LCRO 4/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Waikato Bay of Plenty Standards Committee
BETWEEN	**BAB** Applicant
AND	**MR PW** Respondent

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

Introduction

[1] BAB has lodged an application for review of a determination by Waikato Bay of Plenty Standards Committee to take no further action in respect of a complaint against Mr PW for registering a caveat in breach of Rule 2.3 of the Conduct and Client Care Rules.[1]

Background

[2] On 20 August 2009 Mr PW received instructions from Mr PV to register a caveat against a farm property in [location]. Mr PW had not previously acted for Mr PV, who had until then been represented by BAD in [location].

[3] He advised Mr PW that the property was about to be sold to a third party but was adamant that he had an interest in the property by virtue of the terms of his late

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

mother's will.

[4] On 21 August 2009 BAD sent by fax to Mr PW a copy of the will of Mr PV's late mother on which it was noted in handwriting that Mrs PR had died in July 2007. In addition, BAD forwarded to Mr PW a copy of an Agreement for Sale and Purchase of the property to Mr PV and his partner dated 19 June 2009. That Agreement contained the following clause:-

> The purchaser agrees that if the agreement is not declared unconditional by 10th July 2009 the vendor is free to place the property for sale on the open market.

[5] Clause 5 of Mrs PR's will provided as follows:

> Without imposing any trust or binding obligation on my trustee, I suggest that in carrying out the trusts and directions of my will my trustees:
>
> > (c) transfer to my son PV, subject to sub clauses (a) and (b) above, all my interest in the [location] farm property (excluding the separate title comprising the BAF).

[6] It would seem that search copies of the titles to the property in [location] were faxed to Mr PW by BAD at the same time. Those titles recorded that the registered proprietors of the properties were BAC and Mr PT as to a ½ share as executors and Mr PT and PS as to a ½ share as executors. The searches also recorded a caveat registered by BAB on 28 July 2009.

[7] Mr PW prepared a caveat which recorded the interest claimed by Mr PV in the following terms: -

> As capital beneficiary of trusts created pursuant to the wills of Mr PR and Mrs PR respectively dated 2 September 1978 and 8 September 1998 with the registered proprietors BAC and Mr PT (½ share) and Mr PT and PS (½ share) being the respective executors of the said wills.

[8] The caveat and relevant A & I form were signed by Mr PV on 24 August and the caveat was lodged for registration.

[9] Although it seems from Mr PW's file notes that his client was aware that settlement of the sale was due to take place on Wednesday 26 August he did not directly advise the solicitors acting for the estate (BAE) that the caveat had been lodged. He nevertheless included the firm's name as the address for service of the registered proprietors. He also assumed that the purchaser's solicitor (Mr OD) would obtain a guaranteed search of the title immediately prior to settlement and note the existence of the caveat.

[10] It became apparent that the solicitor for the purchaser did not note that a caveat had been lodged and proceeded to settle. Registration of the transfer was however prevented by the caveat and BAE undertook to hold the proceeds of sale until the issue of the caveat could be resolved.

[11] On 1 September 2009 Mr PW wrote to Mr OD advising that the caveat had been lodged and that he acted for Mr PV. He enquired as to the basis for the assertion by the purchaser to Mr PV that settlement had occurred.

[12] On 4 September, Mr PW received correspondence from BAE challenging Mr PV's claimed interest in the property and taking issue with the description of Mr PV in the caveat as a capital beneficiary.

[13] Mr PW responded to BAE on 7 September noting "that due process provides ample opportunity for legal review." On the same day he forwarded a copy of his file to Mr PU whom he had telephoned earlier and sought advice as to the sustainability of the caveat, anticipating that BAE would lodge a notice to lapse the caveat pursuant to the provisions of the Land Transfer Act.

[14] The Notice to Lapse was issued by LINZ on 15 September and received by Mr PW on 16 September. The notice provided that the caveat would lapse unless notice was received within 14 days that an application to prevent it lapsing had been made to the relevant Court.

[15] On 18 September Mr OD sent a letter to Mr PW by way of facsimile. He referred to research carried out by him and noted that he could not find any authority to support the lodgement of a caveat by a residuary beneficiary. He put Mr PW on notice that his client would be seeking costs against Mr PW personally and his client.

