LCRO 290/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [City] Standards Committee
BETWEEN	**GD** **WL**
	Applicants
AND	**RA**
	Respondent

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

Introduction

[1] Mr GD and Ms WL have applied for a review of the determination of [City] Standards Committee to take no further action with regard to their complaints about Mrs RA. Mrs RA has applied for a review of the finding of unsatisfactory conduct against her.

[2] This review involves a consideration of the issues faced by lawyers in areas where they or their firm are the sole providers of legal services. It also raises the important issue that lawyers are expected to be proactive in offering advice to their clients rather than adopting the position that all that is required is to merely implement a client's instructions.

Background

[3] In early 2011 Mr GD and Ms WL expressed an interest in purchasing a block of land in [Town] which was part of a property owned by a trust of which Mrs PZ, a local real estate agent, was a trustee.[1]

[4] Mrs RA is a principal in the firm of ABC Legal, the only firm of lawyers in [City]. It is also the only firm in [Town].

[1] The parties have referred only to Mrs PZ as the owner and it is assumed the trust was one in which Mrs PZ was beneficially interested.

[5] Mrs RA had previously acted for Mrs PZ and had also acted for Mr GD and his former wife. She subsequently acted for Mr GD and Ms WL.

[6] Mrs PZ made contact with Mrs RA and advised her that Mr GD and Ms WL were interested in buying the block of land. Subdivision consent had been obtained but Mrs PZ did not want to incur the cost of completing the subdivision without Mr GD and Ms WL committing to the purchase. Mrs PZ advised the price had been agreed at $200,000 including GST and instructed that an agreement should be prepared subject to finance and a satisfactory engineer's report as to the suitability of the site for building purposes.

[7] On 16 June 2011 Mrs RA telephoned Mr GD and Ms WL to confirm these terms. Following a discussion with them Mrs RA prepared an Agreement for Sale and Purchase and sent it to them under cover of a letter dated 17 June. The first two sentences of that letter read:

> We enclose two copies of the Agreement for Sale and Purchase. You may want to make alterations, but at least this is a start.

She then went on to record Mrs PZ's agreement to share the cost of fencing and discussed the type of fence to be constructed. The letter also included comments about the amount of the deposit and when it was to be released to Mrs PZ. Mrs RA noted:[2]

> [PZ] is not happy with the deposit not being paid until the Council issues the necessary certificates on completion of all required work, approximately 3-4 weeks before issue of title. She says she needs a real commitment from you before she will go ahead with the subdivision, given that it is such a big financial commitment on her part.

[8] The draft Agreement prepared by Mrs RA provided for the deposit to be released to the vendor when the Council had released the ss 223 and 224 certificates.[3]

[9] Mrs RA advised Mr GD and Ms WL that if they wished to proceed with the Agreement then they should initial all pages, sign at the foot of the last page and give both copies to Mrs PZ or return them to Mrs RA.

[10] A file note made by Mrs RA of a telephone conversation with Mr GD on 21 June recorded that he had confirmed all was in order and they would be signing the agreement. The signed Agreement dated 21 June was returned to Mrs RA by Mrs PZ.

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[2] Letter RA to GD and WL (17 June 2011) at [2].
[3] Resource Management Act 1991, ss 223 and 224.

[11] On the following day Mrs RA wrote to Mr GD and Ms WL and recorded the terms of the Agreement. That letter was headed: "Purchase [Name] Road Section". The first sentence of the letter reads:

> We have received a copy of the signed Agreement for Sale and Purchase back from PZ, and assume that you have retained an original signed copy.

[12] The letter also contained the following important paragraphs:

> **Conditions of contract**
>
> The agreement is conditional upon you arranging mortgage finance, and obtaining a satisfactory report from an engineer as to suitability of the site for building, by 5 July. Please let me know about those matters by that date…
>
> **Acting for both parties**
>
> As you are aware, our firm is also acting for [PZ]. As the terms of the contract have now been accepted by both parties, we would not expect any difficulties. However, if a conflict should arise, then we would of course refer you and [PZ] to other Solicitors for independent advice.

