

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

[2021] NZLCRO 102

Ref: LCRO 78/2020

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [City] Standards Committee [X]

**BETWEEN**

**NS**

Applicant

**AND**

**GL**

Respondent

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

**Introduction**

[1] Mr NS has applied for a review of the determination by [City] Standards Committee [X] to take no further action on his complaints about Ms GL.

**Background**

[2] Mr NS separated from his wife in January 2013.

[3] He says:<sup>1</sup>

I had moved out of the family home back in April 2013 and during this time I still had most of my possessions, including many tools, in the garage of the family home. While trying to finalise the division of assets there was confusion between G and W as to whether or not I could access the garage. I was led to believe I was able to, so every now and then would go over to get tools etc.

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<sup>1</sup> Mr NS's complaint (2 July 2019). "G" is Ms GL, acting for Mr NS. W is Mr WB, acting for Mrs NS.

On the 08<sup>th</sup> May 2014 W sent an email to G saying they were going to seek a protection order if I didn't give them assurance that I would no longer visit the property. Due to all of the frustration I had from their 14 months of continually choosing to ignore our requests and making things difficult for us, I told G to ignore them.

[4] Extensive litigation ensued:

- The Court granted Mrs NS a temporary protection order
- Mrs NS sought to have the order made final. The temporary order was discharged.
- An application for recall of the discharge was granted, but the Judge remained of the view that there were no grounds for a final protection order.
- Mrs NS appealed to the High Court. The appeal was dismissed and costs ordered against Mrs NS.
- Leave to appeal to the Court of Appeal was granted and a final protection order was granted to Mrs NS.
- An application to the High Court for costs was dismissed for lack of jurisdiction.
- "Mrs NS applied to the Court of Appeal for recall of its [date] 2017 judgment. In the alternative, Mrs NS sought an extension of time to appeal the decision of Justice [X] that she did not have jurisdiction."<sup>2</sup>
- "...the Court of Appeal ordered the recall of its [date] 2017 judgment. It amended the judgment to include an order that Mr NS pay Mrs NS's costs in the High Court."<sup>3</sup>
- "Mrs NS also applied to the Family Court for an award of costs in respect of the original DVA proceedings and her subsequent application for recall. Following a hearing on 20 July 2018, Judge [A] made an order for costs in favour of Mrs NS in respect of both sets of proceedings."<sup>4</sup>

### **Mr NS's complaints**

[5] Mr NS's complaints are:<sup>5</sup>

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<sup>2</sup> Standards Committee determination (7 April 2020) at [16].

<sup>3</sup> At [17].

<sup>4</sup> At [18].

<sup>5</sup> Above n 1.

My complaint is I employed G as my legal representative for Relationship Property (R.P). Had she done her duty as my lawyer, and outlined the possible implications of ignoring their email, and how this could jeopardise the R.P proceedings, including more legal costs defending the Protection Order (as she later advised I should do), stress, and ongoing court appearances, I could have made a better informed decision and asked her to simply email them with the assurance they were seeking, therefore avoiding a further four years of financial and emotional hardship. However, she didn't even attempt to discuss any of these details with me, and also failed to forward me a second email she'd received from W on the 12th May, further seeking assurance I would not visit the property. That email wasn't sent to me until the 20th May when she emailed me regarding the R.P proceedings, by which time they already had obtained the protection order.

[6] He describes Ms GL's conduct as "lack[ing] professional advice, guidance and direction...".<sup>6</sup> He says that "she would have known the risks and legal ramifications of ignoring their requests for a response regarding staying off the property".<sup>7</sup>

### **Ms GL's response**

[7] Ms GL engaged Mr RK (at the relevant time, a partner in [AB Law]) to respond to the complaint. He first recounts the events giving rise to Mr WB's letter of 8 May.

[8] On receipt of the letter, Ms GL forwarded it to Mr NS and sought instructions. Mr NS's response<sup>8</sup> included the following paragraph:

I actually just want you to ignore that email from W [WB] – I have no inclination to respond as time after time they have chosen not to respond to our emails which are actually relevant to what we are meant to be dealing with here – the division of assets.

