LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2023] NZLCRO 144

Ref: LCRO 125/2023

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	**TR** Applicant
AND	**HJ** Respondent

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

DECISION

Introduction

[1] The applicant has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) in which it resolved to take no further action in respect of her complaint about the respondent. The respondent is a director of the incorporated law firm, [Law Firm A].

Background

[2] The applicant is the sole director and shareholder of [Company A Ltd], now (but not at the relevant time) in liquidation ([Company A]). [Company A] owned a property at [Suburb A].

[3] The applicant's husband is AEG (Mr EG). He is the sole director and shareholder of [Company B Ltd], also now (but not at the relevant time) in liquidation ([Company B]). [Company B] owned a property at [Suburb B].

[4] The respondent acted for Mr OB (the creditor). Mr EG owed the creditor $600,000.

[5] On 30 March 2022, the creditor lodged for registration a caveat against the title to the [Suburb B] property. On 31 March 2022, the creditor lodged for registration a caveat against the title to the [Suburb A] property. The respondent acted for the creditor on the lodgement of both caveats.

[6] There is neither primary nor secondary evidence as to the nature of the caveatable interest claimed by the creditor under either caveat. The caveat instruments are not in the materials and the affidavit evidence subsequently given in Court proceedings and produced to the Committee relates only to a third caveat later lodged against the title to the [Suburb B] property.

[7] The lawyer acting for the applicant and Mr EG was Mr KD of law firm, [Law Firm B] (the applicant's lawyer). On 4 April 2022, the applicant's lawyer wrote to the respondent. His letter included the following:

> … your client claims [a] caveatable interest in the… two properties as a creditor who is owed money from [Mr EG] and [the applicant] and based on a one-page document written in [Language A] and signed by Mr EG and [the applicant]. We have received a photographed copy of the said one-page document ("Document in [Language A]"), which our client instructs was signed by Mr EG and [the applicant] under duress and at your client's threat. The Document in [Language A] refers to [a] transfer of property held in 'my personal name'(referring to Mr EG and [the applicant]). The Document in [Language A] does not make any reference to our client companies who are the registered owners of the two properties.
>
> As you are aware, the said two properties are owned by our clients which are incorporated companies and not by Mr EG or [the applicant] personally. Any lending or borrowing between your client and Mr EG or [the applicant] does not give your client any right or interest in the properties owned by our client companies. Even if the Document in [Language A] was entered by our client companies (and it was not) that document does not give your client [a] caveatable interest against the aforementioned two properties. The Document in [Language A] does not have a charging clause whatsoever. Being owed money by someone who is a director or shareholder of the company does not on its own give your client the right to lodge a caveat against the land owned by a company that has no dealings with your client and there is no security agreement such as [an] agreement to mortgage between our clients and yours.
>
> As [the respondent] acknowledged on the telephone on 1 April 2022, our client companies have an urgent refinance scheduled to take place on 5 April 2022 which is being progressed by [another law firm] on our clients' behalf and the caveat lodged by your client, if not withdrawn immediately, will prevent our clients from completing that refinance. Our clients have instructed us to put you and

> your client on notice that our clients will be turning to your client and indeed your firm, for all losses and costs incurred in relation to this matter, including without limitation the refinance. Under section 148 of the Land Transfer Act 2017, 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, and the Court of Appeal found in Gordon v Treadwell Stacey Smith [1996] 3 NZLR 281 that section 148 (or the equivalent section in the previous legislation) extends to solicitors.

[8] On 5 April 2022, the applicant's lawyer sent a further letter to the respondent demanding that the caveats on both properties be withdrawn by 3:30pm that day. He repeated that as clients were refinancing and that the caveats were preventing that refinancing from being completed.

[9] In both the 4 April and 5 April letters, the applicant's lawyer cited the dealing numbers of what were at that time pending caveat registrations.

[10] On 6 April 2022, the caveat on the [Suburb B] property was withdrawn. The respondent confirmed this by email to the applicant's lawyer at 2:21 pm "as per the agreement between our clients and your client last night".

