

**CONCERNING**

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

**AND**

**CONCERNING**

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

**BETWEEN**

**DN**

Applicant

**AND**

**EO**

Respondent

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

**DECISION**

**Introduction**

[1] Mr DN has applied for a review of a decision by the Standards Committee dated 7 August 2013 in which the Committee decided to take no further action on Mr DN's complaint against Mr EO pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

**Background**

[2] Mr DN applied for a licence to act as a real estate agent. Any such application is publicly advertised and objections invited pursuant to s 39 of the Real Estate Agents Act 2008 (REAA).

[3] Mr EO wrote to the Real Estate Agents Authority (the Authority) objecting to it granting Mr DN a licence for reasons relating to his views on Mr DN and his conduct when he was in practice as a lawyer.

[4] Mr DN complained to the New Zealand Law Society (NZLS) about Mr EO having raised an objection, and the grounds on which his objection was raised, saying it was time-wasting and vexatious. He considers it was inappropriate for Mr EO to have

disclosed information that was personal to Mr DN, which had come into Mr EO's possession only because of his involvement in NZLS.

### **Standards Committee process**

[5] There is no evidence on the Standards Committee file of NZLS sending Mr DN's complaint to Mr EO, of Mr EO being invited to respond, or of him providing any response in the course of the Committee's process.

[6] The Committee considered the complaint, which included Mr EO's objection. It formed the view that Mr EO could have simplified matters by referring the Authority to decisions by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) and the High Court relating to orders striking Mr DN's name from the roll of barristers and solicitors, rather than expressing his personal opinions. In all the circumstances, however, the Committee decided that further action on Mr DN's complaint was unnecessary or inappropriate.

### **Review application**

[7] Mr DN objects to the Committee's decision on the basis that it should have inquired into Mr EO's conduct, which he believes was dishonest and improper. He considers the Committee's decision was wrong, and that the Committee turned his complaint against him. He wants a "proper investigation" into Mr EO's conduct, including him being required to provide his file, and for Mr EO to be brought before the Tribunal on charges.

### **Role of LCRO on Review**

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

### **Scope of Review**

[9] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

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

**Review hearing**

[10] Mr DN attended a review hearing in [City]. Mr EO was not required to attend, and the review hearing proceeded in his absence.

**Further information**

[11] As there is no evidence of the Committee having invited a response from Mr EO in the course of the complaint process, he was given the opportunity to reply in the course of this review, by way of a request from this Office for further information made under s 207(1) of the Act.

[12] Mr EO filed a short submission saying he considered nothing turned on him not having been given the opportunity to provide a reply to the Committee. He relied on the plain wording of his objection under the REAA, said he was not providing “regulated services” when he lodged the objection and that he, like any other member of the public, was entitled to make an objection to Mr DN being issued with a licence under the REAA. He considered that the information he had provided in his objection was relevant to the question of whether or not Mr DN should be issued with a licence under the REAA.

[13] Mr EO’s email was provided to Mr DN for his comment. He considers the evidence supports a finding that NZLS did not properly consider his complaint. Mr DN maintains that the proper outcome of this review is for Mr EO to be brought before the Tribunal on a charge laid by this Office. He objects to Mr EO being allowed the opportunity to “litigate this matter after the hearing has closed”, and says his comments constitute “prima facie evidence that the Law Society failed to do its job properly and were biased in favour of EO”.

**Review issues**

[14] Pursuant to reg 9 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, the Complaints Service must take certain steps when a complaint is received, including providing a copy of the complaint to the person to whom the complaint relates and advising that person of his right to make a written submission to the Committee. In this case, as mentioned above, there is no evidence that was done.

[15] That procedural defect has been rectified on review. Nothing material arises from the information provided by Mr EO, and there is no prejudice to Mr DN arising from his late submission in the course of this review. In all the circumstances, I can see nothing untoward in Mr EO having adopted the Committee’s reasoning after the event. The

question was, and still is, whether Mr DN's complaint identified any breach of professional standards by Mr EO. His submission does not change the facts.

[16] The failure to comply with reg 9 is, however, the subject of a recommendation to NZLS pursuant to 213(1)(b) of the Act. The recommendation is that the NZLS ensure the Complaints Service processes comply with reg 9. That aspect of the matter will receive no further attention on review.

[17] The question on review is whether there is good reason to depart from the Committee's decision. That question is to be determined with reference to whether Mr EO's conduct fell below a proper professional standard.

[18] I have considered all of the information available on review, including Mr DN's submissions at the review hearing, and the further information provided by the parties. For the reasons set out below, the Committee's decision to take no further action is confirmed on review.

## **Facts**

[19] Mr EO's submission to the Authority was made in the following terms:<sup>2</sup>

1. I am assuming that the applicant is the same as the [DN] who is no longer able to practise law as a result of being struck off by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal for various misdemeanours. This alone should be sufficient to establish that he is not a fit and proper person to hold a salesperson's license.
2. I have more than a passing interest in this matter. It is because I was a member of the Council of what was then the [X] District Law Society when Mr DN applied for permission to practise on his own account in [Town]. This would have been in either 1995 or 1996, the exact year I cannot recall. I was one of two people who interviewed Mr DN. From that I formed the impression that he just did not have what it would take to practise on his own and therefore his application to do so should be declined. However, when it came to a vote at the full council meeting permission was granted to him with my being the only one voting against it. On many occasions since then I have wished that Mr DN had been denied the opportunity to practise on his own both on account of the poor image that he gave of the legal profession, not to mention the hundreds of thousands of dollars that was expended by the Law Society in taking disciplinary action against him.

[20] Mr DN takes issue in two particular respects, he says:<sup>3</sup>

- (a) He was interviewed by three people, not two as Mr EO represents.
- (b) The Law Society did not spend "hundreds of thousands" of dollars taking disciplinary action against him.

