

LCRO 332/2012

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

LM

Applicant

AND

RB

Respondent

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

Introduction

[1] Mr LM has applied for a review of the determination by Area Standards Committee 2, particularly the orders made by it against Mr RB following findings of unsatisfactory conduct for breaches of rules 2.3, 3 and 7 (more particularly 7.1) of the Conduct and Client Care Rules¹ and for failing to follow instructions. The Committee imposed a fine of \$500 and ordered Mr RB to pay the sum of \$500 to the New Zealand Law Society by way of costs.

[2] Mr LM seeks an order of compensation against Mr RB.

Background and the Standards Committee determination

[3] Mr LM and a family trust of which he was a beneficiary and trustee held one half of the shares in Company X. Mr SS was the sole director of Company X.

[4] Mr SS proposed to sell a property owned by the company to a company controlled by Mr SS's brother-in-law and Mr LM asserts that the price at which the property was to be sold was less than its market value.

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

[5] Mr LM sought advice from Mr RB as to how his interests could be protected. One of the options discussed was the registration of caveats against the title to this property and others owned by the company.

[6] It is indisputable, and acknowledged, that Mr RB did not register a caveat against the property.

[7] The Committee made three findings of unsatisfactory conduct against Mr RB and gave the following reasons:

- (a) Mr RB's advice to Mr LM that "... arguably [LM had] a beneficial interest in the property ..." ² which would support a caveat was contrary to rules 2.3 and 3 "... and his actions in 2010 by registering the caveat, again apparently without proper inquiry into the caveatable interest, was a further breach of those rules". ³
- (b) The Committee found that Mr RB was instructed to register a caveat against the property and failed to do so. The Committee acknowledged this to be a "... somewhat unusual finding, given that if Mr RB had properly investigated the caveatable interest, and the result that no caveatable interest existed, then he would not have been able to assist with the registration of the caveat". ⁴
- (c) The Committee could find no evidence that Mr RB had informed Mr LM that he had not registered the caveats and found this to be unsatisfactory by reason of a breach of rule 7, particularly rule 7.1 which requires a lawyer to keep his or her client informed about progress of the lawyer's retainer.

The application for review

[8] Mr LM did not accept the Committee's determination that it was not appropriate to order Mr RB to pay compensation to him. The Committee's reasoning for reaching this view is given in paragraph [43] of its determination:

... the Committee noted that it had not been presented with any reasoned evidence to support Mr LM's caveatable interest. In fact, the evidence before it from Mr RB suggested that any caveat lodged for Mr LM would be likely to be successfully challenged. The Committee was inclined to have

² Email RB to LM (27 February 2009).

³ Standards Committee determination (14 November 2012) at [29].

⁴ At [38].

the same view. Accordingly, if Mr LM did not have any proper caveatable interest to sustain a caveat, he could not incur a loss from the failure to lodge the caveat ...

[9] Mr LM says he thought he was receiving considered advice from Mr RB when Mr RB advised him that arguably, he had a beneficial interest in the properties which would support a caveat.

[10] Mr LM argues that the Committee made its decision not to award compensation to him on the basis that it had decided Mr LM did not have a caveatable interest. Mr LM refers to a decision of this Office⁵ in which it was noted that neither the Standards Committee or this Office should be drawn into determining the validity of a claimed caveatable interest which he points out the Standards Committee has done.

[11] Mr LM also argues that he relied on Mr RB's advice and if Mr RB's advice had been he did not have a caveatable interest then he "could have had the opportunity to seek further advice from Mr RB [or other legal practitioners] on other possible legal remedies to protect [his] interest as a shareholder".⁶

[12] Mr LM submits that the facts of the decision and Mr RB's name should be published as being in the public interest.

Review

[13] The review proceeded by way of an applicant only hearing with Mr LM in Area on 28 April 2016. Mr LM was represented by Ms YG.

[14] Ms YG's submissions focused on Mr LM's call for compensation. In the course of the discussion relating to this, it was identified that the claim for loss of opportunity had not been addressed to any extent by the Committee and that this represented an issue which needed to be considered further. In the circumstances, Ms YG was given the opportunity to provide submissions on that claim.

[15] The audio of the hearing was provided to Mr RB together with Ms YG's submissions. Mr RB was given the opportunity to respond and provide his own submissions, both as to whether or not compensation for loss of opportunity was appropriate, and to respond to Ms YG's submissions.

[16] That process has now been completed.

⁵ *BAB v PW LCRO 4/2011*.

