LCRO 209/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [Standards Committee]
BETWEEN	**KW** Applicant
AND	**LX** Respondent

Decision

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

Introduction

[1] Mr KW has applied for a review of the determination by [Standards Committee] to take no further action on the complaint lodged by him on behalf of a partnership (AD and CE KW) and a company of which he was a director (GP Limited) against Mr LX. The Committee noted that GP Limited (GP) had been placed in receivership on 17 May 2011 and with no evidence that Mr KW had the authority of the receivers to make the complaint on behalf of the company treated the complaint as being by AD and CE KW. I note that the complaint form and the application for review are signed by Mr KW alone. However, there is little relevance in the issue as to whether or not the complainant is KW alone, or by himself and his brother V KW, and I will refer throughout this decision to the complainant as being Mr KW.

[2] This review addresses the question of whether a guarantor is a "person who is chargeable" with a bill of costs and consequently whether a guarantor may complain about a lawyer's bill of costs.[1]

Background

[3] Mr KW was a director and shareholder of GP Ltd. In 2007 GP entered into several loan facilities with [the Bank]. The advances were secured by:

- a mortgage over a farm owned by GP.
- a General Security Agreement (GSA) over GPl's assets.
- a guarantee from five members of the KW family including Mr KW.
- a mortgage over land owned by AD and V KW in a partnership called M Y Partnership.

[4] The facilities fell into arrears and in August 2009 The Bank made a demand for full repayment of the facilities. Subsequently in September 2009 Property Law Act notices were served on GP and the partnership. In May 2011 GP was placed into receivership.

[5] In August 2011 [The Bank] transferred its interest in the securities to [Country Bank] Mr LX acted for [The Bank] and the receivers and the complaints arise out of the steps taken by the receivers and [The Bank] to realise the securities.

The complaints

[6] Mr KW first complained to the Lawyers Complaints Service in December 2011. That complaint was about "botched procedures" and "stuff-ups" in the form and the service process of the various notices served on GP and AD and V KW as partners in the partnership and as guarantors.

[7] Mr KW also complained about a bill of $20,000 for legal fees which Mr LX identified as being a bill for $20,543.47 addressed to [Countrybank] dated 30 November 2011.

[8] Subsequently, Mr KW lodged a second complaint about the cost of legal fees included in the report received from the receivers. This recorded an amount of $93,595 for legal fees.

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[1] Section 132(2) of the Lawyers and Conveyancers Act 2006 provides that "[a]ny person who is chargeable with a bill of costs…may complain…about the amount...of any bill".

[9] Included in the second complaint was a request for a ruling as to the correctness of an offer which Mr KW alleges had been made to him (it is not clear by whom) that the surplus resulting from the receivership would be paid providing they waived "any chance to take them to court".[2]

The Standards Committee determination

[10] The Standards Committee determined to take no further action in respect of either complaint. It considered there was no evidence to support the allegations relating to the form and service of the various notices.

[11] With regard to both complaints about costs, the Committee determined that Mr KW did not have standing to complain as he was not a party chargeable with the fees.

[12] With regard to the final payment of the surplus resulting from the receivership, the Committee noted that it was not clear whether the condition had been communicated direct by the receivers or through Mr LX. In any event, it determined that even if it was Mr LX who communicated the condition, he would have been acting on instructions and any issue lay with the receivers.

Review

[13] This review has been completed on the basis of material to hand with the consent of the parties. The only issue of any substance to arise from this review is the determination by the Standards Committee that Mr KW lacked standing in terms of s 132(2) of the Lawyers and Conveyancers Act to complain about Mr LX's fees, because as guarantors he was not a person chargeable with the bills. I will come back to that issue after addressing the remaining issues.

[14] Mr KW alleged that there had been "stuff-ups" and "botched procedures" in relation to the various notices served on the guarantors.

[15] [Countrybank] was obliged to issue proceedings for possession of the partnership property to enable effective and uninterrupted marketing of the property and for a winter crop to be planted. The right to possession depended on the notices having been served. Any challenge to the validity of the notices or service of same could have been made through those proceedings. There is no evidence this was the case.

