

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

[2020] NZLCRO 172

Ref: LCRO 045/2020

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

MN

Applicant

AND

RK

Respondent

DECISION

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

Introduction

[1] Mr MN has applied for a review of a decision by the [Area] Standards Committee [X].

Background

[2] Mr GS and Ms RK filed an application in the High Court to dissolve their marriage.

[3] The couple owned a residential property located in [Suburbia] (the property).

[4] The parties had, in May 2017, entered into a relationship property agreement.

[5] The parties wished to sell the property.

[6] Both were legally represented.

[7] They required an independent lawyer to act on the sale of the property. Mr MN was given that task.

[8] Sale of the property did not proceed smoothly. The parties were unable to agree on a number of issues.

[9] Eventually the parties reached agreement that Mr GS would purchase Ms RK's interest in the property. Mr MN was not informed of this proposal.

[10] Mr MN rendered fees in the sum of \$9,162.63 (GST inclusive).

[11] On 25 January 2019, Ms RK filed a complaint against Mr MN with the Lawyers Complaints Service.

[12] On 7 February 2019, Mr MN lodged a caveat against the property to protect his fees.

[13] Mr MN provided a first response to the complaint on 19 February 2019. To the extent that his comprehensive response addressed issues of complaint that are not relevant to this review, there is no purpose served in traversing the content of that response.

[14] Ms RK wrote further to the Complaints Service on 4 March 2019. She raised concerns about Mr MN's actions in lodging the caveat. She considered it an "abuse of process" for Mr MN to have taken such a step. Further, she made complaint that this had frustrated her ability to transfer her interest in the property to her former husband.

[15] The parties subsequently reached an agreement with Mr MN over his fees. Mr MN's account was paid. Mr MN withdrew the caveat.

[16] That effectively for Ms RK brought matters to an end.

[17] However, the Committee continued to have concerns regarding Mr MN's actions in registering the caveat.

The Standards Committee concerns and decision

[18] The conduct issues identified by the Committee arising from Mr MN's actions in lodging the caveat were:

- (a) whether there was a proper basis for the registration of a caveat by Mr MN against the title of [Address], [Suburbia] on around 7 February 2019; and

- (b) whether Mr MN failed to use legal processes for a proper purpose in breach of rule 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules); and
- (c) whether Mr MN's conduct fell below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; and/or
- (d) whether Mr MN's conduct would be regarded by lawyers in good standing as being unacceptable, unbecoming, or unacceptable;
- (e) whether Mr MN's conduct amounted to unsatisfactory conduct within the meaning of s 12(a), s 12(b) and/or s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act); and/or
- (f) whether Mr MN's conduct could amount to misconduct within the meaning of s 7(1)(a)(i) and/or s 7(1)(a)(ii) of the Act such that a referral to the Disciplinary Tribunal is necessary.

[19] In responding to Ms RK's correspondence of 4 March 2019 on 7 March 2019, Mr MN gave explanation for his decision to caveat the title to the property. He noted that:

- (a) when he caveated the title, he had no knowledge that a complaint had been lodged with the Complaints Service; and
- (b) the caveat lodged was based upon a remedial constructive trust which protected his right to be paid from proceeds resulting from the sale of the property.

[20] Following receipt of the Committee's notice of hearing, Mr MN wrote further to the Committee advising that:

- (a) he sought that no further action be taken on the complaint; and
- (b) he had provided a full response to the Committee in his correspondence of 19 February 2019 and 7 March 2019; and
- (c) his correspondence of 7 March 2019 provided explanation for his decision to register the caveat; and

- (d) subsequent to his meeting with family members in which agreement had been reached to settle his account in full, the caveat had been withdrawn.

[21] The Standards Committee delivered its decision on 28 January 2020.

[22] The Committee determined pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act) that there had been unsatisfactory conduct on Mr MN's part in terms of sections 12(b) and 12(c) of the Act as a breach of r 2.3 had been established.

[23] In reaching that decision the Committee determined that:

- (a) Mr MN did not have a caveatable interest in the land based on his unpaid legal fees; and
- (b) without a court order imposing a remedial constructive trust, no remedial constructive trust existed; and
- (c) registering a caveat based on a "remedial constructive trust" was fundamentally misconceived; and
- (d) in any event, there were no grounds to register a caveat; and
- (e) Mr MN had failed to use legal processes for a proper purpose and in doing so was in breach of rule 2.3; and
- (f) such conduct fell below the professional standard, and would be regarded as unacceptable by lawyers of good standing

Application for review

[24] Mr MN filed an application for review on 4 March 2020. The outcome sought is for the Committee's finding of unsatisfactory conduct be set aside together with the penalties and costs imposed.

