LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 153

Ref: LCRO 107/2021

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 **NG**

Applicant

AND **WF and OE**

Respondents

DECISION

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

Introduction

[1] Mr NG has applied to review a decision by the [Area] Standards Committee [X] (the Committee) dated 11 June 2021, in which the Committee decided to take no further action on his complaints about Mr WF and Ms OE.

[2] The Committee based its decision upon s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). This allows a Standards Committee to dismiss a complaint at an early stage if, based on the information it has, the Committee considers further action on that complaint is neither necessary nor appropriate.

Background

[3] Mr NG's mother passed away in June 2020.

[4] Mr NG has three brothers: [A], [B] and [C].

[5] [A] is one of three executors in Mrs NG's will. The other two executors are Mr WF and a Ms TP, a long-standing friend of the late Mrs NG.

[6] Mr WF is a partner in the law firm [Law firm X]. That law firm is acting in the administration of the late Mrs NG's estate.

[7] On 29 June 2020, [B] lodged a caveat challenging a grant of probate to his late mother's will.

[8] A hearing as to that caveat was scheduled for 22 March 2021, in the High Court at Auckland.

[9] On 6 November 2020 [B]'s lawyers emailed a settlement proposal to Mr WF (the settlement proposal), which included withdrawal of the caveat.

[10] The settlement proposal was also emailed to Ms OE, although she was not involved in the administration of the late Mrs NG's estate. She deleted the email.

[11] Mr WF did not see the settlement proposal. It was drawn to his attention in further correspondence from [B]'s lawyers on 23 December 2020.

[12] Despite searching his email account, and his firm's email database, Mr WF was unable to locate the email containing the settlement proposal. [A] had a copy of the settlement proposal, and gave it to Mr WF.

[13] The three executors discussed the settlement proposal and responded to [B]'s lawyers on 22 February 2021.

Complaint

[14] Mr NG lodged his complaint against Mr WF and Ms OE with the New Zealand Law Society Lawyers Complaints Service (Complaints Service) in an email sent by him on 18 February 2021. He said:

(a) [Law firm X] are not acting in the best interests of his late mother's estate, "and in fact have acted negligently at best, criminally at worst."

(b) [B] has lodged caveat against probate being granted.

(c) On 6 November 2020 [B]'s solicitors sent an email to Mr WF and Ms OE which included a settlement proposal which could have seen the withdrawal of [B]'s caveat.

(d) The email containing the settlement proposal was not passed on to the other executors.

(e) This has given rise to further difficulties in the administration of the late Mrs NG's estate, for which Mr NG will be seeking compensation.

[15] Upon receipt of the complaint, the Committee asked Mr NG to provide the following additional information: a copy of his mother's will, copies of correspondence following the 6 November 2020 email and settlement proposal, copies of other correspondence and a copy of the court proceedings relating to [B]'s caveat.

[16] In an email to the Complaints Service dated 1 April 2021, Mr NG provided a copy of his mother's Will, and copies of documents filed in the caveat proceedings. He indicated that he had no correspondence fitting the description requested by the Committee.

Standards Committee processes

[17] Mr NG's complaint was initially assessed as being suitable for the Complaints Service's Early Resolution Process (ERP).

[18] That procedure involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to the outcome.

[19] If the Committee's preliminary view is that the complaint appears to lack substance, a Legal Standards Officer (LSO) will contact the respondent lawyer and inform them of the Committee's preliminary view, inviting a response from the lawyer.

[20] Any response is included in a file note (described as "Early Resolution Process – Call Log") prepared by the LSO and provided to the Committee, which then completes its inquiry into the complaint.

[21] On 9 June 2021, the LSO spoke to Mr WF and advised him about the complaint (including the complaint about Ms OE) and the Committee's preliminary view that it may take no further action on Mr NG's complaint.[1]

[22] The LSO offered Mr WF an opportunity to respond to the complaint on his and Ms OE' behalf. Following that discussion, the LSO forwarded Mr WF a copy of Mr NG's complaint.

[23] On 10 June 2021 Mr WF sent an email to the Complaints Service indicating that neither he nor Ms OE wished to respond to the complaint.

[24] The matter was then referred to the Committee for further consideration.

Standards Committee decision

[25] The Committee identified the issue to be determined as being whether Mr WF and Ms OE had breached their professional obligations.[2]

[26] The Committee noted that Mr NG's complaint centred on the concern that Mr WF and Ms OE had failed to forward [B]'s settlement proposal to the other two executors, or to tell him about it.