[11] According to subsequent affidavit evidence of the creditor, "the agreement" was an oral agreement by Mr EG for [Company B] to pay the creditor $50,000 in return for withdrawal of the caveat and for [Company B] to consent to a second caveat being lodged.

[12] On 7 April 2022, the applicant's lawyer sent a further letter to the respondent recording that the caveat on the [Suburb A] property had not been withdrawn and demanding its immediate withdrawal.

[13] Also according to the creditor's affidavit evidence and the respondent's correspondence with the New Zealand Law Society (NZLS), the claimed agreement by Mr EG on behalf of [Company B] to the second caveat being lodged was "reconfirmed" in a conversation between the respondent and [Company B]'s lawyer (who was not the applicant's lawyer and was from a different firm).

[14] On 22 April 2022, the applicant filed her complaint against the respondent with the NZLS.

[15] On 29 April 2022, a second caveat was lodged against the title to the [Suburb B] property. This instrument has been disclosed.

[16] The estate or interest claimed in the second caveat against the [Suburb B] property was as follows:

> Interests including the transfer of the ownership in favour of the Caveator in terms of the term loan agreements dated 26 March 2022 and 5 April 2022, being provided as security for the purpose of the loan repayment in full, between the registered proprietor and his wife, [the applicant] as the Debtor and the Caveator as the Lender.

[17] On 8 July 2022, the applicant's lawyer filed an application for lapse of the second caveat against the [Suburb B] property.

[18] On 26 July 2022, the respondent filed an application for an order that the [Suburb B] caveat not lapse.

[19] On 8 August 2022, the High Court made an interim order that the [Suburb B] caveat not lapse.

[20] On 18 August 2022, the applicant advised the NZLS that she had been advised by her lawyer that the caveat against the [Suburb A] property had been "withdrawn". The date of the withdrawal was not specified.

[21] On 6 December 2022, the High Court dismissed the creditor's substantive application that the [Suburb B] caveat not lapse. The materials do not include a copy of the Court judgment, as it was issued eight months after the complaint was made.

The complaint

[22] The applicant and Mr EG each made a complaint against the respondent. The applicant's complaint was dated 22 April 2022 and related to the caveats lodged against the titles to both properties. Her complaint was that there was no caveatable interest and no legal basis to register any of the caveats.

[23] Mr EG's complaint was dealt with in a separate decision by the same Committee.

[24] The applicant said that she had "… suffered grief, mental distress and financial hardship caused by a delay in my re-finance case due to caveats unlawfully applied by [the respondent]".

[25] The outcome sought by the applicant was relevantly as follows:

> I wish [the respondent] to be questioned and verified by NZLS for his qualification to perform as a lawyer. I strongly suggest [the respondent] to be expelled from his qualification if he is found by NZLS to be unfit for his role. Moreover, I have suffered a loss and grief caused by [the respondent's] unlawful caveat, the legal fees occurred in relation to lift the caveats (sic), a compensation for my grievance and defamation will be charged to [respondent].

[26] The respondent provided his response to the complaint on 5 August 2022. This was three days before the Court judgment sustaining the second [Suburb B] caveat on an interim basis. The respondent provided to the Committee a copy of his client's application for an order that the caveat not lapse and the affidavit evidence of the creditor in support.

[27] As to his own position, the respondent said that he:

> "… considered there was a reasonable arguable case for an interest in the land caveated for the following reasons:
>
> (a) that the property owned [Company B] (sic) consented to the lodgement of the caveat (see paragraph 33 of [the creditor's] affidavit). Prior to lodging the caveat, I contacted [Company B]'s lawyer… and verified the consent to the registration of the current caveat. I then withdraw (sic) the previous caveat pending registration and allowed [Company B]'s refinance to occur. [Company B] through [its lawyer] then paid (as per the agreement) $50,000 into my firm's trust account. I lodged the caveat.
>
> (b) I relied on the advice from [the creditor] of the verbal and written agreement on 26 March 2022 to transfer the caveated property at… [Suburb B] to [the creditor] (see paragraph 24 of [the creditor's] affidavit). [The creditor] says Mr EG entered into the agreement as the director of [Company B].
>
> (c) I relied on the advice from [the creditor] that further to the agreement on 20 April 2022 to transfer the caveat that property (sic), the property owner agreed to make the caveated property available for disposal by [the creditor] and gave [the creditor] will authority (sic) to sell the caveated property (see paragraph 30 of [the creditor's] affidavit).