[16] In his response to the complaint Mr LX advised:

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[2] Complaint 26 June 2012 at [3]. It is not clear by whom and to whom this condition was

- Contrary to Mr KW's assertions that the first PLA notices had not been served. Mr LX provided evidence by way of the service report that they had.

- There was a need to serve further notices pursuant to ss 119(1) and 128(1) of the Property Law Act following appointment of the receivers.

- Service on two guarantors had not been possible as they were evading service.

- Conduct by the KW's themselves had been the cause of substantial extra costs.

[17] In summary, with regard to these complaints, there is no evidence of any conduct on the part of LX that could be considered to be unsatisfactory conduct as that term is defined in the Lawyers and Conveyancers Act 2006.

[18] Mr KW sought a ruling that the condition relating to payment of the surplus resulting from the receivership was "against [their] rights".[3]

[19] The complaint lacked detail and no copy of the correspondence in which the condition was imposed was provided. There is no evidence therefore that the substance of the complaint is correct and who communicated the condition. In any event, entitlement to a surplus following receivership is not a matter with which the complaints and disciplinary process can engage. It is a matter to be determined by the courts.

Section 132(2) Lawyers and Conveyancers Act 2006

[20] This section provides that only a person who is chargeable with a bill of costs may complain about the quantum of a lawyer's bill. Mr KW was a guarantor of the company's facilities. The question as to whether or not he was a person chargeable with Mr LX's bills of costs arose in correspondence between Mr LX and Mr Q. Mr Q asserted that since a complaint had been lodged, s 161(2) of the Lawyers and Conveyancers Act prevented [Countrybank] from proceeding with sales of the properties as that amounted to proceedings to recover Mr LX's fees.

[21] Mr LX responded by saying that he did not need to take any recovery action as his bills had been paid.

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communicated.
[3] Above n 2.

[22] The Standards Committee determined that Mr KW was not a person chargeable with the bills of costs and therefore there was no jurisdiction to consider his complaints.

[23] In terms of the guarantee, Mr KW was liable as a principal borrower and not as a surety.[4] The "guaranteed indebtedness" as defined in the Deed included all "costs…charges and expenses (including legal fees and expenses) incurred or sustained in any way by the Lender in connection with that indebtedness or the enforcement or attempted enforcement of that indebtedness…".[5]

[24] The guarantors were thereby contractually bound to pay any costs incurred by [Countrybank]. They were in the same position as a lessee who contracts with a lessor to pay the lessor's solicitor's costs incurred in documenting a lease or in enforcing the terms of the lease, or an owner of a unit in a body corporate who is bound by statute and/or the Body Corporate rules to meet the costs of recovery of an outstanding levy.[6] There is an added twist in the present case in that the guarantors were not called upon directly to meet payment of Mr LX's bills. They were paid by the receivers from the realisation of company assets. The KW's did not therefore suffer any direct loss. They may have suffered loss by virtue of the fact that they were shareholders in GP but they were not liable for the costs in that capacity.

[25] I do not think that it matters whether or not the person contractually bound to pay the costs has actually been called upon to do so. In terms of the guarantee they could have been required to pay the costs and it is liability for payment that determines the issue not whether or not they have been required to make payment.

[26] The question to be considered is whether or not persons who are contractually bound to reimburse a lawyer's client for the lawyer's fees have a right to challenge the quantum of that bill. The lawyer's client will of course have no interest in complaining about the quantum of the bill as it will be passed on to the party who is contractually liable to pay the costs.

[27] The Law Practitioners Act 1982, which preceded the Lawyers and Conveyancers Act 2006, included a definition of the "party chargeable." Section 139 defined "party chargeable" in relation to a practitioner's bill of costs as including "any person who has paid or is liable to pay the bill either to the practitioner or to any other party chargeable with the bill…".

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[4] Deed of Guarantee dated 29 June 2007 at [3.1].
[5] Above n 4 at [1.1].
[6] Unit Titles Act 2010, s 124(2).

[28] There was therefore no question that a guarantor had standing to complain about a lawyer's bill of costs under the Law Practitioners Act 1982.