[27] [B]'s lawyers had sent the settlement proposal to the executors for them to consider. Upon receipt of that settlement proposal, Ms OE was obliged to inform the executors.

[28] Despite Mr NG's complaint that this had not occurred, the Committee said that "there is no evidence that Mr WF and Ms OE failed to pass on the settlement offer to Ms TP and [A]."[3]

[29] The Committee also observed that "the actions and decisions of executors a matter for the High Court to consider [including when] an executor is also a lawyer" and that this was where Mr NG's remedy lay.[4]

[30] For those reasons, the Committee held that it was unable to take Mr NG's complaint about Mr WF any further.

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[1] Early Resolution Process Call Log (undated).
[2] Standards Committee decision (11 June 2021) at [10].
[3] At [13].
[4] At [14] and [15].

[31] In relation to Ms OE, the Committee noted that she was only able to act upon the unanimous instructions of the three executors. It held that "if any of [the executors] objected to [the settlement proposal], [it] could not proceed."[5]

[32] The Committee concluded that there was "no evidence to support a claim that Ms OE has failed to comply with her obligations to her client executors", and that this issue of complaint could not be upheld.[6]

Review Application

[33] Mr NG filed his application for review on 23 July 2021. He said:

(a) Probate of the late Mrs NG's will "is now looking like becoming a long drawn out and expensive affair, which could have potentially been avoided if [Law firm X] had performed their duties as would have been reasonably expected in a situation such as this."

(b) The Committee failed to ask the obvious question: was the settlement proposal forwarded to the other executors?

(c) Neither Mr WF nor Ms OE have addressed that question.

(d) Both [A] and Ms TP have informed Mr NG that they were not aware of the settlement proposal.

[34] By way of outcome, Mr NG asked for [Law firm X] to "be censured for failing in their basic duties, be investigated for possible deliberate/criminal inaction and that reasonable compensation be paid."

[35] As well, Mr NG asked that the Complaints Service "be censured for failing to properly review/investigate [the] original complaint."

Responses

[36] Through their counsel Mr JB, Mr WF and Ms OE responded to Mr NG's review application as follows:[7]

(a) Mr WF was the responsible Partner in the estate administration.

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[5] At [19].
[6] At [20].
[7] Letter from Mr JB and Ms QT to the Case Manager (17 August 2021).

(b) Although the settlement proposal was correctly addressed to Mr WF's email account, "Mr WF does not recollect receiving [it] on 6 November 2020 and he was unaware of it until 23 December 2020 when [B's lawyers referred to it in subsequent correspondence]."

(c) A search of [Law firm X]'s electronic database failed to locate the original settlement proposal. [A] provided Mr WF with a copy of the settlement proposal on 23 December 2020.

(d) Following that, the executors discussed the settlement proposal.

(e) A response was provided to [B]'s lawyers on 22 February 2021.

(f) No conduct issue arises in relation to Mr WF being unaware that the settlement proposal had been sent to him.

(g) No issues arose with the delay (if indeed it could be so described) between the settlement proposal being sent on 6 November 2020, and the executors' response on 22 February 2021.

(h) Ms OE was not dealing with the administration of the late Mrs NG's estate. She located the settlement proposal in the "deleted" folder of her email account, but did not raise it with Mr WF because she noted that it had also been sent to him. She then deleted the settlement proposal from her deleted folder.

(i) "It is regrettable that Ms OE did not check with Mr WF that he had received the [settlement proposal] prior to deleting it", however this is not a conduct issue requiring further investigation.

Comment by Mr NG

[37] In a letter to the Case Manager dated 13 September 2021, Mr NG made the following comments about Mr JB's submissions:

(a) The information about Mr WF not having the settlement proposal drawn to his attention until 23 December 2020, ought to have been part of the Committee's considerations.

(b) It is “dubious” and “very convenient” for Mr WF to say that he did not receive the 6 November 2020 email which contained the settlement proposal. All other emails sent since then have been received.

(c) Ms TP does not accept that all three executors discussed the settlement proposal on 23 December 2020.

(d) Responding to the settlement proposal on 22 February 2021, “seems an unreasonable amount of time” given that the settlement proposal was forwarded to Mr WF on 6 November 2020.

(e) [B] made a further offer to [A] after the 6 November 2020 offer had been sent to the executors by [B]’s solicitors. That further offer was ignored in the executors’ substantive response on 22 February 2021.

(f) Ms OE action in deleting the email before confirming that Mr WF had dealt with it, is “endemic of the way [Law firm X] [have been administering the late Mrs NG’s estate] – that being no true concern for [her] estate.”

