

**CONCERNING**

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the Auckland Standards Committee 1 of the New Zealand Law Society

**IN THE MATTER OF**

**MR DINGWELL**  
of Auckland  
Applicant

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

**DECISION**

[1] The Auckland Standards Committee 1 commenced an inquiry into the conduct of Mr Dingwell in respect of his attempted attendance with another practitioner at a meeting of the Auckland Complaints Committee 1 on 14 October 2008. The allegations are that Mr Dingwell's actions in attempting to attend that meeting were in breach of his professional obligations. An investigator was appointed and provided a report to the Standards Committee on 10 June 2009. That report was duly provided to Mr Dingwell. The Committee considered the report and other material provided by Mr Dingwell and resolved pursuant to s 152(2)(a) of the Lawyers and Conveyancers Act to refer the matter to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[2] Mr Dingwell seeks a review of that decision. In LCRO 175/09 I concluded that jurisdiction to review a decision of a Standards Committee to prosecute a matter existed and as such the argument in this review focussed on whether such a review application should be granted in this case.

[3] Mr Dingwell provided voluminous submissions and hundreds of pages of additional material in support of his application for review. Mr Dingwell was heard by me in person on 3 December 2009. There was no appearance by the Standards Committee and it was indicated on the Committee's behalf that it would abide by my decision in this matter.

[4] At the heart of Mr Dingwell's submission was the allegation that the resolution to place this matter before the Disciplinary Tribunal was reached on a fundamentally flawed basis and that he had been improperly singled out for prosecution due to mala fides on the part of the Committee, or its members, or members of the Complaints Service, towards him.

[5] I note that another practitioner faces similar charges to Mr Dingwell in respect of the conduct at the meeting of 14 October 2008; however that practitioner has not applied for a review and I consider this matter only in so far as it relates to Mr Dingwell.

### **Review of prosecutorial decision**

[6] Mr Dingwell sought to rely on the doctrine of selective prosecution. That is a doctrine of United States origin which has not been recognised in New Zealand courts. However, its general thrust is that if a prosecution is improperly motivated then the prosecution can be properly struck out on that basis. In particular where it can be demonstrated that a prosecuting authority has generally exercised its discretion not to prosecute in a particular manner and its discretion to prosecute in the instant case can only be explained by some bad faith ground, then the doctrine of selective prosecution may result in the prosecution being struck out. Examples of such improper motivation include prosecution on the basis of some prohibited ground of discrimination (*US v Armstrong* 116 s Ct 1480 (1996)) and retribution for free speech / union membership (*US v Berrios* 501 f 2d 1207 (1974)).

[7] Selective prosecution is an essentially American doctrine based on a breach of rights or protections conferred by that country's constitution (including due process, freedom from discrimination, and free speech). See *Armstrong* at para 2. It should be noted that even under that doctrine the very broad prosecutorial discretion is recognised and unless there is clear evidence to the contrary a court will presume that a prosecutor has properly discharged its duties: *US v Chemical Foundations Inc* 272 US 1 (1926).

[8] The idea that a prosecutor's discretion is subject to "constitutional constraints" is a concept foreign to New Zealand law, and it is not appropriate for this tribunal to import it. However, the arguments made by Mr Dingwell can be framed in terms recognised principles of New Zealand law as regards the basis upon which a decision to prosecute might be reviewed. As such I will consider whether there is a proper ground for reviewing the decision to place these matters before the Tribunal on that basis.

[9] I observe the general stance in common law jurisdictions is to take a very restrictive approach to the reviewability of a decision to prosecute since “the prosecutor’s function is merely to do the preliminary screening and to present the cases, and that the decisions that count are made on the basis of the trial” (*Sankey v. Whitlam* (1979) 53 ALJR 11, 38, 21 ALR 505 561; also *Saywell v Attorney-General* [1982] 2 NZLR 97; *Bow v Police* (1989) 5 CRNZ 276; and *Thompson v Attorney-General* [2000] NZAR 583. I also recognise that the importance of not lightly interfering with the exercise of such a discretion is amplified in the case in that the decision under review was made by a body of Mr Dingwell’s professional peers and informed by lay membership. There would have to be a clear error or a procedural flaw before I would interfere with the exercise of the discretion of such a body on review.

[10] It should, however, also be recognised that this presumption against the reviewability of decisions to prosecute has been somewhat ameliorated in recent times. See for example the comments of Richardson J in *Kumar v. Immigration Department* [1978] NZLR 553, 558 (CA). More recently see *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 and *Down v Van der Wetering* [1999] 2 NZLR 631; [1999] NZAR 307, also *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA).

[11] It must be stated at the outset that it will only be in exceptional cases that a decision to prosecute will be reversed on review. The cases cited above indicate the kinds of basis upon which a decision to prosecute might be revisited. They include situations in which the decision to prosecute was:

- [a] significantly influenced by irrelevant considerations,
- [b] exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process),
- [c] exercised in a discriminatory manner,
- [d] exercised capriciously, in bad faith or with malice.

I will consider Mr Dingwell’s arguments on this basis.

