LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2023] NZLCRO 106

Ref: LCRO 109/2023

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**W JM and F JM** Applicants
AND	**EB and MK** Respondents

DECISION

The names and identifying factors in this decision have been changed.

Introduction

[1] Mr and Mrs JM (the applicants) have applied for a review of a decision by the [Area] Standards Committee [X]. The respondents are Mr EB and Ms MK of the law firm, [Law firm A].

Background

[2] The applicants owned a [property]. The [property] was leased to Company B (Company B).

[3] The applicants entered into an agreement to sell the [property], with settlement to occur on 31 May 2022. The agreement provided that the sale was to be subject to the lease to [Company B].

[4] The lease provided expressly that the [property] could be marketed for sale during the term of the lease.

[5] On [X] May 2022, [Company B] lodged a caveat against dealings on the title to the [property]. The estate or interest claimed was stated to be:

> Purchaser of land pursuant to an oral agreement for sale and purchase of land between the registered owner as vendor and caveator as purchaser.

[6] As a consequence of the lodging of the caveat, the applicants were unable to settle the sale of the [property] on the scheduled settlement date.

[7] The applicants lodged an application for the caveat to lapse.

[8] [Company B] lodged in Court an application to sustain the caveat.

[9] The applicants filed a notice of opposition.

[10] [Company B] withdrew the caveat.

[11] The applicants were then able to settle the sale of the [property] on 8 July 2022.

[12] The applicants incurred legal fees and expenses relating to the Court process in the sum of $50,142.26. They recouped $28,000 from [Company B], apparently by agreement.

The complaint

[13] The applicants say that the caveat was lodged without reasonable cause. They say that [Law firm A], in lodging the caveat as agent for [Company B], "aided and abetted the process of lodging a caveat on the basis of an alleged oral agreement without checking the vital facts".

[14] They say further that:

> There was never any factual or legal basis for the caveat to have been lodged in the first instance. To do this was the decision of MK and EB. We are still amazed and distraught that [Company B]'s claim of an alleged oral agreement and caveat was able to be progressed so far through the legal system in an attempt to stop the sale of our [property].

[15] Their complaint is that the actions of the respondents constituted a breach of r 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), which provides 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, interests, or occupation.

[16] As to outcomes, the applicants stated:

> We do not want money. A claim has been settled with [Company B]. We want the Law Society to investigate this case of malpractice and lack of professionalism. In particular that MK and EB of [Company B] lacked any integrity in researching vital facts pertaining to the information relating to the caveat. Please investigate this thoroughly as to suitable sanctions, and or disciplinary actions that are necessary in our opinion, plus an apology.

[17] The respondents elected not to respond to the complaint. I would normally express surprise at this decision on their part. I acknowledge, however, that the [Area] Standards Committee [X] is an Early Resolution Service committee. There is an email dated 11 April 2023 on the Committee's file from the NZLS to the respondents advising that the NZLS did not require a response from them at that point.

The Standards Committee decision

[18] The Standards Committee delivered its decision on 4 July 2023.

[19] The Committee summarised its understanding of the complaint as follows:[1]

> From the information you provided, we understand your complaint is that [Company B], and thereby the subjects of this complaint, used the legal process of placing a caveat on your property "solely on the unsupported and uncorroborated allegation" of their client. Therefore, you complain, using a legal process for an improper purpose.

[20] The Committee gave its reasons for its conclusion and decision as follows:[2]

> 12. Subject to any overriding duties to the court, a lawyer's duty is to his or her client not a person on the other side of a dispute. The principle that a lawyer's duty is owed to his or her client alone was expressed by Cooke J in *Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22, 24 (CA). That said, rule 2.3 does apply to cases where some limited duties are owed to the opposing parties in a dispute. The Standards Committee considered if this rule could apply in this instance.
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> 13. The Standards Committee considered that Mr EB and Miss MK were following their clients' instructions in reliance on the information of a verbal agreement provided to them. They discharged their duties to their client and acted in their interest in pursuing a caveat over your property. There was no evidence this was done to cause you any unnecessary inconvenience to your interests, even if this was the effect to you, but rather it was done in pursuit of their client's arguments where there was a legal and factual dispute.
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> 14. Whether those arguments were erroneous or not does not directly impact on this issue so long as they were pursued sufficiently respectfully in

[1] Standards Committee decision (4 July 2023) at [6].
[2] At [12].