(g) Legal proceedings concerning the late Mrs NG’s estate are ongoing. That could potentially have been avoided if [Law firm X] had acted in a timely manner when the settlement proposal was forwarded on 6 November 2020.

Review on the papers

[38] This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Legal Complaints Review Officer to conduct the review on the basis of all information available if the Review Officer considers that the review can be adequately determined in the absence of the parties.

[39] In anticipation of that process being followed, on 10 September 2021 the parties were given an opportunity to make submissions as to whether they wished Mr NG’s review application to proceed by way of a hearing in person, or a hearing on the papers.

[40] The parties were advised that in the absence of any response, it would be assumed that there is no objection to the matter being determined on the papers.

[41] In an email to the Case Manager dated 13 September 2021, Mr JB advised that Mr WF and Ms OE agreed to the review application being dealt with on the papers.

[42] Although Mr NG provided comment on Mr JB's submissions responding to the review application, he did not make any comment about the format of the review hearing. From that I have assumed that he has no objection to a papers-based hearing.

[43] On the basis of the information available, I have concluded that the review may be adequately determined on the papers and in the absence of the parties.

[44] I record that I have carefully read 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.

Nature and scope of review

[45] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[8]

> … 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.
>
> 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.

[46] More recently, the High Court has described a review by this Office in the following way:[9]

> 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.

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[8] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).
[9] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[47] 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

Preliminary observations

[48] At the time he lodged his complaint, Mr NG was unaware that Mr WF had not received the 6 November 2020 email which contained the settlement proposal.

[49] Indeed, Mr NG's complaint is centred on his understanding that Mr WF simply failed to pass the settlement proposal on to the other two executors, for discussion and response.

[50] The Committee's decision is predicated upon its belief that Mr NG was required to prove that Mr WF had failed to forward the settlement proposal to the other two executors.

[51] As well, the Committee has assumed, on the basis of the information it had, that Ms OE was acting in the administration of the late Mrs NG's estate, and that Mr WF's role was solely that of executor.

[52] Mr JB's response to the review application, on behalf of Mr WF and Ms OE, effectively puts the record straight by explaining that, first, Mr WF was unaware of the settlement proposal until further reference was made to it by [B]'s lawyers some six weeks after it had been sent and secondly, that Ms OE was not in fact involved in this matter at all.

[53] To that extent, the Committee's findings of fact are plainly wrong.

[54] This appears to have arisen because the Committee dealt with the matter on the assumption that Mr NG's complaint provided a sufficient picture of the events to enable it to reach a decision.

[55] A further assumption made by the Committee, not borne out by the facts as revealed by Mr JB on behalf of the lawyers, was that Mr WF's role was limited to executorship duties and thus not amenable to disciplinary inquiry.

[56] First, I do not necessarily agree with the Committee's assertion that "the actions and decisions of executors are matters for the High Court to consider [even when] an executor is also a lawyer."[10] As the cases make clear, the lawyer/executor may in some circumstances find themselves the subject of disciplinary inquiry and sanction. That will always depend upon a close analysis of the particular facts.[11]

[57] In any event, it seems plain from the way in which Mr JB has framed his submissions on behalf of Mr WF, that Mr WF was also acting as the solicitor in the administration of the late Mrs NG's estate, as well as being one of the three executors. He was not merely an executor, giving instructions to a solicitor.

[58] Thus, on the face of it Mr WF's actions were open to disciplinary inquiry.

[59] It is reasonable to conclude that if the Committee had sought a formal response from the lawyers, then the information which has been subsequently conveyed by Mr JB would have been before the Committee. This would have avoided the errors which underpinned the Committee's decision.

[60] Although the LSO invited the lawyers to respond to Mr NG's complaint, it cannot be overlooked that in the discussion with Mr WF he was informed that the Committee had formed a "preliminary view" about the complaint.

[61] The Call Log does not record the Committee's "preliminary view" and whether that view was conveyed to Mr WF.

[62] However, it was almost certainly the case that the Committee's "preliminary view" was that Mr NG's complaint had no substance. I also think it reasonable to conclude that in their discussion with Mr WF, the LSO conveyed this.

[63] However, if I am wrong about what the LSO may have suggested about the Committee's preliminary view in their telephone discussion with Mr WF, I observe that when forwarding the complaint to Mr WF shortly after that discussion, the LSO said the following in the covering email:

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[10] Standards Committee decision (11 June 2021) at [14].
[11] See for example *Burcher v Auckland Standards Committee 5 of the New Zealand Law Society* [2020] NZHC 43.