⁶ Application for review (20 December 2012) Part 7 at [3](d).

The scope of the review

[17] Even though Mr LM's application for review focused on the Committee's decision not to award compensation to him I am obliged to consider all aspects of the Committee's investigation and determination.⁷

The findings of unsatisfactory conduct

[18] The Committee referred to an earlier decision of this Office⁸ and noted there was "little evidence presented to suggest that Mr RB undertook any real research or assessment of the caveatable interest".⁹ This view formed the basis for the Committee's finding of unsatisfactory conduct by reason of a breach of rule 3.

[19] Rule 3 provides:

- 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.

[20] I do not disagree with that finding.

[21] The Committee determined that Mr LM had instructed Mr RB to register caveats against the properties, which Mr RB failed to do. That resulted in the second finding of unsatisfactory conduct against Mr RB.

[22] The Committee's determination was based on its view that there was more "documentary support"¹⁰ for Mr LM's assertion that he instructed Mr RB to lodge the caveats. Those instructions appear to have evolved more from Mr RB's suggestion to Mr LM that caveats be lodged than from a direction by Mr LM. However, it is difficult to disagree with the view that on the basis of his discussions with Mr RB, supported by the ensuing conduct and correspondence, Mr LM had a legitimate expectation that the caveats were going to be lodged. To this extent, it is reasonable to proceed on the basis that Mr RB had instructions to proceed in the manner that had been discussed.

[23] That, in turn, led to the finding against Mr RB that he had breached rule 7.1 by failing to advise Mr LM he had not registered the caveats.

⁷ Lawyers and Conveyancers Act 2006, s 203; *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [41].

⁸ Above n 5.

⁹ Above n 3, at [26].

¹⁰ Above n 3, at [34].

[24] The three findings of unsatisfactory conduct flowed from the failure by Mr RB to properly research and advise on the grounds for lodging caveats against the titles to the three properties owned by the company. Fully researched advice may have been that Mr LM did not have grounds to lodge the caveats, in which case Mr RB may have properly declined to do so, as he would otherwise have been in breach of rule 2.3 (use of legal processes only for proper purposes).

[25] However, Mr RB did proceed to lodge caveats against the two other properties subsequently when it was discovered that no caveats had been registered. The Committee found that Mr RB had breached rule 2.3 in doing so.

[26] The lack of research into whether or not a caveatable interest could be supported led to the finding of unsatisfactory conduct by reason of a breach of rule 3 which requires a lawyer to act competently. The Committee made a single finding of unsatisfactory conduct by reason of breaches of both rules 2.3 and 3. That was the correct approach and it must be emphasised that there has been a single finding of unsatisfactory conduct based on breaches of two rules, not two separate findings of unsatisfactory conduct.

[27] That was a factor which the Standards Committee would have taken into account when considering penalty and in the circumstances, the fine of \$500 appropriately reflected the unusual facts referred to by the Committee.

Compensation

[28] The Committee noted that “there is little evidence to suggest that Mr RB undertook any real research or assessment of the caveatable interest”.¹¹ It went on to express the view that “... if Mr LM did not have any proper caveatable interest to sustain a caveat, he could not incur a loss from the failure to lodge the caveat. On that basis, an order for compensation was not appropriate”.¹²

[29] At the review hearing Ms YG provided me with a statement of financial position of the company as at 31 March 2009. This showed a debt due to Mr LM in the sum of \$28,777 which is the amount for which Mr LM says he should be compensated.

[30] Section 156(1)(d) of the Lawyers and Conveyancers Act provides that “where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner ...” then the Committee may order the practitioner

¹¹ Above n 3, at [26].

¹² Above n 3, at [43].

“to pay to that person such sum by way of compensation as is specified in the order ...”.

[31] Consequently, there must be a nexus between the act or omission of the lawyer and the loss.

[32] Even if the caveat had been lodged and was sustained in the face of a challenge, and even if the property was then sold for a sum acceptable to Mr LM, there is still no certainty that the company could, or would have, repaid its debt to Mr LM. The connection between the failure to lodge the caveat and the company’s failure to repay its debt to Mr LM is remote. Indeed, there is nothing other than the assertion by Mr LM that the debt remains owing. His claim for compensation for repayment of the debt lacks foundation.

[33] The most that could be said if the caveat had been lodged, is that Mr LM lost the opportunity to be made aware of the proposed sale and the opportunity to prevent the sale proceeding. It is that potential loss that was the subject of discussion at the review hearing and about which I have sought submissions from the parties.

