LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 090

Ref: LCRO 140/2021

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

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

Introduction

[1] Mr TQ has applied for a review of the determination of his complaints about Mr RI.

Background

[2] Mr RI commenced acting for Mr TQ in 2010 and appeared for him in the District Court in August 2014.[1]

[3] The facts giving rise to the proceedings are described by Mr RI in his response to Mr TQ's complaints.[2]

> 2. I (and [Law Firm A]) acted for Mr TQ in proceedings concerning a dispute over what has been described as a "rare and collectable" 19XX [Car A]. The

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[1] *[Company A Ltd], [Company B Ltd] v TQ* CIV 20XX-XXX-XXX.
[2] RI to New Zealand Law Society (9 October 2020).

judgment of His Honour Judge KB of 4 September 2014 (following a hearing on XX and XX MONTH 20XX) is annexed marked as 1. Mr TQ was the defendant, and judgment was entered against him in favour of the third plaintiff for the sum of $67,000 plus interest and costs.

…

5. The background to the dispute regarding this motor vehicle is set out in the judgment. But in summary, Mr TQ purchased the [Car A] motor vehicle sight unseen, from a licenced motor vehicle dealer (a JX of [Company A Ltd]) in December 2006. The purchase price was $84,000, and he paid a deposit of $17,000.

6. The vehicle was imported into [Country A], and Mr TQ took delivery of it in March 2007, and paid by cheque the balance of the purchase price of $67,000. Following taking the vehicle home, Mr TQ viewed that there were several deficiencies with the vehicle in the nature of misrepresentations made by the motor vehicle dealer. He stopped the cheque for the balance of the purchase price, and wished for a refund of his deposit paid. He engaged a lawyer at that time (not myself or [Law Firm A]), and there were a number of pieces of correspondence between lawyers for Mr TQ and the motor vehicle dealer at that time, with the lawyers for the motor vehicle dealer demanding the balance of the purchase price. Through his lawyer, Mr TQ rejected the motor vehicle for breaches of the guarantees under the Consumer Guarantees Act 1993. The motor vehicle dealer also cancelled the motor vehicle agreement due to (what was said) was Mr TQ's breach of it by cancelling the cheque. At all times, Mr TQ retained possession of the vehicle.

7. [Company A Ltd] went into receivership, and its receivers approached Mr TQ regarding the motor vehicle in 2010. At that time, Mr TQ approached me for some advice, and I sent some correspondence on his behalf to the receivers of [Company A Ltd]. Nothing was able to be resolved at that time.

8. Proceedings were brought by [Company A Ltd] and Mr JX against Mr TQ in March 2013, just inside the 6 years from the time of stopping of the cheque for the balance of the purchase price on the motor vehicle. Mr TQ contacted me once more at that time and I proceeded to act for him in the proceedings brought against him in the District Court.

…

[4] During the time that Mr RI acted from Mr TQ, he rendered seven bills of costs, the last one of which was issued on 26 August 2014. Of the total amount invoiced, the sum of $18,643.66 remained unpaid by Mr TQ.

[5] In February 2020, the firm[3] applied for summary judgment against Mr TQ for the amount outstanding, together with interest and costs.

[6] Mr TQ opposed the application.

[7] The Court declined summary judgment and the proceedings have continued on the 'ordinary track'.

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[3] [Law Firm A].

[8] Mr TQ lodged his complaint with the Lawyers Complaints Service on 9 July 2020 and the proceedings remain stayed as required by s 161 of the Lawyers and Conveyancers Act 2006.

Mr TQ's complaints

[9] Mr TQ challenged the advice he received from Mr RI in the conduct of the litigation and asserts that Mr RI was negligent and incompetent. In his complaint, Mr TQ identifies a number of instances where he believes the advice provided by Mr RI was negligent and/or that Mr RI was incompetent.

[10] For the purposes of this decision, there is no need to record Mr TQ's complaints in any detail but I include here a portion of Mr TQ's statement of defence to the summary judgment proceedings[4] which provides the essence of Mr TQ's allegations:[5]