[25] He submits that:

- (a) The original complaint was based on a single allegation that the fees charged were exorbitant; and
- (b) The Committee had directed that the parties consider the possibility of resolving the dispute through mediation; and

- (c) Following a meeting at his office a settlement was reached; and
- (d) Neither of the parties' lawyers had raised concern regarding the lodging of the caveat; and
- (e) Following the meeting at which agreement had been reached which resulted in his fees being settled in full, he had assumed that all matters were settled; and
- (f) The Committee's findings were based on three factual errors being that:
 - (i) it proceeded from assumption that the caveat was based on a remedial constructive trust which it was not; and
 - (ii) that by allegedly registering a caveat on that basis he had committed an abuse of process; and
 - (iii) that in doing so, the process had been employed for the purpose of causing unnecessary embarrassment, distress or inconvenience to others.
- (g) It was obvious that the constructive trust originated on or about the 15th of May 2017; and
- (h) The relevance of that date, being the date the relationship property agreement was entered into, had not been properly considered by the Committee; and
- (i) He had mistakenly referred to the trust purportedly created as a remedial constructive trust when proper research by the Committee into the date of the Relationship Property Agreement would have dispelled suggestion that the caveat was based on a judgement; and
- (j) Regrettably the Committee had chosen to examine the caveat on the basis of his misdescription; and
- (k) The form of the caveat adopted was sustainable; and
- (l) Even if that was arguable, it could never be advanced that he was adopting that form of caveat on a legally incorrect basis; and

- (m) At no time could it be said that he was using the process of a caveat so as to cause “unnecessary embarrassment, distress or inconvenience” to the complainant.

[26] Mr MN attached to his submissions an opinion he had obtained from a senior barrister, Mr NH.

[27] Mr MN submitted that Mr NH’s opinion supported his view that the form of the caveat adopted was sustainable.

[28] A summary of the essential points of Mr NH’s opinion is as follows:

- (a) there was nothing to indicate that Ms RK wished to maintain her complaint about the caveat once the primary complaint of overcharging had been resolved; and
- (b) the factors that Mr MN had in mind when registering the caveat likely proceeded from assumption that a trust in the nature of that which arose in *Lankow v Rose* was in existence;¹ and
- (c) the *Lankow v Rose* type of constructive trust is not limited to the de facto/relationship property situations in which it historically arose, but applies generally where elements of the trust are made out; and
- (d) under the provisions of the relationship property agreement entered into by Mr GS and Ms RK, Mr GS was to hold three quarters of the proceeds of sale in trust for the children; and
- (e) As the lawyer appointed under the agreement to manage the sale of the property, it was reasonable to describe the work being done as work done to generate and preserve the property for the ultimate beneficiaries;
- (f) The fact that a lawyer may have misjudged a situation did not mean that the lawyer was guilty of misconduct; and
- (g) The focus of r 2.3 is the lawyer’s “purpose”, Mr MN’s purpose was simply to secure the payment of fees and disbursements and it cannot realistically be advanced that his purpose was to cause unnecessary embarrassment, distress, or inconvenience to another person’s reputation, interest or occupation; and

¹ *Lankow v Rose* [1995] 1 NZLR 277 (CA).

- (h) relevant to the question as to whether there had been a breach of r 2.3 was the fact that no party had been adversely affected by the lodgement of the caveat; and
- (i) there was no reason as to why Mr MN could not place reliance on a *Lankow v Rose* type of trust having arisen; and
- (j) at worst, Mr MN had simply misjudged his right to lodge a caveat.

[29] Ms RK was invited to provide a response to Mr MN's application but indicated that she did not wish to participate in the review.

Hearing

[30] A hearing proceeded on Thursday, 24 September 2020.

[31] Mr MN was represented by Mr NH.

Nature and scope of review

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

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

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

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A

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].

review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[34] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Discussion

[35] Issues to be addressed on review are:

- (a) Was Mr MN entitled to lodge a caveat by virtue of argument that a constructive trust was in place?
- (b) Was the complaint concluded, and further investigation by the Committee unmerited, following the parties reaching agreement over fees?
- (c) Did the lodging of the caveat cause unnecessary embarrassment, distress, or inconvenience to another person's reputation, interest or occupation?