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<sup>2</sup> Notice of Objection to issue of a Licence, Real Estate Agents Act 2008, s 38.

<sup>3</sup> Email DN to NZLS (11 July 2013).

[21] The first of those aspects of concern to Mr DN, whether the interview panel comprised two or three people, is trivial.

[22] The second aspect, the level of costs incurred by NZLS in taking disciplinary action against Mr DN, is a question that may never be accurately quantified. The only reliable source of information is NZLS itself, and there is no evidence from that organisation. Mr EO's statement about NZLS's costs can best be described as rhetoric. As rhetoric does not equate to reasoned argument, the objection undermines itself for a lack of rigour. Logically, that aspect of it should not trouble Mr DN.

[23] In making the objection Mr EO was speaking for himself. He was not providing regulated services. His conduct is not of a standard that could fall within the definitions of misconduct under s 7 of the Act, and does not fall within the definitions of unsatisfactory conduct under s 12(a) or (b). Section 12(d) is irrelevant. The only part of the definition of unsatisfactory conduct that could apply is s 12(c) which says:

... 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);

[24] I have therefore considered the Act, regulations and practice rules made under it to ascertain whether Mr EO's conduct may have contravened any of those professional standards.

### **Conduct and Client Care Rules**

#### *Rule 2.3*

[25] As the objection process is a legal process under the REAA, I have considered rule 2.3 and whether Mr EO may have been using the objection process for an improper purpose. Rule 2.3 says:<sup>4</sup>

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, interests, or occupation.

[26] That rule appears to address the conduct Mr DN complains of because objection to an entitlement to hold a real estate agent's licence can only be made on grounds limited by statute under s 40 of the REAA. The objection process is therefore a legal process to which rule 2.3 applies. The statutory grounds for objection include whether the applicant

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<sup>4</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

“is a fit and proper person to hold a licence”.<sup>5</sup> Those are the same words that apply when consideration is given to whether a lawyer may be admitted as a barrister and solicitor of the High Court under the Act,<sup>6</sup> and is eligible to hold a practising certificate under the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008.<sup>7</sup>

[27] As Mr DN was struck off the roll of barristers and solicitors on the basis that he no longer fulfilled the criteria for eligibility, including fitness and propriety, there was a legitimate basis on which to raise objection under s 40 of the REAA. Whether the criteria were equivalent was a matter for the Authority to determine.

[28] However, the fact that there was a legitimate basis for an objection does not preclude the possibility that Mr EO’s motives could have been impure. Rule 2.3 is a precaution against lawyers, whether providing regulated services or not, using legal processes for the improper purposes of causing unnecessary embarrassment, distress, or inconvenience to another person’s reputation, interests, or occupation.

[29] The next question is whether, objectively, improper motives can be discerned from Mr EO’s objection.

[30] Mr DN voiced a range of concerns over the propriety of Mr EO’s conduct, the essence of which was that Mr EO wanted to stop Mr DN from having any kind of career, including in real estate sales. Aside from Mr DN’s assertions, no tangible evidence of any broader campaign by Mr EO is available on review.

[31] The primary impediment to Mr DN’s arguments is the seemingly insurmountable obstacle presented by the Tribunal decision which records adverse findings about his fitness and propriety to be a lawyer. The Committee rightly observed that Mr EO could have avoided criticism by simply drawing that decision to the Authority’s attention.

[32] As Mr EO went further, it is necessary to analyse his objection more closely.

[33] Putting rhetoric aside, Mr EO’s objection is an expression of his opinion that the Authority should not grant a licence to a person who has been found unfit to practice law, that his early instincts about Mr DN were right, and that subsequent events have vindicated his concerns.

[34] Whether Mr EO’s concerns are valid or not for the purposes of the REAA is a question for the Authority, rather than this Office, to determine. I note, however, that

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<sup>5</sup> Real Estate Agents Act 2008, s 36(1)(c).

<sup>6</sup> Lawyers and Conveyancers Act 2006, s 55.

<sup>7</sup> Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008, reg 4.

consumer protection and promotion of public confidence are statutory purposes shared by s 3(1) of the REAA and s 3(1)(a) and (b) of the Act.

[35] I am unable to discern an improper purpose from a close, objective reading of Mr EO's objection. Mr EO's objection represents his opinion. Mr EO's objection may, in fact, have caused embarrassment, distress, or inconvenience to Mr DN's reputation, interests, or occupation. However, the thrust of the Tribunal's decision, and the objection processes under the REAA, are to protect the public rather than the lawyer or would-be agent concerned. In both cases any harm to the lawyer or would-be agent is to be balanced by the need to protect consumers and maintain public confidence.

[36] Mr EO's objection is based on his experience of Mr DN in practice as a lawyer. He and the Tribunal consider Mr DN was not a fit and proper person to be in practice as a lawyer. The test is phrased in the same way as that which must be met to be licensed as an agent. While Mr EO may have been frustrated by the history of Mr DN's practice and his removal therefrom, his objection does not suggest that he was motivated by a groundless desire to cause unnecessary embarrassment, distress or inconvenience to Mr DN's reputation, interests or occupation. In the absence of any discernible evidence of impropriety in his purpose, Mr EO's conduct cannot be said to have contravened rule 2.3.

### **Decision**

[37] I have considered the Act, rules and practice rules made under it and have been unable to identify a contravention by Mr EO of any of those. In the circumstances, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the Standards Committee's decision is confirmed.

**DATED** this 31<sup>st</sup> day of August 2015

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**D Thresher**  
**Legal Complaints Review Officer**

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

Mr DN as the Applicant  
Mr EO as the Respondent  
The Standards Committee  
New Zealand Law Society