[28] Paragraphs 24, 30 and 33 of the creditor's affidavit in the proceedings all refer to alleged communications between the creditor and Mr EG relating to the [Suburb B] property.

[29] The respondent stated that no caveat had been "registered" against the title to the [Suburb A] property. He provided an historical search of the title dated 5 August 2022 purporting to evidence this. The search does not record the registration of a caveat.

[30] The respondent also appeared to question the applicant's right to make a complaint about his conduct in relation to the caveat over the [Suburb B] property owned by [Company B].

[31] In January 2023, the applicant made reference to additional alleged consequences of the caveat on the [Suburb A] property:

> …I missed sale chances because of caveat.
>
> The difference between real estate prices of April last year and current market is enormous.

> [The respondent] disclosed all details to the caveat registry at the end of July last year, causing false rumours and preventing additional cashflow. So, [Suburb A] land is currently going through a mortgagee sale.
>
> I may go bankrupt soon and will sue [the respondent].
>
> I request a clear explanation of what legal basis [the respondent] had for caveat on my land and cancelled it himself, and a strong punishment so that wrong [the respondent] does not make such a mistake. (sic)

[32] The [Suburb A] property was indeed sold by the mortgagee in September 2023.

The Standards Committee decision

[33] The Standards Committee delivered its decision on 19 July 2023. It identified the issues for consideration as:

> (a) whether [the respondent] lodged caveats against the title to land knowing that (or failing to inquire whether) there is a caveatable interest on the part of his client to be protected (rule 2.3);
>
> (b) whether [the respondent's] delay or refusal to remove the caveats after receiving correspondence from the registered proprietors' lawyers requesting that the caveats be withdrawn breached professional standards.

[34] The Committee cited a comment by the Legal Complaints Review Officer (LCRO) in a 2011 decision[1] about a lawyer's duty of absolute loyalty to the client, which is essentially a rephrasing of r 6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[35] The Committee noted that "a standards committee is not the primary forum for determining whether the interest was caveatable or not" and referred to the jurisdiction of the High Court. It stated that:

> Caveats are challenged and lapsed by the court every day. When that happens it does not mean that the lawyers who lodged the caveat on behalf of their clients have necessarily acted inappropriately or used legal processes for improper purposes.

[36] The Committee concluded as follows:

> …although the High Court determined that the [Suburb B] caveat could not be sustained, the Committee considered, based on the information provided, that there was enough evidence initially to support all the caveats being lodged. That is, it a reasonable for [the respondent] to reach the conclusion that there was a caveatable interest and lodge the caveats om behalf of his client. In the absence of any improper basis for lodging the caveats (whether they were ultimately sustained or not), no breach of the rule has occurred.

---

[1] LCRO 292/2011 at [17].

[37] Having made that finding, the Committee also concluded that all subsequent steps the respondent had taken on his client's instructions to sustain and defend the caveats were similarly appropriate and breached no professional obligations. It resolved under s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action on the complaint.

Application for review

[38] The applicant filed an application for review dated 28 August 2023. The application reiterated her complaint and specified, mostly paraphrased in legal terms, that:

(a) a lawyer cannot simply rely on the argument that he or she was following client instructions in lodging a caveat;

(b) a lawyer has an obligation to satisfy himself or herself of the legitimacy of the documents relied on by the client and the circumstances alleged to give rise to the claim of a caveatable interest;

(c) it is a misuse of power by a lawyer to "…use caveat whenever there is client direction with the nonsense materials brought by the client without lawful base" (sic).