Was Mr MN entitled to lodge a caveat over the property by virtue of argument that a constructive trust was in place?

[36] The Committee concluded that there were no grounds to register a caveat, and no discernible basis for an institutional constructive trust claim.

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

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

⁴ [2012] NZCA 305.

[39] In *BAB v PW LCRO 4/2011* (14 August 2012) it was noted at [33] that neither a Committee nor a Review Officer should be drawn into determining whether there is a caveatable interest to the degree that would be necessary for the issue to be addressed before the Court. It is not the role of a Committee or this Office to assume that role.

[40] However, it was also noted in that decision at [34] that there is a threshold below which a lawyer should not assist in interfering with the rights of others. That is the purpose of r 2.3. A lawyer must be able to point to an assessment of the grounds on which he or she formed the view that a caveatable interest existed. The Standards Committee must consider this reasoning and form a view as to the merits of that decision. Otherwise r 2.3 would have no relevance or substance in these circumstances.

[41] I have difficulty with Mr MN's argument that instructions he received to act on the sale of a residential property, provided foundation for argument that he acquired an interest in the property such as would sustain a caveat, by virtue of a constructive trust.

[42] When first providing response to the complaint, Mr MN argued that his caveat was based upon a remedial constructive trust which protected his rights to be paid from proceeds of sale.

[43] On review, Mr MN conceded that a right to caveat could never have been founded on argument that a remedial trust was in place, being that such a trust can only come into existence by order of the court. Mr MN criticises the Committee for failing to recognise what he perceives to have been an obvious mistake noting that "it will be obvious on examining the caveat that the constructive trust originated on or about the 15th of May 2017 in which event the relevance of that date should have been explored."⁵

[44] Mr MN goes on to argue that "even though I had wrongly used the adjective "remedial" in my correspondence to NZLS, the factors that the form of the caveat, and the date of the 15th of May 2017 should have been acknowledged by the Committee as the basis for the caveat and not any subsequent explanation by me".⁶

[45] Mr MN complains that "regrettably the Committee (of its own volition) chose to examine form of the caveat based on a misdescription by myself rather than carry out a

⁵ Mr MN, correspondence to Legal Complaints Review Officer (3 March 2020) at p4.

⁶ Mr MN's correspondence (3 March 2020) at p4.

proper examination of the caveat itself. The Committee's findings were based upon a misunderstanding of the document in question".⁷

[46] Mr MN had an obligation to articulate his argument accurately.

[47] It is noted that the Committee did in fact consider the possibility that Mr MN had intended to advance his argument on the basis of a constructive trust rather than a resulting trust providing foundation for the caveat. At [24] of its decision the Committee observed that it had concluded that, "In addition, the Committee did not consider that Mr MN met any other criteria for registration. There was no discernible basis for an institutional constructive trust claim. There was no contribution to the property itself that could create a standard constructive trust claim, nor was Mr MN a trust beneficiary of any kind".

[48] Neither in his responses to the Committee of 19 February 2019 and 7 March 2019, or in his submission to the LCRO of 3 March 2020, does Mr MN provide comprehensive explanation as to how he considered a constructive trust arose, and how he acquired a beneficial interest in the property, by virtue of the fact that he had been engaged to manage the conveyance.

[49] To the extent that limited explanation is provided, he appears to be suggesting that because the relationship property agreement provided that Mr GS would retain his share of the proceeds of sale in trust for his and Ms RK's children, this in ways that are not fully explained, accorded Mr MN a beneficial interest in the property.

[50] The caveat lodged by Mr MN recorded his interest in the land as a "beneficiary".

[51] In expressing his support of Mr MN's position, and in providing clarification as to the significance of the relationship property agreement, Mr NH argues that as the relationship property agreement confirmed an intention that Mr GS held the proceeds of sale in trust for the children, and Mr MN's appointment was necessary to give effect to the agreement and to generate and preserve the property in issue (in this case, final sale proceeds) for the ultimate beneficiaries (including Ms RK), it was reasonable to have described Mr MN's work as "having been done to generate and preserve the property in issue for the ultimate beneficiaries".

[52] This, in my view, mischaracterises the nature of what was an entirely conventional set of instructions.

⁷ Mr MN's correspondence (3 March 2020) at p4.