> reliance on a client's view and for their interest rather than to inconvenience or otherwise distress you. The correct place to evaluate the merit of these arguments was in court, or alternative settlement, which is what you have done.

[21] The Committee decided, pursuant to s 138(1)(c) of the Lawyers and Conveyancers Act 2006 (the Act), to take no action on the complaint. Section 138(1)(c) empowers a Committee to decide to take no action if, in its opinion, the complaint is frivolous or vexatious or is not made in good faith.

Application for review

[22] The applicants filed an application for review dated 25 July 2023. The outcome they sought is simply stated:

> We are asking Mr EB and Miss MK provide a formal response to the Law Society and account for their actions. We believe they owe us an explanation.

[23] The applicants state that the respondents being "allowed to not provide a formal response regarding a caveat, supported by an unsubstantiated alleged oral agreement, is unsatisfactory". The applicants also referred to factual errors made in the Standards Committee's decision.

[24] They disputed the Committee's finding that the respondents "discharged their duties to their client and acted in their interest in pursuing a caveat over your property" and asserted that the caveat was lodged to cause embarrassment, distress and inconvenience to the applicants' reputations, interests and occupation.

[25] They cited particulars as follows:

> Our affidavits record CF shouting, "he would blacken our name".
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> It cost us a lot of money [we employed a lawyer (QA) and a QC now KC (VR) who prepared the necessary affidavits (all sent previously to you).
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> Two [business] families doing a legitimate documented [property] sale were threatened by the caveat process [lodged on [X] May 2022]. We could have lost our [property] sale to the true buyers and we would have missed buying our chosen retirement home. We are aged [redacted] years [W] and [redacted] years [F].
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> Our legitimate documented buyers were already in the process of selling their [location] [property]. They could have been in the precarious position of being "out on the side of the road with nowhere to go".

[26] The applicants proceeded to argue that:

> It became obvious to us that Mr EB and Miss MK were enabling CF to use the caveat as a weapon to stop the legitimate sale of the [property]. They ignored facts which had been presented to them. …

> We believe that they knew full well the time frame for completion of the [property
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> sale is usually June 1st. We certainly believe that an attempt to cause embarrassment, distress and inconvenience to our reputations, interests and occupations by the actions of Mr EB and Miss MK was to stop the sale of the [property]. This was encouraged and enabled by them to not only place a caveat on but also sustain the caveat through the court process for a substantiated hearing, then suddenly lifting it for unknown reasons on 28th June 2022. At the time of putting on the caveat, [X] May 2022 Mr EB and Miss MK had no evidence whatsoever of any agreement. Therefore they were negligent in the discovery and procedures of normal law practices.

[27] The respondents were invited to comment on the applicants' review application. They initially declined to do so other than to rely on the Standards Committee decision.

Review on the papers

[28] 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. This is commonly referred to as a hearing "on the papers".

[29] After undertaking a preliminary appraisal of the file, I formed the provisional view that the review could properly be conducted on the papers. The parties were given the opportunity to comment on that proposal. The applicants wished to be heard in person. The respondents were content with the matter being dealt with on the papers.

[30] The papers did not include any evidence or submissions from the respondents. I sought evidence or submissions from them regarding the two specific matters referred to in paragraph [45] below. This was provided.

[31] Having carefully read the complaint, the Committee's decision, the submissions filed in support of the application for review and the respondents' response to my specific questions, I decided that it was unnecessary to hold a hearing. The applicants' arguments in support of their application were already very clearly articulated and I did not consider that a live hearing would be of material assistance to my determination of the appropriate outcome. No discourtesy to the complainants was intended.

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:[3]

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

> … 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.
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> 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" …
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> … 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:[4]

> 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.

Issues

[35] The issues to be considered in this review are as follows:

(a) What is the substance of the complaint?

(b) Was there a reasonable basis for the Committee to decide to take no action on the complaint pursuant to s 138(1)(c) of the Act?

(c) Were the respondents responsible, on behalf of [Law firm A], for lodging [Company B]'s caveat?

