

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

[2021] NZLCRO 010

Ref: LCRO 109/2020

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

BETWEEN

SV

Applicant

AND

FT

Respondent

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

DECISION

Introduction

[1] Mr SV has applied for a review of a decision by the [AREA] Standards Committee which, following completion of its investigation into conduct complaints advanced by Mr SV against Mr FT, made findings that Mr FT's conduct in lodging a caveat, constituted unsatisfactory conduct pursuant to s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Mr SV's mother, TSV, died on 2 July 2018.

[3] Mr SV was the executor of his mother's will.

- [4] Ms UI (Mr SV's sister) was excluded from her mother's will.
- [5] Mr FT acted for Ms UI in advancing a claim against the estate under the Family Protection Act 1955.
- [6] The assets of Mrs SV's estate included a residential property (the property).
- [7] Mr SV was granted probate on 2 August 2019.
- [8] The property was transferred to Mr SV as executor on 23 August 2018.
- [9] On receiving instructions from Ms UI, Mr FT endeavoured to obtain, from Mr SV's then solicitors, a copy of the probate and a copy of Mrs SV's will.
- [10] That information was not provided.
- [11] Mr FT's client concluded that Mr SV had instructed his lawyers to not respond to any request to provide information relating to the affairs and estate of her late mother.
- [12] Mr FT lodged a caveat on the property. His client was concerned that the property would be sold, and proceeds disbursed by Mr SV before she had an opportunity to pursue her claim to an interest in the property.
- [13] On 18 December 2018, an injunction preventing sale of the property was obtained in the Family Court.
- [14] The caveat lapsed following an application lodged by Mr SV.

The complaint and the Standards Committee decision

- [15] Mr SV lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 7 November 2019. The substance of his complaint was that Mr FT had lodged the caveat when there was no legal basis for him to do so.
- [16] By way of outcome, Mr SV sought reimbursement of costs he had incurred in resisting the caveat.
- [17] In responding to the complaint, Mr FT submitted that:
- (a) the lack of response to his request of Mr SV's solicitors to provide information concerning Mrs SV's estate, properly persuaded him that the solicitors had been instructed not to respond; and
 - (b) the caveat was lodged on instructions from his client; and

- (c) his client was forced to apply to the Court for a copy of probate in the face of the apparent reluctance of the estate's executor to provide information; and
- (d) his client was understandably apprehensive that the property would be sold; and
- (e) Mr SV resisted attempts to reach an accommodation for agreements to be reached on the basis of undertakings; and
- (f) lodging of the caveat was justified; and
- (g) the lodging of the caveat provided opportunity for an application under the Family Protection Act to be lodged, together with accompanying application for injunctive relief; and
- (h) the caveat application was lodged with proper purpose; and
- (i) compensation sought by the complaint for reimbursement of costs was excessive; and
- (j) in lodging the caveat, he was following his client's instructions; and
- (k) there was no improper purpose in lodging the application; and
- (l) the lodgement of the caveat had forced Mr SV to give consideration to his client's claim; and
- (m) the caveat had been lodged on the basis of a cestui que trust; and
- (n) the decision of the High Court in *Kelsey v Taniora* provided authority to support argument that the caveat was properly lodged;¹ and
- (o) the decision of the Court to grant an injunction provided further evidence to support argument that lodging the caveat was justified.

[18] The Standards Committee delivered its decision on 20 April 2020.

[19] The Committee concluded that Mr FT's actions in lodging the caveat constituted unsatisfactory conduct pursuant to s 152(2)(b) of the Act in terms of ss 12(b) and 12(c) of the Act as he had breached r 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

¹ *Kelsey v Taniora* [2018] NZHC 1727.

[20] In reaching that view, the Committee concluded that Mr FT was not entitled to lodge a caveat and that Mr FT ought to have known that there were no grounds to sustain a caveat. The Committee considered that Mr FT had used a legal process for an improper purpose.