Review on the papers

[39] Section 206(2) of the Act allows a Review Officer to conduct the review on the basis of all information available if the Review Officer 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".

[40] 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 applicant requested that there be a hearing with both parties present. The respondent was content with the matter being dealt with on the papers.

[41] Having carefully read the complaint, the Committee's decision, the submissions filed in support of the application for review and the respondent's response, I decided that it was unnecessary to hold a hearing in person. This was because the relevant disciplinary issues were clear to me on the basis of the information already before me,

the law applicable to those issues is clear and holding a hearing in person would have unnecessarily delayed the resolution of the review.

Nature and scope of review

[42] 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 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.

[43] 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.

[44] 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 consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Issues

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

(a) What is the substance of the complaint?

---

[2] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[3] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(b) Was there a reasonable basis for the Committee to decide to take no action on the complaint pursuant to s 138(2) of the Act?

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

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

(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?

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

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

(h) Did the respondent demonstrate sufficient professional competence in his advancement of his client's interests?

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

Discussion

(a) What is the substance of the complaint?

[46] At paragraphs [12], [17] and [18] of its decision, the Committee identified that that the complaint was in substance one of using a legal process for an improper purpose in breach of r 2.3 of the Rules. I agree, although I would characterise it more specifically as the respondent knowingly assisting the creditor in using a legal process for the purpose of causing unnecessary distress or inconvenience to the applicant's interests on four occasions:

(a) in the lodging of the first caveat against the [Suburb B] property on 30 March 2022;

(b) in the lodging of the caveat against the [Suburb A] property on 31 March 2022 (assuming this occurred);

(c) in the lodging of the second caveat against the [Suburb B] property on 29 April 2022; and

(d) potentially, in filing the Court application to sustain the second [Suburb B] caveat when, the applicant says, there was insufficient evidence to support the application.

[47] The Committee also inquired into whether the "delay or refusal to remove the caveats" constituted a more generic breach of professional standards. This seems to be a reference to the catch-all rule 10, which provides that "a lawyer must promote and maintain professional standards".

[48] There is arguably an additional or alternative element relating to the respondent's professional competence which I will touch on in due course.

(b) Was there a reasonable basis for the Committee to decide to take no action on the complaint pursuant to s 138(2) of the Act?

[49] I am not able to answer this question because the Committee has not adequately explained its decision. The difficulty is that the Committee has not identified the evidence that it says was initially enough to support all the caveats being lodged or the basis of its conclusion that the caveats were lodged for a proper purpose.

[50] As the Committee recognised, the lodgement of a caveat without reasonable cause can constitute a breach of r 2.3 on the part of the lawyer responsible for lodging the caveat on behalf of the client. This is expressly recognised in the commentary to the Rules themselves. The footnote to r 2.3 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).

[51] 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.

[52] I consider it unsatisfactory 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.

[53] For the reasons explained below, it is open to the applicant to establish on the balance of probabilities on the information that is available that steps taken by the respondent on his client's instructions were not legitimately taken in terms of the law and the rules governing professional conduct.

[54] Equally, it is open to the Committee to determine that the steps taken were legitimately taken but its reasoning in coming to that conclusion needs to be explained.

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

[55] The comment by the Committee referred to in paragraph [34] 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.

[56] 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 lawyer was following his or her client's instructions and/or promoting the client's instructions to the exclusion of the interests of third parties.

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

[59] It is the law that the caveator must have reasonable grounds for lodging a caveat. As explained further below, it is a requirement of the Rules that the lawyer responsible for lodging the caveat for the client must honestly believe on reasonable grounds that the interest or claim asserted by the client properly supports a caveat.

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

[60] 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.

[61] I mention this for three reasons. The first is to make clear that any claim for compensation that the applicant might have against the respondent can only be heard and determined by a court. Neither the Committee nor the LCRO has any jurisdiction to entertain such a claim.

[62] 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*[4]

> 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 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.
>
> 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[5] 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*[6] "the exercise of that power [to

[4] [1996] 3 NZLR 281 (CA).
[5] The reference is to s 146 of the Land Transfer Act 1952, now s 148 of the Land Transfer Act 2017.
[6] (CA 172/95, 29 April 1996).

