

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [A North Island] Standards Committee

**BETWEEN**

**MS EE**

Applicant

**AND**

**MR ZX**

Respondent

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

**Introduction**

[1] Ms EE has applied for a review of a determination by [A North Island] Standards Committee in which it determined that Ms EE's conduct in registering caveats over properties owned by Trusts of which Mr ZX was a trustee, constituted unsatisfactory conduct. The Committee imposed a fine of \$7,500 and ordered payment of costs in the sum of \$1,000.

**Background**

[2] Mr ZX had guaranteed payment of debts owed by his companies [Company 1] and [Company 2], to [Company A]. [Company 1] and [Company 2] were indebted to [Company B] which instructed Ms EE to take recovery action.<sup>1</sup> There were underlying personal issues which affected the relationship between Mr ZX and one of the principals of [Company B], but those issues have no relevance to this review.

[3] Mr ZX was a trustee of three trusts - the [Trust 1], the [Trust 2] and the [Trust 3]. Each trust owned a property and in each case there were two other trustees. [Trust 3]

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<sup>1</sup> I note that the copy of the guarantee provided by Ms EE is a guarantee of indebtedness to [Company A]. It has however, been accepted that the guarantee was a valid guarantee and this is not a matter to be inquired into in the context of this review.

was a trust established by Mr ZX's parents and owned a property in which Mr and Mrs ZX senior resided.

[4] The Land Transfer system does not recognise a trust as a separate legal entity and consequently the titles to the three properties recorded that they were owned by the trustees jointly. A search of the register under Mr ZX's name therefore revealed his joint ownership of these properties.

[5] On instructions from her client, Ms EE registered caveats against the titles to all three properties in accordance with the terms of the guarantee signed by Mr ZX.<sup>2</sup>

[6] Mr ZX advises that at the time, his parents were in the process of increasing financial facilities secured by the property and the lodgement of the caveat meant that this was unable to proceed.

[7] Ms EE (or more properly, Ms EE's client) declined to accede to requests by Mr ZX and his lawyer (Mr HP) to remove the caveats on the basis that Mr ZX was a trustee. Ms EE noted that her instructions were that Mr ZX was a beneficiary in each Trust. She requested copies of the Trust deeds and advised that if it could be established that Mr ZX was a bare trustee, the caveats would be withdrawn. Mr ZX did not respond to this request.

[8] Mr ZX then offered to secure the indebtedness over another property owned by [Company 2] in return for a withdrawal of the three caveats. There was no response to this offer but in the meantime Mr ZX proceeded with the sale of that property which resulted in an unconditional contract with settlement to take place on 3 December 2010. Ms EE was advised of this by Mr HP on 15 October 2010. At the same time Mr HP requested that in particular, the caveat of the property owned by [Trust 3] be withdrawn.

[9] In the meantime, Ms EE had lodged a caveat over the property owned by [Company 2] as she had been invited to do.

[10] In response to the advice that the property had been sold, Ms EE advised that the caveat over the property owned by [Trust 3] would be withdrawn upon receipt of an undertaking that there would be sufficient funds from the sale of the property to clear the debts owed to [Company B] and to pay that sum, together with Ms EE's costs, to her firm's trust account immediately following sale.

[11] That undertaking was provided by Mr HP and the [Caveat 3] was withdrawn.

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<sup>2</sup> I have proceeded on the basis that the guarantee was enforceable in its terms and provided the right to lodge a caveat against property owned by the guarantor.

[12] Mr ZX took issue with the amount required to be paid to clear the debt and to pay Ms EE's costs, and payment was made reserving the right to dispute the amounts. Further details of the accounts were requested following payment, but no further information was received. Ms EE has advised that her client did not wish to engage in any further communications about the matter.

### **Mr ZX's complaints**

[13] In his complaint to the Law Society, Mr ZX was not specific about the issues he was complaining about. He did however seek a refund of all fees other than fees for the caveat registered over the property owned by [Company 2] and a refund of extra fees incurred with his solicitor which he noted was \$500.

[14] In its determination, the Standards Committee identified the issues as being:

- the use of legal processes for an improper purpose, being a breach of Rule 2.3 of the Conduct and Client Care Rules<sup>3</sup>; and
- overcharging.

### **The Standards Committee determination**

[15] Having considered the complaint, the Committee determined to set the matter down for a hearing on the papers and the parties were invited to provide submissions. Mr ZX did not provide any submissions following issue of the Notice of Hearing but had previously made his views known. These were encapsulated in his email of 21 July 2011 to the Law Society where he stated:

From the start [Company B] were advised that the Trusteeship on my parents property in [Location 1] was not appropriate or necessary when they were also advised that the actual debtor company was selling its property and they would be paid in full upon sale. This caused undue stress on my elderly father who was confused and upset by the whole process. I believe that placing caveats on [Location 2] and [Location 3] was completely over the top and unnecessary. There was no need for any protracted negotiations and therefore no need for the costs to be incurred that they claimed. If they had not deliberately refused to acknowledge the trusteeship the costs would not have been incurred.

