NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 38

LCDT 009/12

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER OF **PAUL GREGORY LOGAN,** Lawyer, of Wellington

CHAIR

D J Mackenzie

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr J Clarke

Mr C Rickit

Mr W Smith

HEARING at Wellington on 6 and 7 November 2012

REPRESENTATION

Mr J Upton QC, for the Standards Committee

Mr J Marshall QC, for the Respondent

RESERVED DECISION OF THE TRIBUNAL ON PENALTY, COSTS AND SUPPRESSION

Introduction

[1] Mr Logan faced two charges against him laid by Wellington Standards Committee No. 2, following investigations commenced in 2010. Both charges relating to events prior to the introduction of the Lawyers and Conveyancers Act 2006, on 1 August 2008.

[2] The first charge alleged misconduct arising from certain matters in relation to an error in the will of a deceased client, and in the alternative, negligence or incompetence reflecting on fitness to practise or as to tend to bring the profession into disrepute.

[3] The second charge also alleged misconduct, in this instance arising from a failure to act on instructions of a client regarding the completion of a revised will. In the alternative, negligence or incompetence reflecting on fitness to practise or as to tend to bring the profession into disrepute was alleged.

[4] At the hearing of the charges on 6 November 2012, counsel for the parties confirmed to the Tribunal that they wished to amend the charges. The first charge of misconduct was to be amended by alleging conduct unbecoming a solicitor, and in the alternative, unsatisfactory conduct. The second misconduct charge was to be amended in the same way. The alternative allegations of negligence or incompetence in both of the original misconduct charges were to be withdrawn.

[5] After hearing from counsel, the charges were amended by consent as proposed. Consequently, the charges faced by Mr Logan were:

(a) Conduct unbecoming a solicitor under s 112(b) Law Practitioners Act 1982, and in the alternative, unsatisfactory conduct under s 241(b)

Lawyers and Conveyancers Act 2006. This charge arose from the allegations relating to an error in respect of the will of a deceased client.

(b) Conduct unbecoming a solicitor under s 112(b) Law Practitioners Act 1982, and in the alternative unsatisfactory conduct under s 241(b) Lawyers and Conveyancers Act 2006. This charge arose from the allegation of failure to act on the instructions of a client regarding completion of a revised will.

[6] The reason the two charges were expressed in the alternative is that respective counsel for the parties had different views on whether the charges should be expressed as conduct referenced to the Law Practitioners Act 1982 ("LPA") or to the Lawyers and Conveyancers Act 2006 ("LCA").

[7] The conduct had occurred prior to the commencement of LCA on 1 August 2008, but counsel could not agree on the affect of the transitional provisions contained in that Act, where proceedings were first commenced after that date.

[8] As a preliminary matter, counsel made submissions on the operation of the transitional provisions in LCA and the way that may affect the form of the charges that were laid to address the conduct concerned.

Transitional provisions

[9] For the Standards Committee, Mr J Upton QC submitted that as the conduct was all pre 1 August 2008, LPA was applicable. In that case, he said, the charges should be considered on the basis of there being conduct unbecoming, rather than the alternative, unsatisfactory conduct. Only if LCA was the relevant legislation for formulating the charge would the matter be one of unsatisfactory conduct he submitted.

[10] In support of his position that the Tribunal was dealing with charges of conduct unbecoming rather than charges of unsatisfactory conduct, Mr Upton submitted that the combined effect of s 350 to s 352 LCA, and s 19 Interpretation

Act 1999, was to require pre 1 August 2008 conduct to be dealt with substantively under LPA, but using LCA institutions, processes and procedures.

[11] Mr Upton submitted that the transitional provisions of LCA did not expressly require pre 1 August 2008 conduct, which had not been the subject of any proceedings commenced before that date, to be dealt with under LPA, but said that was not necessary given the operation of those provisions and s 19 Interpretation Act 1999.

[12] Section 19 Interpretation Act 1999 provides:

> "(1) The repeal of an enactment does not affect a liability to a penalty for an offence or for a breach of an enactment committed before the repeal.
>
> (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of –
>
> (a) investigating the offence or breach:
>
> (b) commencing or completing proceedings for the offence or breach:
>
> (c) imposing a penalty for the offence or breach."

