

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

[2020] NZLCRO 110

Ref: LCRO 202/2018

**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**

**HB**

Applicant

**AND**

**MD**

Respondent

**DECISION**

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

**Introduction**

[1] Mr HB has applied for a review of a decision by the [Area] Standards Committee X to take no further action in respect of his complaint concerning the conduct of the respondent, Mr MD.

**Background**

[2] Mr HB and a Mr S were once good friends. However, the two men fell out with the result that dealings between them have since then been difficult and unpleasant, and includes significant litigation.

[3] Mr S is a trustee of WT. Mr MD acts for WT.

[4] WT holds a mortgage over a property owned by trustees of Mr HB's family trust.<sup>1</sup>

[5] WT had purchased the mortgage from the [XYZ Bank] in mid-2016.

[6] There have been defaults with some mortgage payments by Mr HB, resulting in WT (through Mr MD) either issuing notices under the Property Law Act 2007, or writing letters of demand.

[7] In late 2016 there was a default by Mr HB, which resulted in litigation between himself and WT. During the course of that litigation Mr HB referred to a licence to occupy the property that he had granted to his parents (Mr and Mrs HB Snr) in 2000 (the licence).

[8] That litigation was settled on 31 March 2017 with Mr HB and WT executing a deed of settlement which resolved a number of issues.

[9] In May 2017 Mrs HB Snr lodged a caveat against Mr HB's property. Her claimed caveatable interest was the licence.

[10] In September 2017 there was a further payment default by Mr HB (the 2017 arrears default), and in the course of Mr MD taking steps about that on behalf of WT, he discovered the existence of the caveat.

[11] Mr MD advised WT that Mrs HB Snr did not appear to have a caveatable interest. This triggered a process under the Land Transfer Act 1952 whereby WT informed LINZ, who in turn informed Mrs HB that her caveat would lapse.<sup>2</sup>

[12] Mrs HB Snr made an application to the High Court for an order that her caveat not lapse. WT, through Mr MD, instructed Mr B QC to oppose that application.

[13] In the meantime Mr HB remedied the 2017 arrears default.

[14] WT instructed Mr MD to endeavour to settle the caveat issue with Mrs HB Snr. The resultant settlement saw the caveat re-lodged, with WT reserving its position about any future challenge to it.

[15] Mr HB paid WT's costs associated with the 2017 arrears default.

[16] In February 2018 WT instructed Mr MD that Mr HB was in default with payments under the mortgage.

---

<sup>1</sup> For convenience I will simply refer to "Mr HB" when referring to ownership of the property owned by his family trust.

<sup>2</sup> See, generally, s 145A of the Land Transfer Act 1952.

[17] Mr MD wrote to Mr HB demanding payment and attaching an invoice for costs associated with that default (the 2018 default invoice). The total amount of the invoice was approximately \$640.

[18] In fact, Mr HB was not in default and WT had made a calculation error. The independent trustee in Mr HB's family trust, a lawyer, wrote to Mr MD and pointed this out.

[19] Mr MD acknowledged the error and withdrew the 2018 default invoice.

[20] At the same time as sending the 2018 default invoice, Mr MD sent Mr HB an invoice for WT's costs associated with the 2017 caveat issue (the caveat invoice). The caveat invoice included Mr B's fees, and the total amount was approximately \$8,500.<sup>3</sup>

[21] Mr MD argued that the costs represented by the caveat invoice were payable by Mr HB because they arose out of a breach of the mortgage by him.

[22] Mr HB does not accept that he has any liability to pay the caveat invoice.

### **Complaint**

[23] Mr HB lodged a complaint with the New Zealand Law Society Complaints Service (Complaints Service) on or about 1 March 2018. The substance of his complaint was that:

- (a) In February 2018 Mr MD falsely asserted that Mr HB was in default under the mortgage to WT, and wrongfully invoiced Mr HB for remedying that default.
- (b) Also in February 2018 Mr MD invoiced Mr HB for legal work associated with an alleged default in relation to a caveat. Mr HB is not responsible for those costs, which were in any event excessive.

[24] Mr HB supplemented his complaint with further material before the Committee delivered its determination on 18 September 2018. The essence of that material was:

- (a) he was not in default under the mortgage in February 2018 and a competent lawyer would quickly and easily have ascertained that before sending out a letter of demand.

---

<sup>3</sup> Mr MD's caveat invoice was for approximately \$6,800, and Mr B QC's invoice was for approximately \$1,700.