[29] This was noted by Judge Cunningham in *Body Corporate 183119 v Walden.*[7] That case concerned a body corporate owner who challenged the quantum of costs charged by a lawyer to the body corporate for recovery of the levy payable by her which was recoverable from her pursuant to s 34 of the Unit Tittles Act 1972. The Judge noted that while it was appropriate for the court to decide liability "a Court should not cut across the jurisdiction and powers of the Standards Committee in terms of its statutory function which is to decide whether legal fees rendered are reasonable".[8]

[30] Further at [34] the Judge commented:

> Section 132(2) talks about any person chargeable with a bill of costs. Because the predecessor section defines a party chargeable more widely to include "…any other party chargeable with the bill…" it could be argued that the ambit of persons who can avail themselves of the cost revision process has been narrowed.

[31] She then went on to say:[9]

> The purposes of the Lawyers and Conveyancers Act is set out in s 3 of the Act. They include to maintain public confidence in the provision of legal services and to protect the consumers of legal services. There are in my view good policy grounds that the current section 132(2) should not be interpreted narrowly.

[32] She therefore directed that the debtor should be allowed "to pursue the Law Society cost revision path...".[10]

[33] The issue has now been the subject of submissions from both parties to this review. Submissions for Mr LX were provided by Mr T of B's and Mr KW provided comments.

[34] Judgments of the High Court have discussed the question as to who can be a "person chargeable with a bill of costs" but to date there has been no definitive judgment handed down. Various issues were reviewed by Randerson, Wild and Venning JJ in *Black v ASB Bank Ltd.*[11] I include here a lengthy portion of that judgment as it traverses the legislative history of section 132(2) and the cases which have commented on it.

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[7] *Body Corporate 183119 v Walden* DC Auckland CIV-2008-044-002283 27 April 2010.
[8] Above n 7 at [29].
[9] Above n 7 at [35].
[10] Above n 7 at [39]. By referring to a "cost revision process" the Judge was using the terminology of the Law Practitioners' Act but I do not think that this alters the essence of the judgment.
[11] *Black v ASB Bank Ltd* [2012] NZCA 384.

[89] As it was introduced to Parliament on 24 July 2003, what became s 132(2) of the Lawyers and Conveyancers Act read:

119 **Complaints about practitioners, incorporated firms, and their employees**

Any person may complain to the appropriate complaints service about –
…

(c) the amount of any bill of costs rendered by a practitioner or former practitioner or an incorporated firm or former incorporated firm (being a bill of costs that meets the criteria specified in the rules governing the operation of the Standards Committee that has the function of dealing with the complaint) …

[90] The Select Committee Report tabled on 27 July 2004 records that the Justice and Electoral Committee recommended that cl 119 be amended to remove (c) above and to insert a new subclause (2) as follows:

119 Complaints about practitioners, incorporated firms, and their employees

…

(2) *Any person who is chargeable with a bill of costs,* whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner or former practitioner or an incorporated firm or former incorporated firm (being a bill of costs that meets the criteria specified in the rules governing the operation of the Standards Committee that has the function of dealing with the complaint).

[91] That recommendation was explained as follows:

We recommend the inclusion of new clause 119(2) so that only a person who is chargeable with a bill of costs may lay a complaint about the amount of a bill of costs. Russell McVeagh submitted that it was inappropriate for people unconnected with a fee to be able to lay a complaint.
(footnote omitted)

[92] Parliament voted to accept that recommendation on 29 March 2005. The wording of cl 119(2) was not altered further before the Bill received the royal assent on 20 March 2006.

[93] Unfortunately, although the word "chargeable" was reintroduced by the amendment, no definition of "any person ... chargeable" was included in the 2006 Act. Subsequent case law diverges sharply as to whether a person in Mr Black's position is a "person...chargeable" in terms of s 132(2).

[94] In *Simpson Grierson v Gilmour,* Stevens J was in no doubt that a person in Mr Black's position would not be included.

