LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2023] NZLCRO 145

Ref: LCRO 126/2023

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	**EG** 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 his 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 B].

[3] The applicant's wife is WTR (Ms TR). She 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 A].

[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 relates only to a third caveat later lodged against the title to the [Suburb B] property.

[7] The lawyer acting for the applicant 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 [the applicant] and Ms TR and based on a one-page document written in [Language A] and signed by [the applicant] and Ms TR. We have received a photographed copy of the said one-page document ("Document in [Language A]"), which our client instructs was signed by [the applicant] and Ms TR 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 [the applicant] and Ms TR). 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 [the applicant] or Ms TR personally. Any lending or borrowing between your client and [the applicant] or Ms TR 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 his 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 the applicant for [Company A] to pay the creditor $50,000 in return for withdrawal of the caveat and for [Company A] to consent to a second caveat being lodged.

[12] The applicant denies any agreement with the creditor for a second caveat to be lodged and has complained expressly about the respondent being party to the filing in the High Court of an affidavit by his client containing evidence to that effect.

[13] On the drawdown date of the refinance, $50,000 was paid by [Company A]'s lawyer on the refinancing into the respondent's firm's trust account. The lawyer acting for [Company A] on the refinancing stated in an email to the applicant that this was done on the applicant's instructions once he had confirmation from the respondent of withdrawal of the caveat.

[14] On 7 April 2022, the applicant's lawyer, who was also lawyer for Ms TR, 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.

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

[16] The applicant denies this. There is no evidence from [Company A]'s lawyer about the matter.

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

[18] 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.

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

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

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

[22] On 28 October 2022, the applicant filed his complaint against the respondent with the NZLS.

[23] On 6 December 2022, the High Court dismissed the creditor's substantive application that the [Suburb B] caveat not lapse.

The complaint

[24] The applicant and Ms TR each made a complaint against the respondent. Ms TR'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. That complaint has been dealt with in a separate decision.

[25] In his complaint six months later, the applicant stated relevantly that:

(a) there was an investment dispute between Ms TR and the creditor's domestic partner;

(b) in April 2022, the applicant was going through a refinancing process which involved the [Suburb B] property owned by [Company A];

(c) the first caveat lodged by the creditor delayed the refinancing;

(d) the applicant appointed one lawyer[1] to resolve the caveat issue and another lawyer from a different firm to handle the refinancing;[2]

(e) after completing the refinancing, the applicant offered the [Suburb B] property for sale and then learned that a second caveat had been lodged;

(f) the statement made in the creditor's affidavit that [Company A]'s lawyer on the refinancing had agreed for the second caveat to be lodged was "an absolute untruth" because the lawyer was appointed to handle the refinancing only;

(g) [Company A] was unable to proceed with the sale of the [Suburb B] property because of the caveat and this "… caused so much mental stress and financial struggle with the huge interest rate and poor cash flow";

(h) the application to sustain the caveat caused rumours to spread in the community and the applicant was "… suffering from social disgrace and rumours and under the extreme stress because of an truthful statement made by [the respondent]"

[26] The applicant's complaint does not appear to me to extend to the caveat lodged against the title to the [Suburb A] property. From the manner in which the Committee expressed the issues for consideration, it may have assumed that the complaint did so extend.

[27] The outcomes sought by the applicant were relevantly as follows:

> I want to know whether [the respondent] has justification for the caveat that he applied against the property owned by my solely owned company[3] and if so, on what basis.
>
> I want to know if a lawyer can be punished for filing a complaint to the High Court with false statements? [The respondent] evidently lodged untruthful statement to the High Court. This to me is utterly fearful not only for my ongoing case between [the respondent] and his client but for him practising law unworthy to the court.
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> [The respondent] advised his client [the creditor] to see me in person to acquire a written agreement to allow the transfer of the property to [the creditor] also hand over the all rights to [the creditor] (sic).
>
> Is it the lawful advise from a lawyer to his client? (sic).

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[1] KD of [Law Firm B].
[2] UD or GD of [Law Firm C].
[3] This is a reference to [Company A], not to [Company B].

> 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.