[53] Mr GS and Ms RK were separated.

[54] They had formalised the division of relationship property in a relationship property agreement

[55] Both had engaged their own lawyers.

[56] As is not uncommon in such cases, they had decided that a lawyer independent of the parties' lawyers would be instructed to manage the sale of the property.

[57] It can be reasonably assumed from the limited information on the file, that the relationship was acrimonious.

[58] When agreeing to take on what regretfully for Mr MN appears to have become a rather burdensome retainer, Ms RK made request of Mr MN to certify that he was independent and was not conflicted. This presumably to assuage Ms RK's concern that Mr MN may have enjoyed a close professional relationship with her husband's lawyer.

[59] Mr MN's task was to act as the parties' independent representative on the sale of the property.

[60] The scope of the retainer expanded beyond what would have been anticipated as a consequence of the parties being unable to agree on such fundamental matters as the appointment of an agent to sell the property. Rather than simply attending to the formalities of the conveyance, Mr MN became heavily involved in endeavouring to assist the parties to reach agreement on a sale process.

[61] Recovering fees rarely presents a problem for conveyancing lawyers as fees are, in the majority of cases, paid on settlement.

[62] But in this case, Mr MN was unable to secure payment of his fees on the sale of the property, as the sale did not proceed.

[63] Mr GS and Ms RK reached agreement that Ms RK would transfer her interest in the property to Mr GS.

[64] After having spent many months endeavouring to assist the parties to achieve a sale of the property, Mr MN was not accorded the courtesy of being informed that the parties were negotiating between themselves to finalise an agreement to transfer the property to Mr GS.

[65] Having completed a considerable amount of work on the file over a period of two years, Mr MN was understandably anxious to recover his fees. He rendered his final account in December 2018. His first had been sent out in December 2017.

[66] Clearly concerned at the prospect that he may have difficulty recovering his fee, Mr MN on 21 January 2019 wrote to his clients making request of them to sign an acknowledgement of debt.

[67] This acknowledgement included a provision recording that Mr MN's clients would, if called on, execute a registrable second mortgage over the family home, to secure payment of Mr MN's fee.

[68] Mr MN's clients did not respond to his request.

[69] Shortly after, Mr MN took steps to register the caveat, this on the basis of Mr MN's belief that the work completed, "had been done to generate and preserve the property in issue for the ultimate beneficiaries".⁸

[70] I do not consider that the work done by Mr MN is accurately described as work completed with purpose to generate and preserve the property in issue for the ultimate beneficiaries.

[71] It is argued for Mr MN, that lawyers are frequently required to make value judgements, and to express views and recommendations which may ultimately turn out to be wrong.⁹

[72] Further, it is contended that:¹⁰

In relation to the lodging of caveats, rarely will a lawyer know with certainty whether the caveat, if challenged, can be sustained. A value judgment is required. This is particularly so in the area of constructive trusts. Very little is certain about constructive trusts and their existence in individual cases is routinely debated in good faith by lawyers with opposing views. The fact that a caveat turns out to be unsustainable if ultimately tested in court is, of itself, unremarkable.

[73] Whilst I agree with Mr NH that it is common for caveats to be challenged, I do not agree that the process of lodging a caveat it is so uncertain and random as to render the process something of a lottery.

[74] On many occasions, lawyers will lodge caveats with reasonable certainty that the grounds for lodging are unassailable.

⁸ Mr NH, correspondence to Mr MN (20 February 2020) at p2.

⁹ Mr NH, correspondence to Mr MN (20 February 2020) at p2.

¹⁰ Mr NH, correspondence to Mr MN (20 February 2020) at p2.

[75] But the question here is not focused on the vulnerability of caveats to challenge, but rather on whether Mr MN had a reasonable ground for belief that he had legitimate grounds to register the caveat on the basis of argument that he had a beneficial interest in the property (as described in the caveat) or an obligation to preserve property for ultimate beneficiaries (as argued for by Mr NH).

[76] The Committee concluded that there was “no discernible basis for an institutional constructive trust claim”.

[77] It is submitted for Mr MN, that “instinctively” the principles Mr MN had in mind when he provided explanation for lodging the caveat, was his reliance on a constructive trust in the nature of that described in *Lankow v Rose*.¹¹

[78] I see nothing in the circumstances of Mr MN’s retainer which equate to, or provide meaningful points of comparison with, the circumstances in *Lankow v Rose*.