[9] Ms GL complied with those instructions and, similarly, did not respond to a follow up email from Mr WB. She did, however, attempt to contact Mr WB by telephone, but did not manage to speak with him.

[10] Mr RK says:<sup>9</sup>

At that time Ms GL had been instructed to apply to the Family Court for an order that the home be sold. She was focused on drafting that application. Mr NS was concerned that his former wife was adopting an unco-operative and obstructive approach and he wanted to be proactive rather than reactive. ...

[11] On 19 May 2014, Ms GL sent draft documentation to Mr NS and with that documentation she included a letter dated 12 May, from Mr WB, requesting a response to his letter of 8 May.

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<sup>6</sup> Mr NS's complaint at Part 3.

<sup>7</sup> Ibid.

<sup>8</sup> Ms HM on behalf of Mr NS, email to Ms GL (8 May 2014).

<sup>9</sup> Mr RK, letter to Complaints Service (18 October 2019) at [19].

[12] Mr NS complains about the delay in forwarding to him the follow up letter from Mr WB.

[13] In response, Mr RK says:<sup>10</sup>

Ms GL took detailed instructions and gave her client detailed and careful advice.

[14] On Ms GL's advice, Mr NS instructed her to apply to have the temporary protection order set aside. Ms GL was successful in that regard.

[15] Mr RK says, Ms GL's advice relating to subsequent court hearings was directed at minimising costs for Mr NS in which she was successful in some regard.

[16] Mr RK submits:<sup>11</sup>

A review of that history reveals that Mr NS was in fact very well served by Ms GL. As stated, the total fees charged in relation to DV proceedings were less than \$20,000 which was remarkable given the work involved. While the Court of Appeal eventually identified relevant errors of law made by the District Court Judge, no criticism could fairly be offered of the advocacy of Ms GL.

[17] Mr RK concludes:<sup>12</sup>

Mr NS's reaction as a disappointed litigant viewing events with the benefit of hindsight is understandable. However, the decisions that Ms GL made were competently made. She communicated clearly with her client and reasonably promptly, giving him sound advice and accepting his informed instructions. She regrets that he is now disappointed with the outcome and that he believes he is disappointed with the advice or service that he received from her but she wishes him well for the future. She understands how difficult it is to be involved in lengthy contentious litigation.

### **The Standards Committee determination**

[18] The Standards Committee identified the issues for consideration as being:<sup>13</sup>

- Whether Ms GL was incompetent and provided inadequate advice, and if so, whether Ms GL breached Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the RCCC) and/or any other Rule or enactment;
- Whether Ms GL failed to promptly disclose all relevant correspondence and generally failed to keep Mr NS informed, and if so, whether Ms GL breached Rule 7 of the RCCC and/or any other Rule or enactment.

[19] The Committee addressed both issues together. Rules 3 and 7 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) provide:

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<sup>10</sup> Mr RK, letter, above n 9, at [23].

<sup>11</sup> At [33].

<sup>12</sup> At [35].

<sup>13</sup> Standards Committee determination, above n 2, at [23].

### Competence and client service

- 3 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.

### Disclosure and communication of information to clients

- 7 A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.

[20] The Committee said:<sup>14</sup>

The Standards Committee wished to emphasise, however, that the simple fact that Mr NS did not receive the outcome he was hoping for, and now wishes he had handled matters differently, does not necessarily mean that Ms GL's representation was deficient. ...

[21] It continued:<sup>15</sup>

The Standards Committee noted that Mr NS's instructions to Ms GL, namely to ignore Mr WB's correspondence, were clear and unequivocal. He had also made it clear that he had no intention of returning to the family home. Mr NS did not ask Ms GL for advice about the possible consequences of ignoring Mr WB's correspondence. He instead urged Ms GL to focus on relationship property, something he considered Mr WB and Mrs NS had delayed. The Standards Committee observed that the main thrust of Mr WB's letter was that Mrs NS wanted Mr NS's visits to stop. With Mr NS's confirmation that he had no intention of returning to the property, Ms GL had no reason to fear a further escalation of tensions.