> lodge a 'caveat] is not conditional on the caveator actually *having* the entitlement or interest. Rather the caveator must *claim* the entitlement of interest".
>
> 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….
>
> 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.

(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,*[7] 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.
>
> [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.
>
> [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.
>
> [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

[7] LCRO 4/2011 (14 August 2012).

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]

[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.

[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.

[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 record of any reasoning pursuant to which the grounds for lodging a caveat was identified.

[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.

[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.

[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.

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

[71] In *NR v WP,*[8] the lawyer formed the view that there was a basis for a claim for caveatable interest, checked his view with two senior lawyers, and proceeded. The decision contains a useful summary of the academic commentary on the philosophical underpinnings of r 2.3 generally.

[72] Checking with another lawyer is not necessarily a saviour in a situation of uncertainty. In *MN v RK,*[9] 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.

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

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

[74] The first difficulty is that there were three caveats. Although the Committee's finding quoted at paragraph [36] above refers to "all the caveats", the material on its file relates only to the third caveat and there is nothing in its decision to indicate that it separately examined the circumstances of the first (30 March) and second (31 March) caveats.

[75] For example, the Committee does not appear to have obtained copies of the caveat instruments lodged for the first and second caveats. It therefore cannot have considered whether either of those instruments appeared to record a claimed estate or interest in land that was capable of being a caveatable interest.

[76] For the purposes of this decision, I have assumed that the Committee considered that the applicant had a sufficient personal interest in the lodgement of the two [Suburb B] caveats and do not propose to reconsider that implicit aspect of its decision.

[77] The second difficulty is that the Committee does not appear to have inquired into the nature of the evidence available to the respondent on which he satisfied himself, before lodging each caveat for the creditor, that there was a reasonably arguable basis

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

for the caveat to be lodged. The affidavit evidence prepared four months later is not necessarily the same as the evidence available to the respondent at the time.

[78] The third difficulty is that the Committee does not appear to have explored the circumstances of the lodgement of a caveat over the [Suburb A] property owned by the applicant's company, [Company A].

[79] There does not appear to be any suggestion in the materials either that the transaction giving rise to the $600,000 debt involved the applicant, or that [Company A] had any transaction or other commercial or legal relationship with the creditor. Nor is there any discussion in the Committee's decision either identifying the documents in [Language A] on which the creditor presumably purported to rely or determining their arguable meaning or effect, for caveat lodgement purposes.

[80] There is then the matter of the solitary comment made by the respondent in submissions about the [Suburb A] caveat, which appears to have been carefully phrased in its reference to no caveat being "registered". The applicant's lawyer's letters of 4 and 5 April 2022 refer to the relevant dealing number.

[81] There would seem to be several possibilities. One is that the Registrar declined to allow registration of the dealing on the basis that it disclosed no caveatable interest. A second is that the respondent successfully applied for Registrar's approval for the dealing not to be registered. In the second scenario, this might have been either on the creditor's instructions, the creditor by then having received $50,000 from Mr EG, or of the respondent's own volition after reflecting on his professional responsibilities.

[82] In short, the caveat pending dealing was either rejected or withdrawn prior to registration. In any of these speculative scenarios, either inferences or conclusions can be drawn about the propriety of the lodgement of the dealing in the first place.

[83] It is inappropriate for me to speculate or to draw any inference or conclusion where the Committee does not appear to have inquired into the matter and drawn any inference or reached any considered conclusion on it at first instance.

[84] Similarly, there is no evidence from the respondent about any matters he took into account in considering the propriety of lodgement of the first [Suburb B] caveat (and again, the nature of the claimed caveatable interest is unknown).

[85] I respectfully adopt the comment made at paragraph [34] of the decision in *BAB v PW* quoted above.[10] Here, the only evidence given of the assessment the respondent

[10] At [70] of this decision.

needed to have made appears to be the three paragraphs quoted at paragraph [27] above and the Committee does not appear to have formed its own view of the merits of his decision, on each occasion.