[79] At the heart of *Lankow v Rose*, was argument that a partner who had made substantial direct and indirect contributions to property held in the name of the other partner, could claim an interest in the other partner’s property.

[80] Mr MN’s argument places reliance on the principles that emerged from *Lankow v Rose* so it is appropriate to identify the now well-established principles that have been distilled from that case.

[81] Matters required to be established when argument is advanced as to the existence of a constructive trust are:

- (a) contributions, direct or indirect to the property in question;
- (b) the expectation of an interest in the property;
- (c) that such expectation is reasonable; and
- (d) that the defendant should reasonably expect to yield the claimant and interest.

[82] In a recent judgment, *Batusov v Batusova*, van Bohemen J set out the general principles relating to constructive trusts sufficient to sustain a caveat:¹²

¹¹ Above n 4.

¹² *Batusov v Batusova* [2020] NZHC 1272 at [37]–[41] (footnotes reproduced). See also *Daisley v Ark Contractors Ltd* [2020] NZHC 793.

[37] In accordance with s 138(1)(b) of the Land Transfer Act 2017, a person may lodge a caveat on the basis that the person has an interest in the land under an express, implied, resulting, or constructive trust.

[38] To sustain a caveat, however, the constructive trust must be an institutional constructive trust arising by operation of the principles of equity as distinct from a remedial constructive trust imposed by the court in circumstances where, without court intervention, no trust would arise: *Fortex Group Ltd (in rec and liq) v MacIntosh*¹³ and *Boat Harbour Holdings Ltd v Steve Mowatt Building and Construction Ltd*.¹⁴

[39] In *Almond v Read*, the Court of Appeal clarified that what is sometimes referred to as a “common intention constructive trust” simply describes one type of situation in which a reasonable expectation will be found to exist.¹⁵ Following that decision, it is clear that there is no conceptual distinction between a constructive trust based on common intention and one based on reasonable expectation. However, proof of a common intention can be sufficient to establish a reasonable expectation.

[40] In *Almond v Read*, the Court of Appeal noted that:¹⁶

- (a) As described by the authors of *Equity and Trusts in New Zealand*,¹⁷ the common factor in institutional constructive trusts would appear to be the unconscionability of the defendant in denying the plaintiff an equitable interest in the relevant property because of a previous understanding, whether subjectively agreed upon between the parties or more commonly deemed by the law to have been appropriate in the circumstances;
- (b) One common category of constructive trust is where contribution has been made to the acquisition, improvement or maintenance of property, or its value, by a party other than the registered proprietor;
- (c) Following *Lankow v Rose*,¹⁸ the essential requirements of that kind of constructive trust are that the plaintiff contributed in more than a minor way to the acquisition, preservation or enhancement of the defendant’s assets, whether directly or indirectly, and that in all the circumstances the parties must be taken reasonably to have expected that plaintiff would share in them as a result;
- (d) As set out by Tipping J in *Lankow v Rose*,¹⁹ in order to establish that equity should regard a defendant’s denial of a claimant’s interest to be unconscionable, a claimant needs to prove:
 - (i) Contributions direct or indirect to the property in question;
 - (ii) The expectation of an interest therein;
 - (iii) Such an expectation is a reasonable one; and

¹³ *Fortex Group Ltd (in rec and liq) v MacIntosh* [1998] 3 NZLR 171 (CA) at 172–173.

¹⁴ *Boat Harbour Holdings Ltd v Steve Mowatt Building and Construction Ltd* [2012] NZCA 305, (2012) 13 NZCPR 489 at [45].

¹⁵ *Almond v Read* [2019] NZCA 26 at [71].

¹⁶ At [66]–[69].

¹⁷ Jessica Palmer “Constructive Trusts” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2013) at [13.2.1].

¹⁸ Above n 4 at 282.

¹⁹ At 294.

- (iv) The defendant should reasonably expect to yield the claim and interest; and
- (e) There will be no difficulty in establishing a reasonable expectation where a contribution is made on the basis of a pre-existing common intention that the contribution will result in a proprietary interest.

[83] Mr NH submits that the *Lankow v Rose* type constructive trust is not limited to the de facto/relationship property situations in which it historically arose, but applies generally where the elements of the trust are made out.