- (b) The February 2018 letter of demand caused the Trustees of Mr HB's family trust "considerable emotional and financial distress."
- (c) The fees charged in relation to the caveat issue were "unjustified, unfair and unreasonable."
- (d) Proper due diligence at the time that WT purchased the mortgage from the [XYZ Bank] would have revealed the existence of the licence. This in turn would have made Mr MD and WT aware that the licence gave rise to a "right to caveat".
- (e) Mr MD undertook work claimed for in his two invoices "purely for obtaining unwarranted and unjustifiable fees."

### **Response by Mr MD**

[25] Mr MD provided responses to Mr HB's complaint and supplementary material, as follows:<sup>4</sup>

- (a) In relation to the caveat issue, in taking steps to recover arrears owing in approximately September 2017, Mr MD discovered the existence of the caveat. After researching the legal issues concerning the caveat Mr MD advised WT that it was unlikely to be sustainable and so he was instructed to begin a process to challenge the caveat.
- (b) Mr B was instructed to litigate the caveat issue.
- (c) The arrears owing in September 2017 were paid by Mr HB and Mr MD was instructed by WT to settle the caveat issue.
- (d) Lodgement of a caveat by a third party triggers a breach of the mortgage by the mortgagor. WT had a right under the mortgage to take steps to protect its position. The terms of the mortgage included the standard requirement for a mortgagor to fully indemnify a mortgagee for costs associated with remedying any breaches by the mortgagor.
- (e) The legal work associated with the caveat was necessary, and the fees fair and reasonable.

---

<sup>4</sup> Mr MD, letters to the Complaints Service (8 March 2018, 28 March 2018, 2 August 2018 and 14 August 2018).

- (f) In relation to the February 2018 default, neither Mr MD nor WT deliberately or falsely accused Mr HB of being in arrears. WT had made a mistake which was quickly remedied by withdrawal of the invoice.
- (g) At no stage has Mr MD cynically generated fees on behalf of WT for unnecessary work, in order to recover them from Mr HB under the terms of the mortgage.
- (h) Mr HB's complaints should be seen in the context of a lengthy history of disagreement and unpleasantness, including litigation, between Mr HB and Mr S which has at times involved Mr MD as WT's lawyer.

### **Standards Committee decision**

[26] The Standards Committee delivered its decision on 18 September 2018.

[27] It identified the issues to be determined, as follows:<sup>5</sup>

- (a) Did Mr MD falsely allege that Mr HB was in default under the mortgage, in his 16 February 2018 letter of demand?
- (b) Were Mr MD's fees on behalf of WT, fair and reasonable.

[28] The Committee determined, pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action on Mr HB's complaint.

[29] In reaching that decision the Committee determined that:

- (a) It was common ground that in February 2018 Mr HB was not in default under the mortgage. The information Mr MD relied upon, which he had received from WT, was wrong.
- (b) Nevertheless, Mr MD "was entitled to rely on the information provided by his client and take it at face value."
- (c) Any error was WT's. No professional conduct issues arise on Mr MD's part.
- (d) As to the issue of whether there is liability under the mortgage for Mr HB to pay WT's costs in connection with the caveat issue, "that is an issue of liability that is outside the jurisdiction of the Committee."

---

<sup>5</sup> Standards Committee determination at [4].

- (e) The issue for the Committee is whether the fees were fair and reasonable.
- (f) In the circumstances, those fees were fair and reasonable. In particular, the matter was of some importance to WT given that it related to the security of its position under the mortgage. The result achieved was reasonable. Given the potential complexity of the matter, including its difficulty or novelty, it was appropriate to engage Mr B to assist.

### **Application for review**

[30] Mr HB filed his application for review on 2 November 2018. The outcome sought is a reversal of the Committee's determination.

[31] Mr HB submits:

- (a) The Committee's reasoning was inadequate, and insufficient attention was paid to the detail of his complaint.
- (b) Mr MD had not produced any evidence to rebut what Mr HB had said.

[32] Mr MD was invited to comment on Mr HB's review application. In an email to the Case Manager dated 15 November 2018 he said that he relied upon the information that he had provided to the Complaints Service.

### **Nature and scope of review**

[33] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>6</sup>

... 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.

---

<sup>6</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

[34] More recently, the High Court has described a review by this Office in the following way:<sup>7</sup>

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.

[35] 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.