[13] Mr Upton submitted that the conduct allegations faced by Mr Logan did involve an "*offence*" or "*breach of an enactment*" for the purposes of s 19 Interpretation Act 1999, and that such words should be interpreted in a non-technical sense, giving them the wider import of ordinary dictionary meanings.

[14] There was a consistency between LPA and LCA in terms of the disciplinary charges available, the powers of the decision maker, and provisions relating to powers regarding strike off and suspension sanctions, Mr Upton submitted. This consistency supported his submission he said, that LPA could be utilised in the way suggested, applying s 19 Interpretation Act. He submitted that there was nothing of the nature referred to by s 4 Interpretation Act 1999 that would operate to prevent that Act from applying in this situation involving LPA.

[15] Section 4 Interpretation Act 1999 provides, so far as relevant, that it applies to an enactment that is part of the law of New Zealand unless:

> "(a) the enactment provides otherwise; or
>
> (b) the context of the enactment requires a different interpretation."

[16] Section 4(b) means that the operation of the Interpretation Act 1999 is excluded if there is a significant change to the rights and obligations of a person under current law, compared to the law under the repealed enactment Mr Upton submitted. In that context it could be said that the current law should take precedence, but in this case that did not arise because of the consistency between LPA and LCA Mr Upton said.[1]

[17] Mr Upton QC also noted that in a number of cases, some of which had been considered by higher courts (although he acknowledged that the higher courts had not specifically addressed this point and thus had not made a particular finding regarding it), this Tribunal had accepted that pre 1 August 2008 conduct, the subject of disciplinary proceedings commenced after that date, had invariably referenced the conduct in the terms of LPA notwithstanding the use of LCA machinery.

[18] Mr J Marshall QC, for the practitioner, noted that the charges had been laid in 2010 and related to conduct before 1 August 2008, the date LCA commenced. In those circumstances he submitted the charges should be laid under LCA, but acknowledging that penalty would apply as if an LPA matter.[2] In support he noted the particular requirements of the LCA transitional provision contained in s 351(1), requiring a complaint about pre 1 August 2008 conduct now to be made to the Complaints Service established under s 121(1) LCA.

[19] Mr Marshall noted that LCA prevented a complaint about pre 1 August 2008 conduct being made under LPA post 1 August 2008. If there was pre 1 August 2008 conduct to be the subject of a complaint it had to be made and completed under LCA, he submitted, referring to s 350 and s 351(1) LCA.

---

1 In support of this submission Mr Upton QC also referred the Tribunal to *Mackay v The Queen* [1972] NZLR 694 where, in a bankruptcy matter, an earlier Act applying to such matters was held not to apply and the position was not saved by the equivalent of s 4 Interpretation Act 1999, s 20(h) Acts Interpretation Act 1924, because there were significant changes in the law which meant the rights and obligations of the person concerned were vastly different under former law compared to the current law then applicable. Such a context required that the previous enactment not be applied by the Acts Interpretation Act.

2 Section 352(1) Lawyers and Conveyancers Act 2006.

[20] A key feature of LCA supporting Mr Marshall's submissions regarding the applicability of LCA was s 353 he submitted, as it showed that the only matters to continue under LPA post 1 August 2008 were proceedings (which expression includes investigations and inquiries) commenced prior to 1 August 2008 and not determined or completed by that date. Section 353(2) made it clear, he said, that such matters are to be continued and completed as if LPA was still in force and had not been repealed, except for the involvement of new entities established by LCA in place of entities existing under LPA.

[21] In Mr Marshall's submission, the circumstances covered by s 353 were the only circumstances in respect of which an exception to the requirement that all proceedings post 1 August 2008 were to be completed under LCA had been provided. He submitted that the plain interpretation of LCA must preclude the operation of s 19 Interpretation Act 1999 to invoke LPA, having regard to s 4 of that Act. Mr Marshall also noted that LCA provided all the mechanisms necessary for investigating, prosecuting, and imposing sanctions, so there was no need to rely on s 19 Interpretation Act to facilitate such matters by utilising the repealed LPA.