Compensation for loss of opportunity

[34] The possibility of compensation for loss of opportunity was recognised by the Legal Complaints Review Officer (LCRO) in *Sandy v Khan*.¹³ However, there was no discussion in that decision as to what principles would apply to such a claim as the LCRO noted that the applicant’s claim for loss of opportunity was inconsistent with her statement that if she had been properly advised she would not have entered into a contract for the sale of her business at all. There was no identifiable loss.

[35] In her submissions, Ms YG linked the loss of the opportunity to prevent the sale with assertions that the value of the property was higher than the sale price. Argument on this basis reduces the claim to a claim already declined due to the speculative nature of what the outcome would have been.

[36] It must not be overlooked either, that Mr LM would have incurred further costs either defending the caveat or negotiating with Mr SS. In this regard, the loss of opportunity in reality, could very well have had no value at all.

¹³ *Sandy v Khan* LCRO 181/2009.

[37] Ms YG's submissions extended into claims for legal fees incurred in bringing the complaint, and now, this review. She also submitted that Mr RB's fees should be reduced as the failure to lodge the caveat had reduced the value of his advice.

[38] This extension of the submissions beyond what had been called for prompted Mr RB to express some confusion with what he refers to as "the current status of Mr LM's complaints". Mr RB also seems to be confused as to the role of this Office as it appears he is under the impression this review is a continuation of the consideration of the complaint by the Standards Committee.

[39] Mr RB does however produce evidence (in the form of an email from Mr SS to Mr LM dated 12 May 2009 seeking Mr LM's consent to the sale) that Mr LM was aware of the proposed sale. Mr RB submits Mr LM had the opportunity to seek an injunction at that stage to prevent the sale proceeding.

[40] Whilst that is correct, there is no evidence that this was an option canvassed by Mr RB. That is the issue Mr LM raises on review, in that he relied upon Mr RB's advice that a caveat could be lodged, and if Mr RB's advice had been that he did not have a caveatable interest then he could have sought advice as to what other options were open to him.

[41] I accept Mr LM's assertions in this regard but I am not at all certain that Mr LM was thereby deprived of all options available to him. It seems to me that the potential existed for action to be taken against Mr SS subsequently for alleged breaches of his duties as a director.

[42] In considering a claim based on loss of opportunity, I cannot embark on an enquiry as to what the outcome would have been if the caveat had been lodged. After considering all of the circumstances involved in this matter I do not think the loss of opportunity to be aware that the sale was proceeding can be said to have a value that is capable of being quantified or indeed represented a "loss" at all.

[43] I therefore decline to modify the Standards Committee determination to make any further order against Mr RB.

Publication

[44] Ms YG did not pursue the submissions by Mr LM in his application for review, that the facts of the decision, and Mr RB's name, should be published.

[45] In its determination, the Committee did not provide any reasons for its decision not to publish other than it did not consider “publication was necessary or desirable in the public interest”.¹⁴

[46] Publication is at the discretion of the Committee. The statutory provision for publication is the same for this Office as for the Standards Committee.¹⁵

[47] I have therefore given consideration as to whether or not this decision should be published.

[48] It is the practice of this Office to seek submissions on publication from the parties if the LCRO forms a preliminary view that publication may be in the public interest. Again, and at this stage, it is a matter of discretion.

[49] One of the expressed purposes of the Lawyers and Conveyancers Act is “to protect the consumers of legal services ...”.¹⁶ Publication of decisions is made with this objective in mind.

[50] It has already been noted that the facts and the Standards Committee decisions, are unusual. The facts of this decision will be published in anonymised format on the website of this Office. The Act otherwise requires complaints and reviews to be conducted in private.¹⁷

[51] I do not consider there is any need to publish Mr RB’s name to fulfil the objective of the Act.

Decision

[52] Having considered all of the issues arising in this complaint and the Standards Committee determination, I have arrived at the same conclusions as the Standards Committee. I agree that the facts and the result is somewhat unusual, but the outcome remains the same.

¹⁴ Above n 3, at [46].

¹⁵ Lawyers and Conveyancers Act 2006, ss 142(2) and 206(4).

¹⁶ Section 3(1)(b).

¹⁷ Section 206(1).

[53] Consequently, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is confirmed.

DATED this 15th day of June 2016

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:

Mr LM as the Applicant
Ms YG as a Representative for the Applicant
Mr RB as the Respondent
Mr NC as a Related Person
The Area Standards Committee
The New Zealand Law Society