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

(d) Does the principle expressed in r 6 of the Rules preclude the potential application to the circumstances of r 2.3?

(e) What is the relevance of s 148 of the Land Transfer Act 2017?

(f) What is the extent of a lawyer's professional obligation to verify that a client has reasonable cause to lodge a caveat against dealings?

(g) How has r 2.3 been applied in other decisions in the context of the lodgement of a caveat without reasonable cause?

(h) Has it been established whether or not there was reasonable cause for lodging the caveat?

(i) What is the appropriate outcome of the review application?

Discussion

(a) What is the substance of the complaint?

[36] At paragraph [6] of its decision, the Committee recorded its understanding that the complaint was one of "using a legal process for an improper purpose". I consider that the complaint is more specific than that. I consider the substance of the complaint to be that, in the applicants' view, the respondents knowingly assisted [Company B] in using a legal process for the purpose of causing unnecessary inconvenience to the applicants' interests on two occasions:

(a) in the lodging of the caveat on [X] May 2023; and

(b) in filing the Court application to sustain the caveat when, they say, there was insufficient evidence to support the application.

(b) Was there a reasonable basis for the Committee to decide to take no action on the complaint pursuant to s 138(1)(c) of the Act?

[37] I am not able to answer this question because the Committee has not adequately explained its decision.

[38] The Committee may have considered that it had reasonable grounds to make its finding that the complaint was frivolous, vexatious or not made in good faith. If so, given the implicit criticism of the applicants, it was incumbent on the Committee to state what those grounds were. It has not done so in its decision.

[39] At paragraph [12] of its decision, the Committee asked itself whether r 2.3 "could apply in this instance". It did not expressly answer that question. Rather, it decided that r 2.3 did not apply in the circumstances, primarily by reference to the principle in r 6 of the Rules.

[40] For the reasons explained below, it is certainly possible for the lodgement of a caveat without reasonable cause to constitute a breach of r 2.3 on the part of the lawyer responsible for lodging the caveat on behalf of the client.

[41] This is expressly recognised in the commentary to the Rules themselves. The footnote to the rule gives examples of conduct that potentially falls within the ambit of the rule. One of the examples given is "registering a caveat on a title to land knowing that (or failing to inquire whether) there is not a 'caveatable interest' on the part of the client to be protected" (sic).

[42] The reason this is given as an example in the footnote to the rule is that there is case authority and commentary on the obligations of a lawyer in receiving instructions to lodge a caveat, as discussed below.

[43] I consider it unreasonable for the Committee to have made the decision it made without any discussion of the circumstances and their potential application in terms of r 2.3 and its consequent finding that the complaint was not legitimately made. Its decision therefore cannot stand on the basis stated, or not stated.

(c) Were the respondents responsible, on behalf of [Law firm A], for lodging [Company B]'s caveat?

[44] In undertaking a preliminary procedural appraisal of the review application, I observed that:

(a) The respondents had given no evidence in response to the complaint;

(b) The Committee had assumed that the respondents were responsible, on behalf of [Law firm A], for lodging the caveat;

(c) The caveat instrument recorded that the person lodging the caveat was GY;

(d) The caveat instrument recorded that the Caveator Representative who provided the necessary caveator certification was NJ;

(e) Mr NJ was a partner of [Law firm A], Mr EB was a Special Counsel of the firm and Ms MK was an Associate of the firm.

[45] I issued a minute requiring a response from the respondents to the following questions:

(a) Did the respondents accept that they had responsibility on behalf of the firm for the lodgement of the caveat by [Company B]?

(b) If the respondents did not accept that they had responsibility on behalf of the firm for the lodgement of the caveat by [Company B], who did have that responsibility?

[46] In response on behalf of himself and Ms MK, Mr EB confirmed that he, rather than Mr GY or Ms MK, had responsibility on behalf of the firm for the lodgement of the caveat by [Company B]. He advised also that:

> Mr NJ is a partner of [Law firm A] and is authorised to certify e-dealings with LINZ on behalf of the firm. Mr NJ undertook his usual assessment of the proposed e-dealing, was satisfied that the necessary registration requirements and threshold was met (sic), and certified the e-dealing.