[86] Although the paragraph of the decision quoted at paragraph [36] above implies that the Committee formed its own view of the objective merit of the respondent's assessment, at least on the third occasion, neither has it articulated what it considered the reasonably arguable claim to a caveatable interest to have been.

[87] I acknowledge the undoubted breadth of expertise of the Committee members. If the Committee accepted the nature of the arguable claim to a caveatable interest explained by the respondent, it would have been appropriate to identify it. I would be less concerned about this if the nature of the arguable claim of interest was plain from the documents themselves. This does not appear to be the case.

[88] I make that observation having avoided to this point reading the High Court judgment of 6 December 2022 (which was provided to the LCRO in support of the parallel complaint by Mr EG), so as not to be influenced in my own decision on the respondent's professional conduct by whatever the Court ultimately found to be the deficiency in the second [Suburb B] caveat having had the benefit of full legal argument.

[89] The first argument raised by the respondent relies on the alleged agreement of Mr EG on behalf of [Company B] for a second caveat to be lodged against the [Suburb B] property. This argument relates to the third caveat only; not to the first two caveats. In relation to the third caveat, the Committee has not expressed a view whether the alleged agreement is relevant to the professional assessment of the reasonableness of a claim of caveatable interest.

[90] The second argument raised by the respondent was "the verbal and written agreement on 26 March 2022 to transfer the caveated property at… [Suburb B] to [the creditor". This relates to the first and third caveats.

[91] It has not been explained how any competent lawyer could reasonably consider a caveatable interest to arise from an alleged verbal (meaning oral) agreement for the sale and purchase of land. The respondent has not advanced a part performance argument.

[92] The certified [Language B] translation of the relevant document reads as follows:

Certificate of Confirmation

Name in full: AEG

Passport No: M23960655

I, the person named above, promise to transfer the ownership of my property (at [Address 1]) in the case of failing to repay the debt of NZD600,000 to Mr OB by 10AM on 30 March 2022. If this promise fails to be kept, twenty thousand dollars are to be paid per day for the interest.

26 March 2022

AEG (*Signed*)

Debtor OB (*Signed)*

[93] It has not been explained how any competent lawyer could reasonably consider this document to constitute an agreement for sale and purchase of land between [Company B] and the creditor.

[94] The applicant was not the registered proprietor of the land and [Company B] is not expressed to be a party to the document. Failure by the applicant to repay the debt is expressed to be the trigger for the transfer of ownership but not as the consideration for the transfer. It could hardly have been intended to be, unless [Company B] was in some way a debtor.

[95] The respondent and the Committee must have had their own views about these apparent impediments to reliance on the 26 March document. If so, they need to be expressed and examined, not glossed over without explanation.

[96] The third argument raised by the respondent, relying on an alleged agreement dated 20 April 2022, relates solely to the third caveat, which was lodged on 29 April 2022.

[97] I have been unable to locate any document dated 20 April 2022 on the Committee's file. There are two "Promissory Notes" dated 9 April 2022, one of which refers to repayment of the debt by 20 April 2022. If this is the document the respondent intended to refer to, the certified [Language B] translation of it reads as follows:

Promissory Note

Name in full: AEG, [Company B] [Company B] Director

I, the person named above, promise to pay back NZD 600,000 to OB by 20 April 2022. The payment will be made by priority as soon as TR raises money in [Country A] and make (sic) a deposit to either my personal account or company account. In addition, I promise to make all the assets

> (i.e. real estates in [Suburb B] and [Suburb A], and the [industry] business) available for disposal by OB. I promise to bear legal responsibility in the event of failing to fulfill these promises.
>
> Dated 9 April 2022
>
> AEG (*Signed*)
>
> TR
>
> OB (*Signed)*

[98] The document is signed by the Mr EG and the creditor but not by the applicant.

[99] The implication of the Committee's finding is that this document, either on its own or in conjunction with the other matters raised by the respondent, was sufficient for a lawyer in the respondent's position to reasonably consider there were grounds for an arguable claim of caveatable interest.