[16] On 25 September Mr PU provided his formal opinion to Mr PW. In that letter he advised that "[s]imply put Mr PV does not have a legal interest in the land owned by the estate. His legal interest is in the nominated share of the residue of the estate. In the absence of any direct interest in the land owned by the estate he has no caveatable interest."

[17] From a file note made by Mr PW, it would appear that Mr PV still wished to advance his claim in the Courts but Mr PU was unwilling to do so. Consequently, the caveat lapsed and the transfer to the purchaser, BAB, was registered.

[18] Possession of the property continued to be interfered with by Mr PV resulting in Mr PV being served with a Trespass Notice. On 11 December 2009 Mr OD wrote to Mr PW and sought compensation on his client's behalf from Mr PW and Mr PV and referred to a possible complaint to the New Zealand Law Society. Mr PW declined to enter into any discussions with regard to compensation and a complaint was lodged on 1 April 2010 by Mr OD on his client's behalf.

[19] The outcome sought in the complaint was reimbursement of legal expenses incurred by BAB being: -

- Counsel costs - $4,655.25 (GST inclusive); and
- Costs to the date of lodging the complaint incurred with Mr OD being $13,065.00 (GST inclusive).

The company also sought maximum compensation but no details of the losses were provided.

[20] As noted in the introduction to this decision, the Standards Committee determined to take no further action in respect of the complaint and BAB has applied for a review of that determination.

The review

[21] The application for review was lodged on 5 January 2011. BAB was not satisfied that Mr PW had exercised proper care in coming to a decision to lodge the caveat and noted that he had not provided any explanation as to what steps he took in this regard. Overall, the company considered that the Committee's response to the complaint was perfunctory.

[22] After conducting a preliminary review of the file, I determined that the review could be completed on the material available to me on the file and in a letter dated 23 May 2011 sought consent from the parties pursuant to section 206(2)(b) of the Lawyers and Conveyancers Act 2006 for the review to be conducted on the papers.

[23] Mr PW consented promptly and consent from Mr OD on behalf of BAB was received on 30 March 2012.

[24] I then commenced a detailed consideration of the file as a result of which I determined that further inquiry was necessary.

[25] On 17 May 2012 I wrote to Mr PW and requested answers to a number of queries. On receipt of his response, it was apparent that the review would be best completed by way of a hearing with both parties.

[26] That hearing took place in Rotorua on 20 July 2012 attended by Mr OD accompanied by Mr BAB, and Mr PW accompanied by Mr PU.

The issue

[27] The issue to be addressed in this review is whether, in lodging the caveat, Mr PW had breached the provisions of Rule 2.3 of the Conduct and Client Care Rules. That Rule provides as follows: -

> A lawyer must use legal processes only for proper purposes. A lawyer must not use or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interest, or occupation.

[28] The commentary to this Rule notes that "registration of a caveat on a title to land knowing that (or failing to inquire whether) there is a caveatable interest on the part of the client to be protected" will constitute a breach of the Rule. The commentary should of course refer to registering a caveat on a title to land knowing that there is no caveatable interest to be protected.

[29] The combined effect of the Rule and the commentary is that a solicitor must not lodge a caveat knowing that there is no caveatable interest, or fail to make inquiries as to whether there is a caveatable interest. In addition, the lodgement of the caveat must also not have been done for the purposes of causing unnecessary inconvenience to the interests of another person.

[30] Mr PV's immediate purpose was to delay the sale. That in itself would constitute an "inconvenience" to both the Estate vendor and BAB. That would have been apparent to Mr PW. It is therefore self evident that the lodgement of the caveat was done for the purpose of causing unnecessary inconvenience if there was no legitimate interest to be protected.

[31] The issue therefore is whether Mr PW believed that Mr PV had a caveatable interest or had grounds to believe that one existed. Mr PW had an obligation to make reasonable inquiries in making this assessment.