[13] With that letter Mrs RA included the firm's terms of engagement and asked for them to be signed and returned. That letter of engagement referred to the services to be provided as being with regard to "Purchase [Name] Road section". The original of the terms of engagement was signed by Mr GD and Ms WL, dated 6 July 2011, and returned to Mrs RA.

[14] At that stage Ms DH, a solicitor in Mrs RA's firm, continued to act for Mrs PZ. Mrs RA said that she had acted for both parties up until that time as Ms DH was on leave.

[15] The deposit of $20,000 was paid by Mr GD on 5 July. The conditions were due to be satisfied by 7 July and a file note by Mrs RA dated 6 July reads:

> Rang QB
> Mge fin
> engineer
> Abs, all fine
> We to hold dep
> Just wait for PZ to do her thing
> Contract confirmed officially to TC

[16] Mrs RA then provided Ms DH with a handwritten note on the firm's letterhead which said:-"This contract is now confirmed. The deposit has been paid to our trust account and will be held for GD and WL as per clause 19 of the Agreement".

[17] In early November Ms DH indicated that matters were progressing and this was communicated to Mr GD and Ms WL. In a note made by Mrs RA of a telephone

conversation with Mr GD on 3 November she recorded that Mr GD had some concerns that they may not be able to secure a loan to complete the settlement.[4]

[18] On 17 January 2012 Ms DH advised that the s 224 certificate was due to issue the following day and noted the requirement in the Agreement that the deposit was then to be released to Mrs PZ. Having been advised of this Ms WL apparently approached Mrs PZ directly to request an extension of the settlement date as they did not have the necessary funds to settle.

[19] Mrs RA also spoke to Mr GD and Ms WL and confirmed that the best course of action was to try and negotiate an extension of the settlement date as Ms WL had already attempted to do.

[20] At that stage Mr GD and Ms WL consulted Mr AO of AOF who sent a letter to Mrs RA by fax dated 24 January, received by Mrs RA at 10.38 am on 25 January. At 11.58 am on the same day Mrs RA sent an e-mail to Mr GD and Ms WL advising the basis on which Mrs PZ would agree to an extension of the settlement date. That included a requirement for the deposit to be released.

[21] I was advised at the review hearing that the deposit had not been released but that Mrs PZ has issued proceedings to forfeit the deposit, while Mr GD and Ms WL have sued Mrs RA and her firm in negligence and joined them to the proceedings.

The complaints and the Standards Committee determination

[22] Mr GD and Ms WL lodged a complaint on 1 August 2012 and sought return of the deposit together with interest. In the Notice of Hearing issued by the Standards Committee dated 16 April 2013 the issues identified were:

1. A conflict of interest in that Mrs RA and her firm acted for both parties (Rules 6.1 and 6.2 of the of the Conduct and Client Care Rules);[5] and

2. A failure to obtain written confirmation from the complainants' bank that appropriate mortgage finance was available to complete the purchase when acting for the purchaser (Rule 3 of the Conduct and Client Care Rules).

[23] With regard to the alleged conflict of interest the Standards Committee recorded its determination as follows:[6]

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[4] After signing the agreement Mr GD and Ms WL had established a restaurant resulting in a marked reduction of income.
[5] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

> The Standards Committee was satisfied that Mrs RA should not have agreed to her firm acting for both parties and she had failed to properly consider the obligations imposed by rules 6.1 and 6.2 prior to agreeing to act. The Standards Committee noted that there was an incomplete subdivision of the land and the need for both an engineer's report and finance to be arranged. It found that there was, in those circumstances, more than a negligible risk that Mrs RA and her firm would not be able to discharge her obligations to both clients in relation to the proposed transaction and that this overrode any informed consent that may have subsequently been obtained. The Standards Committee accepted that in the New Zealand legal environment this was an ongoing and common area of difficulty, particularly for practitioners in rural communities. However, the Standards Committee determined that Mrs RA had breached the obligations imposed by of rule 6, and that this amounted to unsatisfactory conduct pursuant to section 12(c) of the Lawyers and Conveyancers Act 2006 (the Act).