> RI, [Law Firm A] has not included all the previous invoices relating to this matter. The previous work, which was carried out, and the other invoices which have been charged and paid for, were due to the negligence and incompetence of RI, [Law Firm A]. I had made it quite clear to RI, [Law Firm A] from the initial outset, that the first and second plaintiffs should not have the right to sue me, as the first and second plaintiff was incorrect. RI, [Law Firm A] refused to accept that the plaintiffs were incorrect, and told me that there was absolutely nothing I could do about the false court proceedings made against me, and that my only 4option was to go to court and fight this false claim made against me. I questioned as to whether or not I could somehow oppose this false court proceeding, due to the fact that the plaintiffs were incorrect, but RI, [Law Firm A] was adamant that I was unable to do anything to oppose these court proceedings, – which is in fact untrue, as subsequently RI, [Law Firm A], has now admitted in his affidavit, that the plaintiffs were incorrect (see Exhibit B). Also, as I was preparing these court documents for today, I found the following information regarding this matter which states about an "interlocutory application" (see Exhibit J) – where a defendant may oppose an incorrect claim made against them. RI of [Law Firm A] never advised me about this "interlocutory" option which proves again about his negligence and incompetence.
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> Please see following the list of invoices I have been charged.

Invoice 78043	12 April 2013	$ 5,286.20	PAID	(Exhibit C)
Invoice 78130	24 May 2013	$ 2,915.00	PAID	(Exhibit D)
Invoice 78458	28 Nov 2013	$ 8,189.23	PAID	(Exhibit E)
Invoice 78695	9 April 2014	$13,475.44	PAID	(Exhibit F)
Invoice 78838	18 June 2014	$24,876.48	Paid $24,076.48 to date	(Exhibit G)
Invoice 78969	26 Aug 2014	$17,843.66		(Exhibit H)
Total		**$72,586.01**		
		Total paid to date $53,942.35		

> With all the costs, this then blew out from the estimated costs of $18,975.00 to $72,586.01 which is more than 382% increase to their estimated costs.

[4] TQ statement of defence (13 July 2020).
[5] At [5].

[11] Mr TQ also asserts that Mr RI had estimated his fees would be $16,500 plus GST, whereas the total amount charged to Mr TQ amounted to $72,586.01.

[12] The outcome sought by Mr TQ from his complaints is to have the unpaid balance of the fees cancelled and compensation for Mr RI's alleged 'negligence and incompetence'.[6]

Mr RI's response

[13] I will not record here the detail of Mr RI's rejection of Mr TQ's allegations of negligence and incompetence. Suffice to say, at this point, the outcome of this review is to confirm the determination of the Committee to take no further action on Mr TQ's complaints for the reasons which follow.

The Standards Committee determination

Negligence

[14] The Committee discussed various issues arising in the course of the litigation in some detail. It concluded:[7]

> Overall, the conduct of the litigation generally appears to the Committee to have been careful, well considered and handled in a competent manner with all appropriate defences being pled and argued in submissions that were based on detailed legal research. As such, the Committee does not find that Mr RI was negligent in the conduct of the litigation.

Fees

[15] The Committee first observed that all of the invoices were rendered more than two years prior to Mr TQ's complaint. It then concluded that there were no special circumstances[8] which would enable the Committee to address the fee complaint.

[16] The Committee also considered there was an adequate remedy for Mr TQ to pursue, given that matters remain before the court.

[17] Members of the Committee include lawyers versed in litigation and they formed the view that the fees charged by Mr RI were fair and reasonable. The Committee also noted that Mr RI had advised Mr TQ that costs were going to be in excess of the estimates provided by him.

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[6] TQ complaint to Lawyers Complaints Service (9 July 2020), pt 8.
[7] Standards Committee determination (4 August 2021) at [34].
[8] As required by reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[18] Having made these observations, the Committee then concluded that the fees were fair and reasonable.

Summary

[19] Having considered Mr TQ's complaints, Mr RI's response, and all of the material provided by them, the Committee determined to take no further action on Mr TQ's complaints.

Mr TQ's application for review

[20] Mr TQ believes that the Committee had made 'some prejudgements on [his] ability to understand' advice provided to him,[9] but he says that Mr RI had not given him any advice on which he could make an informed decision as to whether or not to oppose the joinder application in the earlier litigation.

[21] He refers to the Committee's comment that Mr RI was 'ill prepared' to deal with the issue that arose at the summary judgment hearing as evidence that Mr RI was 'negligent' in the advice which he provided (or did not provide).

Fees

[22] I insert here Mr TQ's reasons for not accepting the Committee's determination to take no further action on his complaints about Mr RI's fees:[10]

> I believe I have paid well in excess of what was required if the Lawyer had acted according to court protocols. I have been charged 3 x the original estimate which I believe is unjustifiable.

Mr RI's response

[23] Mr RI relies largely on the material provided by him to the Standards Committee. He points out that the Judge at the summary judgment hearing did not have before her all information relating to the joinder application discussed, which has to be taken into account when addressing Mr TQ's complaints in this regard.

[24] In all respects, Mr RI submits that the Committee's determination be upheld.

