

LCRO 26/2015

**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

**BETWEEN**

**PD**

Applicant

**AND**

**JL**

Respondent

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

**DECISION**

**Introduction**

[1] Mr PD has applied for a review of a decision by the Area Standards Committee dated 15 December 2014, in which the Committee decided to take no further action on Mr PD's complaint.

**Background**

[2] Mr PD is one of four sons of his father, Mr PD senior. Mr JL acted for Mr PD senior. In late 2006 Mr JL drafted a final will which Mr PD senior executed on 18 December 2006.

[3] Mr PD senior passed away, and the terms of the will were contested by the four sons in the Family Court (the Family Court proceeding). The Family Court decision was taken on appeal to the High Court (the appeal). The appeal was settled between the four sons by Deed of Settlement dated 22 December 2011 (the Deed). Each son had his own lawyer represent and advise him in relation to the Deed. Mr PD, unfortunately, remained dissatisfied with the treatment he had received under his late

father's will, and considered Mr JL should be held responsible for the way his father's will affected him.

[4] On 14 May 2014 Mr PD made a complaint to the New Zealand Law Society (NZLS).

### **Complaint**

[5] Mr PD's primary concern relates to errors he perceives in Mr JL's drafting of Mr PD senior's will, and relies for support on emails sent by one of his brothers before the will was executed in December 2006. He also expressed concerns about Mr JL not having enforced the terms of the Deed.

### **Standards Committee**

[6] The Committee considered Mr PD's complaint, and an affidavit filed by Mr JL in the Family Court proceeding. Mr JL's response acknowledged that there were minor errors in the will. However, he says those concerns were resolved by the sons having executed the Deed, and were not of the same kind or substance that Mr PD's complaint was concerned with.

[7] The Committee identified two key issues:

- (a) Did Mr JL's drafting of the will affect the final outcome?
- (b) If so, was Mr JL guilty of negligence or incompetence in his professional capacity to such a degree as to reflect on his fitness to practice as a barrister or solicitor or as to tend to bring the profession into disrepute?

[8] The Committee considered its jurisdiction over the events that were the subject matter of Mr PD's complaint. Referring to s 351 of the Lawyers and Conveyancers Act 2006 (the Act) the Committee determined the complaint on the basis that further action was not necessary. The Committee's conclusion was that Mr JL's conduct was not of a type that could have been the subject matter of proceedings of a disciplinary nature under the legislation that regulated lawyer conduct at the time, the Law Practitioners Act 1982 (LPA). In essence, the conduct was not serious enough to attract an adverse disciplinary outcome, so further action was unnecessary.

[9] Mr PD disagreed, and applied for a review.

## Review application

[10] Mr PD's application for review says he is still "missing out" under the will, and cannot understand how Mr JL is, apparently, not accountable for the errors in the will. He remains unsettled by the possibility that not all of the mistakes Mr JL may have made have been identified and rectified.

## Nature and Scope of Review

[11] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>1</sup>

... 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.

[12] More recently, the High Court has described a review by this Office in the following way:<sup>2</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[13] Given those directions, the approach on this review 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.

<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>2</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

*Review issue*

[14] As Mr JL's conduct occurred in 2006, a complaint about it can only be made if Mr PD is alleged to have been guilty of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the LPA. The question on review, therefore, is whether Mr PD's complaint identifies conduct by Mr JL that could have been the subject of proceedings of a disciplinary nature pursuant to the LPA.

[15] Having reviewed all of the information available, and applied s 351 of the Act, I conclude that no complaint could be made under the Act about Mr JL's conduct in 2006. Any concerns about enforcement of the terms of the Deed are not Mr JL's responsibility.

**Analysis**

[16] The Committee correctly identified the jurisdictional hurdle presented by the transitional provisions of the Act, and s 351 in particular, which says:

If a lawyer ... is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the complaints service established under s 121(1) by the New Zealand Law Society.

[17] The relevant standards in 2006 were contained in ss 106 and 112 of the LPA. The Committee identified the standard in s 106(3)(c), which calls for a two-stage assessment of whether the practitioner has been guilty of negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practice as a barrister or solicitor or as to tend to bring the profession into disrepute. The Committee appears to have correctly identified the relevant standard. None of the other standards set out in ss 106 and 112 readily apply on the present facts.

[18] Mr PD's application for review does not traverse any reasons targeted towards the jurisdictional point. His complaint, broadly speaking, is a response to the treatment he received under the will. What Mr PD senior chose to do, and the decisions he made, cannot be attributed to Mr JL. Mr JL's role was to draft the will in a way that gave effect to the intentions Mr PD senior expressed to him.

[19] Mr JL was a witness in the Family Court proceeding. He was not a party to the proceeding or the Deed. Mr PD confirmed by signing the Deed of settlement that all of his disputes with his brothers were resolved. There is no reason to believe the

Deed would have, or could have, resolved any concerns Mr PD had over Mr JL's conduct, and whether he had met his professional obligations to Mr PD senior.

[20] Mr PD, the complainant, was not Mr JL's client. Fundamentally, Mr JL's obligations to Mr PD were to treat him with respect and courtesy, and to generally maintain proper standards of professionalism in his dealings with him. There is no evidence to suggest Mr JL failed in those obligations. Mr PD's complaint, however, is that there were significant deficiencies in the services Mr JL provided to his client, Mr PD senior, which leads to the application of the test in s 106(3)(c).

[21] The first stage of the test in s 106(3)(c) is whether Mr JL was guilty of negligence or incompetence in his professional capacity. The answer to that is guided by what Mr PD senior retained Mr JL to do.

[22] It is fair to say that Mr JL had a duty to draft the will in a way that gave effect to the intentions expressed by Mr PD senior. While the sons were able to satisfy the Family Court that there were errors in the will that needed rectification, that is not the same as saying Mr JL's drafting did not accord with Mr PD senior's instructions to him at the time he gave them. There is no sufficiently clear evidence to prove that Mr JL did not follow the instructions Mr PD senior gave him, and evidence to the contrary. There is insufficient evidence to confidently say Mr JL's drafting of Mr PD senior's will was negligent or incompetent.

[23] The errors, such as they were, were minor and made on only one occasion. Lawyers are human. They can make mistakes. The errors were not to such a degree as to reflect on Mr JL's fitness to practice as a barrister or solicitor. While the preference is that lawyers do not err, there would have to be more serious or repeated errors before Mr JL's drafting might tend to bring the profession into disrepute.

[24] On the evidence available on review, the conjunctive test in s 106(3)(c) is not met. While Mr JL retains a sense of dissatisfaction with the treatment he received under the will, the evidence of Mr PD's conduct could not give rise to the commencement of proceedings of a disciplinary nature under the LPA. Section 351 therefore prevents a complaint about that conduct being made. The Committee's decision to take no further action is therefore correct.

**Decision**

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

**DATED** this 22<sup>nd</sup> day of June 2016

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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 to be provided to:

Mr PD as the Applicant  
Mr JL as the Respondent  
Mr BA as the Related Person  
Area Standards Committee  
The New Zealand Law Society