[22] The Committee "was not persuaded by Mr NS's argument that Ms GL had a duty to warn him of the possible consequences of his instruction to ignore Mr WB's correspondence".<sup>16</sup>

[23] It considered:<sup>18</sup>

...the situation would have been different if, for example, Mr NS had made it clear to Ms GL that he intended to continue visiting the family home despite Mr WB's advice that Mrs NS found his visits intimidating. In such circumstances, it seems likely that Ms GL would have advised Mr NS about the risks of such a course of action, most obviously that Mrs NS might apply for a Protection Order.

[24] The Committee "did not consider that it was Ms GL's role to try to persuade Mr NS to reconsider matters and convince him to provide the undertaking sought".<sup>17</sup>

[25] The Committee also noted that Mr WB's letter of 8 May made it clear that Mrs NS was considering applying for a protection order.

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<sup>14</sup> Standards Committee determination, above n 2, at [35].

<sup>15</sup> At [39].

<sup>16</sup> At [40].

<sup>17</sup> At [41].

[26] The Committee then addressed Mr NS's complaint that Ms GL had not sent him Mr WB's email of 12 May until one week later, on 19 May. The Committee did not consider a delay of one week was sufficient to result in an adverse disciplinary finding. It noted Ms GL's success in having the temporary protection order set aside and then minimising future costs for Mr NS.

[27] The Committee considered that Ms GL's fees were modest and that no complaint about fees would be upheld.<sup>18</sup>

[28] Having considered these issues, the Committee determined to take no further action on Mr NS's complaints.

### **Application for review**

[29] Mr NS's application for review centres on the issue that if Ms GL had advised him of the consequences of ignoring Mr WB's letter of 8 May (with the result that Mrs NS obtained the temporary protection order) meant that Mr NS incurred significant legal fees subsequently, when all that he would have needed to do was to provide Mrs NS with the assurance that he would not visit the property again.<sup>19</sup>

[30] The outcome Mr NS seeks is:<sup>20</sup>

I would like to see it acknowledged that Ms GL was negligent as per what I have outlined in my complaint, and to get compensation for the financial burden I have incurred.

### **Ms GL's response**

[31] Mr NG (a partner at [ABC]) responded to the application for review on behalf of Ms GL, relying, in the main, on the responses and information provided to the Standards Committee. He considers that the Committee gave careful consideration to Mr NS's primary areas of concern and supports the Committee's determination to take no further action on the complaints.

[32] Mr NG submits:<sup>21</sup>

... There was only one issue in Mr WB's letter to respond to – whether or not an undertaking would be provided that Mr NS would not visit the property in the near

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<sup>18</sup> Mr NS had advised that his complaint was not about the quantum of the fees for the work carried out. He says that his complaint was that he considered the need for the work could have been unnecessary if Ms GL had offered or provided appropriate advice when Mr WB had advised that Mrs NS was considering applying for a Protection Order.

<sup>19</sup> As requested by Mr WB in his letter of 8 May.

<sup>20</sup> Application for review (4 May 2020) at Part 8.

<sup>21</sup> Mr NG, letter to the LCRO (27 May 2020) at [12].

future. He did not want to accede to Mrs NS's demands, when they were failing to comply with his.

[33] Mr NS did not ask for advice from Ms GL and she complied with his instructions to take no further action on the letter.

[34] Mr NG supports the Committee's comment that Mr NS is now looking at the matter with hindsight.<sup>22</sup>

## Review

[35] An applicant only hearing was held with Mr NS on 27 April 2021. Mr NG and Ms GL declined the option to attend.