### **Hearing in person**

[36] Both parties appeared at a hearing before me sitting in Auckland on 22 June 2020.

[37] I heard extensively from both Mr HB and Mr MD.

[38] I record that I have read the Standards Committee's file, which includes the parties' submissions to it. I have also read the parties' submissions in relation to the application for review.

[39] I confirm that there are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either party.

### **Discussion**

[40] There are two issues for me to consider:

- (a) Did Mr MD act competently in writing to Mr HB in February 2018 making demand for default arrears under the mortgage, when there was no default by Mr HB?

---

<sup>7</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (b) Did Mr MD competently represent WT when it purchased the [XYZ Bank] mortgage in 2016, by failing to do adequate due diligence as to the existence of the licence? Two sub-issues arise out of this:
- (i) If Mr MD did act competently, did he act excessively in triggering a High Court process to examine the caveat, including instructing a QC?
  - (ii) If it is the case that Mr HB must pay the caveat invoice, were those fees fair and reasonable?

## Analysis

### *February 2018 default*

[41] In fact, this was a non-default. There is no disagreement about that. On learning this some three or so days after he issued his letter of demand on behalf of WT, Mr MD acknowledged the error and withdrew the invoice.

[42] The language of Mr HB's complaint fits neatly into s 12(a) of the Act. It reads where relevant:

#### **Unsatisfactory conduct defined in relation to lawyers ...**

In this Act, **unsatisfactory conduct**, in relation to a lawyer ... means –

- (a) 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.

[43] Mr MD explained that he receives an excel spreadsheet every three to six months from Mr S, showing repayments under the mortgage by Mr HB. Mr S does not send (and never has), and Mr MD does not ask for, copies of bank statements from which the excel spreadsheets are prepared.

[44] Mr MD said that the spreadsheets he receives are generally around eight weeks behind. He said that if and when there are arrears arising after the final date in the latest spreadsheet, he relies on Mr S to inform him about those arrears. I infer that this is coupled with instructions to write to Mr HB about the arrears, and to possibly also issue a notice under the Property Law Act.

[45] When it was put to Mr MD by me that it would be a simple matter of asking Mr S to be sure about his figures before instructing Mr MD that there had been a default by



Mr HB, Mr MD said that he felt he could rely on Mr S because he was (or had been) a qualified accountant with several years' experience.

[46] It was further suggested by me that when instructed to take up a default with Mr HB, prudence might suggest that Mr MD should check the documents himself (i.e. the bank statements informing the spreadsheet), to make absolutely clear that there was not an error. Mr MD's response was that his client would be likely to balk at paying yet more legal fees, which that checking process would entail, in relation to issues with Mr HB.

[47] Mr HB argues that Mr MD had a responsibility to check the figures he had been given by WT. He said that writing a letter of demand based on a default under a mortgage was a serious step to take, and it required accuracy. He noted that the effect on himself and Mrs HB of receiving an incorrect demand in February 2018, was to cause anxiety and stress, exacerbated by the history between the HBs and Mr S.

[48] Mr HB's position is that a competent lawyer would not have made the error in the first place.

[49] I cannot quibble with Mr HB's comments about the importance of accuracy.

[50] It is a serious matter to threaten legal action, let alone when based on something that turns out to be completely wrong. I do not discount the effect of this on a person on the receiving end of an erroneous claim. Mr MD was prepared to acknowledge that if it happened to him, he would be irritated.

[51] As well, time better spent elsewhere is then devoted to challenging the demand.

[52] Equally, I accept that Mr MD quite reasonably believed that he could rely on the accuracy of his client. Mr S is obviously a careful and experienced businessman with emphasis on financial management.

[53] I do not for one moment think that the February 2018 error was anything more than that: an oversight.

[54] There is merit in the suggestion that when a default is discovered, before a letter of demand is sent a quick double-check is prudent. There is also merit in the suggestion that a lawyer in Mr MD's position would be well-advised to see the bank statements behind a spreadsheet, to satisfy himself that there is a case to be made for a letter of demand. Presumably, fees incurred by the mortgagee (likely to be modest), are recoverable under the terms of the mortgage as being costs associated with a default.

[55] I would not put that as high as saying that in every case the failure to check source documents before sending a letter of demand, amounts to unsatisfactory conduct under s 12(a) of the Act. It will always depend on the circumstances of each case. Repeated errors might trigger such a finding.