[47] For the applicants' information, I record that the respondents are not obliged to provide any explanation of their conduct unless specifically required by the Committee or by the LCRO to do so, as was the case with my requirement that they confirm responsibility for lodgement of the caveat.

[48] Also for the applicants' information, I record that a lawyer facing a complaint by someone who is not his or her client is precluded from providing any information that is subject to solicitor-client privilege unless the lawyer's client waives that privilege. In short, the respondents cannot disclose what their advice was to [Company B] or what their instructions were from [Company B] without [Company B]'s consent.

[49] In simple terms, a lawyer does not "owe an explanation" directly to an opposing party for actions taken in accordance with a client's instructions and may be precluded by those instructions from providing any explanation even if he or she wanted to.

[50] Accordingly, although I acknowledge the applicants' clearly expressed concern about the steps taken by the respondents for [Company B], the respondents are not obliged to explain directly to them why they took those steps.

[51] For the reasons explained below, however, the respondents are answerable for their professional conduct in a disciplinary context. It is open to the applicants to

establish on the balance of probabilities on the information that is available that steps taken by the respondents on their client's instructions were not legitimately taken in terms of the law and the rules governing professional conduct.

[52] Mr EB has confirmed that he had lodgement responsibility on behalf of the firm. I can confirm for the applicants' information that it would be unusual for a law firm associate to have such responsibility. No complaint has been made against Mr NJ.

(d) Does the principle expressed in r 6 of the Rules preclude the potential application to the circumstances of r 2.3?

[53] The comment by the Committee at paragraph [12] of its decision quoted at paragraph [20] above is a reference to r 6 of the Rules, which provides that:

> In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

[54] The Committee's comment in that paragraph that "… rule 2.3 does apply to cases where some limited duties are owed to the opposing parties in a dispute" reflects the second part of the qualification to r 6, i.e. "… within the bounds of … these rules …".

[55] The first part of a qualifying phrase also applies, i.e. "… within the bounds of the law …". It is the law that a caveator must honestly believe that it has reasonable cause to lodge a caveat. Specifically, a caveat must support a claimed estate or interest in land.

[56] For present purposes, I confirm that r 6 applies in accordance with its terms, including the qualifying phrase, and does not preclude the application of r 2.3.

[57] It follows that it is not a sufficient answer to a complaint of breach of r 2.3, in the context of the alleged improper lodgement of a caveat, simply to state that the lawyers were "following their client's instructions" or that "they discharged their duties to their client and acted in their interest in pursuing a caveat over your property".

[58] It is open to a complainant to challenge whether the lawyers' actions to protect and promote the client's interests were "within the bounds of the law" and/or consistent with the Rules.

(e) What is the relevance of s 148 of the Land Transfer Act 2017?

[59] Section 148 of the Land Transfer Act 2017 provides for compensation for the lodging of an improper caveat against dealings. It relevantly provides as follows:

> (1) A person, including the agent of a person, who lodges a caveat against dealings without reasonable cause is liable to pay compensation to a person who suffers loss or damage as a result.
>
> (2) A claim for compensation must be heard and determined by the court.

[60] The applicants are clearly aware of s 148. They referred to it at the beginning of their complaint particulars. They have stated that they do not seek financial compensation through the complaints process.

[61] I mention this as an issue for consideration for three reasons. The first is to make clear that any claim for compensation that the applicants might have against [Law firm A], as [Company B]'s agent, can only be heard and determined by a court. The LCRO has no jurisdiction to entertain such a claim.

[62] I am not suggesting that the applicants' complaint does constitute such a claim and I have no information as to whether the terms of the applicants' settlement with [Company B] precludes any claim under s 148 against [Law firm A]. I just wish to make clear that any claim that is in substance a claim for compensation for the improper lodgement of a caveat cannot be brought by the alternative route of a complaint of breach of r 2.3 of the Rules.

[63] The second reason is also to make clear that s 148 does not preclude a standards committee or the LCRO from determining whether a lawyer's action in lodging a caveat for a client contravenes r 2.3 in all the circumstances. It is only a claim for compensation that must be determined by a court.