[36] Section 12(a) of the Lawyers and Conveyancer Act 2006 defines unsatisfactory conduct as being:

conduct of the lawyer ... that occurs at a time when he or she ... 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; or...

[37] The letter of 8 May 2014 from Mr WB reads:<sup>23</sup>

As discussed it seems there is little purpose arguing the technicality of a trespass notice. If your client's understanding of an occupation order is it still allows him to visit the home at will – notwithstanding the clear advice of how intimidating my client finds this – the next remedy is to seek a protection order. The argument particularly being there appears little purpose to your client's visits other than to cause my client distress.

Can we please have your urgent undertaking that your client will not visit the property in the near future and if he requires any items that communication be made through ourselves? If we cannot have this matter resolved application will be made for the necessary orders protecting my client from this ongoing abuse.

[38] The essence of Mr NS's complaint is that Ms GL did not counsel against Mr NS's instructions to ignore the letter.

[39] The Committee considered that Mr WB's letter of 8 May made it clear that Mrs NS was considering applying for a protection order, the implication being that Mr NS's instruction to ignore the letter was made with the knowledge of that possibility.

[40] Mr NS had no intention of visiting the property again. He formed the view that whether or not his wife obtained a protection order would be of little consequence. What he did not appreciate became evident later, when Ms GL advised him that the existence

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<sup>22</sup> Standards Committee determination, above n 2, at [41].

<sup>23</sup> Mr WB, letter to Ms GL (8 May 2014) at [7]–[8].

of the protection order could be used tactically by Mrs NS's counsel, in negotiations relating to relationship property, to enable Mrs NS to obtain an unequal sharing.

[41] This is the crux of Mr NS's complaint.

[42] Mr NS instructed Ms GL as the person with knowledge and expertise in relation to the issues he was facing. He was "[naïve]"<sup>24</sup> – and understandably so. He relied absolutely on Ms GL to provide accurate and expert advice.

[43] As already noted, the question is whether Ms GL should have advised Mr NS against his instructions to ignore the 8 May letter from Mr WB, and that by not sending on the 12 May letter until after the protection order had been granted, the further opportunity to discuss his instructions had been lost.

[44] It was only after the temporary protection order had been granted, that Ms GL advised Mr NS of the relevance that it may have to relationship property negotiations. In this regard, Mr RK's comments in response to Mr NS's complaints, are particularly relevant. He says:<sup>25</sup>

Ms GL gave him detailed and appropriate advice about the effect and implications of the order and about his options. She had a legitimate concern that the order might be used tactically in the Property (Relationships) Act proceedings. In particular she was concerned that Ms NS was trying to justify an unequal division of relationship property in her favour. She was concerned that some of the facts alleged in the domestic violence application and the existence of the order might be used in an attempt to justify an unequal sharing whether under section 13 or 15 of the Property (Relationships) Act. She was well aware that those were arguments that had been raised by Ms PB in the well known case of *Scott v Williams*. She agreed with Mr NS's belief and that it was in his interests to oppose the orders and she accepted his instructions accordingly.

For that reason Mr NS made an informed decision that he would seek to have the Temporary Protection order set aside, that he would oppose the direction requiring him to attend anger management counselling (which he was adamant he did not need) and that he would oppose final orders being made. Affidavits and a notice of opposition were accordingly drafted and filed.

[45] It is significant that the "detailed and appropriate advice" was provided after the temporary protection order had been obtained leading to the extensive litigation that then ensued. Mrs NS was a determined litigant, but that is a possibility that can never be dismissed in any litigation.

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<sup>24</sup> Application for review (4 May 2020), supporting reasons (undated).

<sup>25</sup> Mr RK, letter, above n 9, at [24]–[25].



*The delay in forwarding the email of 12 May*

[46] Although this issue may appear to be a minor part of Mr NS's complaints, it becomes subsumed into the general question as to whether or not the application for the protection order should have been opposed from the outset, or more relevantly, that Mr NS should have given the assurances Mr WB was seeking that he would not visit the property again, thereby removing the need for the protection order.