[24] With regard to the second issue the Standards Committee determined:[7]

> The Standards Committee preferred the evidence presented by Mrs RA in relation to the manner in which the purchase agreement was declared to be unconditional and did not regard her actions as amounting to a breach of any of her professional obligations. The Standards Committee noted that there had been no written confirmation from the bank and that Mrs RA had instead relied on assurances from Mr GD and Ms WL. However, it was satisfied that Mr GD and Ms WL were not naive purchasers and were aware of the risks when the contract was made unconditional.

[25] Mr GD and Ms WL, and Mrs RA, have sought a review of the determination.

Review

[26] A review hearing was held in [City] on 4 August 2014. Mr GD and Ms WL attended, represented by Mr AO, and Mrs RA attended with a support person and was represented by Mr FX.

Was there a conflict of interest?

[27] Rules 6.1 to 6.3 of the Conduct and Client Care Rules provide:

> 6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.
>
> 6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.
>
> 6.1.2 Despite rule 6.1.1, if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.

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[6] Standards Committee determination dated 22 August 2013 at [24].
[7] Above n 6 at [19].

> 6.1.3 Despite rule 6.1.2, a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act for the client and no duties to the consenting clients have been or will be breached.
>
> 6.2 Rule 6.1 applies with any necessary modifications whenever lawyers who are members of the same practice act for more than 1 party.
>
> 6.3 An information barrier within a practice does not affect the application of, nor the obligation to comply with, rule 6.1 or 6.2.

[28] As noted, ABC Firm was the only firm in [City]. It is apparent from the summary of work previously carried out for Mr GD which Mrs RA provided at the hearing that she (and/or her firm) has on a number of occasions acted for more than one party in transactions involving Mr GD. These include:

(a) acting for both Mr GD and his former wife where he acquired her interest in the matrimonial home;

(b) acting for Mr GD on the purchase of a property and also acting for the vendor;

(c) purchase by Mr GD of a half share in Ms WL's property (Ms WL's signature was witnessed by an independent solicitor). Preparation of wills and enduring powers of attorney for both. This included a new loan raised by them both from which Ms WL's existing borrowing was repaid; and

(d) proposed purchase of a section by Mr GD and Ms WL. ABC Firm acted for the vendors as well.

[29] Although I did not specifically ask Mrs RA if this was indicative of her practice in general I have assumed this to be the case. This no doubt arises because of the fact that ABC Firm is the only law firm in [City] and because of this lawyers are frequently requested by clients to act for both parties.

[30] In a number of instances I note that Mrs RA states in the summary provided that she acted <u>on instructions from her clients</u>, for example, the purchase of the former matrimonial home and the purchase of a half-share in Ms WL's property. I have some reservations that it is sufficient for a lawyer to assert that because they were acting on instructions they were therefore acting pursuant to a limited retainer, thereby enabling the lawyer to act for both parties. A lawyer has the training and experience to recognise issues that have not been addressed by a client or to recognise unexpected consequences flowing from instructions given by a client. In those cases a lawyer must

be proactive in offering advice rather than merely implementing a client's instructions without further inquiry.

[31] This issue was commented on by Kos J in *Woods v Legal Complaints Review Officer*[8] where a lawyer had sought judicial review of a finding by the Legal Complaints Review Officer (LCRO). In that case the lawyer had prepared a will on the basis of instructions from her client that a property was owned jointly by the testator and her husband whereas the property was owned as tenants in common. The lawyer's defence was that the client was adamant that the property was owned jointly and had instructed the lawyer not to obtain a title search to verify the client's instructions. Kos J referred to a statement by Tipping J in *Gilbert v Shanahan*:[9]

> [While] [s]olicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer.

