

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Standards Committee

**BETWEEN**

**P and Q GP**

Applicants

**AND**

**FS**

Respondent

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

**DECISION**

**Introduction**

[1] Mr and Mrs GP have applied for a review of a decision of the Standards Committee to take no further action in respect of their complaint concerning the respondent Mr FS.

**Background**

[2] In November 2012 Mr and Mrs GP listed a residential property for sale with a real estate agent. The terms of the listing allowed Mr and Mrs GP to sell the property by private treaty. If however they were to sell the property to a purchaser who had been introduced to the sale through the real estate agency, the agency would be able to claim its commission on the sale.

[3] Mr JS was taken through the property by a real estate agent. Subsequent to that visit, he contacted Mr and Mrs GP and arranged to meet with them at Mr and Mrs GP's home. Mr and Mrs GP's home was located in close proximity to the home they were selling.

[4] Mr JS was accompanied at the meeting by his father Mr FS, a solicitor, and his brother. It is Mr FS who is the subject of the disciplinary complaint.

[5] Mr and Mrs GP maintain that they made it clear at the meeting with members of the FS family that they could only negotiate a deal if they were certain that the purchasers had not been introduced to the property by the real estate agent. Their margin of profit in the sale was modest. The price they would agree to accept on a private sale was considerably below what they could afford to sell at, if the sale was subject to a commission from the real estate agent.

[6] It is Mr and Mrs GP's position that they received confident assurance from Mr JS, and from Mr FS, that they had not learnt about the property through a real estate agent. Mr JS told them that the property had come to his attention when he was searching for an investment property on the TradeMe website.

[7] Mr and Mrs GP produced a blank sale and purchase agreement that was completed by Mr FS. Mr FS inserted some conditions into the agreement that needed to be satisfied. Those conditions, for the benefit of the purchaser, were standard conditions which allowed opportunity to the purchaser to make enquiries into some consent issues and to secure a LIM report. On satisfaction of those conditions, the agreement would become unconditional. No opportunity was provided to the vendors to obtain independent legal advice.

[8] The agreement became unconditional. The real estate agency learnt of the sale, and sought payment of its commission on grounds that it had introduced Mr JS to the property. The commission was paid.

### **Complaint**

[9] Mr and Mrs GP lodged a complaint with the New Zealand Law Society Complaints Service in July 2013. They submit that:

- Mr FS, when drafting the sale and purchase agreement, failed to make the agreement subject to the approval of their solicitor.
- Mr FS had advised them that his son had not been introduced to the property by the real estate agent.
- Mr FS failed to advise them of their right to take independent legal advice.

- He had completed the sale and purchase agreement on a form provided by the GPs, but should have been aware that the agreement was inadequate.
- They had suffered loss in the sum of \$30,000 (plus legal costs) as a consequence of Mr FS's actions.

[10] In response to the complaint, Mr FS submitted that:

- He had not misled the GPs.
- He was unaware that a real estate agency had been instructed to facilitate the sale.

### **Standards Committee decision**

[11] The Committee identified the issue to be determined as follows:

- Did Mr FS act for his son in the purchase of Mr and Mrs GP's property and mislead them by advising that his son had not been involved with the real estate agent or been introduced to the property by a real estate agent.

[12] In its decision delivered on 23 May 2014 the Committee determined to take no further action on the complaint. In reaching that decision the Committee concluded that:

- Mr FS was not acting for Mr and Mrs GP.
- He had no obligation or duty to them.
- The complaint raised no professional conduct issues.

[13] The Committee decided to take no further action on the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

### **Application for review**

[14] Mr and Mrs GP filed an application to review the Committee's decision on 18 June 2014. They submit that:

- The Committee failed to give sufficient weight to their evidence.
- Mr FS was, in the course of the transaction, acting for his son.

- Mr FS had contravened rules 10.2 and 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), in that he should not have communicated directly with Mr and Mrs GP and should have advised them of their right to take legal advice.

[15] In response Mr FS submits that:

- Mr and Mrs GP were aware of their ability to take legal advice.
- The sale and purchase agreement included a standard form warning that the parties should avail themselves of independent legal advice.
- He had no knowledge as to the involvement of the real estate agent.
- He was not acting in the capacity of a lawyer.

### **The role of the LCRO on review**

[16] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion it is appropriate for the LCRO to exercise particular caution before substituting his own judgment for that of the Standards Committee without good reason.<sup>1</sup>

### **The hearing**

[17] An applicant only hearing was attended by Mrs GP and her representative on 22 June 2015.