### **Submissions of applicant**

[12] Mr Dingwell argued that he had been treated differently than other practitioners who had been complained against or had otherwise engaged in conduct which ought to properly be the subject of professional scrutiny. He raised a number of facts in this regard including:

- [a] He had complained to the Society about the conduct of a member of the Complaints Committee in respect of the incident of 14 October 2008 and

the Standards Committee which considered his complaint resolved to take no further action against that practitioner. Mr Dingwell argued that on the statements of witnesses present at the incident this was irrational.

- [b] At a function involving lawyers and judiciary a lawyer was involved in a fight and the Society appears to have taken no action against that lawyer.
- [c] That the Society Complaints Service did not require a practitioner Mr Dingwell had complained about to answer allegations of lying.
- [d] Mr Dingwell referred to a number of other instances of what he regarded as conduct of other lawyers which was more serious than the conduct alleged that is to be prosecuted before the Tribunal.

### **Consideration**

[13] In respect of the decision of the National Standards Committee not to prosecute or otherwise proceed against the practitioner who was a member of the Complaints Committee and involved in the incident, I observe that Committee appeared to proceed on the complaint of Mr Dingwell alone and that no other material was submitted to or considered by the Committee. Obviously that decision of the Committee is not under review. It is also the case that for various reasons which may not be apparent to the onlooker the conduct of lawyers will be treated in different ways. This is not a good ground for reviewing the decision to prosecute.

[14] Some of the other matters referred to by Mr Dingwell (such as the lawyer being involved in a fight at a function) were based on entirely anecdotal evidence and it would be inappropriate for me to place the considerable weight on it that would be necessary to make a finding of bad faith suggested.

[15] Mr Dingwell provided a large amount of documentation in respect of a complaint made against him by another practitioner, and a cross complaint made by him against that practitioner. He alleged that the practitioner had lied in his complaint against Mr Dingwell. The complaints were lodged and considered under the Law Practitioners Act 1982 regime. On 8 October 2008 the Professional Standards Director informed the parties that on a review of the matter the file would be closed without further action. Mr Dingwell argued that this demonstrated inconsistency because in that case the Society (albeit the Auckland District Law Society under the predecessor framework) had failed to investigate allegations made by him against the other practitioner. On reviewing the information I do not agree that the file shows any inappropriate exercise of discretion or

underlying discrimination. The decision of the Professional Standards Director took into account the overall circumstances between the parties and concluded that there was no need to proceed further in respect of either practitioner. This was a reasonable conclusion to reach. I do not consider that this supports Mr Dingwell's assertion that the Society or the Standards Committee has exercised its prosecutorial discretion in a discriminatory or inappropriately selective manner.

[16] Underlying these arguments was the suggestion (which was made express at the hearing) that Mr Dingwell had been singled out for prosecution because he is foreign and not part of the "establishment". This can be framed as an argument that the decision of the Committee was made on the basis of discriminatory grounds. While this would be a ground for review if it were established, I do not consider that Mr Dingwell presented any convincing evidence that this is the case.

[17] In referring to other actions (or inactions) of the Society Mr Dingwell may have been seeking to establish his argument of selective prosecution. I have noted that there is no such doctrine under New Zealand Law. As such the references to the wider conduct of the Society in dealing with complaints is of no significant relevance. I do not consider that Mr Dingwell's comparisons of his treatment with the treatment of other lawyers established discrimination of itself. To make such a finding, cogent evidence that the Society or the Committee made decisions based on discriminatory grounds would need to be produced. The material presented by Mr Dingwell does not approach that threshold.

[18] Part of Mr Dingwell's submission was the argument that the conduct in question was patently not of a nature to warrant putting the matter before the Tribunal and therefore the only explanation of such a course of action was a bad faith motivation. In making this submission Mr Dingwell went through the witness statements which were made for the purposes of the investigation. He emphasised those aspects of the statements in which his conduct was least objectionable, and the conduct of members of the Society and Committee were most objectionable.

[19] I have read and considered the witness statements referred to. It is clear that there are substantial disagreements about not only the events themselves but also about the demeanour of the parties involved. It is not appropriate for me to prefer one version of the events over the other on this review. On the basis that the version of events that places Mr Dingwell in the worst light is accepted as accurate there is clearly a basis for placing this matter before the Tribunal because either that a finding of unsatisfactory conduct might be made, or a finding of misconduct might be made.

[20] Mr Dingwell's argument could also be construed as one alleging that the decision of the Committee to put the matter before the Tribunal was manifestly unreasonable and failed to take into account the reasons that he put before the Committee as to why the matter should proceed no further. Obviously had the Committee accepted the points made by Mr Dingwell the matter would have proceeded no further, however their rejection of those matters and decision to proceed could not be seen as irrational or unreasonable. It was based on the existence of disputed facts which gave rise to a prima facie case against Mr Dingwell of misconduct or unsatisfactory conduct.