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[9] Standards Committee determination, above n 7, at [24].
[10] Application for review (7 September 2021), Step 7.

Nature and scope of review

[25] The High Court has described a review by this Office in the following way:[11]

> 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.

[26] This review has been conducted in accordance with those comments.

Process

[27] Mr RI advised he was content for the review to be completed on the papers unless Mr TQ requested a hearing, in which case he wished to attend.

[28] Mr TQ did not respond to the suggestion that the review could be completed on the papers, but advised subsequently that he was available at any time should further information be required.

[29] The material provided by each party to the Standards Committee and on review is comprehensive and I have not found it necessary to seek further information from either party.

Review

[30] There are two aspects to Mr TQ's complaints:

1. He alleges that Mr RI was negligent and/or incompetent when acting for Mr TQ in the litigation with [Company A Ltd]/[Company B Ltd]; and

2. Mr RI's fees were excessive and exceeded estimates provided by him.

Negligence/incompetence

[31] Mr TQ asserts that Mr RI did not act proactively to have the claims against him dismissed due to the fact that the plaintiffs named in the proceedings were incorrect and the application to join a third-party plaintiff should have been opposed because the claim was statute barred.

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[11] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[32] Mr RI has provided his reasons for not taking these steps, both procedural and a lack of evidence.

[33] In his review application, Mr TQ asserts that Mr RI did not provide him with full information and options, to enable him to make an informed decision. The joinder application was made on the morning of the judicial conference. After initial comments from the Judge, Mr RI discussed the application with Mr TQ outside the courtroom.

[34] There was no opportunity for full and detailed written advice to be provided. Mr TQ took Mr RI's advice, and the plaintiffs' application was not opposed.

[35] Section 12(a) of the Lawyers and Conveyancers Act 2006 defines unsatisfactory conduct as:

> conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; …

[36] Rule 3 of the Conduct and Client Care Rules[12] requires:

> 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.

[37] Breaches of the rules constitute unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act.

[38] Standards Committees and this Office may make findings of unsatisfactory conduct.

Negligence

[39] There are a number of decisions of this Office that have discussed allegations of negligence in the context of the complaints and disciplinary process provided in the Lawyers and Conveyancers Act 2006 and I include here extensive portions of three decisions:

[40] *BR v CS* LCRO 226/2013 (20 October 2014)

> [14] The relationship between the tort of negligence and unsatisfactory conduct as defined in s 12(a) is close. In the Introduction to the chapter on negligence in *The Law of Torts* the authors state:
>
>> Negligence is a relatively straightforward and well-understood concept in lay terms. It is defined in the Concise Oxford Dictionary

[12] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

> simply as a lack of proper care and attention or carelessness. This broad notion of carelessness is undoubtedly an integral part of negligence as a foundation for legal liability, but other elements are also involved. If one or more of those elements is lacking then an action will fail, even though the defendant may have been careless, even grossly so, in a popular sense.

[15] Those seeking compensation based on negligence should look to the general law for a remedy. Standards Committees and this Office have many times stated that the complaints process is not to be considered an alternative to court proceedings and s 138(1)(f) of the Lawyers and Conveyancers Act 2006 provides that a Standards Committee:

> … may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee, –
>
> …
>
> there is in all the circumstances an adequate remedy … that it would be reasonable for the person aggrieved to exercise.

[41] *VM v ND & HB* LCRO 249/2012 (30 November 2015)

[32] It is important to first of all disabuse Mr VM (and Mr YK) of their apprehension that a finding of unsatisfactory conduct is the same as a finding of negligence. Unsatisfactory conduct is defined in s 12(a) of the Lawyers and Conveyancers Act as "conduct of the lawyer…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…"

[33] The tort of negligence has been developed by the courts over centuries and it is only necessary to pay a cursory glance to any text book on the law of negligence to realise that it does not follow as a simple fact, that if a lawyer's conduct is adjudged to be unsatisfactory conduct in terms of the Lawyers and Conveyancers Act, then he or she is ipso facto negligent. Similarly, the reverse also applies.

[34] I refer for example to *The Law of Torts in New Zealand* where the author states:

> This broad notion of carelessness is undoubtedly an integral part of negligence as a foundation for legal liability, but other elements are also involved. If one or more of those elements is lacking then an action will fail, even though the defendant may have been careless, even grossly so, in a popular sense.

[35] It is misleading to suggest that the principles of negligence are the touchstones for a finding of unsatisfactory conduct. It follows therefore, that it is a futile exercise, to refer to possible damages awards following a finding of negligence by the court, as the outcome to follow a finding of unsatisfactory conduct.