[32] In the case under consideration by Tipping J, a solicitor was held to be negligent for not obtaining a copy of a prior agreement to lease when the client (instructing her to act on the formal lease) had not supplied her with a copy.

[33] In the matter before Kos J, he confirmed the finding of the LCRO that the lawyer's conduct constituted unsatisfactory conduct, being:[10]

> … satisfied the [lawyer's] omission to ascertain the titular position was conduct falling short of the standard of competence and diligence that a member of the public was entitled to expect of a reasonably competent lawyer.

[34] It seems to me that Mrs RA perhaps adopts the view that if she restricts herself to acting on, and implementing, client instructions, it is then in order for her to act for both parties to a transaction.

[35] I accept that where an agreement to purchase a property has already been signed by a client before the lawyer is instructed, it may be reasonable to adopt the view that there is no more than a negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients and acting for both parties may be in order. However, this should be considered to be more of an exception rather than the rule and clients should be encouraged to have separate representation in all but the simplest of transactions. There are fewer obstacles now to obtaining separate representation than there was previously when communication was more difficult and

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[8] *Woods v Legal Complaints Review Officer* [2013] NZHC 674.
[9] Gilbert v Shanahan [1998] 3 NZLR 528 at 537.
[10] Above n 8 at [63].

there was a need for clients to physically attend a lawyer's office for a variety of reasons. That is not now the case and I note that Mr GD and Mr WL instructed Mr AO with little difficulty when they decided that independent advice was necessary.

[36] I consider the present case to be one where Mrs RA should not have accepted instructions from both vendor and purchaser. The fact that Ms DH acted when she returned from leave for Mrs PZ does not assist- see Rules 6.2 and 6.3 of the Conduct and Client Care Rules.

[37] The transaction on which Mrs RA was instructed involved a subdivision. Although the subdivision consent had already been issued, there are any number of issues which should be considered by a purchaser when entering into a contract to purchase a property in a subdivision. At the review hearing I noted for example, that the Agreement did not include a "sunset clause". Mrs RA advised that she had raised this with Mr GD whose instructions were that the longer it took for title to issue, the better. However, I am not sure that this is necessarily a reason to not include a sunset clause, and if Mrs RA had not been acting for both parties she may have been somewhat more forceful in her recommendation to Mr GD that such a clause should be included. As it is, Mr GD expressed no understanding of such a clause or its purpose, and indeed, disputed the fact that Mrs RA had even raised the question.

[38] The principle of the matter under consideration is that where parties are negotiating a contract to buy and sell a property, and particularly a property which is to result from a subdivision, I consider that there is more than a negligible risk that a lawyer would be unable to discharge obligations to both parties.

[39] The unsatisfactory nature of Mrs RA's conduct was compounded when she was advised that Mr GD and Ms WL were going to be unable to settle on the due date. At that stage it is beyond argument that Mrs RA was conflicted when she continued to act (or allowed her firm to continue to act) for both parties and endeavoured to negotiate an extension of the settlement date. Both parties should immediately have been referred for independent advice at that stage.

[40] In the circumstances I confirm the finding of unsatisfactory conduct against Mrs RA in this regard.

[41] The Committee was not satisfied that either Mr GD or Ms WL had suffered any loss due to the conflict of interests and imposed no penalty following its finding of unsatisfactory conduct. It did however order Mrs RA to pay the sum of $500 costs to the New Zealand Law Society.

[42] Whether or not Mr GD and Ms WL suffered any loss is relevant only to whether an order for compensation should be made. I agree with the conclusion of the Standards Committee that it was not satisfied that Mr GD and Ms WL had suffered loss as a result of the conflict of interests and consequently decline to make an order for compensation as sought by them.[11]

[43] I have given consideration whether some other penalty should be imposed, such as a fine, censure or reprimand, but have come to the view that there is no need for any penalty to be imposed. Mrs RA advised that she is now much more alert to conflict issues and I consider the finding of unsatisfactory conduct is penalty enough in the circumstances.