[18] At the conclusion of that hearing I made directions that a telephone conference was to be convened, so that Mr FS would have an opportunity to respond to various matters raised at the hearing, and in particular to allow him to give evidence as to his recollection of the events that transpired at the time the sale and purchase agreement was entered into.

### **Analysis**

[19] Mr and Mrs GP believe that Mr JS, assisted by his father Mr FS, failed to disclose to them that Mr JS had been introduced to the property by the real estate agent who had an authority to sell the property.

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<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

[20] Mr IT, the representative who appeared for Mr and Mrs GP at the hearing and assisted them in the preparation of their submissions, was the real estate agent instructed by Mr and Mrs GP. He confirmed that prior to the meeting attended by Mr and Mrs GP, he had visited the property with Mr JS and discussed at length with JS issues relating to the possibility of subdividing the property. Mr IT considered the FS' apparent, as reported by the GPs, disavowal of their knowledge of having dealt with him to be an unconscionable breach of faith.

[21] The agreement for sale and purchase records Mr JS as purchaser and it was against Mr JS that complaint was initially pursued. The GPs' initial approach to seeking resolution was to lodge a claim against Mr JS in the Disputes Tribunal. That claim was unsuccessful. Mr and Mrs GP consider that the decision delivered by the Disputes Tribunal was manifestly wrong, but advise that they did not have the financial resources to appeal the decision. Their attention then turned to Mr FS's involvement in the transaction.

[22] The complaints process established under pt 7 of the Lawyers and Conveyancers Act 2006 is a statutory regime which governs the process by which complaints against lawyers are managed. It is not a forum for parties to pursue civil claims.

[23] Any person may complain to the appropriate complaints service about the conduct of a practitioner. After completing inquiry into a complaint, a Standards Committee may elect to take no further action on the complaint, refer the matter to the Disciplinary Tribunal if it considers that the conduct may constitute misconduct, or make a finding of unsatisfactory conduct. A Committee can only make penalty orders, consequential upon a finding of unsatisfactory conduct. The ability of a LCRO to make penalty orders is also conditional upon a finding of unsatisfactory conduct.

[24] A disciplinary finding may follow if it is established that the conduct complained of constitutes misconduct or unsatisfactory conduct.

[25] Conduct which may engage findings of misconduct are defined in s 7 of the Act. Misconduct may arise in circumstances where the practitioner is providing regulated services (a professional context) or in circumstances where the conduct arises in a personal context.<sup>2</sup>

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<sup>2</sup> In a recent High Court judgment *A v Canterbury Westland Standards Committee 2 of the New Zealand Law Society* [2015] NZHC 1986 at [57] the Court noted that the misconduct provision

[26] For reasons discussed below, I do not consider that Mr FS was providing regulated services. For the conduct arising within a personal rather than professional context to meet the threshold of establishing a finding of misconduct, the behaviour must be such which would justify a finding that the practitioner was not a fit and proper person, or is otherwise unsuited to engage in practice as a lawyer.<sup>3</sup> That is a high threshold.

[27] I do not consider that the conduct complained of, if established, would meet the threshold necessary for establishing a finding of misconduct. The focus then is on whether the offending conduct constitutes conduct which can be deemed to be unsatisfactory.

[28] Unsatisfactory conduct is defined in s 12 of the Act, and provides as follows:

**12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms**

In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means—

(a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or

(b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—

(i) conduct unbecoming a lawyer or an incorporated law firm; or

(ii) unprofessional conduct; or

(c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or

(d) conduct consisting of a failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject (not being a failure that amounts to misconduct under section 7).

[29] Relevantly, a prerequisite for a finding of unsatisfactory conduct in three of the four circumstances provided in s 12 is an initial finding that the conduct occurred whilst

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requires that all conduct considered under s 7 of the Act must be either professional or private, there can be no gap or lacuna.

<sup>3</sup> Lawyers and Conveyancers Act 2006, s 7(1)(b)(ii).

the lawyer was providing regulated services. A finding of unsatisfactory conduct may be arrived at in circumstances where the lawyer is not providing regulated services, if the conduct constitutes a contravention of the Act or of any regulations or practice rules made under the Act that apply to the lawyer relating to the provision of regulated services.