[28] The respondent provided his response to the complaint on 24 February 2023. He gave a reasonably extensive explanation of the background commercial dealings between the creditor and the applicant. This involved in part a dispute over a sum of $600,000 which was intended to be applied by the creditor and his partner towards settlement of the purchase from a third party of a [City A] property and business but which ended up in the applicant's control.

[29] The response also included considerable subjective expression of opinion about the personal and business conduct of the applicant and Ms TR generally.

[30] As to the basis for the caveats, the respondent principally stated as follows:

> [The applicant] promised to transfer the ownership of the property at… [Suburb B]… to [the creditor], if he was failing to pay $600K (the monies) back to [the creditor] on 26 March 2022. [The applicant] did fail to repay [the creditor] in full on 26 March 2022. [The creditor] at this point of time has right to protect his interested property not to be disposed of without having his consent. This could only be done by lodging a caveat against the [Suburb B] property.
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> ….
>
> [The applicant] wrote another promissory statement saying that if the monies were not paid back to [the creditor] by 20 April 2022, [the creditor] will have full authority to sell the both properties in [Suburb B] and [Suburb A] and the [Business A] businesses. When the deadline was passed, [the creditor] had a right to protect the properties and the businesses available for recovering of his monies, which was already authorised by Ms TR and/or [the applicant]. Again, how to protect as interest on the property is the only can be done by [the creditor] is to register caveat against the property is in [Suburb B] and/or in [Suburb A] and PPSR registration against the [Business A] businesses because [the applicant] did not want to speak nor give indication whatsoever how to repay the monies to [the creditor] and [his partner].
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> ….
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> This is not the case of disputing investment between Ms UD and Ms TR but [the applicant] and Ms TR had planned taking huge monetary advantages from [Ms UD] and [the creditor] by way of deceiving them as if they were helping [Ms UD] and [the creditor] getting mortgages by using their family home as a security from [Bank A] and once taking the monies, they changed their faces and until now there is no single word – how to pay the monies back to Ms UD and [the creditor]. Because [the applicant] and Ms TR they are too smart and already learnt a lot from the two previous cases before the case of [the creditor) and Ms UD.
>
> ….
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> I acted as a lawyer based on genuine understanding of the findings from [the creditor] and Ms UD including verbal communications with [the applicant] and Ms TR and promises written in [Language A] language. I believe that [the creditor] is entitled to protect his arguable interest in the property protected by a caveat. If [the applicant] did not change his face and willing to pay the monies back to

> [the creditor] with sincere payment schedule then all parties could save valuable time and monies.

The Standards Committee decision

[31] 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);
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> (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;
>
> (c) whether the affidavit of [the creditor] contained false statements. If so, whether [the respondent] breached its duties to the Court (Chapter 13).

[32] The Committee cited a comment by the Legal Complaints Review Officer (LCRO) in a 2011 decision[4] 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).

[33] In discussing the applicability of r 2.3 of the Rules, 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 courts 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.

[34] The Committee made reference to the respondent's response to the complaint and stated that it:

> … included what [the respondent] said were reasonable grounds for lodging the caveats, including the written promises prepared by [the applicant] himself (a promise to transfer the ownership of the [Suburb B] property and another promise that the [Suburb B] property could be sold if he failed to pay the $600,000 back).

[35] The Committee concluded as follows:

> The Committee reviewed copies of the application for an order that the caveat to not lapse and the supporting affidavit and found there was enough evidence to support the caveats being lodged. That is, it was reasonable for [the respondent] to reach the conclusion that there was a caveatable interest and lodge the caveats on behalf of his client. In the absence of any improper basis for lodging

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

> the caveats (whether they were ultimately sustained or not), no breach of the rule has occurred.

[36] 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.

[37] It decided that the respondent had not breached his professional obligations and 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 29 August 2023. The application reiterated his original complaint and expanded on it significantly by reference to extensive commentary on the respondent's response to the complaint and other information not previously provided to the Committee principally about the respondent's alleged property business interests.