[21] The Committee made orders that Mr FT was to pay costs to the New Zealand Law Society in the sum of \$500 and pay compensation to Mr SV in the sum of \$1,250.

Application for review

[22] Mr SV filed an application for review on 10 June 2020.

[23] His application is confined to requesting a review of the Committee's compensation order.

[24] He submits that the Committee should have reimbursed him the full sum of the legal costs he had incurred in opposing the caveat.

[25] Mr FT was invited to provide response to Mr SV's application and did so on 10 July 2020.

[26] In providing his response, Mr FT did not confine that response to addressing the issue that was the subject of Mr SV's review (the sum of compensation awarded), rather he sought that the Standards Committee unsatisfactory conduct finding be reversed.

[27] His application presented as an application to review the Committee's substantive decision.

[28] In advancing argument that the unsatisfactory conduct finding should be set aside, Mr FT submitted that:

- (a) the grounds on which the caveat was lodged were at least arguable; and
- (b) the Committee had affirmed that a caveat may be lodged on the basis of a beneficial interest in land, an interest which he submitted his client held; and
- (c) legal authority had been provided which supported his client's position; and
- (d) the caveat was at least arguably sustainable; and

- (e) there was no improper purpose in registering the caveat; and
- (f) the caveat had achieved its purpose; and
- (g) the purpose was not improper; and
- (h) the conduct of the complainant was responsible for leading to a situation where it became necessary to register a caveat; and
- (i) the Committee had failed to sufficiently address the overall justice of the matter; and
- (j) in any event, costs claimed by the complainant were excessive.

Review on the papers

[29] The parties were given indication that the review would be conducted on the papers and given opportunity to raise objection if they wished to do so. No objections were raised.

[30] Section 206(2) of the Act allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[31] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[32] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... 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

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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.

[33] More recently, the High Court has described a review by this Office in the following way:³

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.

[34] 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.

Discussion

[35] The issues to be addressed on review are:

- (a) Should the Review, in addressing Mr FT’s response to Mr SV’s application be:
 - (i) limited to considering Mr SV’s challenge to the compensation order; or
 - (ii) addressed by the Review Officer as an application to review the Committee’s unsatisfactory conduct finding?
- (b) If the answer to (a)(ii) is yes, did Mr FT’s lodgement of the caveat constitute a breach of r 2.3?

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (c) Did the Committee err in concluding that the lodging of the caveat presented as a legal process being used for improper purpose?
- (d) Should the Committee have awarded Mr SV the full sum of the costs he had incurred resisting the caveat?

Should the scope of the Review be confined to addressing Mr SV's opposition to the compensation order?

[36] Mr SV's application seeks a review of the compensation order.

[37] The Standards Committee delivered its decision on 20 April 2020.

[38] The decision was emailed to Mr FT on 21 April 2020.

[39] Every Standards Committee decision concludes with advice to the parties as to their rights to review the Committee decision. Parties are informed that review applications must be filed within 30 working days of date of receipt of the decision.

[40] Mr FT took no steps to review the Committee decision within the time frame required.

[41] Mr SV's application was filed on 10 June 2020, 4 days out of time.

[42] Mr FT was provided with a copy of Mr SV's review application on 15 June 2020 and informed that the Review Officer would be making a decision as to whether the application would be accepted for filing out of time.

[43] As at 15 June 2020, Mr FT had taken no steps to exercise his right to review the Committee decision and was out of time to do so.

[44] On 29 June 2020, the parties were advised that I had satisfied myself that that it was necessary and desirable to exercise a discretion under sch 2 of the Epidemic Preparedness Act 2006 and accept Mr SV's application for filing.

[45] Mr FT filed submissions in response to Mr SV's application on 10 July 2020. His submissions do not strictly present as a response to Mr SV's application to have the compensation order reviewed. They are, in essence, an application to review the Committee's substantive conduct finding.