[100] I do not consider it appropriate to substitute my own view of the matter without knowing what the Committee's view was.

[101] The information the respondent had at the time of lodgement of the third caveat on 29 April 2022 was different from the information he had in late March 2022 for the above reason cited by the respondent. It was also different by reason of the various potentially pertinent issues the applicant's lawyer had raised with him in the early April correspondence.

[102] In particular, the nature of the relationship between [Company B] and [Company A] respectively on the one hand and Mr EG and the applicant respectively on the other hand was plainly a potential issue that had been expressly raised, even if the respondent had not given it thought in late March.

[103] There had been no change of understanding about the alleged debt. Even on the basis of the affidavit evidence prepared in late July 2022, the creditor's $600,000 monetary claim was solely against Mr EG personally.

[104] It is for the applicant to establish the basis of her complaint on the balance of probabilities. The Committee needs to consider whether she has done enough to discharge that onus. It may be a case where the onus of proof shifts to the respondent to rebut an adverse presumption. This is an issue the Committee needs to consider.

[105] The Committee quite properly focused on "purpose" as the key element of r 2.3. Although the effect or outcome does not necessarily define the purpose of the first [Suburb B] caveat, the Committee needs to have considered whether its withdrawal after

the making of a $50,000 payment to the creditor is consistent with an honestly and reasonably held belief in a caveatable interest in land.

[106] The decision implies that it has done so but, again, the absence of reasons in the decision does not engender confidence that this is so.

[107] As the matter was expressed in *MN v RK*[11], did the respondent reasonably satisfy himself, on the basis of the information provided to him by the creditor, that the creditor had a contestable argument that he had reasonable grounds to lodge each of the caveats?

[108] I note 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", although I would qualify that comment by referring to "no legitimate claim of interest to be protected".

[109] The necessary assessment must be made at two separate points in time, the date of lodgement of the relevant caveat and, in the case of the third caveat only, the date of filing the application to sustain it. The lodgement of a caveat and the filing of a Court application to sustain it are different legal processes.

[110] It may be that the information available to the respondent on which he formed his belief as to reasonable cause may have been different on the one date from the information available to him on the other date, as appears to have been the case with the third caveat. This is a matter the Committee needs to have considered.

[111] Although the Committee's generic reference to "breaching professional standards" serves to "cover the bases" in terms of its arguably implicit reference to r 10, I am inclined to think that the two separate points in time referred to above were the relevant decision points for the respondent and that the more specific r 2.3 is more applicable. Withdrawing any of the caveats at any other time could not have been done without the creditor's instructions, regardless of any second thoughts the respondent might have had on receipt of the relevant correspondence.

[112] It is of course possible that the 9 April 2022 document was prepared as a response to such second thoughts.

---

[11] Above n 9.

[113] Regardless of what I tend to think, however, I acknowledge that it is open to the Committee to determine that a particular step taken or not taken constitutes a breach of r 10 without being a breach of r 2.3.

[114] I have read the July 2022 application to sustain the caveat and supporting affidavit evidence and an amended application filed in November. I note that the caveatable interest arguments advanced for the creditor in both July and November were different from each other and materially different from the interest claimed in the second caveat instrument.

[115] The interest claimed by the creditor in July was "… an implied trust being either a resulting and/or constructive trust…". In November, it changed again to "…a bare trust, express or implied". Both arguments relate to the statutory grounds available under s 138(1)(b) of the Land Transfer Act 2017.

[116] The possible significance of this for present purposes is that they do not appear to be the grounds the respondent had in mind either at the time the caveats were lodged or in responding to the complaint. His explanation appears to relate to the statutory ground available under s 138(1)(a) of that Act even though, in responding to the complaint, he provided Court documentation inconsistent with that explanation.

[117] So far as the lodgement of the caveats is concerned, it is of course the respondent's analysis and reasoning at that time that is the subject of inquiry.