[39] The central thrust of the additional commentary and allegations was that the respondent had breached the Rules in relation to conflicts of interest and was improperly motivated in the performance of his role as legal advisor to the creditor by the pursuit of his own business interests.

[40] The applicant recorded that the [Suburb B] property was by then subject to a mortgagee's sale, that he intended to sue the respondent for losses incurred by [Company A] on its sale and for compensation and that he was claiming costs of over $46,500 against the respondent personally.

[41] He also made reference to what he considered to be the respondent's groundless and defamatory allegations against him.

[42] As to the original complaint, the applicant made reference to the decision of the High Court dated 6 December 2022 declining to uphold caveat on the [Suburb B] property.

[43] The applicant sought "fine or suspension" as an adequate penalty.

Review on the papers

[44] 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".

[45] 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 respondent was content with the matter being dealt with on the papers. The applicant requested a hearing in person.

[46] 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

[47] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[5]

> … 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.

[48] More recently, the High Court has described a review by this Office in the following way:[6]

> 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.

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

[49] 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

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

(a) What is the substance of the original complaint?

(b) What is the appropriate response to the additional matters raised by the applicant on review?

(c) 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?

(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 two caveats?

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

(j) Was the respondent a knowing party to the filing of false, misleading or deceptive affidavit evidence and did he thereby breach his duty of absolute honesty to the Court?

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

Discussion

(a) What is the substance of the original complaint?

[51] At paragraphs [11(a)], [15] and [17] of its decision, the Committee identified that that the first element of 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 three occasions:

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

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

(c) in filing the Court application to sustain the second [Suburb B] caveat when, the applicant says, there was insufficient evidence to support the application and no legal basis for it.

[52] I exclude the lodging for registration of the caveat against the [Suburb A] property on 31 March 2022. There is no reference to it in the complaint. The matter has been dealt with in the separate decision on Ms TR's complaint.

[53] 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".

[54] Thirdly, the Committee explored whether the respondent breached his duties to the Court under chapter 13 of the Rules by the filing of the affidavit evidence of the creditor if that evidence contained false statements.

[55] I consider that there is also an issue of professional competence that needs to be considered.

(b) What is the appropriate response to the additional matters raised by the applicant on review?

[56] It is inappropriate for the applicant to have advanced fresh allegations in his application for review of the Committee's decision. The LCRO has a review jurisdiction, not a first instance complaint jurisdiction. As stated previously by the LCRO:[7]

> The review process is not intended to provide opportunity to parties to adduce fresh or new evidence at the review stage. A Review Officer must be cautious to ensure that he or she does not get cast into the role of a "first instance" determiner of the evidence. Such an approach, if permitted, would undermine the very process of review

[57] Consequently, I have no jurisdiction to consider either the additional factual allegations relating to alleged conflict of interest on the respondent's part and alleged improper motivations relating to his property business interests.

[58] If the applicant wishes to advance arguments of breach of the Rules on either conflict of duty and/or lack of independence based on fresh factual allegations not put to the Committee, he is entitled to do so by making a fresh complaint to the NZLS in the usual way.

[59] Similarly, if the applicant wishes to make a complaint about the respondent not dealing with him with appropriate respect, including in the context of his response to the complaint, he is entitled to lodge a fresh complaint about that matter with the NZLS. It is not a matter I can deal with in the context of this review application.

[60] Matters of alleged defamation are the province of the High Court.

[61] This decision is confined to the matters specified in the preceding section of this decision.

(c) 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?

[62] 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 the caveats being lodged or the basis of its conclusion that the caveats were lodged for a proper purpose.

[63] 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

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[7] *GS & Ors v ABC LTD and HY & Ors* [2022] NZLCRO 126 at [70].

the caveat on behalf of the client. 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).

[64] 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.

[65] 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.

[66] 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.

[67] 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.

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

[68] The comment by the Committee referred to in paragraph [32] 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.

[69] 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.

[70] 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.

[71] 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.

[72] 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.

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

[73] 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.

[74] 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. I infer that the claim by the applicant against the respondent referred to in paragraph [40] is such a claim.

[75] 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.

[76] 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.

[77] 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.

(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?