[30] The conduct rule which is most directly engaged by the GPs' complaint, is rule 10, which provides that a lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings. Whilst argument could be made that the more wide ranging expressions of a lawyers obligations found in s 4 of the Act and in rule 2 (a lawyer's obligations to uphold the rule of law and facilitate the administration of justice) are engaged by the complaint, those expressions of broad principle are at best peripherally engaged by the complaint. It is rule 10 which has most relevant application to the complaint. Mr and Mrs GP contend that Mr FS was unprofessional in his dealings with them.

[31] An examination of the conduct involves then a two stage enquiry. Firstly, consideration as to whether Mr FS was providing regulated services. Secondly, consideration as to whether his conduct amounted to a breach of rule 10 of the conduct rules.

#### *Regulated services*

[32] It is necessary to consider in what capacity Mr FS attended the meeting at the GPs' home. If Mr FS's argument is accepted that he attended the meeting solely in the capacity of a support person for his son, many of the arguments that he incurred obligations to the GPs arising from his professional position as a lawyer, fall away.

[33] Regulated services refers to the provision of legal services.

[34] It is accepted by Mr and Mrs GP that Mr FS was not acting as their lawyer, and they are critical of the Committee's finding that Mr FS was not acting for them. That was never advanced as being their position.

[35] Mr FS says that he was not acting in his capacity as a lawyer at all, that he had attended the meeting as a support person, and that he had completed the sale and purchase agreement at the GPs' request, simply because they had asked him to.

[36] If argument is advanced that Mr FS was acting in the role of a lawyer for his son, and was providing regulated services then the obligations nevertheless owed to Mr and Mrs GP were limited. He was under no obligation to protect the GPs' interests.

[37] Subject to any overriding duties to the court, a lawyer's duty is to his or her client not the person on the other side of the dispute. The principle that a lawyer's duty is owed to his or her client alone was expressed by Cooke J in *Allied Finance and Investments Limited v Haddow & Co*:<sup>4</sup>

The relationship between two solicitors acting for their respective clients does not normally of itself impose a duty of care on one solicitor to the client of the other. Normally the relationship is not sufficiently proximate. Each solicitor is entitled to expect that the other party will look to his own solicitor for advice and protection.

[38] Mr FS did not owe the GPs any duty arising from his professional capacity as a lawyer, simply by virtue of the fact that he was a lawyer.

[39] It would however be unacceptable for a lawyer to attend a meeting in a professional capacity with the purpose of negotiating an agreement for sale of a property, in circumstances where the other party was legally represented, and the other party's lawyer was not present. Rule 10.2 provides that a lawyer acting in a matter must not communicate directly with the person whom the lawyer knows is represented by another in the matter. Mr and Mrs GP made it clear that they had a lawyer acting for them.

[40] But it is not the case that a lawyer's professional status precludes them from providing support to family members in their personal capacity.

[41] The first issue to examine is whether Mr FS held himself out at the meeting, to be acting in his professional capacity, or whether any objective examination of Mr FS's role in the meeting could lead to conclusion that he was holding himself out to be a lawyer.

[42] Mr and Mrs GP place considerable focus on the fact that Mr FS completed the sale and purchase agreement. They go further. They submit that Mr FS deliberately connived with his son, and concealed the fact that his son had met previously with the real estate agent in order to secure a financial advantage on the purchase.

[43] It is clear that the GPs were alerted to the fact that Mr FS was a lawyer, but I do not consider that Mr FS initially presented himself at the meeting as attending in his professional capacity. There is no evidence, and it is not advanced by Mr and Mrs GP,

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<sup>4</sup> *Allied Finance and Investments Limited v Haddow & Co* [1983] NZLR 22 (CA) at 24.



that Mr FS gave an initial indication that he was accompanying his son in any capacity other than that of a father providing support.

[44] Much is made by Mr and Mrs GP of the fact that Mr FS completed the sale and purchase agreement. They consider that it was unconscionable of Mr FS to complete the agreement, and reflective of his underhand approach to the transaction. Mr and Mrs GP submit that:

- They were disadvantaged by Mr FS completing the agreement.
- They were not advised by Mr FS that they should seek legal advice.
- Mr FS should have identified deficiencies in the agreement.
- The agreement was not made subject to the approval of the vendor's solicitor.
- Mr FS was obliged to advise the GPs that they should seek independent legal advice.
- Mr FS had a personal interest in the transaction as a trustee for one of the purchasing trusts.