The advice provided to Mr GD and Ms WL

[44] The next question to consider was whether or not the advice provided by Mrs RA to Mr GD and Ms WL met the standard required by s 12(a) of the Lawyers and Conveyancers Act 2006. That section defines unsatisfactory conduct as meaning 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.

[45] Mr GD and Ms WL assert that they were not advised by Mrs RA at the outset that they were entering into a contract to purchase the property and Mr AO submits that the level of advice and discussion provided by Mrs RA prior to making the Agreement unconditional was inadequate.

[46] Mr GD and Ms WL maintain that they thought all they were doing was expressing an interest in the property and when Mrs PZ had completed the subdivision they would then enter into a binding commitment.

[47] I do not accept this. Amongst the reasons for not doing so I include:

(a) although they professed to be unfamiliar with the legal processes for buying and selling a property, Mrs RA provided details of some seven other conveyancing transactions with which Mr GD and/or Ms WL had been involved since 1999. In one particular instance this involved a contract to purchase a property in a subdivision which did not proceed because Mr GD and Ms WL were unable to secure funding and the agreement was cancelled;

[11] Mr GD and Ms WL seek an order that the deposit should be refunded to them.

(b) the standard form Agreement for Sale and Purchase of real estate is replete with warnings that it constitutes a binding contract and parties should seek legal advice before signing;

(c) Mr GD paid the deposit of $20,000 into ABC Firm Trust Account and there had been specific discussions about the amount of the deposit and the basis on which it was to be released to Mrs PZ;

(d) immediately following receipt of the signed Agreement Mrs RA wrote to Mr GD and Ms WL setting out the terms of the Agreement, which made it quite clear that they had signed an Agreement for Sale and Purchase; and

(e) Mr GD states that he relied absolutely on Mrs RA (and other persons who requested documents to be signed) and did not have the time to read or consider what it was he was signing. He advised that whenever Mrs RA rang he was busy in his restaurant where he worked long hours and was unable to understand or address the issues that she was raising due to pressures on him. Whilst this completely ignores the fact that Ms WL was a signatory also, and her role in the business was not discussed, Mrs RA cannot take responsibility for their lack of attention to the content of documents signed by them or to correspondence sent to them.

[48] However, I consider there is some merit in Mr AO' submission that it was incumbent upon Mrs RA to be absolutely certain that her clients understood what they were committing to before declaring the Agreement unconditional.

[49] Mrs RA says she rang Mr GD on 6 July to enquire whether the conditions had been satisfied and noted Mr GD's response as recorded in [15]. Mr GD asserts however that he merely indicated he expected everything would be all right when the time came in the following year to confirm the transaction.

[50] The Agreement was conditional upon Mr GD and Ms WL arranging satisfactory finance to complete the purchase and for a satisfactory engineer's report on the building site to be obtained. There is dispute between the parties as to what Mr GD actually said when Mrs RA rang him but it is beyond dispute that he affirmed in some manner that everything was or would be in order.

[51] It seems however that Mrs RA's somewhat restricted approach to her instructions may have determined her response. A lawyer who was actively advising her clients may very well have seen fit to inquire more deeply into what her clients were telling her and to make sure they comprehended the consequences. This was particularly so in

the circumstances where no formal loan instructions had been received. In addition, Mrs RA would have been aware that loan offers extended by a bank do not remain open for acceptance indefinitely and generally lapse after a period of time. This eventuality needed to be discussed with her clients. Only a week previously, Ms WL had attended Mrs RA's office to execute a guarantee for a small overdraft for the company which she and Mr GD had formed and it is a little surprising that there was no discussion at the time about the fact that no loan instructions for the section purpose had been received or the impact that this additional borrowing would have.