> Should you and Ms OE be content for the Standards Committee to proceed without receiving a written submission from you, the Standards Committee will finalise its decision on the basis of the original complaint material. The decision will note that you were invited to provide a response to the complaint, and expressed your willingness to provide any information or response that the Standards Committee required. It will also note that the Standards Committee considered that the complaint could be adequately decided with the information it held.

[64] This paragraph makes it tolerably clear, even if the discussion with Mr WF over the telephone did not, that the Committee was not looking for a response to Mr NG's complaint from either Mr WF or Ms OE.

[65] The purpose of the Early Resolution Process is to identify complaints which clearly have no substance and thus do not require any response from the lawyer complained about. This is a reasonable and commendable approach to take.

[66] Complaints that seem regularly to come into this category are those involving lawyers who have not acted for the complainant, but about whom the complainant has some concern that does not readily translate into a professional conduct or other ethical issue.

[67] It is of course impossible to lay down any bright-line test as to which complaints are clearly suitable for the Early Resolution Process, and which require, at the very least, an initial response from the lawyer complained about. In every case, it will be the combined experience of the members of a Standards Committee (which includes non-lawyers), which will inform any decision to flag a complaint as being amenable to the Early Resolution Process.

[68] In my view there were sufficient indicators from Mr NG's complaint to alert the Committee to the need to receive a response from the lawyers.

[69] For example, there is nothing in the material that was before the Committee to indicate what, if anything, Mr WF had done about the settlement proposal contained in the 6 November 2020 email. The failure by Mr WF to do anything about it was front and centre of Mr NG's complaint.

[70] The Committee asked Mr NG to provide copies of correspondence generated after the 6 November 2020 email, but Mr NG was unable to do so because he did not have any.

[71] That line of inquiry should not have stopped there.

[72] In my view, the Committee ought to have asked Mr WF and/or Ms OE about that very issue.

[73] It may well be, with a response in the nature of that provided by Mr JB on behalf of the lawyers in this forum, that the Committee would still have come to the conclusion that further action on Mr NG's complaint was neither necessary nor appropriate.

[74] However, that outcome would have had a proper grounding in fact rather than assumption.

Mr WF

[75] The Committee's decision is largely predicated on the application of the burden of proof – specifically that Mr NG was required to prove that Mr WF had not sent the settlement proposal to his co-executors.

[76] With every respect to the Committee, this presents as a rather glib approach, and the point made by Mr NG in his review application was reasonable: why did the Committee simply not ask Mr WF about the settlement proposal?

[77] Be that as it may, I am in the fortunate position of having, effectively, a comprehensive account of the relevant events.

[78] Mr NG asserts that in his response to the complaint, Mr WF deliberately failed to mention that he did not see the settlement proposal when it was first emailed to him. Mr NG considers that Mr WF's attitude to his complaint was to maintain that "[Mr NG] needed to prove it had not been forwarded on to the executors."

[79] In commenting on Mr JB's submissions, Mr NG put it this way:

> If Mr WF had been more honest and forthcoming in his response to the original complaint … it is likely this matter would now not be with the LCRO.

[80] I do not consider that Mr WF was deliberately obstructive, obtuse or dishonest about the way in which he dealt with Mr NG's complaint. As I have endeavoured to explain above, the way in which the matter was managed through the Early Resolution Process meant that, in effect, Mr WF was encouraged to the view that he need not provide any response.

[81] I accept what Mr JB has said on behalf of Mr WF as to the events surrounding the 6 November 2020 settlement proposal. I accept that Mr WF did not see that

settlement proposal until 23 December 2020, and that this was due to circumstances for which no blame can attach to him.

[82] In coming to that view, I reject Mr NG's characterisation of these events as being "dubious" or otherwise convenient for Mr WF. It is difficult to see why Mr WF would turn a blind eye to a settlement proposal received and seen by him on 6 November 2020.

[83] To be clear, I accept that Mr NG has established on the balance of probabilities that the settlement proposal was sent to Mr WF (and inadvertently to Ms OE) on 6 November 2020. Indeed, the fact that this occurred does not appear to be disputed.

[84] Nor is it disputed that, upon receipt of any settlement proposal at any time, Mr WF had an obligation to discuss that with his co-executors and endeavour to come to a unanimous view one way or the other about the settlement proposal. That obligation is founded upon the fiduciary duties owed by the executors to the beneficiaries.

[85] Indeed, the very existence of that obligation was another factor that ought to have prompted the Committee to make inquiry of Mr WF.

[86] Nevertheless, I am satisfied that Mr WF did not see the email containing the settlement proposal, and was not made aware of it until further correspondence from [B]'s solicitors was received on 23 December 2020.