> ...The opening words of [s 132(2)] are important. Such person must be one "who is chargeable with a bill of costs". This depends upon there being a contract of retainer between the practitioner and the person concerned.
> (footnote omitted)

[95] In *GM v TT* the Legal Complaints Review Officer reached the same view. She said:
(footnote omitted)

> [20] The Practitioner did not invoice the Applicant. Rather, his complaint is based on a costs order of the Court. Notwithstanding that the costs sought by the [District Council] may have reflected the fees it had paid to the Practitioner, it is difficult to see any basis on which the Applicant had standing to file a complaint under s 132(2) against a lawyer concerning charges to its client.

[96] On the other hand, in *JG* v *RS,* another Legal Complaints Review Officer notes the view expressed by Judge Cunningham in a related District Court proceeding that "there are in my view good policy grounds that the current section 132(2) should not be interpreted narrowly", even though the Judge acknowledged that "it could be argued that the ambit of persons who can avail themselves of the costs revision process has been narrowed".
(footnote omitted)

[97] *JG* v *RS* involved a dispute between the registered proprietors of a unit in, and the body corporate of, a unit title development. That was also the context of Associate Judge Christiansen's decision in *Doody* v *Body Corporate* 343562. Without deciding the point, the Associate Judge observed that s 132 "may not preclude a complaint by a unit title owner about the legal fees incurred by a body corporate in the recovery of outstanding levies".

[98] Finally, there are two judgments of the High Court which note the issue as to the ambit of s 132(2), without needing to decide the point: *Hannam* v *Herd; Eagle* v *Petterson.* In the first of those cases White J said:

> [20] ...The Standards Committee may, however, wish to consider whether Mr Herd is a person "who is chargeable with a bill of costs" in terms of s 132(2) of the Lawyers and Conveyancers Act 2006. The issue appears to be whether the reference to "any person chargeable with a bill of costs" is limited to a person, who as a result of a contractual relationship with a lawyer or a third party, such as a lessor, mortgagee or guarantor, or as a result of a statutory or regulatory obligation is liable to meet a lawyer's costs (cf *Simpson Grierson v Gilmour* at [63]-[65], *Crown Money Corp Ltd v Grasmere Estate Trustco Ltd,* and *Watson & Son Ltd v Active Manuka Honey Assoc)* or whether, in addition to beneficiaries who are expressly entitled to complain about certain costs under s 160 of the Lawyers and Conveyancers Act 2006, it extends to anyone else, including a party in a proceeding who is ordered by the Court to pay indemnity costs to another party in the amount which the Court determines was "reasonably incurred".
> (footnote omitted)

[99] We have set all this out because we have suggested that a complaint under s 132 (2) is a potential avenue for dealing, in a detailed way, with a challenge to the reasonableness of indemnity costs. Yet it remains to be authoritatively decided whether, in a case such as this, that is so. 'Hopefully the background we have set out will assist when that decision needs to be made.

[35] As noted, I am unaware of any judgment of the Court which has decided the issue.

[36] The most compelling argument in principle to support the contention that persons such as the KW's should have standing to complain about costs which they are required to pay, is that voiced by Judge Cunningham, namely, that excluding such

persons from the category of those who may make a complaint about a lawyer's costs would be to remove a right previously held, which would run counter to the consumer protection principles of the Lawyers and Conveyancers Act 2006. However such an argument is only a guide to interpretation of the Act and the legislation itself must be capable of supporting such an interpretation.

[37] Mr T submits that it does not. He argues:[12]

> (1) Mr KW is not chargeable with the fees. Implicit in the concept of "charge" is a right to hold liable or right to request payment. That right will usually be contractual. The practitioner did not, and had no right to, charge with (sic) Mr KW with fees. [ABC] had a contractual right to charge [The Bank] for its services. [The Bank] then had a separate contractual right to hold Mr KW liable for those fees;
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> (2) Mr KW is a bankrupt. Any rights he could have exercised in respect of property are vested in the Official Assignee. In substance this review is an exercise of a property right as Mr KW is challenging his liability for solicitors fees charged to [The Bank]. It follows that the right he is purporting to exercise is vested in the Official Assignee not in Mr KW.

[38] Expanding on the first submission, Mr T argues "that a third party who has no contractual relationship with the solicitor cannot complain to the Law Society"[13] and that the Lawyers and Conveyancers Act 2006 intentionally narrowed the category of persons who may complain about a lawyer's fees.