[84] In advancing this argument, he relies on the decision in *Almond v Read*.²⁰

[85] Whilst that case did not concern a property dispute between relationship partners, *Almond v Read* concerned a bitter and protracted family dispute, in which arguments were advanced that family members had made significant contributions to a property in which legal title was held by one family member.

[86] Following the hearing, Mr NH helpfully forwarded another decision to the LCRO, *Li v 110 Formosa (NZ) Ltd*, this to reinforce argument that the courts have found the existence of a constructive trust, in circumstances outside of a *Lankow v Rose* domestic setting. I do not consider that the decision provided by Mr NH provides assistance in the present case, other than to reinforce that the court may, as Mr NH describes it, “found the existence of a constructive trust in a commercial setting based on *Lankow v Rose* principles”.

[87] In *Li*, the plaintiff appellant argued that he had provided funds in the sum of \$4.8 million to assist with the purchase of land that he had not acquired an interest in. Whilst the argument is advanced from a commercial rather than domestic context, a pivotal element of the constructive trust argument is present, being submission that there had been (in this case significant) financial contribution to property. Mr MN does not argue that attending to conveyancing matters represented a contribution to his client’s property, rather his argument as I understand it, is that his services were preserving property for the ultimate beneficiaries.

[88] I see nothing in the *Lankow v Rose* case, or cases that have applied the principles elucidated in that case, of relevance to the situation that confronted Mr MN.

[89] I do not consider there to be strength in argument that Mr MN, in registering his caveat, was preserving property for the ultimate beneficiaries.

²⁰ Referenced at [83].

[90] Mr MN's obligations were not so expansive as to extend to assuming obligations for parties (in this case Mr GS's and Ms RK's children) who may or may not have benefited from the decisions made by their parents. His obligations were confined to acting as solicitor for the parties on the conveyancing and sale.

[91] Nor was it the case that taking instructions on a conveyancing matter resulted in Mr MN, as his caveat recorded, becoming a beneficiary of a discretionary family trust.

[92] In explaining his grounds for registering the caveat as arising under and by virtue of a constructive trust entered into on the 15th of May 2017 (the date the relationship property agreement came into force), Mr MN is arguing the existence of a trust relationship to establish the basis for a creditor's remedy.

[93] Mr MN's instructions did not take on an added dimension because they were recorded in a relationship property agreement.

[94] It would not have been contemplated by Mr GS or Ms RK that including a provision in the agreement for Mr MN's appointment, would have led to an outcome where Mr MN could lay claim to an interest in their property.

[95] Mr MN's instructions were recorded in the relationship property agreement because the parties wanted to ensure that the sale process was clearly understood. If any issues of disagreement arose, the agreement was to provide guidance to the parties as to how those difficulties could be resolved.

[96] Nor was it the case that Mr MN was the only professional whose services were engaged under the property agreement.

[97] The duties of an accountant appointed by the parties to prepare annual financial statements were set out in the agreement, including provision for the accountant to retain funds from sale proceeds towards settlement of his/her account.

[98] The agreement provided for an appointment of an independent valuer, with, again, provision made for the valuer's costs to be paid from sale proceeds.

[99] Mr MN's position was no different to the other professionals instructed under the relationship property agreement. Their task was to assist Mr GS and Ms RK with the sale of the property. In doing so, they did not acquire an interest in the property such as would entitle them to register a caveat against the property.

[100] If their bills were not paid, they were able to seek recourse in exercising creditor's remedies available to them.

[101] Following the approach in *BAB v PW* LCRO 4/2011 (14 August 2012), it is my view that Mr MN has failed to meet the necessary threshold to establish a contestable argument that he had reasonable grounds to lodge a caveat.

[102] In the absence of reasonable grounds, I agree with the Committee, that his decision to lodge the caveat constituted a breach of r 2.3.

Was the complaint concluded, and further investigation by the Committee unnecessary, following the parties reaching agreement over payment of Mr MN's fees?

[103] Mr MN argues that no party complained about the fee other than Ms RK, and that, in any event, following a meeting between the parties which was prompted by a Committee recommendation that the parties consider mediation, agreement was reached that his fees be paid in full and that was the end of the matter.

[104] The fact that Mr GS had apparently not pursued complaint is irrelevant.

[105] It was Ms RK's complaint that had to be responded to.

[106] In any event, there is information on the file that Mr GS had given indication that he supported the fee complaint being advanced.²¹

[107] I accept that Mr MN considered the main thrust of the complaint concerned the fee charged. He understandably would have considered the agreement to pay his fee in full as reflecting a total vindication of his position.