[78] 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*[8]

[8] [1996] 3 NZLR 281 (CA).

> 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.
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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[9] 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.

[79] 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*[10] "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".
>
> 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.

[80] 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?

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

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

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

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

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

[83] 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*[11], 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 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

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

> 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.

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.
>
> [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.

[84] In *NR v WP,* 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.[12]

[85] Checking with another lawyer is not necessarily a saviour in a situation of uncertainty. In *MN v RK*[13]*,* 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.

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

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

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

[87] The first difficulty is that there were two caveats over the [Suburb B] property. Although the Committee's finding quoted at paragraph [35] above refers to "the caveats", the material on its file relates only to the second (29 April) caveat and there is nothing in its decision to indicate that it separately examined the circumstances of the first (30 March) caveat.

[88] For example, the Committee does not appear to have obtained a copy of the caveat instrument lodged for the first caveat. It cannot therefore have considered whether that instrument appeared to record a claimed estate or interest in land that was capable of being a caveatable interest.

[89] 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 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.

[90] I respectfully adopt the comment made at paragraph [34] of the decision in *BAB v PW* quoted above.[14] Here, the only evidence given of the assessment the respondent needed to have made appears to be the paragraphs quoted at paragraph [30] above. Those paragraphs do not articulate what the respondent subjectively considered to be a reasonably arguable claim to a caveatable interest, beyond a "promise to transfer the ownership".

[91] Although the paragraph of the decision quoted at paragraph [35] above implies that the Committee formed its own view of the objective merit of the respondent's assessment, at least on the second occasion, neither has it articulated what it considered the reasonably arguable claim to a caveatable interest to have been. It could hardly do so, the respondent not having identified it himself, unless the "promise to transfer the ownership" was considered to be sufficient in itself.

[92] 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. I acknowledge the undoubted expertise of the Committee members. If the nature of the

[14] At [83] of this decision.

arguable claim to a caveatable interest was obvious to the Committee, it should have been able to articulate what it was, even if the respondent had not.

[93] I make that observation having avoided to this point reading the High Court judgment of 6 December 2022, 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 caveat itself having had the benefit of full legal argument.

[94] I have read the July 2022 application to sustain the caveat and supporting affidavit evidence and an amended application filed in November, however. I note that the caveatable interest argument advanced for the creditor in July was materially different from the interest claimed in the second caveat instrument. The interest claimed by the creditor was "… an implied trust being either a resulting and/or constructive trust…". In November, it changed again to "…a bare trust, express or implied".

[95] The information the respondent had in July 2022 may well have been different from the information he had at the time of lodgement of the second caveat on 29 April 2022, which was in turn definitely different from the information he had in late March 2022. In particular, the applicant's lawyer had raised expressly with him various potentially pertinent issues in the early April correspondence.

[96] The nature of the relationship, if any, between the creditor and [Company A] was plainly a potential issue. Even on the basis of the affidavit evidence prepared in late July 2022, the creditor's $600,000 monetary claim was against the applicant personally.

[97] The nature of the claimed caveatable interest in the second caveat is quoted in paragraph [18] above. Although the descriptive phrase is quite short, it contains what appear to be four problematical concepts.

[98] The first is the reference to "change of ownership". On my reading of the materials, this has never been explained, other than by the reference to the "promise to transfer the ownership".

[99] The creditor's originating application dated 26 July 2022 refers to "a verbal agreement dated 26 March 2022". It has not been explained how any lawyer could reasonably consider a change of ownership to arise from a verbal (meaning oral) agreement.

[100] The application also refers to a document dated 26 March 2022. The certified English translation of the relevant document reads as follows:

Certificate of Confirmation

Name in full: EG

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

EG (*Signed*)

Debtor OB (*Signed)*

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

[102] The second problematical concept is the reference to "term loan agreements dated 26 March and 5 April 2022". The document quoted above appears to be the first of these. It is at least evidence of an acknowledgement of debt.