[52] A closer consideration of the engineer's report condition would surely have raised the question as to whether there had been sufficient time between signing the Agreement and the unconditional date for such a report to have been commissioned and carried out. Some lawyers may have requested a copy of the report although I do not suggest by this that there was an obligation to do so. However, an engineer's report produced for this purpose would have been comprehensible by a lay person and a lawyer may be able to offer comment or a different viewpoint on the content of such a report.

[53] I do not accept Mr AO's submission that it is an absolute that loan instructions be received before declaring a finance condition satisfied. A lawyer is able to rely on his or her client's advice provided the lawyer is satisfied that the client has received the necessary assurances from the bank. Nevertheless, even if this were the case Mrs RA should have alerted her client to the fact that loan offers do not remain open for acceptance indefinitely and have discussed with Mr GD whether he was aware of this and addressed the issue with the bank.

[54] The issue to be determined here is not so much an evidentiary issue as to what it was Mr GD said but whether or not Mrs RA should have offered further comment and/or advice rather than accepting Mr GD's statements at face value. In this regard therefore, the Standards Committee's preference of Mrs RA's version to Mr GD's version becomes less significant.

[55] Unfortunately, Mr AO has not provided any expert evidence which assists me in reaching a decision in this regard. Members of the Standards Committee practice in this field of law but the benefit of their decision is somewhat diluted by the fact that they concentrated on whether or not Mrs RA had received instructions to confirm the conditions, whereas I consider that Mrs RA should have conducted further dialogue with her clients to ensure that they acted advisedly.

[56] In matters relating to litigation a lawyer has a duty to ensure that he or she receives informed instructions. Rule 13.3 of the Conduct and Client Care Rules provides:

> Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.

Clearly, that rule is not applicable in the present circumstances.

[57] However, a lawyer does have a general duty to protect and promote a client's interests:[12]

> In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

This rule immediately precedes the rules relating to conflict of interests.

[58] Mr AO argues that Mrs RA was driven by her conflicting loyalty to Mrs PZ when she failed to make further inquiries with Mr GD. I do not necessarily accept this submission if for no other reason than there would be little point in committing Mr GD and Ms WL to a contract which they were going to be unable to complete. There was no advantage to Mrs PZ for this to occur. I therefore consider that Mrs RA adopted a similar approach to the instructions from Mr GD and Ms WL when advising Mrs PZ which could be described as a neutral approach based on implementing client instructions.

[59] Weighing up all of the factors involved in this matter, I have reached the view that an adverse finding against Mrs RA is not warranted, although only by the slimmest of margins. The factors which weigh against an adverse finding are that she cannot be expected to take responsibility for what could be termed an uninterested approach (albeit driven by business pressures) by Mr GD and Ms WL to the transaction in which they had become involved, and an acceptance that whatever the actual words used, Mr GD did express confidence that the conditions would be able to be satisfied. In addition, and despite Mr GD's professed naivety in proper transactions, he had been involved in a number of transactions and Mrs RA cannot be expected to be aware that he had not engaged fully with those transactions as he asserts.

[60] This conclusion leads to the result that the determination of the Standards Committee is confirmed.

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[12] Above n 5, Rule 6.

Decision

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

Costs

Both parties have applied for this review. I have confirmed the Standards Committee decision. Where an adverse finding is confirmed against a lawyer, costs will be awarded against them in accordance with the LCRO Costs Orders Guidelines. Pursuant therefore to the Guidelines and s 210(1) of the Lawyers and Conveyancers Act, Mrs RA is ordered to pay the sum of $800 by way of costs to the New Zealand Law Society by no later than 19 September 2014.

DATED this 19th day of August 2014

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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:

Mr GD and Ms WL
Mr AO as Representative for the Applicants
Mrs RA as the Respondent
Mr FX as Representative for the Respondent
Mr BF as a Related Person
[City] Standards Committee
The New Zealand Law Society