[16] The Committee recorded its deliberations in the following way:<sup>4</sup>

The Committee noted that no submissions had been received from the complainant, Mr ZX, for the hearing on the papers. The Committee was concerned at the basis on

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<sup>3</sup> Lawyers and Conveyances Act (Lawyers: Conduct and Client Care) Rules 2008.

<sup>4</sup> Standards Committee determination dated 23 March 2012 at [23].

which the caveats had been lodged on the various properties, in particular once a caveat had been offered on a fourth property which had a value more than adequate to cover the debt allegedly owing. The Committee noted the impact of the actions of Ms EE on Mr ZX and his parents, who at the time were seeking to refinance the properties. The Committee considered that there had been an inadequate response to their request for removal of the caveat to allow such refinancing. The Committee was concerned at Ms EE's failure to promptly reply to letters from Mr ZX's lawyer and considered that Ms EE appeared to have used legal processes in breach of Rule 2.3 of the Rules of Conduct and Client Care, which obliges a lawyer to use legal processes only for proper purposes.

[17] Following a consideration of the matter, the Committee concluded that Ms EE's conduct constituted unsatisfactory conduct, imposed a fine of \$7,500 on Ms EE and ordered her to make payment of \$1,000 on account of costs.

[18] The Committee also sought submissions from Ms EE as to what compensation should be awarded and whether or not the Committee should publish her name.

### **The review**

[19] Mr LG, on behalf of Ms EE, provided comprehensive submissions setting out the reasons why he and Ms EE considered the determination of the Standards Committee was flawed. An applicant only hearing was held in [Location] on 15 August 2013. Mr ZX did not exercise his right to attend. Ms EE, attended accompanied by her Counsel, Mr EF and a member of her client company.

### **The focus of the complaints**

[20] At the review hearing Ms EE made the initial observation, that as far as she was concerned, Mr ZX's primary complaints related to the fees that he paid under protest to obtain a release of the caveats. When one reads Mr ZX's complaint as lodged with the Law Society, I considered that this view of the complaint is probably correct. Although Mr ZX referred to the lodging of the caveats, there is no actual complaint by Mr ZX about Ms EE's conduct in doing so.

[21] As noted, the fees were paid under protest, and following settlement Mr HP sought details of the invoices paid. This request related to the amounts included by [Company B] by way of interest as well as Ms EE's costs.

[22] In his letter of 12 November 2010, Mr HP asked Ms EE if she and her client were willing to participate in putting the dispute before the Conveyancing Committee for resolution. The reference to the Conveyancing Committee is, I believe, the Property Disputes Sub Committee of Auckland District Law Society Inc which offers a service to

practitioners and their clients as a cost effective and prompt means of resolving commercial and conveyancing disputes.

[23] Mr HP requested a response within three days but no response was forthcoming. The three days would have expired on 15 November 2010 and the complaint was lodged by Mr ZX on 28 November 2010. In his complaint, Mr ZX indicated that resolution for him would be achieved by a refund of “[a]ll fees other than the fees for the caveat over the company’s property”<sup>5</sup> and his solicitors additional costs in the sum of \$500.

[24] Following issue of the Standards Committee determination, Mr ZX wrote to the Law Society and rather than repeat the content of that letter, a copy of that is attached. It is date stamped 12 April 2012. It would appear that this letter may not have been sent to Ms EE.

[25] In this letter, Mr ZX seeks recovery of the interest charged by [Company B] and a refund of the [Law firm 1] fees in the sum of \$2,632.71. It needs to be stated immediately, that neither the Standards Committee or this Office has any jurisdiction in respect of the amounts charged by [Company A]. It is unfortunate that Mr ZX has not been disabused of this expectation long ago. That is a civil matter to be addressed between him and [Company B] in the appropriate forum which is most definitely not the Lawyers Disciplinary process.

[26] Having considered all of these factors I agree with Ms EE’s view that the complaint was largely about fees.

[27] The Committee has not specifically addressed the complaint about fees in its decision unless it intended to do so in the context of the further consideration in respect of compensation. Given the outcome of this review it will no longer be a matter which the Committee will need to address.

[28] Having made these observations, it does seem to me that the Committee approached this matter from a different perspective from that which Mr ZX was complaining about. The Committee’s approach was to consider whether or not Ms EE had acted properly in lodging the caveats, whereas what Mr ZX was complaining about is that he considered the action in lodging the caveats was “over the top and unjustified”.<sup>6</sup>

[29] Since the Committee has made its findings in part on the basis of a breach of

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<sup>5</sup> Complaint to NZLS dated 28 November 2010.