[103] There were two signed documents dated 5 April 2022. One relates to a company called [Company C Ltd] that owned two [Business A]. It has nothing to do with the [Suburb B] property. The other reads as follows:

Pledge of Interest payment

Name in full: EG (M23960655)

I, the person named above, promise to take over the financial interest on NZD600,000 accrued to Mr OB as a debtor on his behalf. NZD3,000.00 is to be paid every month and the refund will be made later for the overpaid portion after reconciliation.

05 April 2022

EG (*Signed*)

OB

[104] The respondent has not explained why these documents constitute term loan agreements or, if they do, why he considered this to be consistent with a change of ownership of, or other caveatable interest in, land owned by [Company A].

[105] The third problem is the reference to "being provided as security". This is also unexplained, particularly as [Company A] does not appear to be a party to any arguably

relevant document. An assertion of land being provided "as security" would presumably be inconsistent with any alleged "change of ownership".

[106] The fourth problem is the reference to "the registered proprietor". In context, I think this can only be a reference to the applicant, who was plainly not the registered proprietor. One assumes the respondent must have known this when lodging the caveats for registration.

[107] One is left grasping for any sense of coherence. 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, other than to disrupt any dealing with the land.

[108] I referred earlier to a possible competence issue. I consider that the difficulties that appear to be evident from the second caveat instrument could be regarded as primarily relevant to an objective assessment of the reasonableness of the grounds for the respondent's honest belief that there was a proper basis for lodging it. Alternatively, they could be regarded as potentially reflecting on the respondent's professional competence.

[109] In either case, both the law and the professional disciplinary regime require a more rigorous assessment by the lawyer than an inchoate sense of "the vibe". I refer again to paragraph [34] of the LCRO decision in *BAB v PW* quoted above.

[110] There is also the matter of the relevance, if any, of the alleged agreement of the applicant on behalf of [Company A] for a second caveat to be lodged against the [Suburb B] property. This appears to have had some significance for the respondent.

[111] The Committee does not appear to have addressed the question of whether an alleged agreement by the client for a caveat to be lodged is relevant to the professional assessment by the lawyer of the reasonableness of a claim of caveatable interest, in the absence of any clear identification of an arguable caveatable interest without such agreement.

[112] Nor has the Committee sought to test the applicant's evidence about "re-confirming" the alleged agreement with the lawyer acting for [Company A] on its refinancing. This may be because the Committee did not consider any such agreement to be relevant to its objective assessment of the merit of the respondent's view on caveatable interest.

[113] If it was considered to be relevant, however, one might think the Committee would have put the matter to the lawyer with whom the conversation took place.

Confirmation from the other lawyer of the substance of the conversation would arguably be relevant to the reasonableness of the respondent's belief.

[114] It is for the applicant to establish the basis of his complaint on the balance of probabilities. The Committee needs to consider whether he 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.

[115] 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 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 claim to a caveatable interest in land.

[116] 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.

[117] As the matter was expressed in *MN v RK,*[15] 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?

[118] 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".

[119] 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 second 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.

[120] As already noted, the information available to the respondent on which he formed his belief as to reasonable cause is likely to have been different on the one date from the information available to him on the other date. This is a matter the Committee needs to have considered.

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[15] Above n 13.

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

[121] I raise this as a possible issue for the reasons set out in paragraphs [97] to [111] above. It is inherent in the original complaint. It is a matter I will direct the Committee to reconsider.

[122] 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.

(j) Was the respondent a knowing party to the filing of false, misleading or deceptive affidavit evidence and did he thereby breach his duty of absolute honesty to the Court?

[123] The specific allegation made by the applicant in this respect was as follows:

> In the document presented to the High Court by [respondent), it was evidently mentioned that my Lawyer Mr UD has agreed for [the creditor's] party to apply caveat against the property in [Suburb B] mentioned above which is an absolute untruth for two main reasons.
>
> 1. It was officially informed to [the respondent] of this arrangement and that Mr KD is appointed Lawyer to resolve the caveat matter. Supporting document attached. (Document #1 & #2).
>
> 2. Mr UD was only appointed to handle the re-financing only. Mr UD has provided an written statement (sic) to explain his position and to confirm the arrangement between myself and his role. Supporting document attached… (Document #3 & #4).