[21] Mr Dingwell also argued that the decision to put the matter before the Committee was a poor policy decision which did not uphold the purposes of the regulatory framework. I do not consider that to be a proper ground for review. While a prosecution taken for collateral purposes unrelated to the objectives of the statute in question would be subject to review, I have not found any collateral purpose to exist in this case. The question of whether a prosecution is in the public interest and/or would promote the purposes underpinning professional regulation is for the Committee to make and would be revisited on review only on the clearest grounds.

[22] Mr Dingwell's objections extended to criticisms of members of the Standards Committee as dishonest and to members of the Complaints Service as holding "fascist" beliefs. I note that this added nothing to the arguments of Mr Dingwell.

[23] I observe that Mr Dingwell has repeatedly alleged that the process of the Committee is essentially corrupt. It is also the case that consideration of the conduct of Mr Dingwell also involves consideration of the conduct of members of a Standards Committee. I consider that the fact that the conduct of the Committee and its members is raised by Mr Dingwell is a reason which weighs in favour of having the matter considered by the Tribunal rather than a Standards Committee of coordinate jurisdiction.

[24] Mr Dingwell made various submissions in respect of the conduct of the investigation into this matter and in respect of the process of the Committee. One such allegation was that he has never been reasonably put on notice of the nature of the allegations against him. I did not find the points he made persuasive. Mr Dingwell confused the investigatory process with that of prosecution. When a matter is to be heard by a Tribunal (whether the Standards Committee or the Disciplinary Tribunal) the allegations must clearly be put. In the case of a matter brought before the Tribunal that will be by the formal laying of charges: reg 5 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008. When the matter is under investigation, while it may be appropriate to indicate the events that are being investigated, there is no

obligation to set out any particular allegation. It is self evident that this may be impossible prior to the conclusion of the investigation. Mr Dingwell was put on notice as to the nature of the events under investigation by a letter from the Investigator to Mr Dingwell of 6 January 2009.

[25] In any event when the Standards Committee resolved to hear this matter on the papers it provided Mr Dingwell with a notice of hearing which invited him to make submissions concerning the issues raised by the investigation that had been completed (an a copy of the report had been provided to him) The notice of hearing invited submissions in respect of "your conduct leading up to, at and after the meeting of Complaints Committee 2 of ADLS on 14 October 2008". In all of the circumstances Mr Dingwell was fairly put on notice of the matters being considered by the Standards Committee.

[26] Mr Dingwell also submitted that it was inappropriate for a member of the New Zealand Complaints Service to continue to provide support to the Standards Committee that considered this matter in light of the fact that he was a witness to the incident under examination. It should be noted that none of the people who were witnesses to or involved in the incident were present when the Committee deliberated on this matter and resolved to put it before the Tribunal. As such, in so far as this is an allegation of bias or apparent bias it is unsupported.

[27] I do not consider the fact that administrative tasks may have been undertaken by a person who was present at the incident is fatal. While it was open to the Complaints Service to refer the matter to a Committee which was administered outside of Auckland the failure to do this does not affect the validity of the Committee's decision. Other than a general allegation of inappropriateness and the suggestion that the Law Society as a whole was acting wrongly Mr Dingwell did not point to any particular prejudice that arose from this.

[28] I have dealt with what I understood to be the key arguments of Mr Dingwell's submissions on his application. Mr Dingwell's arguments were wide ranging and somewhat unstructured. He also sought to draw in numerous other matters regarding the conduct of practitioners who had no involvement in the matter currently under consideration and how the Society had dealt with this (such as the treatment of a further complaint by Mr Dingwell against a practitioner by a letter of the Society dated 5 November 2009). I have read all of the submissions and correspondence of Mr Dingwell and reviewed all of the documentation provided to this office. I do not consider that any of the other material raised demonstrates a ground (whether taken alone or

taken together with other matters raised) to overturn the decision of the Standards Committee to put this matter before the Tribunal.

[29] Mr Dingwell's application for review is declined.

### **Costs**

[30] In light of the fact that he has been unsuccessful in his application for review it is appropriate that he bear the costs of the conduct of this review. I observe that at short notice an earlier scheduled hearing of this matter was abandoned due to Mr Dingwell's unavailability. He stated that he was unaware that the matter had been scheduled on the stated day and had not agreed to that date. I had indicated that he should address whether costs should flow from that rescheduling. In all of the circumstances I will not take that rescheduling into account in the costs awarded.

[31] Mr Dingwell provided voluminous information and submissions in this matter which I have reviewed. The matter was heard in person. He also put forward arguments based on the law of the United States, but not in respect of established grounds for reviewing a prosecutorial decision under New Zealand law. In light of these matters I consider this to have been a review of average complexity. I take into account that this was a review of a determination to prosecute rather than a final determination.

[32] In accordance with the Costs Order Guidelines of this office an order of costs against Mr Dingwell in favour of the New Zealand Law Society in the sum of \$1600.00 is appropriate.

### **Decision**

The application for review is declined pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Auckland Standards Committee 2 is confirmed.

### **Order**

Mr Dingwell is to pay \$1600.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

**DATED** this 15<sup>th</sup> day of December 2009

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Duncan Webb  
**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 Dingwell as Applicant  
The Auckland Standards Committee 1  
The New Zealand Law Society