[42] *C v H* LCRO 49/2009 (17 May 2009)

[11] It is well established that the bare fact that a court reaches a conclusion that differs from an opinion provided by a lawyer does not show negligence. The question is whether the opinion provided was one which a reasonable practitioner could have arrived at after competent and diligent research. …

[43] The Supreme Court has also commented on allegations of negligence in litigation before the courts.[13]

> [77] … negligence is more than an error of judgement, Lord Salmon in *Saif Ali* indicated why establishing negligence will not be easy:
>
> > Lawyers are often faced with finely balanced problems. Diametrically opposed views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent.

[44] Those comments are echoed in another decision of this Office[14], where it is said:[15]

> In any litigation there will generally be what could be termed a "winner" and a "loser". It would be untenable for this decision to support the principle that it necessarily follows that there would be a finding of unsatisfactory conduct against the lawyer for the "loser" in any litigation.

[45] Finally, in *Auckland Standards Committee 3 v Castles*,[16] the New Zealand Lawyers and Conveyancers Disciplinary Tribunal has said:[17]

> ... We wish to make it clear that it is not this Tribunal's role to closely analyse and second guess every move of counsel during each piece of litigation. We consider our role is to take an overview, and to look at patterns of behaviour.

Lack of competence

[46] This Office has also commented on allegations of a lack of competence in numerous decisions, extracts from which are provided here:

[47] *R and N Family Trust v EL* LCRO 205/2015 (27 June 2019):

> [44] The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care or skill that any reasonable lawyer in the same position would have done.
>
> [45] It has been noted that lawyer competence, though pivotal to public confidence in the profession and the administration of justice, lacks any generally accepted meaning; it instead takes its flavour from the perspective of the observer.
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> [46] Not surprisingly, neither the Act, nor the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), attempt to lay down a definitive definition of competence, a determination of which must inevitably be attempted through an examination of a variety of factors including, but not limited

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[13] *Chamberlain v Lai* [2006] NZSC 70, [2007] 2 NZLR 7.
[14] *RCN & OCN v MA, JS, LB & GD* LCRO 2/2019.
[15] At [99].
[16] *Auckland Standards Committee 3 v Castles* [2013] NZLCDT 53.
[17] At [177].

> to, the nature of the retainer and the context in which the conduct complaint arises.
>
> [47] It is important to recognise that an obligation to provide competent advice does not impose unreasonable burden on a practitioner to be always right, or to always provide the right advice.
>
> [48] It has been noted that:
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>> while there is an existing professional duty of competence in New Zealand, albeit one which is particularly narrow, there is no duty to provide a high level of service to clients. The duty of competence is, in reality, a duty not to be incompetent and is aimed at ensuring minimum standards of service.
>
> …

[48] In *AA v SM* LCRO 36/2018 (19 December 2018) and citing Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [11.3]:

> [45] When providing "regulated services" to a client, pursuant to r 3 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".
>
> [46] The duty to be competent has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help". In the practice of law, competence "entails an ability to complete the work required by finding the relevant law and applying the relevant skills". Whether the lawyer concerned meets this standard is to be determined objectively.
>
> [47] This does not, however, impose the duty "to provide a high level of service to clients", and "is, in reality, a duty not to be incompetent … aimed at ensuring minimum standards of service". The duty is concerned with "the outcome of lawyer's work rather than the way in which they deal with clients".

Conclusion

[49] Having considered the advice provided by Mr RI and the steps taken in the litigation with which Mr TQ was involved, and applying the principles discussed in the decisions referred to above, it is clear to me that there is no basis on which to make a finding that Mr RI's conduct constituted unsatisfactory conduct as defined in the Lawyers and Conveyancers Act 2006.

Fees

[50] During the period that Mr RI acted for Mr TQ, he rendered six invoices between 12 April 2013 and 26 August 2014.

[51] Mr TQ's complaint is dated 9 July 2020, some six years after the date of the last invoice.

[52] Regulation 29 of the Standards Committee rules provides:

> If a complaint relates to a bill of costs rendered by a lawyer or an incorporated law firm, unless the Standards Committee to which the complaint is referred determines that there are special circumstances that would justify otherwise, the Committee must not deal with the complaint if the bill of costs—
>
> (a) was rendered more than 2 years prior to the date of the complaint; or
>
> (b) relates to a fee that does not exceed $2,000, exclusive of goods and services tax.

[53] The issue to consider therefore becomes whether there are any 'special circumstances' which prevented Mr TQ from complaining about Mr RI's fees within the two-year timeframe.