[124] The reference to the mention in "the document presented to the Court" is a reference to paragraph [33] of the creditor's affidavit, in which he stated:

> Whilst this caveat was pending registration [the applicant] contacted me to say that if I withdraw the pending caveat to allow [Company A]'s refinance to proceed, [Company A] will consent to a second caveat being registered against the [Suburb B] property and will also pay $50,000 from the refinance towards the $600,000 debt owed by [Company A]. I agreed and advised my lawyer [the respondent] who spoke to [Company A]'s lawyer [Law Firm C] and reconfirmed the agreement to consent to the registration of the current caveat.

[125] The Committee's finding about this aspect of the applicant's complaint was that it "…did not find any evidence of false statements by [the respondent] and therefore no breach of Chapter 13 of the [Rules]".

[126] The reference is to r 13.1 of the rules, which provides that "a lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court".

[127] The Committee did not have the benefit of seeing whatever affidavit evidence the applicant filed in response to the application, assuming he did so. Nor do I. Consequently, there was and is no conflict in such evidence to consider.

[128] There is no suggestion in the materials that either the respondent or [Company A]'s lawyer gave any affidavit evidence in the Court proceedings.

[129] I think it tolerably clear that the applicant was not complaining that the respondent himself had given false evidence but that, as solicitor on the record for the creditor, he was responsible for the filing of affidavit evidence relating to something within his personal knowledge that he knew to be incorrect.

[130] The evidence from the creditor as to what was said between the respondent and [Company A]'s lawyer was plainly hearsay. I am confident, without having read the judgment, that the Court would have had no regard to it.

[131] By the same token, whatever was said between the respondent and [Company A]'s lawyer was also hearsay from the applicant's perspective. The applicant cannot have had personal knowledge of the matter and cannot assert that the creditor's hearsay evidence was false.

[132] The two lawyers clearly had a conversation about removal of the first caveat in return for a payment of $50,000. The email from [Company A]'s lawyer confirms this, as does the subsequent payment of $50,000 and the withdrawal of the caveat.

[133] The respondent has affirmed in his evidence to the Committee his version of the rest of the conversation relating to the lodgement of a second caveat. There is neither evidence from [Company A]'s lawyer nor hearsay evidence from the applicant that no such discussion was had.

[134] The applicant may well consider it inherently improbable that a lawyer who was not acting in relation to the caveat would have expressed any agreement on [Company A]'s behalf for a second caveat to be lodged. This does mean there was any evidence before the Committee contradicting the statement from the respondent.

[135] The applicant should not interpret the Committee's finding as a positive finding that the respondent's assertion was true but only that there was no evidence that it was untrue.

[136] It is for the complainant/applicant to establish the grounds for his complaint on the balance of probabilities. I agree with the Committee that this aspect of the complaint has not been made out.

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

[137] 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.

[138] Nor should my decision be interpreted as implying any undue sympathy for the applicant. If the creditor's affidavit evidence is factually correct, the whole set of events allegedly arose from the transfer of $600,000 of the creditor's money to the applicant by way of an unauthorised journal of funds within the trust account of a law firm[16] acting for both of them in what appears to have been a stark conflict of interest situation.

[139] Nevertheless, 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 second caveat.

[140] 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.

[141] 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.

[142] 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 more robust consideration by the Committee of the propriety of the lodgement for registration of each of the two caveats, and the propriety of the application to sustain the second caveat, from the respondent's viewpoint.

Decision

[143] 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, so far as it relates to the professional conduct implications of the lodging of the two caveats against the title to the [Suburb B] property, on the basis that it has not been

[16] Which was neither the respondent's firm nor the applicant's lawyer's firm.

adequately explained and that it remains open to the Committee to affirm that finding with reasons.

[144] Also pursuant to s 211(1)(a) of the Act, the decision of the Standards Committee to take no further action on the complaint is confirmed, so far as it relates to his duties to the Court under chapter 13 of the Rules in relation to the pleadings and affidavit evidence filed for the creditor in the High Court proceedings.

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

(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 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

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

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

Publication

[146] 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.

[147] 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.

[148] 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:

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