[64] The third reason is that the law relating to s 148 as it has been applied to lawyers informs the parallel application of r 2.3 of the Rules to the lodgement of caveats. The principles are the same.

(e) What is the extent of a lawyer's professional obligation to verify that a client has reasonable cause to lodge a caveat against dealings?

[65] It is long-established law that a lawyer can be held legally liable under section 148 of the Land Transfer Act for the improper lodgement of a caveat on a client's instructions. As the Court of Appeal held in *Gordon v Treadwell Stacey Smith*[5]

> The liability of each person who participates as agent in the lodgement of a caveat (solicitor, solicitor's clerk or registration agent) is examined separately and depends on what the person knew or ought to have known of the facts and whether from that person's viewpoint the lodgement was done honestly and with reasonable cause. In the case of a registration agent or other person whose function is mechanical, liability is most unlikely to arise. Where the solicitor acts

[5] [1996] 3 NZLR 281 (CA).

> on the basis of incomplete information and it cannot be said that in the circumstances the solicitor ought to have taken inquiries further, there will be no liability.
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> A solicitor cannot, however, hide behind the instruction of a client to lodge a caveat if to do so was otherwise to act without reasonable cause in the circumstances confronting the solicitor. In our view s 146[6] makes solicitors or other agents responsible for their actions in lodging a caveat where they act dishonestly or without reasonable cause notwithstanding that on the basis of their advice to their client they have received instructions to caveat the title. If this were not so, the client might be protected by taking advice from the solicitor, however wrong the advice proved to be, and the solicitor would be protected by acting in accordance with the instruction which was given because of the incorrect advice.

[66] In the same case, the Court addressed the onus of proof in the following terms:

> The onus of proof is on the person seeking compensation. By way of defence it is not necessary to show that the caveator actually had a valid claim of interest. This Court said recently in *Taylor v Couchman*[7] "the exercise of that power [to lodge a 'caveat] is not conditional on the caveator actually *having* the entitlement or interest. Rather the caveator must *claim* the entitlement of interest".
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> All that ss 136 and 137 require, when read in conjunction with s 146, is that there shall be an honest belief based on reasonable grounds that the caveator has an interest.

[67] The Court then addressed the required process of inquiry, stating that:

> In examining the position of a solicitor called upon to advise whether a caveat should be lodged – and this will often occur in circumstances of some urgency - the Court will first look at the honesty of the solicitor's belief. When examining reasonableness, it will be aware that it is not uncommon for solicitors to be sued for professional negligence where they fail to advise a client to lodge first and argue for its validity afterwards….
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> The matter will be judged by the standards of a reasonable conveyancing practitioner possessed of the factual material available to the solicitor whose action in lodging a caveat is under scrutiny and advising and acting in the same circumstances. Would such a practitioner have thought in those circumstances that there was a proper basis upon which a claim could be asserted by the client?

[68] The Court also discussed procedural alternatives open to a lawyer who does not have the requisite confidence in the client's claim of interest.

[69] These principles have been applied in a professional conduct context, as discussed below.

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[6] The reference is to s 146 of the Land Transfer Act 1952, now s 148 of the Land Transfer Act 2017.

[7] (CA 172/95, 29 April 1996).

(f) How has r 2.3 been applied in other decisions in the context of the lodgement of a caveat without reasonable cause?

[70] The approach consistently taken by the LCRO to the application of r 2.3 to a lawyer lodging a caveat is well articulated in *BAB v PW*[8]*,* in which PV was the client and PW the lawyer lodging the caveat:

> [29] The combined effect of the Rule and the commentary is that a solicitor must not lodge a caveat knowing that there is no caveatable interest, or fail to make inquiries as to whether there is a caveatable interest. In addition, the lodgement of the caveat must also not have been done for the purposes of causing unnecessary inconvenience to the interests of another person.
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> [30] Mr PV's immediate purpose was to delay the sale. That in itself would constitute an "inconvenience" to both the Estate vendor and BAB. That would have been apparent to Mr PW. It is therefore self evident that the lodgement of the caveat was done for the purpose of causing unnecessary inconvenience if there was no legitimate interest to be protected.
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> [31] The issue therefore is whether Mr PW believed that Mr PV had a caveatable interest or had grounds to believe that one existed. Mr PW had an obligation to make reasonable inquiries in making this assessment.
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> [32] The Committee expressed the view that "the justification for lodging the caveat ... is very basic and nothing more than having prima facie grounds to justify the lodgement." That is the force of the submissions made by Mr PU on behalf of Mr PW. He submits that the caveator does not have to demonstrate that at the time the caveat was lodged there was an undisputed caveatable interest. He also notes the difficulties in establishing just what constitutes a caveatable interest by referring to *Boat Harbour Holdings Ltd v Steve Mowat Building and Construction Ltd*.[2]
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> [33] That judgement is useful in that it identifies quite clearly that the Courts may find that a party has a caveatable interest in circumstances where it is not readily apparent that one exists. I agree with Mr PU and the Committee's approach, in that neither the Committee nor I should be drawn in to considering to whether there is a caveatable interest to the degree that would be necessary for the issue to be addressed before the Court. It is not the role of the Committee or this Office to assume that role.
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> [34] However, there is a threshold below which a lawyer should not assist in interfering with the rights of others. That is the purpose of the Rule. A lawyer must be able to point to an assessment of the grounds on which he or she formed the view that a caveatable interest existed. The Standards Committee must consider this reasoning and form a view as to the merits of that decision. Otherwise the Rule would have no relevance or substance in these circumstances.
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> [35] The Committee noted that it was "not concerned with the merits of the case but only the original basic premise for the lodgement". However, as noted by Mr BAB in his review application, Mr PW has not identified what he considered Mr PV's interest in the land to be other than what is recorded in the caveat itself. There is nothing on Mr PW's file which I retained after the hearing to show that Mr PW had conducted any research, or sought an opinion in any formal sense. All that Mr PW has provided to support his decision is an informal discussion with another practitioner. There is no file note of the content of that discussion, or any

[8] [2012] NZLCRO 68.

> record of any reasoning pursuant to which the grounds for lodging a caveat was identified.
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> [36] In his response to the Standards Committee Mr PW refers to a case[3] which his firm had been involved in which a caveatable interest had been established by reason of a contract to purchase drawn from various documents. There is no suggestion that Mr PV could establish such an interest – indeed he had already had the opportunity to purchase the property but had not been able to proceed. That judgement has no relevance to Mr PV's situation other than to support the general proposition that a caveatable interest may exist even though not readily apparent.

2 [2012] NZCA 305, CA146/2011, 13 July 2012.
3 *Welsh v Gatchell* CIV 2005-406-279 High Court Blenheim 21 June 2007.

> [37] The force of the submissions made by Mr PW and Mr PU is that a caveatable interest may be able to be established in circumstances where it is not readily apparent that one exists and that therefore Mr PW was justified in lodging the caveat. However, what is lacking in this instance is any evidence of research, notes or opinions identifying just what Mr PW considered to be the interest that Mr PV had.
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> [38] In determining whether what the Committee describes as "the basic premise for the lodgement" constitutes reasonable grounds for lodging a caveat, it is not sufficient that the Committee should merely accept assertions by the practitioner that he had formed a view that there was a caveatable interest. The Committee must examine what grounds the basis for that view was formed and to do so, it must itself form a view on the merits of the claimed interest.

[71] In *NR v WP,* the practitioner formed the view that there was a basis for a claim for caveatable interest, checked his view with two senior practitioners, and proceeded. The decision contains a useful summary of the academic commentary on the philosophical underpinnings of r 2.3 generally.[9]

[72] Checking with another practitioner is not necessarily a saviour in a situation of uncertainty. In *MN v RK*[10]*,* a solicitor lodged a caveat in his own interest and produced a supporting opinion from a senior barrister. The caveat was found to be legally untenable and more than a misjudgement on the part of the solicitor and barrister. The solicitor was found to have "failed to meet the necessary threshold to establish a contestable argument that he had reasonable grounds to lodge a caveat". Breach of r 2.3 was established.

(f) Has it been established whether or not there was reasonable cause for lodging the caveat?

[73] The short answer to this question is "no". There are several difficulties with the Committee's decision in this respect.

