors of most relevance and importance to their complaint. Mr ZK says, and I accept his evidence, that when he and his wife first met with Mr XM, they made it clear to him, that they were having financial difficulties. Mr ZK says that arrangements were made for him to complete the legal aid application form and return to Mr XM. However, he then says that some months after the initial meeting, Mr XM made demand for payment of outstanding fees. Mr ZK says that at this point, he challenged Mr XM as to what had happened with his legal aid grant to be met with response by Mr XM that as the grant had not been completed, and given the nature of the charges being faced by Mr ZK, Mr ZK would be required to meet his fees.

[67] Mr ZK suggests that his wife had, at various times, raised the issue of legal aid with Mr XM. But suggestion that Mr ZK’s wife had been involved in discussions with Mr XM is inconsistent with the affidavit sworn by Mrs ZK on 10 September 2019 and filed in the Court of Appeal in support of Mr ZK’s appeal against conviction. At paragraph 60 of her affidavit, Mrs ZK recalls a discussion she had had with Mr XM at the [city] court during the course of Mr ZK’s trial. Mrs ZK notes, that she had only one dealing with

Mr XM outside of her discussion at court, being when she attended with her husband, the first meeting at Mr XM's office.

[68] In considering the consequences of Mr XM's oversight, I have carefully examined the correspondence between Mr XM and Mr ZK. In my view, the singular feature of that correspondence is the conscientious and comprehensive approach adopted by Mr XM in his reporting to Mr ZK. At each significant step in the proceedings, Mr XM carefully explains the steps that have been taken and the steps that need to be taken. His analysis of the evidence, his identification of potential problems, his assembling and co-ordination of the expert witness evidence is thorough. Whilst I am not required on this review to address Mr ZK's complaints that Mr XM had failed to provide competent representation, the extent and nature of the communication by Mr XM, presents as consistent with the Court of Appeal's conclusion that Mr XM had represented Mr ZK in a competent and thoroughly professional way.<sup>7</sup>

[69] In the face of such regular and comprehensive reporting, and the evidence of no objection having been raised by Mr ZK to invoices received, I agree with the Committee that it was reasonable to have expectation of Mr ZK that he raise the issue of the legal aid application with Mr XM. I do not find the contradicting explanations provided by Mr ZK for his failure to do so to be persuasive.

[70] Mr XM made a mistake. But it was an error that reasonably could have been expected to have been drawn to his attention early in the piece by Mr ZK.

[71] Mr XM rendered his first account in October 2016. Mr ZK's response on receiving the account was to advise Mr XM of his intention to promptly settle the account.<sup>8</sup> That response is entirely at odds with Mr ZK's contention when first filing his complaint that he had challenged Mr XM when Mr XM had made demand for his account to be paid.

[72] I have emphasised that I consider that Mr XM's failure to respond to an email, engaged a broader consideration of potential conduct issues rather than simple examination of the possible disciplinary consequences for a lawyer in overlooking an email received, but on balance I find myself in agreement with the Committee that Mr XM's acknowledged error was not sufficient to necessitate or require a finding of unsatisfactory conduct.

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<sup>7</sup> *ZK v The Queen* [20XX] NZCA XX at [106].

<sup>8</sup> Mr ZK, email to Mr XM (21 October 2016).

[73] If the error, considered in a broader context, presented as a failure on Mr XM's part to act competently, I nevertheless would not consider it necessary to impose a disciplinary sanction.

[74] Not every conduct breach, if established, requires a disciplinary response. In *Burgess v Tait* the Court observed that:<sup>9</sup>

The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances, including those which would justify taking no action under s 138(1) and (2). It is not confined to circumstances where there is no basis for the complaint at all.

[75] That position was affirmed in *Chapman v The Legal Complaints Review Officer* where the Court the observed that:<sup>10</sup>

... it appears to me that the LCRO may have assumed that her finding of unsatisfactory conduct inevitably led to the setting aside of the Committee's decision to take no further action under s 138. No point has been taken on this but any such assumption would be incorrect. The discretion which s 138 confers subsists throughout.

[76] In *CW v XB* the LCRO held that "an honest mistake is not a proper basis for disciplinary action".<sup>11</sup>

[77] In conducting a review, the LCRO may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.<sup>12</sup>

[78] Included in those powers, is the ability to exercise a discretion to take no action, or no further action on the complaint.<sup>13</sup> That discretion may be exercised in circumstances where the Review Officer, having regard to all the circumstances of the case, determines that any further action is unnecessary or inappropriate.<sup>14</sup>

[79] I am also mindful, that conduct rules are to be applied as sensibly and fairly as possible.<sup>15</sup>

[80] Throughout the course of the retainer, Mr XM diligently attended to keeping Mr ZK informed on progress. Invoices were rendered and paid. The retainer extended over a considerable period of time. It was regrettable that Mr XM overlooked the email that had been sent with the legal aid application, and I remain uncertain as to why the

<sup>9</sup> *Burgess v Tait* [2014] NZHC 2408 at [82].

<sup>10</sup> *Chapman v Legal Complaints Review Officer* [2015] NZHC 1500 at [47].

<sup>11</sup> *CW x XB* LCRO 213/2010 (15 June 2011) at [16].

<sup>12</sup> Lawyers and Conveyancers Act 2006, s 211(1)(b).

<sup>13</sup> Section 138.

<sup>14</sup> Section 138(2).

<sup>15</sup> *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].

issue as to whether the application had been progressed was seemingly not more directly addressed, but Mr ZK, in providing contradicting explanations for his apparent acquiescence to proceeding with the retainer on the basis that he would be responsible for Mr XM's fees, does not provide convincing account of the fee arrangements.

[81] I see no grounds which could persuade me to depart from the Committee's decision.

*Anonymised publication*

[82] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

**Decision**

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

**DATED** this 30<sup>TH</sup> day of August 2021

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**R Maidment**  
**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:

Mr ZK as the Applicant  
Ms SR QC as the Applicant's Representative  
Mr XM as the Respondent  
[Area] Standards Committee [X]  
New Zealand Law Society  
Secretary for Justice