[108] If there was indication that Ms RK considered that the meeting at Mr MN's office which concluded with agreement that his fee be paid in full brought all outstanding issues to conclusion, it could be reasonably argued by Mr MN that he had legitimate expectation that all matters had been settled, particularly as the Committee had recommended that the parties attempt mediation.

[109] But it is clear that the settlement of the fee issue did not, in Ms RK's mind, appear to settle all aspects of her complaint.

²¹ TA, email to Mr MN (13 March 2019).

[110] In her correspondence to the Complaints Service of 4 March 2019, Ms RK said:

I strongly believe there has been an abuse of process for Mr MN to lodge a caveat on the property especially now so when there has been progress by my ex-husband, G and myself to sort this immediately. Due to this caveat now, we are now unable to proceed forward and do the necessary transfer of the house and funds transfer.

[111] When reporting back to the Complaints Service to confirm agreement to meet with Mr MN and to advise that a formal mediation may not be required, Ms RK made it clear that she considered Mr MN's decision to lodge the caveat on the property was a matter that still necessitated enquiry. She said this:²²

However, I would appreciate if you could advise what of the caveat on the house? This is clearly an abuse of process and unacceptable. In the event if this is condoned, it may open the floodgates for other lawyers to do the same in respect to their clients.

[112] On receipt of the Standards Committee decision, Ms RK wrote to the Complaints Service to thank the Service for its assistance, noting in this correspondence, that she was "glad justice has been served".

[113] The indication is that Ms RK considered that the matters raised by her caveat complaint still needed to be considered by the Committee irrespective of the fact that the fee complaint had prospect of being settled by agreement.

[114] The fact that a Committee has recommended mediation and the parties subsequently agree to a settlement, does not prevent the Committee from dealing with, or continuing to deal with the complaint.²³

[115] The Committee may (as was the case here) consider that all, or aspects of, the conduct investigation needs to proceed, irrespective of indication from the parties that an agreement was reached at mediation

Did the lodging of the caveat cause unnecessary embarrassment, distress, or inconvenience to another person's reputation, interest or occupation?

[116] Rule 2.3 of the Rules provide that:

A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interest or occupation.

²² Ms RK, email to Complaints Service (27 May 2019).

²⁵ Section 143(3) of the Act.

[117] Mr MN submits that:

- (a) At no time could it be said that he was using the process to cause unnecessary embarrassment, distress or inconvenience to the complainant; and
- (b) rule 2.3 required the Committee to reach conclusion (which it had not) that he had an improper purpose.

[118] In my view, Mr MN was not registering the caveat to protect the interests of a client, but rather to protect his own interests.

[119] In *BAB v PW* LCRO 4/2011 (14 August 2012) it was noted that when considering argument as to whether there had been reasonable grounds for lodging a caveat:²⁴

... 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.

[120] It is advanced for Mr MN that even if he was incorrect in his view that a caveatable interest was established, no disciplinary sanction could properly arise under r 2.3, as it cannot be realistically argued that his purpose was to cause unnecessary embarrassment, distress or inconvenience.

[121] Whilst it is contestable as to whether Mr MN's purpose was to cause embarrassment or distress, it would be difficult to argue against the proposition that Mr MN both knew, and intended, that the registering of the caveat had potential to cause his clients inconvenience.

[122] Lodging the caveat, as Mr MN would have been aware, substantially interfered with his client's autonomous rights to deal with their property in such manner as they saw fit.

[123] It is a serious matter to take steps to interfere with ownership rights.

[124] Nor am I persuaded that Mr MN fails to be captured by the rule as the focus of the rule is, as argued by Mr NH, on knowledge or a failure to inquire.

²⁴ At [38].

[125] Mr MN's failure to take more strenuous steps to establish whether he had reasonable grounds to register a caveat, and his subsequent registering of the caveat, supports conclusion that Mr MN had not used a legal process for a proper purpose.

[126] His apparent initial misdescription of the trust mechanism on which he was placing reliance was not a mistake that can be rationalised by argument that what Mr MN "instinctively" meant to say was that he was placing his reliance on a constructive trust. What Mr MN's initial response to the complaint reflects, is that he had given insufficient thought and attention to ensuring that he had a secure foundation for argument that he had a caveatable interest.

[127] The potential for a caveat to cause inconvenience is obvious.