[87] Mr WF is unable to explain why he did not see the email, and there is nothing in any of the material before me which points to a reason, either. However, to reject Mr WF's explanation would be to characterise it as dishonest. Proof of actual dishonesty requires considerably more than speculation.

[88] It is well-enough known, to the point where judicial notice could be taken of the fact, that from time to time an email sent by someone is not seen by the recipient. Whether it is because the email in question did not arrive in the recipient's inbox, or whether it arrived in the recipient's "junk" folder and was then automatically deleted, or whether it was received and accidentally deleted, or otherwise simply overlooked, can be difficult to establish.

[89] That is not to say that disciplinary issues could never arise in circumstances where there is uncertainty about the fate of an email that has been sent to a lawyer. If, for example, if a lawyer regularly loses incoming email because of some easily fixable flaw in their systems, then this could raise a question of whether the lawyer was

"[maintaining] professional standards" under r 10 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[90] There is no suggestion that this the case here.

[91] In my view, this appears to be one of those infrequent but nevertheless acknowledged missing email cases. A disciplinary finding against Mr WF, in those circumstances, could not possibly be made.

[92] Mr WF has said that once the settlement proposal was drawn to his attention on 23 December 2020, he discussed it with his co-executors and a formal response was provided by 22 February 2021.

[93] According to Mr NG, Ms TP disputes that this discussion took place. However, Mr NG has not provided any confirmation directly from Ms TP about this.

[94] I am not for a moment suggesting that Mr NG has not spoken to Ms TP about the matter. But, in the absence of something specific from her about whether there was a discussion between the three executors on 23 December 2020, I am left with – on the one hand – Mr NG's hearsay account of what Ms TP said; and on the other hand, with Mr WF's direct evidence that such a discussion did take place.

[95] In those circumstances, there is no good reason for me not to accept what Mr WF has said about the discussion.

[96] Having accepted that the earliest Mr WF saw the settlement proposal was 23 December 2020, I do not consider that a response sent eight weeks later on 22 February 2021 presents as an issue warranting disciplinary inquiry. This is principally because an allowance of up to three to four weeks must be made for the traditional Christmas and New Year period, which began more or less on 23 December 2020.

[97] Making that allowance reduces the actual delay to something in the region of four weeks.

[98] In the absence of any evidence that a delay of that order has caused prejudice or loss to anybody, no conduct issue arises.

[99] I do not overlook Mr NG's comments about the protracted nature of the litigation concerning his late mother's estate, but nothing I have seen suggests that the delay in responding to the 6 November 2020 settlement proposal has caused that to occur.

[100] Indeed, the nature of some of that correspondence would suggest a degree of tension between the NG siblings which, I perceive, has substantially delayed matters being resolved.

Ms OE

[101] Ms OE had no involvement in the estate administration file, and seems to have randomly been sent the 6 November 2020 email containing the settlement proposal. On receiving it Ms OE noted that the partner with responsibility for the matter (Mr WF) had also been sent the email and would be dealing with it, and so she simply deleted it without any further thought.

[102] Whilst that is, as Mr JB described, regrettable it does not engage any conduct issues on Ms OE's part. It is "regrettable" in the sense that Mr WF remained unaware of the existence of the settlement proposal until some six weeks later.

[103] I do not regard Ms OE's action in deleting the email as being regrettable. Indeed, it presents as something that most lawyers would probably do; and reasonably so. After all it related to a file in which she had no involvement, being managed by a fellow partner who appeared also to have been sent the email.

Other

[104] Mr NG's request for investigation as to whether there has been criminal conduct is a matter that, if he wishes to pursue it, may only be taken up with the Police.

[105] I do not wish to be seen as encouraging Mr NG to adopt this course; rather, whether or not a lawyer has committed a criminal offence is something that is primarily within the Police's domain. A lawyer convicted of a criminal offence will almost certainly find themselves the subject of disciplinary inquiry and possible sanction.

Conclusion

[106] Albeit for quite different reasons, I am satisfied that the Committee's decision to take no further action on Mr NG's complaint on grounds that further action was neither necessary nor appropriate, is correct.

Decision

[107] Pursuant to s 211(1)(a) of the Act, the decision of the Committee is confirmed.

Anonymised publication

[108] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision may be published but without any details that may directly or indirectly identify the parties, or any other person named in this decision.

DATED this 29th day of September 2021

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R Hesketh
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 NG as the Applicant
Mr WF as a Respondent
Ms OE as a Respondent
Mr JB as counsel for the Respondents
Mr RK as the Related Person
Area Standards Committee X
New Zealand Law Society