[45] It is important to note that Mr and Mrs GP produced the agreement for sale and purchase at the meeting. Mr FS did not attend the meeting with the intention of playing an active role in the drafting of an agreement. If he had intended that to be the case, he would likely have brought an agreement to the meeting. It is reasonable to conclude, that Mr FS would not have contemplated that the parties would have been in a position where they would have been able to execute a sale and purchase agreement. This gives support to argument that Mr FS attended the meeting in the role of a support person for his son, not in his capacity as a lawyer.

[46] The fact that Mr and Mrs GP had taken steps to purchase, and have on hand a CCH agreement, gives clear indication that it was their intention that they would have the ability to complete an agreement with a private purchaser, if the opportunity arose. That would indicate that they had a sufficient degree of confidence in their ability to progress an agreement to the point where sale and purchase terms were confirmed in a standard agreement.

[47] Allegation cannot be fairly levelled at Mr FS that he was responsible for initiating the decision to execute the sale and purchase agreement. Mr FS was invited to

complete the agreement. He did so. Much is made of the fact that conditions were inserted into the agreement that were for the benefit of the purchaser, but there was nothing remarkable or unusual about the conditions in themselves, and they were typical of the type of conditions that commonly form part of a sale and purchase agreement.

[48] Inherent in Mr and Mrs GP's submission is argument that once Mr FS had agreed to complete the agreement, that he assumed at that point an obligation to ensure that their interests were protected. He should, says Mr and Mrs GP, have advised them of their right to take legal advice. He should have ensured that the contract was conditional upon them obtaining their own legal advice. He should, as he was acting in the role of a lawyer for his son, refrained from communicating with them.

[49] Those submissions, individually and considered collectively, are submissions which endeavour to disavow any degree of responsibility on Mr and Mrs GP's part, for the consequences of decisions that they were part of, and contributed to. They produced a sale and purchase agreement. They agreed to Mr FS completing the agreement. They were prepared to execute the agreement without taking the basic step of checking with their own solicitor. Their explanation for their actions is to submit that they placed reliance on Mr FS as he was a lawyer, and they placed confidence in him to protect their interests.

[50] I do not consider that Mr and Mrs GP can abrogate responsibility for the decisions they made, by argument that:

- Mr FS was acting in the role of a lawyer.
- Mr FS had obligations to protect their interests.
- The responsibility for management of their own affairs, was abrogated to Mr FS by virtue of the fact that he was a practising lawyer.

[51] Mr and Mrs GPs criticisms of Mr FS evolve in part, from the perspective that they consider that Mr FS, because he was a lawyer, owed particular duties to them. He did not. He attended the meeting as a support person for his son. The fact that he completed the agreement did not elevate his position to that of one where he was formally holding himself out to be a legal representative for his son. He did not record himself in the agreement as the purchaser's lawyer.

[52] I do not find that Mr FS was providing regulated services to his son.

*Breach of Rule 10*

[53] I am satisfied, for the reasons outlined above, that Mr FS did not breach his obligations to maintain proper standards of professionalism by assisting with the completion of the sale and purchase agreement.

[54] The second issue to consider is the question as to whether Mr FS knowingly and deliberately misled Mr and Mrs GP by failing to disclose that his son had had prior contact with the real estate agent.

[55] Mr and Mrs GP's complaints are underpinned by argument that Mr JS, abetted by Mr FS, intentionally misled them by deliberately disavowing knowledge of having been introduced to the property by the real estate agent.

[56] Mr IT, the real estate agent directly involved in the transaction, reports that he visited the GPs' property on 20 December 2012 with Mr JS. He says that during that visit he had lengthy discussions with Mr JS concerning potential opportunities to develop the property.

[57] There is suggestion that Mr JS, subsequent to meeting with the real estate agent, checked with the council as to whether the relevant council regulations allowed opportunity for the property to be developed. I have no direct evidence before me to confirm whether or not that was the case.

[58] Mrs GP's evidence was that none of the FS's took the opportunity to inspect the property that was for sale when they attended at her and her husband's home to discuss the purchase. That evidence was not challenged.

[59] Mr and Mrs GP argue that it presents as surprising that Mr JS would fail to recall that he had visited the property a few days earlier with the real estate agent, and had engaged in discussions concerning options for development. They say it presents as equally surprisingly, that a prospective purchaser, if they had not had an opportunity to peruse the property, would attend a meeting at the vendors' home which was located next to the property listed for sale, and not take an opportunity to look through the property.

[60] These apparent incongruities were the subject of enquiry in the Disputes Tribunal proceedings. The Tribunal concluded that it was not possible to establish to the appropriate legal threshold, whether Mr JS had misrepresented the position when he claimed to have had no recollection of being introduced to the property by the real estate agent.