[47] The importance of Mr NS's complaints about the delay in sending the email is that Mr WB advised in that email that "the situation for [Mrs NS] was urgent". This indicates that Mr WB was about to apply for the order.

[48] The protection order was granted on 16 May, following the email of 12 May but before Ms GL sent it to Mr NS.

[49] Mr NS says that, had he been aware of the consequences of the protection order being granted, he would have had the opportunity to amend his instructions to ignore the correspondence.

[50] This issue therefore, becomes inextricably linked with the fact that Ms GL did not explain the important part that the protection order would play in the relationship property proceedings until it was too late to oppose the application, leading to the ongoing court proceedings.

*Should Ms GL have advised Mr NS against his instructions to ignore the 8 May letter?*

[51] The question to be asked is, to what extent is a lawyer obliged to advise a client that his or her instructions are unwise and could have detrimental consequences. There are a number of judicial and academic comments, that support the principle that a lawyer must be proactive in tendering advice.

*J v Auckland Standards Committee* <sup>126</sup>

[52] This judgment followed an appeal by *J* against a decision of the Lawyers and Conveyancers Disciplinary Tribunal. It involved a lawyer complying with instructions to remit funds that had been received by the lawyer following a mediation, that exceeded the amount the other party had agreed to pay. The payment had been made in error.

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<sup>26</sup> [2018] NZHC 2706.

[53] The lawyer did not advise the client what the consequences could be when he [the lawyer] complied with the client's instructions. It is appropriate to record some of the comments made by the Tribunal referred to in the judgment.

[26] In considering the misconduct charge brought against Mr J, the Tribunal identified:

The central issue to be decided is what responsibility [Mr J] had to his client in respect of advice about the consequence of retaining the additional payment where he, [Mr J], was concerned about why the payment was made.

...

The question then becomes what level of seriousness is to be attributed to [Mr J's] failure to advise his client.

[27] After listing particular facts it found "relevant to an assessment of [Mr J]'s conduct", the Tribunal found:

[Mr J]'s failure to advise his client of the risks of retaining the additional payment without further enquiry and his action of subsequently applying the funds to his client's outstanding legal costs was serious to the degree that it is disgraceful and dishonourable.

[54] The Tribunal found a charge of misconduct proved.

[55] The ground of appeal was that the Tribunal had not provided any reason to support the finding. The Court referred to the appeal as a "general appeal ... conducted by way of a rehearing".<sup>27</sup>

[56] Quotes from the judgment are particularly relevant to this Review:<sup>28</sup>

[40] On the other hand, Mr J is not to be a 'nodding automaton' at the client's volition. ...

...

[42] Mr J's hindsight concession he ought to have been more proactive in providing the advice is not a counsel of perfection; it was the bare minimum demanded in circumstances of a lawyer's receipt, in conjunction with an expected extraordinary compensatory payment on the client's account, of an unexpected contended ordinary transactional payment also on the client's account. ... I am clear Mr J's failure to advise the client of the risks presented by receipt of unexpected funds fell well short of the expected standard of competence and diligence, and would be regarded by lawyers of good standing as unacceptable.

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<sup>27</sup> At [30].

<sup>28</sup> At [40] and [42].

*Woods v Legal Complaints Review Officer*<sup>29</sup>

[57] In this case, a lawyer took instructions from a client to make a will. The client believed that she and her husband owned a property as joint tenants and did not want the lawyer to obtain a title search as she was unwilling to pay for it. It was clear however that the client expected that her interest in the property would pass to her husband by survivorship. Complying with the client's instructions, the lawyer did not obtain a title search.

[58] After the client died, it was ascertained that the title was held by the client and her husband as tenants in common. Consequently, the client's interest in the property fell into the residue of her estate, passing to the residuary beneficiary.