[46] Mr FT begins his submissions with request that the Review Officer reverse the Committee's decision. He rehearses argument (put earlier to the Committee) that his grounds for lodging the caveat were contestable, that the caveat was arguably

sustainable, and that the Committee had erred in concluding that the caveat was lodged with improper purpose.

[47] To the extent that Mr FT's submissions touch on the matter which are at the core of Mr SV's review application (compensation), Mr FT submits that Mr SV was responsible for the costs he had sustained, as his refusal to co-operate with Mr FT's client was directly responsible for his client having to take steps which resulted in the costs being incurred.

[48] In the majority of cases that come before Review Officers, applicants are seeking to either reverse a Committee's unsatisfactory conduct finding or reverse a Committee's decision to decline to make an unsatisfactory conduct finding.

[49] Mr SV's application understandably does not seek to reverse the Committee's decision. He agrees with it. He disagrees with the Committee's assessment as to appropriate compensation.

[50] Mr FT's response goes further than simply responding to the compensation issue. He seeks a reversal of the Committee's substantive findings.

[51] That raises issue as to the scope of this review. Should the review be confined to addressing the compensation issue, or expanded to embrace a reconsideration of the question as to whether Mr FT's conduct in lodging the caveat merited a disciplinary response?

[52] In my view, if Mr FT wished to challenge the Committee's substantive decision, he should have taken steps to do so. He is a lawyer. He would be aware that the right to challenge a decision in most jurisdictions is circumscribed by requirement to file an objection to a decision issued within a specified time frame.

[53] In filing a response to Mr SV's application in terms which amount to request for the substantive finding to be reconsidered, Mr FT is advancing a review application without requirement for him to lodge such application in the form required. He avoids obligation to pay the requisite filing fee and avoids the requirement to file his application in time.

[54] Time frames for filing applications are strictly enforced.

[55] The discretion allowed to Mr SV was extended only because of the circumstances he had identified, which fell within the power of a Review Officer to extend time for filing under the Epidemic Preparedness Act 2006. The circumstances which persuaded me to grant an extension related to Mr SV's health issues, and difficulties he

had in making arrangements to file an application as a consequence of concerns that his health would be compromised if put at risk of exposure to COVID-19. I think it unlikely that Mr FT, equipped with the resources available to a lawyer, would have had difficulty filing a review application in time, if he had motivation to do so.

[56] If Mr SV had not filed an application, Mr FT would have lost any opportunity to challenge the Committee's decision.

[57] Mr SV's review application is narrowly confined to challenging an order made by the Committee.

[58] I consider that the scope of the current review should be confined to addressing Mr SV's compensation argument, and Mr FT's response to that argument restricted to addressing Mr SV's compensation submissions.

[59] Mr FT had opportunity to challenge the Committee decision and elected not to do so.

[60] I am mindful that the powers of a Review Officer in conducting a review are broad, and that the particular nature of the disciplinary jurisdiction demands that Review Officers do not become inflexible or overly dogmatic in addressing procedural issues. However in considering the circumstances of this particular review, I conclude that the scope of the review is properly confined to considering the question as to whether the compensation order was appropriate.

[61] However, whilst I am satisfied that Mr FT is unable to challenge the conduct finding, if I am wrong in that view, for completeness I will address the issue as to whether the Committee erred in concluding that Mr FT's lodgement of the caveat constituted a breach of a conduct rule.

Did Mr FT's lodgement of the caveat constitute a breach of r 2.3?

[62] Issues as to whether there is a right to caveat a title are matters that can be robustly contested.

[63] The judgment in *Boat Harbour Holdings Ltd v Steve Mowat Building and Construction Ltd* reinforces that the Courts may find that a party has a caveatable interest in circumstances where it is not readily apparent that one exists.⁴

[64] In *BAB v PWLCRO 4/2011* (14 August 2012) it was noted at [33] that neither a Committee nor a Review Officer should be drawn into determining whether there is a

⁴ [2012] NZCA 305.

caveatable interest to the degree that would be necessary for the issue to be addressed before the Court. It is not the role of a Committee or this Office to assume that role.