<sup>6</sup> Letter ZX to NZLS (12 April 2011).

Rule 2.3<sup>7</sup> I will address that issue in this review. However, it is necessary to first address some preliminary matters referred to in Mr LG's submissions.

[30] Mr LG takes issue with the fact that it would appear the Committee did not refer correspondence from Mr ZX, in particular an email from Mr ZX to the Law Society dated 21 July 2011, to Ms EE for comment. He considers that this failure is a breach of natural justice given that the content of the email goes to the root of the issue as to whether or not there was legal justification for lodging the caveat. I agree with Mr LG's comments in this regard and it does seem to be something of an oversight on the part of the Committee as the letter predated the Notice of Hearing. It was not as if it was an incidental piece of correspondence arriving after the hearing had been concluded. The matter has now of course been addressed as Ms EE has had the opportunity to comment on the content of the email although she may still have not received a full copy.

[31] I also note Mr LG's correction of the statement that the Statutory Demand was issued by Ms EE, and accept his advice that it was instead sent by her clients without reference to her.

#### **Has there been a breach of rule 2.3 of the Conduct and Client Care Rules?**

[32] Rule 2.3 provides:

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, interests, or occupation.

[33] The commentary to this Rule gives by way of example, the registration of a caveat on a title knowing that (or failing to enquire whether) there is no caveatable interest on the part of the client to be protected.

[34] Although the Committee has referred to Rule 2.3 in its determination, there is no specific finding that Ms EE breached the Rule. Instead, the record of the Committee's deliberation states:<sup>8</sup>

The Committee was concerned at the basis on which the caveats had been lodged on the various properties, in particular once a caveat had been offered on a fourth property which had a value more than adequate to cover the debt allegedly owing.

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<sup>7</sup> Above n3.

<sup>8</sup> Above n4.

[35] The Committee went on to note the impact of the registration of the caveats on Mr ZX and his parents and expressed the view that “there had been an inadequate response to their request for removal of the caveat to allow for such refinancing”.

[36] It is not a breach of the Rules to refuse to adopt what the other party considers is a reasonable course of action. Indeed, a creditor may be totally unreasonable and over the top in his or her requirements. This does not mean that the creditor’s lawyer has somehow breached professional standards. Indeed, a lawyer is bound to follow his or her client’s instructions so long as that does not mean the lawyer is in breach of his or her professional duties or the law.

[37] The Committee’s comments are somewhat puzzling, in that it seems to be adopting Mr ZX’s position, that because [Company B]’s requirements were unreasonable, or over the top, that this therefore resulted in an adverse finding against Ms EE.

[38] That is not the case. The only basis for an adverse finding against Ms EE is whether or not she breached the provisions of Rule 2.3. The Committee’s determination is expressed somewhat ambivalently when it states:

..Ms EE appeared to have used legal processes in breach of Rule 2.3... which obliges a lawyer to use legal processes only for proper purposes.

The question has to be examined and answered definitively.

[39] The title to the three properties against which the caveats were registered, recorded Mr ZX as one of three joint proprietors. There is no question that Mr ZX had an interest in these properties. The nature of that interest could only be determined by an examination of the underlying documentation which would need to not only include the Trust Deed under which the property was allegedly held, but in addition, evidence that the particular property had been acquired by the Trust and not by the registered proprietors in their own right. This would need to include at least a Trust Minute evidencing that the property had been acquired by the Trust, and perhaps other documentation such as the purchase agreement or finance documents referring to the Trust.

[40] Whatever was the case, there can be no question that Mr ZX had an interest in the properties – the titles speak for themselves.

[41] It is then necessary to look at the actual memorial recorded against the title to the properties. This states:<sup>9</sup>

Caveat against the interest of [Mr ZX] by [Company B].

[42] It is clear therefore that the caveat did not purport to be registered against the whole of the property – it was registered against Mr ZX’s interest only. Mr ZX had signed the guarantee in which he agreed to provide a mortgage over any of his interests in property and it was in reliance on that agreement that Ms EE lodged the caveat. I do not accept that in doing so Ms EE was in breach of Rule 2.3.

[43] The Committee seems however to then consider that by not being reasonable in dealing with the proposals put forward by Mr ZX, and by declining to release the caveats, this too “appeared” to be a breach of Rule 2.3. I consider that this is taking the application of that Rule too far.

[44] There is absolutely no need at all for a creditor to be reasonable. It is entirely the decision of the creditor as to whether or not it agrees to a particular course of action. In this case, [Company B] was reluctant to release its caveat without being absolutely certain of payment. It was entitled to decline to even consider Mr ZX’s proposals. It was entitled to be unreasonable and over the top in its demands. I note however that Ms EE did ask for evidence that Mr ZX was a bare trustee only, but no evidence to this effect was provided.