9 *NR v WP* [2018] NZLCRO 109 at [14] – [22].
10 *MN v RK* [2020] NZLCRO 172.

[74] The first difficulty is that the caveat instrument, on its face, does not appear to record a claimed estate or interest in land that is capable of being a caveatable interest. The word “oral” is critical. The default position must be that a claimed oral agreement for sale and purchase, without more, is not a sufficient interest to support a caveat.

[75] The respondents having given no evidence at that time, there was no evidence on which the Committee could conclude that the respondents honestly believed on reasonable grounds that “an oral agreement for sale and purchase of land” could constitute a caveatable interest. No basis had been advanced to support an arguable basis for displacing the default position.

[76] The second difficulty also arises from the fact that the respondents had given no evidence. The Committee recorded that the respondents “were following their client’s instructions in reliance on the information of a verbal agreement provided to them”. There was no evidence before the Committee of what [Company B]’s instructions were to the respondents prior to lodging the caveat on [X] May 2022 or what information had been provided to them by [Company B]. It was not open to the Committee to make an assumption about either matter.

[77] In addition, and regardless of the instructions, there was also no evidence before the Committee of any steps taken by the respondents to satisfy themselves that there was a reasonably arguable basis for the caveat to be lodged before doing so on [X] May 2022.

[78] I respectfully adopt the comment made at paragraph [34] of the decision in *BAB v PW* quoted above. Here, no evidence had been given of the assessment the respondents needed to have made and the Committee did not form its own view of the merits of their decision.

[79] The applicants’ argument, in essence, appears to be that no evidence was ever presented to the Court that could conceivably support a caveatable interest in land, the respondents therefore could not have had knowledge of any such evidence when lodging the caveat for [Company B] and the course of events establishes, by necessary implication, that the caveat was lodged without reasonable cause.

[80] In particular, they emphasise that no evidence was ever given of any alleged conversation between Mr CF and Mrs JM. Consequently, they argue, the respondents could never have had information from their client of any oral agreement as asserted in the caveat instrument.

[81] If that is a correct summary of their argument, I consider that the Committee needs to give it proper consideration before dismissing it.

[82] It is of course for the applicants to establish the basis of their complaint on the balance of probabilities. The Committee needs to consider whether they have done enough to discharge that onus.

[83] Given that the caveat, on its face, does not appear to support a claimed caveatable interest (and I appreciate that the Committee may have its own views about that issue), it may be a case where the onus of proof shifts to the respondents to rebut an adverse presumption. This is an issue the Committee needs to consider.

[84] The Committee quite properly focused on "purpose" as the key element of r 2.3 in stating that, "There was no evidence [the lodging of the caveat] was done to cause you any unnecessary inconvenience to your interests, even if this was the effect to you …". The distinction between purpose and effect is a valid one.

[85] The Committee went on to state, "Whether those arguments were erroneous or not does not directly impact on this issue so long as they were pursued sufficiently respectfully in reliance on a client's view and for their interest rather than to inconvenience or otherwise distress you".

[86] If I understand the Committee's implicit reasoning correctly, it is that, provided the lawyer is advancing the client's interests, the lawyer's purpose is necessarily proper even if the client's purpose is allegedly improper.

[87] If I understand the applicants' implicit reasoning correctly, it is that it is not sufficient, in the context of the lodgement of a caveat, for a lawyer to do this "in reliance on a client's view" if the lawyers have not first honestly made their own assessment that there is an objectively reasonable basis for the client's view. If so, the authorities support the applicants' view of the matter.

[88] As the matter was expressed in *MN v RK,* did the respondents reasonably satisfy themselves, on the basis of the information provided to them by their client [Company B], that [Company B] had a contestable argument that it had reasonable grounds to lodge a caveat?

[89] It seems to be further implicit in the applicants' argument that, if the lawyers have not satisfied themselves that there was reasonable cause for lodging the caveat, they are infected by the client's allegedly improper purpose. Such an argument would seem to be consistent with the comment at paragraph [30] of the decision in *BAB v PW*

that "[i]t is … self evident that the lodgement of the caveat was done for the purpose of causing unnecessary inconvenience if there was no legitimate interest to be protected".

[90] I would qualify that comment by referring to "no legitimate claim of interest to be protected".