[56] Whilst a mistake was made, it was quickly acknowledged by Mr MD. Without diminishing the effect on Mr and Mrs HB as alluded to by Mr HB, I do not think that the circumstances are such that there was any breach of professional rules by Mr MD. The Act and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) do not demand excellence: they simply ask that a lawyer does not fall below the standard of competence. An isolated error of this type does not reflect upon Mr MD's competence.<sup>8</sup>

[57] I agree with the Committee's decision to take no further action on this issue of complaint.

#### *Caveat issue*

[58] The background to this issue is slightly more complicated. However, I find these to be the pertinent facts:

- (a) During 2000 Mr HB granted his mother and father a licence to occupy a property that he owned (the license). The license was recorded in a formal document.
- (b) [XYZ Bank] was mortgagee of that property.
- (c) Mr HB verbally informed an [XYZ Bank] mortgage manager about the license. It is less clear whether the document recording the license was given to the mortgage manager at the time.<sup>9</sup>
- (d) For whatever reason, by 2016 there was no record of the license on the [XYZ Bank] mortgage file. Whether this was because the mortgage manager failed to record what s/he had been told about the license by Mr HB and put that information on the file, or whether s/he did so but the file note was then misplaced or misfiled, it is not necessary for me to determine.

---

<sup>8</sup> I hasten to add that I do not consider that it reflects on Mr S's competence either.

<sup>9</sup> At the hearing Mr HB said that he "believes" that he gave the mortgage manager a copy of the document formally recording the license. Expressing it this way leaves room for the possibility that he did not do so. I am prepared to accept that he told the mortgage manager about the license, verbally, during a discussion at his home.

- (e) In early 2016, WT purchased the mortgage from the [XYZ Bank]. Mr MD acted for WT in the purchase, which included undertaking pre-purchase due diligence.
- (f) Due diligence did not reveal the existence of the license.
- (g) In May 2017 Mrs HB Snr lodged a caveat against the title, with her asserted caveatable interest being the license.
- (h) In approximately September 2017 Mr HB fell into arrears under the mortgage.
- (i) Mr S instructed Mr MD to take steps to recover those arrears.
- (j) In the course of preparing the necessary demand paperwork, Mr MD searched the title to the property and discovered the caveat.
- (k) Mr MD carried out research as to whether there was, as a matter of law, a caveatable interest to support the caveat. He concluded that a licence to occupy would be unlikely to support a caveat.
- (l) Mr MD notified LINZ, who in turn informed Mrs HB Snr that her caveat would lapse unless she took steps to sustain it.
- (m) Mrs HB Snr made an application to the High Court to sustain her caveat.
- (n) WT instructed Mr MD to oppose that application. Mr MD instructed a QC to act for WT.
- (o) In the meantime, Mr HB settled the arrears owing under the mortgage.
- (p) WT instructed Mr MD to negotiate a settlement of the caveat issue with Mrs HB Snr.
- (q) The terms of that settlement were that Mrs HB Snr would re-lodge her caveat, and that WT would reserve its position as to whether it could be sustained if challenged.
- (r) WT considers that allowing a caveat to be lodged against a title is a breach by Mr HB of the terms of his mortgage with it. The costs incurred by a mortgagee in taking steps to enforce the terms of a mortgage, are recoverable from the mortgagee on a full indemnity basis.

- (s) WT incurred costs of approximately \$8,500 in taking steps to deal with the caveat.

[59] Mr HB's core position is that the terms of his mortgage with WT do not include recovery of costs in connection with the caveat issue. I am told that there is other litigation between these parties, one of the issues on which is liability under the mortgage to pay a mortgagee's costs of this nature.

[60] That issue must be dealt with by the courts as it involves a question of law concerning the proper construction of a contractual document. A Review Officer does not have the jurisdiction to make legal findings of that nature. The parties accept this.

[61] Nevertheless, Mr HB argues that a competent lawyer would have been alerted to a potential caveat issue when undertaking due diligence prior to purchasing a mortgage. The failure by Mr MD to have done so means that costs incurred afterwards in sorting the issue out must be borne by the mortgagee.

[62] Alternatively, Mr HB argues that even if he is liable to pay a mortgagee's costs of this nature, Mr MD's fees (including the QC's invoice) are neither fair nor reasonable. Quite apart from anything else, argues Mr HB, it was unnecessary to go to the extreme of instructing a QC to deal with what was a relatively straightforward matter.

[63] I agree that these are disciplinary issues falling within the purview of a Review Officer.