[32] The Committee expressed the view that "the justification for lodging the

caveat...is very basic and nothing more than having prima facie grounds to justify the lodgement." That is the force of the submissions made by Mr PU on behalf of Mr PW. He submits that the caveator does not have to demonstrate that at the time the caveat was lodged there was an undisputed caveatable interest. He also notes the difficulties in establishing just what constitutes a caveatable interest by referring to *Boat Harbour Holdings Ltd v Steve Mowat Building and Construction Ltd*.[2]

[33] That judgement is useful in that it identifies quite clearly that the Courts may find that a party has a caveatable interest in circumstances where it is not readily apparent that one exists. I agree with Mr PU and the Committee's approach, in that neither the Committee nor I should be drawn in to considering to whether there is a caveatable interest to the degree that would be necessary for the issue to be addressed before the Court. It is not the role of the Committee or this Office to assume that role.

[34] However, there is a threshold below which a lawyer should not assist in interfering with the rights of others. That is the purpose of the Rule. A lawyer must be able to point to an assessment of the grounds on which he or she formed the view that a caveatable interest existed. The Standards Committee must consider this reasoning and form a view as to the merits of that decision. Otherwise the Rule would have no relevance or substance in these circumstances.

[35] The Committee noted that it was "not concerned with the merits of the case but only the original basic premise for the lodgement". However, as noted by Mr BAB in his review application, Mr PW has not identified what he considered Mr PV's interest in the land to be other than what is recorded in the caveat itself. There is nothing on Mr PW's file which I retained after the hearing to show that Mr PW had conducted any research, or sought an opinion in any formal sense. All that Mr PW has provided to support his decision is an informal discussion with another practitioner. There is no file note of the content of that discussion, or any record of any reasoning pursuant to which the grounds for lodging a caveat was identified.

[36] In his response to the Standards Committee Mr PW refers to a case[3] which his firm had been involved in which a caveatable interest had been established by reason of a contract to purchase drawn from various documents. There is no suggestion that

[2] [2012] NZCA 305, CA146/2011, 13 July 2012.

[3] *Welsh v Gatchell* CIV 2005-406-279 High Court Blenheim 21 June 2007.

Mr PV could establish such an interest – indeed he had already had the opportunity to purchase the property but had not been able to proceed. That judgement has no relevance to Mr PV's situation other than to support the general proposition that a caveatable interest may exist even though not readily apparent.

[37] The force of the submissions made by Mr PW and Mr PU is that a caveatable interest may be able to be established in circumstances where it is not readily apparent that one exists and that therefore Mr PW was justified in lodging the caveat. However, what is lacking in this instance is any evidence of research, notes or opinions identifying just what Mr PW considered to be the interest that Mr PV had.

[38] In determining whether what the Committee describes as "the basic premise for the lodgement" constitutes reasonable grounds for lodging a caveat, it is not sufficient that the Committee should merely accept assertions by the practitioner that he had formed a view that there was a caveatable interest. The Committee must examine what grounds the basis for that view was formed and to do so, it must itself form a view on the merits of the claimed interest.

[39] The interest claimed by Mr PV in the caveat was as "capital beneficiary of Trusts pursuant to the Wills" of Mr PV's parents. That is patently incorrect. The submission by Mr PU that Mrs PR's will gave Mr PV "a right to acquire" the property is also incorrect and that submission is incompatible with his subsequent advice to Mr PV.

[40] Mrs PR's will included a suggestion "without imposing any trust or binding obligation on [the] trustees" as to how the distribution of the Estate could be effected. There was nothing in the nature of an option granted to Mr PV to acquire the property and there is nothing in the will to support Mr PU's submission.

[41] In addition, there was no similar provision in the will of Mr PV's father. That will provided for a life interest to his wife, and after her death for the estate to be distributed to Mr PV and his brother as tenants in common in equal shares. Mr PV had an interest in the residue of the Estate only, not in the property itself. Consequently, even if an interest could be claimed by reference to Mrs PR's will, no such claim could be sustained in respect of the interest under the will of Mr PV's father.

[42] Notwithstanding this, the caveat was lodged against the half share owned by each of the Estates on the grounds that Mr PV was a "capital beneficiary" in each

Estate.

[43] On this ground alone it is difficult to ascertain any claim which would support a caveat against the whole of the property. The expression of the interest claimed as a "capital beneficiary" in both Estates has no merit at all.