[91] There is of course an inherent difficulty in that a court has not determined whether there was arguably reasonable cause for the caveat to be lodged and will not now do so, assuming the applicants' settlement with [Company B] extended to any potential claim under s 148. This does not entitle the Committee to shy away from that task.

[92] In this instance, the applicants argue that the necessary assessment must be made at two separate points in time, the date of lodgement of the caveat and the date of filing the application to sustain the caveat. The lodgement of a caveat and the filing of a Court application to sustain it are different legal processes.

[93] It may be that the information available to the respondents on which they formed their belief as to reasonable cause may have been different on the one date from the information available to them on the other date. This is a matter the Committee needs to have considered.

i) What is the appropriate outcome of the review application?

[94] On the face of it, the Committee has cursorily dismissed the complaint in finding that it was frivolous, vexatious or not made in good faith. I consider that conclusion to be wholly unsatisfactory absent proper explanation.

[95] It remains open to the Committee to affirm that finding but it needs to clarify whether it considered the complaint to be frivolous, or vexatious, or not made in good faith, and to give its reasons for that view.

[96] I further consider the Committee's reliance on the principle in r 6 to be not wholly convincing because of possibly inadequate consideration of "the bounds of the law" in the specific context of the lodgement of a caveat against dealings. The Committee may have considered those issues but this is not evident from its decision.

[97] I agree with the Committee that r 2.3 "could apply" in the circumstances and am not satisfied that it has adequately explained why it does not apply.

[98] Ultimately, the Committee may well be correct in principle in its comments about a lawyer's purpose being proper provided the relevant conduct is to advance the client's

interests but the commentary would seem to require a factual and legal inquiry by the Committee into the respondents' assessment of the arguable legitimacy of the client's initial claim to a caveatable interest in land and to its subsequent application to sustain that interest.

[99] This Office does not normally accept fresh evidence at the review stage. In this instance, in requiring a response to the two specific matters referred to in paragraph [45], I provided the respondents with the opportunity to adduce such evidence.

[100] I did so for two related reasons. The first was that the lack of a response from the respondents appeared to have been prompted by the NZLS advice that no response was required from them. Consequently, and although I have come to a different view about that, I intend no implied criticism of the respondents.

[101] The second reason was the manifest uncertainty, by reason of the respondents' silence in response to the complaint and the form of the caveat itself, about the basis on which they honestly believed that there was reasonable cause for the caveat to be lodged.

[102] The respondents took up that opportunity. They provided evidence in the form of a copy of their client's application to sustain its caveat and the affidavit evidence filed in support, with a letter from Mr EB dated 11 September 2023. In doing so, they recorded that privilege had not been waived. That is a matter they may wish to raise with their client.

[103] It is not procedurally appropriate for me to make a decision about the respondents' explanation effectively at first instance. This was the Committee's task and I have found that it was not adequately undertaken. Accordingly, I make no comment on the information now provided by the respondents, which was not available to the Committee.

[104] In all circumstances, I consider that the applicants are entitled to a better explanation of the decision to take no action than is contained in the Committee's decision and a proper consideration by the Committee of the propriety of the lodgement of the caveat, and the propriety of the application to sustain the caveat, from the respondents' viewpoint.

Decision

[105] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee to take no action on the complaint on the grounds

that the complaint was frivolous, vexatious or not made in good faith is reversed on the basis that it has not been adequately explained and that it remains open to the Committee to affirm that finding with reasons.

[106] Pursuant to s 209(1)(a) of the Act, I direct the Committee to reconsider whether or not the conduct of the respondents, or either of them, in:

(a) assisting in the lodgement of the caveat against dealings on the terms it was lodged and on the basis of the information known to the respondent(s) at the time; and

(b) acting on the filing of [Company B]'s application to sustain the caveat on the basis of the information known to the respondent(s) at the time,

constituted a breach of r 2.3 of the Rules.

Anonymised publication

[107] 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 4TH day of OCTOBER 2023

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FR Goldsmith
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 and Mrs JM as the Applicants
Mr EB and Miss MK as the Respondents
Mr LZ as a related person
[Area] Standards Committee [X]
New Zealand Law Society