[65] However, it was also noted in that decision at [34] that there is a threshold below which a lawyer should not assist in interfering with the rights of others. That is the purpose of r 2.3. 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 r 2.3 would have no relevance or substance in these circumstances.

[66] In providing explanation for his decision to register the caveat, Mr FT emphasises that it would not have been necessary for him to take steps to lodge the caveat, if Mr SV had been properly receptive to providing information that should have been provided.

[67] I agree with Mr FT that it was unfortunate that his requests for information were not met with more receptive response, but I am not persuaded that resistance met in obtaining information justified the decision to lodge the caveat.

[68] Mr FT would understandably have been anxious to ensure that Mr SV was not provided opportunity to take control of the estate's assets, but the relevant question remains whether his client had an entitlement to lodge a caveat.

[69] Nor is Mr FT's argument that filing the caveat was efficacious and justified, in that it both prompted Mr SV to become more receptive to paying attention to his client's position and "created the opportunity to apply for the injunction that was ultimately successful",⁵ relevant to the issue as to whether the caveat was properly lodged.

[70] Mr FT submits that when issue was raised with the caveat, his client was faced with the choice of applying to the High Court to sustain the caveat or seeking injunctive relief. He explains that the decision was made to file an application under the Family Protection Act 1955, accompanied by an application for an injunction.

[71] Couched in these terms, the suggestion is that lodging of the caveat was a necessary precursor to filing the proceedings under the Family Protection Act 1955. It was not. Those proceedings, and that application, could have been filed at any time. Obtaining an injunction was, as it proved to be, an appropriate remedy to protect Mr FT's client's interests.

⁵ Mr FT, response to the Complaints Service (25 November 2019) at p2.

[72] Mr FT argues that the grounds on which the caveat was lodged were at least arguable. He contends that his client's entitlement to lodge arose on the basis of a cestui que trust. Neither in his submissions to the Committee, or in the submissions filed on review, does he provide explanation as to how this particular trust is established.

[73] He does however provide to the Committee a High Court decision (*Kelsey v Taniora*), the facts of which he says were on "all fours" with the circumstances he faced.

[74] Mr FT contends that the administration of the trust had been granted at the time the caveat was registered, and Mr SV was holding the property as trustee.

[75] The case relied on by Mr FT confirms that prior to the administration of a deceased's estate being completed, there is no specific property capable of constituting the subject matter of any trust.⁶

[76] I cannot conclude on the evidence before me, that the administration of the estate had been concluded at the time the caveat was lodged.

[77] The residential property was transmitted to Mr SV as executor on 23 August 2018.

[78] Mr SV, in his capacity as executor, had decided to sell the property.

[79] He was entitled to make that decision.

[80] It would be reasonable to conclude that the administration of the estate would have been completed following sale of the property, settlement of costs associated with sale, and a final accounting being completed as to the assets and liabilities of the estate. It is at that point, as the case relied on by Mr FT reinforces, that the property of the estate ceases to be part of the estate and becomes trust property, held by named trustees or the executor otherwise.

[81] In *Kelsey* it was noted, that a determination of the point at which administration is deemed to be completed, is a matter of fact to be inferred from the evidence but what, as a general rule is required for the completion of administration, is the gathering in of assets and repayment of debts.⁷

[82] I am not persuaded that Mr FT has established that at the time the caveat was lodged, Mr SV was managing estate funds in the capacity as trustee rather than executor, this to assist Mr FT in his argument that following the completion of

⁶ *Kelsey*, above n 1 at [32].

⁷ At [34].

administration, a beneficiary claiming an interest in particular property, has entitlement to lodge a caveat.

[83] I also consider it significant, that in the case relied on by Mr FT, the discussion as to entitlement to caveat arose in the context of a discussion as to the rights available to a legatee.

[84] Mr FT's client was not a beneficiary under her mother's will.