[39] This submission is premised on the view that before a person can be "chargeable" with a bill of costs, there must be a contract of retainer between the lawyer and the person concerned. That was the observation made by Stevens J in *Simpson Grierson v Gilmour*.[14] However the wording of the Act does not include such a restriction. It merely refers to a person who is "chargeable" with a bill of costs. Whilst the lawyer will render his or her bill of costs to his or her client, the client may then "charge" another person who is contractually or otherwise bound to pay those costs with payment of the bill. That third party may therefore become '"chargeable" with the bill by the lawyer's client.

[40] The principle must be to provide the person who is liable at law (whether in contract or otherwise) to pay the lawyer's bill with the right to challenge the reasonableness of the fee.

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[12] Submissions T to LCRO (4 April 2013) at [1.3].
[13] Above n 12 at [2.9].
[14] *Simpson Grierson v Gilmour* HC Auckland CIV-2008-404-008674 29 October 2009. It is worth noting here that the comments by Stevens J were *obiter* in that they were not correctly addressing the issue under consideration here.

[41] Mr T observed that the Act had provided beneficiaries of a trust or estate with the right to complain about a lawyer's bill in support of his argument that it was necessary for persons other than the client to be specifically afforded by the Act with the right to complain. Beneficiaries of a trust or estate are not of course contractually or otherwise bound to make payment of a lawyer's bill of costs and even under the Law Practitioners Act did not otherwise have the right to complain about costs rendered to the trust or estate. That is not a submission that supports the argument that persons who are liable contractually or otherwise to pay the bill must be specifically authorised to complain.

[42] It is worth noting that in *Hannam v Herd* White J distinguished persons who have a contractual relationship with a lawyer or a third party "such as a lessor, mortgagee or guarantor, or as a result of a statutory or regulatory obligation is liable to meet a lawyer's costs..."[15] from another group including a party in Court proceedings who is ordered by the Court to pay indemnity costs. It would seem therefore that he has taken it as read that a person such as a guarantor is considered to be a person who is chargeable with a lawyer's bill of costs.

[43] Applying this reasoning, it is understandable that the Act specifically provides beneficiaries of a trust or estate with the right to complain about a lawyer's bill[16] - they have no contractual obligation to make payment of the bill and without this provision would otherwise be unable to challenge the bill.

[44] Mr T also argues that reasonableness of a lawyer's fee is best dealt with by the Courts when determining liability. He submits that: [17]

> In determining liability for indemnity costs, a debtor/defendant will always be able to submit that the costs were not reasonably incurred. It is submitted that, along with considering the contract or source of the liability, is the proper means to address liability for costs.
> (footnote omitted)

Mr T cites as authority for this submission the case of *Black v ASB Bank Ltd* referred to at [89] – [99].

[45] Mr T's submission is correct where an application has been made to the Court for indemnity costs. That was the case in *Hannam v Herd* where the Court went on to examine and determine the quantum of the indemnity costs award. Those situations

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[15] *Hannam v Herd* HC Auckland CIV 2008-404-5195 3 December 2010 at [20].
[16] Lawyers and Conveyancers Act 2006, s 160(1).
[17] Above n 12 at [2.18].

differ from the present, where a guarantor, mortgagee or lessee is contractually bound to pay the costs incurred by another party.

[46] I do not accept Mr T's submission in this regard. While the Court will fix costs where there has been an application to the Court for indemnity costs, it is not necessarily the case where the quantum of a lawyer's bill is to be assessed after liability has been established.[18] Indeed, in *Henderson Reeves Connell Rishworth v Busch* the Associate Judge said:[19]

> The policy that the courts should not allow their proceedings to impinge on the procedures under the Lawyers and Conveyancers Act for investigating the amounts payable for a lawyer's bill and the need to avoid a miscarriage of justice means that the judgement of the District Court should not be relied on as finally establishing the amount of Mrs Busch's liability under Henderson Reeves' bills.