[59] The Court referred, with approval, the following statement in the LCRO's decision:

- (e) Mrs Pearce's unwillingness to pay for a title search did not absolve Ms Woods from obtaining "sufficient information to enable proper and thorough advice to have been given to her client". It was not an answer for a lawyer to say he or she was following the client's instructions when those instructions prevented a full consideration of the factors relevant to the retainer. The failure to undertake a "basic inquiry, to form the basis of sound legal advice, meant that Ms Woods was unable to act in Mrs Pearce's best interests concerning her testamentary wishes".

*Gilbert v Shanahan*<sup>30</sup>

[60] In this judgment the Court said:

Solicitors' 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.

*YR v OS LCRO 3/2019*<sup>31</sup>

[61] This decision by this Office, includes the following comments:

[47] A lawyer must be proactive in offering advice. In this regard the courts have made a number of comments, some of which I include here:

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"[While] solicitors' duties are governed by the scope of their retainer, ... it would be unreasonable and artificial to define that scope by reference only

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<sup>29</sup> [2013] NZHC 674.

<sup>30</sup> [1998] 3 NZLR 528 (CA) at 537.

<sup>31</sup> At [47]–[50].

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 under the scope of the retainer."<sup>32</sup>

"Mr J's hindsight concession he ought to have been more proactive in providing the advice is not a counsel of perfection; it was the bare minimum demanded in circumstances ..."<sup>33</sup>

[48] In his email to AF (14 July 2015) advising of her removal as a Trustee, Mr OS says he "was always available" to her to provide advice about how Trusts operate. However, when asking a client or any other person, to sign a document whereby they assume significant responsibilities, it falls to a lawyer to volunteer advice and information or to ensure that person acquires advice and information independently.

[62] Applying the comments above to the facts of this review, it follows that Ms GL had a duty to look beyond the limits of her instructions/retainer. The question becomes:

*Should Ms GL have recognised the potential consequences of the protection order?*

[63] The consequences of Mrs NS obtaining the protection order is referred to by Mr RK in his response to the complaint. He says:<sup>34</sup>

[Ms GL] was well aware that those were arguments that had been raised by Ms PB in the well known case of *Scott v Williams*.

[64] By that time, Ms PB was acting for Mrs NS. That being the case, it was reasonable to expect that Ms GL would have advised Mr NS that his instruction to ignore the letter was unwise. Mr NS had advised Ms GL that he did not intend to visit the property again and there would therefore have been no difficulty in convincing Mr NS to give the assurances sought by Mr WB.

## **Conclusion**

[65] Ms GL did not protect and promote the interests of her client by following his instructions without registering disagreement with those instructions and providing advice. Instead, Ms GL followed the instructions and then compounded the problem by not recognising that Mrs NS had become serious in her proposals to obtain the protection order when Mr WB sent his email of 12 May.

[66] By the time Mr NS received that email, Mrs NS had obtained the temporary Protection Order and matters developed from there, resulting in Mr NS incurring \$40,000<sup>35</sup> in legal fees in the litigation which followed.

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<sup>32</sup> *Gilbert v Shanahan*, above n 30, at 537.

<sup>33</sup> *J v Auckland Standards Committee 1*, above n 29, at [42].

<sup>34</sup> Mr RK, letter, above n 9, at [24].

<sup>35</sup> As advised by Mr NS

[67] Ms GL's conduct represents unsatisfactory conduct pursuant to s 12(a) of the Lawyers and Conveyancer Act 2006.

### **Orders**

[68] The outcome of this review sought by Mr NS is recorded in [67] above. Ms GL's submissions are directed at supporting and agreeing with the determination of the Standards Committee. She has not therefore provided any substantive submissions as to orders which would follow a finding of unsatisfactory conduct.

[69] Any submissions as to penalties/orders that the parties wish to make are to be received by this Office by no later than three weeks from the date of this decision.

### **Publication**

[70] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

**DATED** this 29<sup>th</sup> day of June 2021

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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:

Ms NS as the Applicant  
Ms GL as the Respondent  
[City] Standards Committee [X]  
New Zealand Law Society  
The Secretary for Justice