[118] This does not give comfort that the respondent had any clear idea of what he was doing in endeavouring to advance his client's interests in late March and April 2020 beyond disrupting any dealing by either [Company B] or [Company A] with their respective land.

(h) Did the respondent demonstrate sufficient professional competence in his advancement of his client's interests?

[119] I raise this as a possible issue for the reasons set out in paragraphs [87] to [104] and [114] to [118]. It is inherent in the original complaint. It is a matter I will direct the Committee to reconsider.

[120] It is open to a person who is not the lawyer's client to raise an issue of the lawyer's competence if that person's interests are affected by the conduct of the lawyer. The extent to which the applicant's interests have been affected would be relevant to that inquiry.

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

[121] Ultimately, the Committee may well be correct in its essential conclusions that "there was enough evidence initially to support all the caveats being lodged" and that they were not lodged for an "improper purpose". My decision should not be interpreted as implying any view one way or the other. It will be evident from the above discussion, however, that I consider there are grounds for concern.

[122] The relevant commentary requires a factual and legal inquiry by the Committee into the respondent's assessment of the arguable legitimacy of the client's initial claim to a caveatable interest in land, on each occasion, and to its subsequent application to sustain that interest in the case of the third caveat.

[123] It is not procedurally appropriate for me to undertake that inquiry effectively at first instance. This was the Committee's task and I have found that it was not adequately undertaken or, if undertaken, not adequately explained.

[124] Although the Committee correctly noted that the Court is the "primary forum" for determining whether or not a claimed interest is caveatable, the Committee is the primary forum for determining whether or not a lawyer has met his or her professional obligations in assisting the caveator to lodge the caveat (but not for determining any claim for financial compensation).[12]

[125] In all circumstances, I consider that the applicant is 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 for registration of each of the three caveats, and the propriety of the application to sustain the third caveat, from the respondent's viewpoint.

Decision

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

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

[12] See [60] to [69] above.

(a) assisting in the lodgement of the first caveat against dealings against the title to the [Suburb B] property on the terms it was lodged and on the basis of the information known to the respondent at the relevant time; and

(b) assisting in the lodgement of the caveat against dealings against the title to the [Suburb A] property (if it was lodged) on the terms it was lodged and on the basis of the information known to the respondent at the relevant time; and

(c) assisting in the lodgement of the second caveat against dealings against the title to the [Suburb B] property on the terms it was lodged and on the basis of the information known to the respondent at the relevant time; and

(d) acting on the filing of the creditor's application to sustain the third caveat on the basis of the information known to the respondent at the time,

constituted a breach of either r 2.3 and/or r 10 and/or r 3 of the Rules.

[128] I observe that there is substantial overlap between the applicant's complaint and Mr EG's subsequent complaint arising from the same circumstances. The same Committee will be reconsidering both complaints. Given that there are two complaints, the Committee may wish to address expressly the possible issue of the sufficiency of the applicant's personal interest in the [Suburb B] caveat matters.

[129] Alternatively or additionally, depending on what view the Committee comes to on the relevant aspects of Mr EG's complaint, it may be that it should consider the potential application of the "necessary" element of s 138(2) of the Act in relation to the same elements of the applicant's complaint. This comment should not be interpreted as implying any view about the matter on my part but just as raising the matter for the Committee's consideration.

Publication

[130] Section 206(1) of the Act requires that every review must be conducted in private. Section 213(1) of the Act requires a Review Officer to report the outcome of the review, with reasons for any orders made, to each of the persons listed at the foot of this decision.

[131] Pursuant to s 206(4) of the Act, a Review Officer may direct such publication of his or her decision as the Review Officer considers necessary or desirable in the public

interest. "Public interest" engages issues such as consumer protection, public confidence in legal services and the interests and privacy of individuals.

[132] Having had regard to the issues raised by this review, I have concluded that it is desirable in the public interest that this decision be published in a form that does not identify the parties or others involved in the matter and otherwise in accordance with the LCRO Publication Guidelines.

DATED this 28th day of NOVEMBER 2023

_____

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:

TR as the Applicant
HJ as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society