[45] What needs to be recognised here is that Ms EE was obliged to act on her client’s instructions. It was not her decision to make as to whether or not the proposals were to be accepted. In addition, it needs to be recognised, that once the caveats were registered, it was only Ms EE’s clients who could authorise them to be withdrawn.

[46] It was wrong for the Committee to conflate the actions of [Company B] with those of Ms EE and hold her responsible for those actions.

[47] I have therefore come to the view that Ms EE has not breached Rule 2.3 and as a consequence, the finding of unsatisfactory conduct cannot stand.

#### **Did Ms EE “lodge” the caveats?**

[48] Having come to the view above, it is not necessary for me to consider Mr LG’s argument that Ms EE did not register the caveat. However, I shall do so as his submission is an important issue in relation to the electronic lodgement of documents by solicitors.

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<sup>9</sup> Title of property [Property code] [date].



[49] Mr LG argued that because it was Ms EE's client that signed the Authority and Instruction form (A & I) that this exonerated Ms EE from any suggestion that she registered the caveat. He says: "She simply certified their lodgement in her capacity as a Conveyancing Professional and had legal justification to do so".<sup>10</sup>

[50] In support of this argument Mr LG refers to the comments made by Blanchard J in *Gordon v Treadwell Stacey Smith*.<sup>11</sup> That case concerned an application for compensation pursuant to section 146 of the Land Transfer Act. Blanchard J commented that a solicitor who has had his or her client sign a caveat and then merely lodged it for registration on behalf of the client could not be considered to have "lodged" the caveat for the purposes of the Land Transfer Act and was not therefore liable to pay compensation.

[51] That case predated the e-dealing registration process. Prior to this a caveat could be lodged by a solicitor signing a caveat "for and on behalf of" their client.

[52] Under the e-dealing regime that is not possible. Every caveat must be lodged pursuant to a valid A & I which must be signed by the client (or their attorney). If Mr LG's proposition were to be taken as correct it would mean lodging a caveat on this basis could never constitute a breach of Rule 2.3.

[53] I refer the parties to the decision of this office in *BAB v PW*.<sup>12</sup> In that case, the lawyer took absolutely no steps to verify whether or not his client had any grounds to lodge a caveat but nevertheless proceeded to do so with significant consequences for the registered proprietor and the purchaser. These consequences were all the more dramatic as the client refused to withdraw the caveat even when it became clear that there was no basis to do so.

[54] In that case, I considered that the lawyer had indeed breached the provisions of Rule 2.3 and ruled accordingly.

[55] I do not therefore accept as a matter of principle that just because a caveat is lodged on the basis of an A & I signed by the client, that a lawyer can escape all responsibility in terms of the Rules. Lawyers occupy a privileged position with regard to the operation of the Land Transfer system and must act responsibly in the exercise of that privilege. This includes ensuring that there are at least arguable grounds for lodging a caveat.

## **Conclusion**

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<sup>10</sup> Submissions in support of application for review dated 9 May 2012 at para 3.1.

<sup>11</sup> Unfortunately the citation of this judgment was omitted from the materials provided by Mr LG.

[56] Having made the comments above it will be apparent that I do not agree with the determination of the Standards Committee and in the circumstance, I intend to reverse the determination.

### **The complaint as to costs**

[57] As noted above, the Standards Committee did not rule on Mr ZX's complaint as to the quantum of Ms EE's costs. Mr ZX's complaint is based on a view that Ms EE's actions with regard to the caveats were unwarranted. As noted by him in his letter date stamped 12 April 2011 the amount of Ms EE's costs were \$2,632.71.

[58] Given that I have reached a different conclusion from the Standards Committee and reversed the Standards Committee determination, it follows that the work undertaken by Ms EE with regard to the caveats was justified. For the purpose of bringing finality to this matter, I consider that the costs rendered by Ms EE represent a fair and reasonable fee for the work that she undertook and that no further action should be taken with regard to Mr ZX's complaint about Ms EE's costs.

### **Decision**

1. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is reversed.
2. That determination is replaced by a determination pursuant to section 152 (2)(c) of the Lawyers and Conveyancers Act 2006 to take no further action with regard to all aspects of Mr ZX's complaint.
3. It follows that the fine and costs orders imposed by the Committee are reversed.
4. It also follows that there is no need for any further submissions from Ms EE on costs and publication.

**DATED** this 10<sup>th</sup> day of February 2014

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O W J Vaughan  
**Legal Complaints Review Officer**

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<sup>12</sup> *BAB v PW LCRO 4/2011.*

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms EE as the Applicant  
Mr EF as counsel for the Applicant  
Mr LG as a related person or entity  
Mr ZX as the Respondent  
[A North Island] Standards Committee  
The New Zealand Law Society