[85] When Mr FT took instructions, it would have been readily apparent that any interest or claim to an interest in estate assets, if disputed, would need to be established by negotiation or referral to the court.

[86] It is a significant matter to register a caveat.

[87] I do not consider that the arguments advanced by Mr FT to support his contention that he had reasonable grounds to lodge the caveat, meet the threshold discussed at [65] above.

[88] The explanatory note to r 2.3 clarifies, in providing examples as to conduct that may amount to a breach of r 2.3, that registering a caveat on a title to land knowing that (or failing to enquire whether), there is not a "caveatable interest" on the part of the client to be protected would constitute a breach of r 2.3.

[89] I agree with the Committee, that Mr FT, in lodging the caveat, breached r 2.3.

Did the Committee err in concluding that the lodging of the caveat presented as a legal process being used for improper purpose?

[90] Rule 2.3 of the Rules provide that:

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.

[91] Mr FT would, understandably, have been anxious to ensure that his client's potential interest in a share of the estate's assets be protected. His degree of apprehension would have been amplified by the lack of response he had received to reasonable request for information, and his awareness that Mr SV, in his capacity as executor, had taken steps to place the residential property on the market.

[92] But a compelling and justifiable need to take steps to protect his client's interests did not absolve Mr FT of the need to ensure that the legal process initiated was a process

that was available to him to exercise. In the absence of a right to register, the steps taken by Mr FT could not constitute a “proper” purpose.

Should the Committee have awarded Mr SV the full sum of the costs he had incurred resisting the caveat?

[93] It is rare for a Review Officer to interfere with a cost or compensation order made by a Standards Committee.

[94] The approach adopted when addressing applications to review orders made, is that robust evidence needs to be provided by an applicant to support argument that compensation orders should be varied.

[95] Section 156(1)(d) of the Act provides that the Committee may:

where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner ..., order the practitioner, to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding, [\$25,000]⁸.

[96] The causative link between the conduct of the lawyer and the loss is expressed somewhat loosely in terms of the loss being suffered “by reason of any act or omission” of the lawyer.

[97] In this case, the causal link is readily established. The costs incurred by Mr SV directly arose as a consequence of him having to expend legal costs opposing the caveat which the Committee concluded Mr FT had no basis to lodge.

[98] Following what could be regarded as the fundamental approach in determining compensation, that is to ensure if compensation is awarded that the measure of compensation restores the injured party to the position that they would have been in but for the actions of the party responsible for the loss suffered, it would have been expected that the starting point for the Committee would have been to consider reimbursing Mr SV the full sum of his loss.

[99] The Committee clearly chose not to do so, and it provides explanation for why it elected not to do so at [5.3] of its decision where it noted that “there was some contributory behaviour on the part of the complainant in not providing (or not permitting his solicitor to provide) Mr FT with a copy of his late mother’s Will, or a copy of Probate”.

⁸ Regulation 32 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[100] I agree with the Committee that the apparent reluctance to provide Mr FT with the information requested, contributed to the problems that arose as a consequence of the caveat being lodged.

[101] The late Mrs SV had two children, one of whom was excluded entirely from her will.

[102] In such circumstances it would not have been unexpected that the disinherited daughter would consider possibility of challenging the will.

[103] It would be common practice when request was made for the information in the nature of that sought by Mr FT, for that information to be willingly provided.

[104] I consider the reduction of the sum of compensation sought by Mr SV to be reasonable considering the apparent disinclination from Mr SV to provide instructions to his lawyer to provide information which, if provided earlier, would likely have facilitated a more constructive approach to resolution.

[105] I do not consider it necessary to interfere with the compensation order.

Anonymised publication

[106] 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.

Decision

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

DATED this 28TH day of JANUARY 2021

R Maidment
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 SV as the Applicant
Mr FT as the Respondent
Mr RF as a Related Person
[AREA] Standards Committee
New Zealand Law Society