[128] The reason why Mr MN took the step he did was to assert leverage for payment of his fee.

[129] An unsecured personal debt (as I consider Mr MN's debt was) will not support a caveat.

[130] It is argued for Mr MN that the sale was not impeded, that no party was inconvenienced or suffered loss.

[131] That is not the point. The caveat was lodged to cause inconvenience.

[132] Nor is it clear, as there is no evidence on the issue, as to the effect that the registering of the caveat may have had on the settlement negotiations that took place at Mr MN's office. His decision to remove the caveat was taken after his fees had been paid.

Outcome

[133] I agree with the Committee that a breach of r 2.3 is established. I also agree with the Committee that the conduct merited a finding that there had been unsatisfactory conduct

[134] However, the benefit and advantage a Review Officer has over a Committee, when conducting a "hearing in person", is the prospect it accords a Review Officer to hear more fully from the parties, and the opportunity it affords the lawyer to provide a more comprehensive context to the complaint than may have been achieved in advancing the argument by written submission.

[135] Mr MN explained at the hearing, that he had, in taking the decision to register the caveat, a genuine belief that the provisions of the relationship property agreement provided him with a caveatable interest.

[136] Mr MN conceded that lodging a caveat in these circumstances was not an approach he had:

- (a) adopted in the past; or
- (b) would follow in the future; or
- (c) would recommend to any lawyer working for him.

[137] Following the informal mediation at which agreement was reached to settle his fees in full, Mr MN said that he continued to maintain a good relationship with the family. He believed that in reaching agreement over his fee, all elements of the complaint had been settled.

[138] Mr MN is a practitioner with [many] years of experience. He advised that he had never, in his lengthy career, had any adverse conduct finding made against him. He says that he has, throughout his career, upheld all of the obligations that fall to an Officer of the Court.

[139] Mr MN explained that he had maintained a busy criminal, civil and matrimonial practice for many years, and that he had completed a vast amount of court work including frequent appearances in the Higher Courts. He noted that he had spent some years as the senior practitioner on a Standards Committee.

[140] He emphasised that the approach he had adopted throughout his career had been to always seek to assist clients achieve a solution.

[141] It is unfortunate when a practitioner of Mr MN's background and experience is encumbered with an unsatisfactory conduct finding in the twilight of their career.

[142] In the course of the hearing I indicated to Mr MN that on occasions a Review Officer may give consideration to reversing an unsatisfactory conduct finding, despite having concluded that a breach had occurred.

[143] It was carefully emphasised to Mr MN and Mr NH that in raising possibility of considering that option, I was not providing them with indication of outcome but rather clarifying the scope of the options available to a Review Officer. Review Officers will consider all options when looking at matters afresh as they are required to do.

[144] That approach is informed from the position that not every conduct breach demands a disciplinary response as emphasised in *Keene v Legal Complaints Review Officer* where it was observed that not every breach of the Rules will warrant disciplinary action.²⁵

[145] In *Wilson v Legal Complaints Review Officer*, the High Court noted that rules are to be applied as sensibly and fairly as possible.²⁶

[146] I have reflected carefully on the question as to whether the disciplinary objectives would be adequately met by a decision which reinforced the Committee's conclusion that there was no reasonable basis for Mr MN to have lodged the caveat but reversed the disciplinary sanction imposed by the Committee in consideration of the matters addressed at [138]–[141] above.

[147] Having done so, and with some reluctance considering Mr MN's record, I conclude that the Committee's disciplinary findings must stand.

[148] It is a serious matter for a lawyer to register a caveat (to protect their own interests) when there is no indication that Mr MN had reasonable grounds to form an assessment that a caveatable interest existed.

[149] I see no grounds which could persuade me to depart from the Committee's decision.

Costs

[150] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. Mr MN is ordered, pursuant to s 210(1) of the Act, to pay costs in the sum of \$1,200 to the New Zealand Law Society within 30 days of the date of this decision.

Enforcement of costs order

[151] Pursuant to s 215 of the Act, the order for costs may be enforced in the civil jurisdiction of the District Court.

²⁵ [2019] NZCA 559 at [23].

²⁶ [2016] NZHC 2288 at [43].

Anonymised publication

[152] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

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

DATED this 22nd day of December 2020

R Maidment
Legal Complaints Review Officer

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

Mr MN as the Applicant
Mr NH as the Applicants Representative
Ms RK as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society