[61] As noted, Mr and Mrs GP indicated that they considered the Tribunal decision to be wrong both in fact and law, but were unable to pursue an appeal.

[62] It must be emphasised that it is not the role of this Office to consider the conduct of Mr JS, but a discussion of Mr JS's level of engagement in the transaction, is necessary in order to address the GPs' argument that Mr FS was complicit in a misrepresentation they say was perpetrated by Mr JS.

[63] Mr and Mrs GP contend that it would have been inconceivable that Mr FS's son would not have discussed the property with Mr FS, and improbable that Mr FS would not have been aware of the extent of the agent's involvement.

[64] Mrs GP is insistent that she made enquiry of the FS's as to whether they had any involvement with the agent who had listed the property. She emphasises that her enquiry was forcefully made and in terms which left little opportunity for any possibility of misunderstanding. She says that she repeatedly emphasised that she and her husband would not be able to finalise a deal at the price agreed, if a commission had to be paid.

[65] Mr FS's response is to emphatically deny such discussions took place. He says that at various times during the meeting he had absented himself from the meeting. He is adamant that he was not privy to any discussions which traversed the issue as to whether his son had been introduced to the property by an agent.

[66] He rejects allegation that he should have been aware that his son had visited the property previously, and says that his son had compiled a list of properties to look at, that the GPs' property was not the only home that was being considered, and that he accompanied his son to provide family support, but was quite unaware of the extent of his son's previous enquiries. His role was that of an unengaged bystander, and only became more proactive when request was made of him to complete the agreement.

[67] When considering issues of contested evidence which involve credibility issues, before a finding is made that one party's evidence is to be preferred over another, the decision maker must be satisfied on the balance of probabilities that there are sound reasons to prefer the evidence of a particular party.

[68] When the issues of credibility engage attack on personal reputation, there must be strong evidence to support an adverse finding which may carry such serious consequences. Mr FS is drawn into the dispute, but it is Mr JS whose conduct is at the centre of allegation of misleading and deceptive behaviour.

[69] It is not possible at this distance to reach firm conclusion on the evidence provided, as to whether Mr FS was a party to discussions which specifically engaged enquiry as to whether Mr JS had previous involvement with the real estate agent.

[70] Mrs GP has resolutely advanced her position with conviction, but in the face of Mr FS's equally emphatic rejection of Mrs GP's position, I am unable to make a definitive finding on the contested issue.

[71] Argument was advanced that when enquiry was made of Mr FS subsequent to the claim for commission being raised, the response he provided, in as much as that response traversed his view on whether the real estate agent could reasonably pursue a claim for recovery of commission, assisted in establishing what Mr FS's understanding of the background was at the time of the meeting with the GPs. I do not consider that argument provides any helpful assistance in clarifying the contest between the GPs and Mr FS as to what transpired at the meeting.

[72] If criticism can be made of Mr FS, it is that it would have been prudent for him to have suggested that the agreement include a clause which allowed opportunity for the GPs to have their solicitor look over the agreement, but I do not consider that criticism carries sufficient weight to establish an unsatisfactory conduct finding. It is difficult to be certain as to the momentum that the GPs were bringing to the transaction, and the extent to which they were pushing to have an agreement concluded. Nor am I persuaded that allowing an opportunity for the GPs to have their lawyer consider the agreement would necessarily have materially changed the situation. The GPs were not alerted to the agent's claim for reimbursement of the commission until February 2013. If they presented the position to their lawyer, as they understood it to be, that there was no impediment to proceeding with a private sale, it is speculative to assume that their lawyer would have done anything other than confirm the agreement was in order.

[73] I conclude that a breach of Rule 10 has not been established.

### **Conclusion**

[74] I am satisfied that Mr FS was not providing regulated services when he attended the meeting at the GPs' home.

[75] To the extent that the disciplinary provisions of the Lawyers and Conveyancers Act can be engaged in circumstances where a lawyer is not providing regulated services, I am satisfied that no professional breaches have been established.

[76] I see no basis to depart from the Committee's decision.

**Decision**

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

**DATED** this 27<sup>th</sup> day of August 2015

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**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:

P and Q GP as the Applicants  
IT as the Applicants' Representative  
FS as the Respondent  
WP, SG, TS and UV as Related Persons under s 213  
The Standards Committee  
The New Zealand Law Society