[44] I also take note of the opinion expressed by Mr PU following his instructions to advise on the sustainability of the caveat. Having considered all of the material (which I acknowledge could not have been obtained in the short time available to Mr PW) Mr PU stated that "simply put Mr PV does not have a legal interest in the land owned by the estate." That is a forceful and definitive statement. It leaves no doubt that in Mr PU's view there were no grounds to argue for the support of the caveat. This provides a clear indication that the low threshold necessary to establish whether or not there was the possibility of a caveatable interest was likely not to have existed even with the degree of information that could have been ascertained in the time available to Mr PW prior to lodging the caveat.

[45] Lack of time to make inquiries does not in itself justify breaching the Rule. If there is insufficient evidence for a lawyer to form a view that there is a caveatable interest, then the caveat should not be lodged, notwithstanding the fact that a sale was imminent. A lawyer must be sure that he or she is not offending the Rule when lodging a caveat and positive grounds must exist for the decision to do so.

[46] The purpose of the Rule is to ensure that persons with a legitimate interest in the property do not have those rights or interests interfered with. A lawyer has a responsibility not to assist persons who wish to do so.

[47] In this regard I note Mr BAB's comments at the review hearing. The company had initially submitted an offer to purchase the property which had not proceeded while the executors explored the possibility of Mr PV acquiring the farm. Mr BAB was then subsequently approached by the trustees and invited to re-submit an offer.

[48] The company entered into a valid and binding Agreement to purchase the farm. It was in a position to settle (and in fact made payment of the purchase price) on the settlement date. It had a programme in place to develop and improve the farm. It was unable to access the necessary funds to implement this programme due to the existence of Mr PV's caveat. The existence of the caveat provided Mr PV with some sense of justification in obstructing BAB in its operations on the farm. Mr BAB

considers that Mr PW has been instrumental in facilitating the interruption of the purchase and subsequent difficulties with Mr PV.

[49] I mention these views, because Mr PW has, dismissed the consequences of his role in lodging the caveat. He places responsibility on Mr OD for not noting the existence of the caveat and considers that Mr OD's actions in endeavouring to ensure his client received what it had contracted for were unnecessary. He considers that all responsibility should have been left to the vendors and its solicitors to deal with the issue.

Mr OD's conduct

[50] In the course of this review Mr PW has placed some emphasis on the fact that Mr OD did not note the lodgement of the caveat in the guaranteed search obtained prior to settlement. Whilst not dismissing Mr OD's oversight in this regard, it is not Mr OD's conduct which is under scrutiny. It is the conduct of Mr PW that is in question and it was his responsibility to ensure that the caveat was properly lodged.

[51] Mr PW knew that settlement was scheduled for the day after he lodged the caveat and would have known also that it was unlikely that BAE would have received formal notification from LINZ by the day of settlement. His client would not have been prejudiced if he had advised BAE of his actions, and given that he expected the Notice to Lapse provisions being activated, nothing was achieved by not advising them.

[52] I stop short of finding that Mr PW's conduct in not advising BAE that he had lodged the caveat constitutes unsatisfactory conduct. There is no specific obligation to do so. However, in the circumstances I consider that by not doing so, his conduct, at the very least did not reflect the collegiality that could be expected from a fellow practitioner, and at worst was discourteous. It reflects poorly on Mr PW.

[53] Mr PW adopts the view that BAB would not have incurred any costs if Mr OD was aware of the caveat prior to settlement in that it would not have paid over its funds and in his view, would have been entitled to sit back and insist that BAE, as the vendors' solicitors, took steps to have the caveat removed. This is a simplistic approach. Even if Mr OD was aware of the existence of the caveat, his client had a keen interest in whether the caveat remained on the title or not. BAB had a development programme in place for the property which required it to uplift a loan from the bank which was to be secured over the property. The existence of the caveat

prevented that from happening and at the very least some three weeks or so would have been lost while the notice to lapse process took place.

[54] In addition, BAB, Mr OD and BAE would have presumed that Mr PV would take steps to prevent the caveat from lapsing. BAB therefore needed advice as to what the potential outcomes could be and the implications for them. It was in the company's interests that the caveat be removed and it was entitled and expected that it would seek advice from Mr OD. He in turn sought advice from counsel. I do not therefore accept that the costs incurred by BAB would have been any different if Mr OD had noted the caveat prior to settlement.