#### *Due diligence*

[64] Mr HB's position is that [XYZ Bank] was aware of the license, and competent due diligence by Mr MD would have revealed its existence. He went so far as to say that Mr HB should have asked the [XYZ Bank] whether there were any licenses to occupy.

[65] Mr MD said that he did not ask the [XYZ Bank] about this issue because there was no need to do so. There was nothing in the paperwork to suggest that there was a licence to occupy associated with the property.

[66] Obviously, if in the course of reviewing the [XYZ Bank]'s files Mr MD had discovered a file note written by an [XYZ Bank] employee which made reference to a licence, this would have triggered further enquiry by him.

[67] I do not accept that competent due diligence in connection with this purchase should have included asking the [XYZ Bank] a question, about which there were no triggers to do so.

[68] Indeed, during 2018 [XYZ Bank] informed Mr MD that it was unaware of the license during its time as mortgagee.

[69] It would seem to follow that even if Mr MD had taken the extreme step of asking the [XYZ Bank] during the due diligence process, he would have been told in 2016 that, so far as [XYZ Bank] was aware, no licenses to occupy were in existence.

[70] Mr HB also suggests that courtesy dictated that Mr MD should contact him before WT purchased the mortgage, to indicate that such a process was underway. He said that if Mr MD had done so, it is likely that the existence of the license would have been made clear.

[71] I do not accept that there is any obligation whatsoever on the part of a purchaser such as WT to contact a mortgagor prior to purchasing the mortgage. Indeed, it potentially raises difficult issues both professionally for a lawyer, and commercially for the purchaser. During the pre-purchase stage, there is no contractual or other relationship between the purchaser and the mortgagor.

*Fees fair and reasonable*

[72] In round terms, WT incurred fees of \$8,500 in pursuing the caveat issue during September and October 2017. These were eventually invoiced to Mr HB during February 2018.

[73] Mr MD's position is that the question of whether a licence to occupy could sustain a caveat, was one requiring a research. I accept that. The law as to what can amount to a caveatable interest is rich with decided cases. It would have been remiss of Mr MD not to undertake some research on this point.

[74] Having satisfied himself that there was a strong case for saying that the licence did not give rise to a caveatable interest, he was obliged to follow the caveat procedures provided for in the Land Transfer Act. This included notifying LINZ about the mortgagee's objection to the caveat, and then being prepared to respond to an application by the caveator to the High Court to sustain their caveat.

[75] Mr MD took those steps and did so competently and diligently. There was nothing excessive about that. He was obliged by his instructions from WT to inform LINZ about his client's objection to the caveat. This triggered a statutory process over which he had no control.

[76] Mr MD is primarily a transactional rather than a litigation lawyer. Mr MD did not go so far as to say that Mrs HB Snr's application to sustain her caveat was doomed to fail. The position was properly contestable.

[77] I accept that this was a matter in which counsel with experience and expertise was needed to argue the mortgagee's position.

[78] I find nothing either unfair or unreasonable about Mr MD's fees in the caveat invoice. The matter was important, involving a potential breach by Mr HB of the terms of his mortgage, and there was a degree of urgency about it given the potential impact of a caveat.

[79] Moreover, the invoice sent by Mr B to Mr MD, was very modest indeed.

[80] As it happens, the caveat issue was settled with Mrs HB Snr. The terms of that settlement were pragmatic, and that outcome avoided the need for what would undoubtedly have been a costly argument before the High Court.

[81] The fact that this particular caveat may not have affected the value of WT's security, is entirely irrelevant. On the face of it, a mortgagor breaches the terms of their mortgage with a mortgagee when they allow circumstances to arise whereby a third party lodges a caveat against the mortgaged property. Security value does not bear upon a mortgagee's right to enforce the terms of their mortgage.

[82] I emphasise that these findings (due diligence, and fairness and reasonableness of fees) are not to be taken as any indication by me as to whether the costs are recoverable under the contract of mortgage. As I have set out above, that issue (liability) is one currently before the courts and there it must be determined.

### **Conclusion**

[83] I see no grounds which could persuade me to depart from the Committee's decision.

### **Decision**

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

**Anonymised publication**

[85] Pursuant to s 206(4) of the Act, 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 26<sup>th</sup> day of June 2020

---

**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 HB as the Applicant  
Mr MD as the Respondent  
Mr VR as the Related Person  
[Area] Standards Committee X  
New Zealand Law Society