[47] In that case, the law firm had obtained judgement in the District Court for its bills following which the client then made a complaint about the bills to the Lawyers Complaints Service. The Associate Judge recognised that the amount of Henderson Reeves' bills could very well be altered following completion of a review by this Office.

[48] Mr T rightly points out that responding to a complaint about fees by a guarantor may be difficult for a lawyer, as it necessarily involves communications between the lawyer and his or her client which are privileged. I acknowledge that difficulty but that would be an issue which a Standards Committee would need to address and take into account.

[49] Mr T also submitted that "defining chargeable by reference to the lawyer/client relationship avoids the Law Society process being used for collateral or ulterior purposes".[20] He refers to the fact that Mr KW, through Mr Q "argued that the complaint regarding the fees should operate to prevent the receiver taking any further steps in relation to recovery of debts, including those costs…"[21] That is not an issue which is restricted only to these circumstances and Standards Committees and this Office often encounter situations where it is clear that the complaints process is being used to defer liability for payment of a lawyer's bill. It is not an argument that supports restriction of the right to complain.

[50] Mr T also submits Mr KW's complaint is a "right", "interest" or "claim" in relation to property and causes of action relating to that property. He argues that, as Mr KW is a bankrupt, such rights are vested in the Official Assignee.

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[18] See for example *Simpson Grierson v Gilmour* [2009] NZHC 1142.
[19] *Henderson Reeves Connell Rishworth v Busch* [2013] NZHC 2521 at [36].

[51] I do not accept Mr T's submission. A right to complain is a right to have a lawyer's conduct considered by a Standards Committee – it is not a right to pursue recovery or reduction of a lawyer's bill. If a complaint about a lawyer's bill is upheld, it results in a finding of unsatisfactory conduct against the lawyer. The focus is on the professional record of the lawyer. The Standards Committee then has a discretion as to what orders pursuant to s 156(1) of the Lawyers and Conveyancers Act are to be imposed. This may include an order that a lawyer's bill be reduced or cancelled. However, I stress that this is a discretion to be exercised by the Committee and there is no "cause of action" available to a complainant.

[52] Finally, Mr T argued that Mr KW had complained as a partner of the AD and CE KW partnership which had been dissolved and that therefore Mr KW could not complain on behalf of the partnership. Section 132(2) provides that "any person chargeable with a bill" may complain. That right is not restricted to persons in a position as a partner in a partnership, or director of a company – the right exists whether or not those entities remain in existence. Mr KW's right to complain is not therefore restricted as Mr T suggests.

[53] In his submissions Mr KW expresses the view from the point of principle already referred to, namely, that if persons such as himself are unable to challenge a lawyer's bill of costs they become exposed to liability to pay whatever amount is charged by the lawyer without being subject to assessment for reasonableness by a Standards Committee.

[54] Having considered all of the arguments for and against Mr KW's right to complain about Mr LX's bills of costs, I have come to the view that both the principles of the Act and an interpretation of the section, dictate that Mr KW has the right as guarantor to complain about Mr LX's bills of costs rendered to the receivers.

The outcome

[55] Having reached this view, it follows that the bills of costs need to be examined. There is minimal information about the bills as the only information Mr KW has about the bills of costs is the total figure in the receiver's report in which legal fees are recorded as being $93,595. Mr KW would not have been privy to the detail of those bills and substantially more information is required to enable this complaint to be considered. In addition, Mr LX is entitled to an opportunity to present submissions as

[20] Above n 12 at [2.20].
[21] Above n 20.

to the reasonableness of the fee if the Committee determines to inquire into the complaint.

[56] The only course therefore open to me is to return this matter to the Standards Committee to consider and determine the complaint about costs.

Decision

1. Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee insofar as they relate to the complaints concerning Mr LX's fees is reversed.

2. Pursuant to section 209 of the Act the Committee is directed to accept jurisdiction to consider the complaint about costs and to investigate and issue a determination in respect thereof.

3. In all other respects the determination of the Standards Committee is confirmed.

DATED this 27th day of August 2014

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OWJ 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:

Mr KW as the Applicant
Mr LX as the Respondent
Mr RD as a Related Person
Mr T as the Representative for the Respondent
The Standards Committee
The New Zealand Law Society