[54] In *Cortez Investments Ltd v Olphert & Collins*,[18] three Judges of the Court of Appeal made various comments about the concept of special circumstances:

Woodhouse P

- "…the test of special circumstances…would be met where aspects of the facts seemed to indicate a problem which had relatively unusual features while reasonably deserving at the same time [of] relief…".
- The mistake had been made by the company's solicitor and the delay was short – the notice of appeal was filed 22 days late.
- "There was no possible prejudice to the respondent yet the company thereupon lost its right to challenge the Law Society ruling".
- The revised bill had been paid so "there is no question of delaying tactics on the company's behalf in order to avoid payment…".
- "… the company remains dissatisfied for reasons which it generally wishes to put forward".
- "… the bill in itself is still a substantial one and it has been shown that as delivered it involved a significant degree of error" (the bill had been reduced by the Costs Revision Committee on the first revision).

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[18] [1984] 2 NZLR 434 (CA).

Richardson J

- "… the serious risk of prejudice yardstick" as applied by the High Court "puts the statutory test too high".
- "… in the public interest, the expression 'special circumstances' should not be construed narrowly".
- "… it is a question of where the interests of justice lie in all the circumstances."
- "… no Court could or ought to lay down any exhaustive definition of the words" (his Honour was recording a comment here that had been made in an 1886 judgment)
- "A factor or combination of factors which may properly be characterised as not ordinary or common or usual may constitute a "special circumstance …"
- "… the inquiry never calls for the mechanical application of a rigid set of criteria. The interests of justice must govern …"
- Allowing the bill to be revised again allowed the right to appeal which had been lost by the solicitor's mistake, to be reinstated.
- The company had demonstrated its conviction that the first revision had not reduced the bill by a sufficient amount by immediately instructing its solicitor to appeal.
- "In the face of a winding-up petition by the respondent the company paid the revised bill".

McMullin J

- "… because the circumstances are special to each case, a judgment on whether or not they exist will often be a value judgement on the facts, and not one of general application".
- "All that can be said is that to be special, circumstances must be abnormal, uncommon, or out of the ordinary".

- "… the time limits prescribed … balance the need on the one hand to afford the client the opportunity to seek a form of redress for his grievance … on the other, the need to achieve finality in a dispute".
- "… if there is a perceived risk of injustice I do not think anything more is required".
- "The bill was paid only because a failure to pay it would have resulted in the company being wound up …".

[55] Mr TQ puts forward the following reasons in support of his view that special circumstances exist:[19]

> …I would consider this special circumstances when a judge pulls the lawyer up about it at a subsequent hearing about the costs involved. …
>
> I have paid approximately $25,000 for work which did not need to progress due to it being a false claim ...

[56] Mr TQ believes the Standards Committee ought to have requested Mr RI's timesheets to justify the costs.

[57] The reference to 'special circumstances' in reg 29 is whether or not circumstances exist which prevented a client from making a complaint about the lawyer's fees or where reasons only became apparent more than two years after the invoices had been rendered.

[58] If Mr TQ had genuine concerns about the quantum of Mr RI's fees, one would expect that his complaint would have been made much earlier. It would seem that the trigger for his complaints is the filing of court proceedings by [Law Firm A] to recover its fees.

[59] The observations by Judge ZR are by no means conclusive and matters are now on hold because of Mr TQ's complaint and now, this review. The claim before the court represents the best opportunity for Mr TQ to pursue his defence and seek recompense which would include attention to the fees incurred. Alternatively, if Mr TQ chooses to pursue an action in negligence against Mr RI, that too will present him an opportunity to address fees.

[19] TQ application for review, Step 6.

Conclusion

[60] The arguments put forward by Mr TQ are founded on allegations that have not been argued and decided. This does not provide grounds for a decision that there are special circumstances in this case to enable fees to be considered.

[61] The proper place to address the issue of costs will be before the court in the litigation which is currently on foot or in any other litigation Mr TQ may elect to pursue. Quite apart from declining to consider the fees on the basis that reg 29 prevents it, there is an adequate remedy available for Mr TQ to pursue before the courts in s 138(1)(f) of the Lawyers and Conveyancers Act.

Decision

[62] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee to take no further action on Mr TQ's complaints is confirmed.

Anonymised publication

[63] Pursuant to s 206(4) of the Lawyers and Conveyancers Act, I direct that this decision be published in an anonymised format on the website of this Office.

DATED this 08th day of AUGUST 2022

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O 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 TQ as the Applicant
Mr RI as the Respondent
Mr UV as a related person
[AREA] Standards Committee
New Zealand Law Society