[55] For the reasons stated above I consider that Mr PW was in breach of the provisions of Rule 2.3. Section 12(c) of the Lawyers and Conveyancers Act provides that a breach of any of the Conduct and Client Care Rules constitutes unsatisfactory conduct. Mr PW's conduct therefore constitutes unsatisfactory conduct.

Penalty

[56] Having reached that conclusion, it is necessary to consider what penalties should follow. Section 211(1)(b) of the Lawyers and Conveyancers Act provides that the LCRO may exercise any of the powers that could have been exercised by the Standards Committee. The orders that a Standards Committee may make are set out in section 156 of the Act.

[57] BAB seeks reimbursement of its legal costs and compensation to the full extent possible. Mr OD had not provided a copy of his account for which recovery was sought. That has been provided subsequently and a copy provided to Mr PW with his copy of this decision. The total bill is for $14,785.97. The narration to the bill includes reference to attendances in connection with the complaint and this review. These attendances do not constitute a "loss" in terms of section 156(1)(d) of the Lawyers and Conveyancers Act which is attributable to Mr PW's actions and therefore are not costs which can be recovered by BAB. They are costs incurred as a result of the decision to lodge a complaint and there is no provision to order costs in the same way as are ordered in Court proceedings. Costs incurred in relation to the review are similarly irrecoverable unless there had been some improper conduct by Mr PW in the course of

the review which had added to the costs of BAB.[4] I have assumed that the calculation of costs on page 2 of Mr OD's bill relate to these attendances, and have therefore deducted the sum of $3,128 from Mr OD's account. There will be an Order that Mr PW pay $11,657.97 on account of this bill. If I am incorrect in this assumption, Mr OD may make submissions in this regard. I reserve the right to vary this Order if my assumption is incorrect.

[58] Mr OE's (the barrister from whom advice was sought by Mr OD) account has been provided. It is clear that this relates solely to the lodgement of the caveat and accordingly there will be an order that this be refunded to BAB.

[59] BAB has also sought compensation to the full extent possible. A Standards Committee and the LCRO has the power to order compensation to the extent of $25,000.00.[5] Compensation may be awarded in reimbursement of costs incurred as a result of the practitioner's conduct.[6] No details have been provided by BAB or Mr OD and any assessment of the costs that could be directly related to Mr PW's actions would be difficult. In the circumstances, I consider that the reimbursement of legal costs constitutes appropriate compensation to be ordered.

[60] In addition to the reimbursement of these costs, some penalty is required to reinforce the fact that Mr PW has breached one of the Conduct and Client Care Rules. In *Workington v Sheffield*[7] the LCRO considered the function of a penalty in a professional context by reference to *Wislang v Medical Council of New Zealand.*[8] It was noted that it was important to mark out the conduct as unacceptable and to deter other practitioners from failing to pay due regard to their professional obligations. In the circumstances, it is appropriate that a modest fine be imposed.

[61] There will also be a costs order as provided in the LCRO costs orders guidelines.

Decision

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[4] Refer LCRO Costs Orders Guidelines.

[5] Regulation 32 Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee's Regulations 2008).

[6] Section 156(1)(d) Lawyers and Conveyancers Act 2006.

[7] LCRO 55/2009.

1. Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is reversed.

2. By reason of a breach of Rule 2.3 of the Conduct and Client Care Rules and pursuant to section 12(c) of the Lawyers and Conveyancers Act 2006, Mr PW's conduct constitutes unsatisfactory conduct.

3. Pursuant to section 156(1)(d) of the Act Mr PW is ordered to pay the sum of $16,313.22 to BAB in reimbursement of Mr OE's and Mr OD's accounts. Such payment is to be made within one month of the date of this decision to Mr OD for reimbursement to BAB.

4. Pursuant to section 156(1)(i) of the Lawyers and Conveyancers Act 2006 Mr PW is ordered to pay the sum of $500.00 to the New Zealand Law Society within one month of the date of this decision.

5. Pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006 and the LCRO Costs Orders Guidelines, Mr PW is ordered to pay the sum of $1,200.00 to the New Zealand Law Society by way of costs, such sum to be paid within one month of the date of this decision.

DATED this 14th day of August 2012

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:

[8] [2002] NZAR 573.

BAB as the Applicant
Mr PW as the Respondent
The Waikato Bay of Plenty Standards Committee
The New Zealand Law Society