[22] So far as the reliance by Mr Upton on there being no major changes between LPA and LCA, ensuring that the Interpretation Act was not rendered inapplicable on that basis, Mr Marshall submitted that in fact there had been major changes, citing new charges, jurisdictional changes at the preliminary stages of an enquiry and any later Standards Committee hearing, and in penalties.

[23] In summary, the position for the practitioner was that it was the clear intention of Parliament that LPA be repealed and replaced with LCA, and that except in very limited cases all charges were, from that repeal, to be brought under LCA. For the reasons traversed, he considered that s 19 Interpretation Act did not vary that position.

Discussion – Transitional provisions

[24] LPA was repealed with the coming into force of LPA on 1 August 2008.[3] The relevant transitional provisions of LCA are contained within s 350 to s 361.

[25] Section 350 LCA prohibits any disciplinary complaint being made or referred under s 98 LPA, and prohibits any own motion disciplinary investigation being undertaken under s 99 LPA, from the commencement of LCA on 1 August 2008. Any complaint or own motion investigation to be made or undertaken after the repeal of LPA, regarding the conduct of a practitioner prior to that time, is unable to be dealt with under LPA. Section 350 LCA makes it clear that the provisions and procedures of LPA cannot be used for pre 1 August 2008 matters commenced after the repeal of LPA on that date.

[26] Section 351 LCA then provides provisions for dealing with disciplinary matters if there is conduct which occurred prior to 1 August 2008, and about which a complaint[4] is to be made post that date.

[27] Section 351 LCA provides, so far as relevant for the current discussion:

> "(1) If a lawyer or former lawyer or employee or former employee of 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 section 121(1) by the New Zealand Law Society."

[28] This provision indicates two things. First, pre 1 August 2008 conduct may be the subject of a complaint, provided the conduct could have the subject of

---

3 Section 349 and sch 7 of the Lawyers and Conveyancers Act 2006.

4 The Tribunal has previously considered whether s 351 Lawyers and Conveyancers Act 2006 should also be read as extending to own motion matters, in addition to "complaints" and is of the view that own motion matters should be read into this section – see *Auckland Standards Committee 1 v Ravelich* [2011] NZLCDT 11.

disciplinary proceedings under LPA,[5] and second, if there is such a complaint, it is to be addressed using the processes and procedures of LCA.

[29] Such a complaint made to the service established under s 121(1) LCA pursuant to s 351(1) LCA, is to be referred to a Lawyers Standards Committee by that service[6], considered by that Committee,[7] and if the complaint is to be inquired into[8], the Committee is to commence a formal inquiry following various processes and procedures as set out in LCA.[9] Eventually, if referred to this Tribunal, such a pre 1 August 2008 matter will be heard and dealt with by the Tribunal using its powers provided under LCA.

[30] In our view, as well as s 350 LCA excluding the use of LPA provisions for dealing with pre 1 August 2008 conduct the subject of a complaint post that time, there can be little doubt that s 351(1) LCA dictates that such pre 1 August 2008 conduct must proceed using the institutions, processes and procedures of LCA when the subject of a complaint after that date.

[31] The one exception to pre 1 August 2008 conduct matters being dealt with under LPA post 1 August 2008, notwithstanding its repeal, is contained in s 353 LCA. That section provides a scheme for the completion of proceedings in relation to all investigations, inquiries, applications, appeals, and other proceedings of a disciplinary nature already commenced prior to the coming into force of LCA on 1 August 2008. Such matters are to be continued and completed "*as if the Law Practitioners Act 1982 had not been repealed".*[10]

[32] Importantly, this exception to the cessation of disciplinary processes and procedures under LPA provided by s 353 LCA, only maintains the availability of LPA

---

5 It is also subject to some restrictions set out in s 351(2) relating to issues such as the matter not having already been disposed of under the Law Practitioners Act 1982, and the exclusion of historic matters, which cannot be pursued if occurring before 1 August 2002. These have no application to the current matter.

6 Section 135(1) Lawyers and Conveyancers Act 2006.

7 Ibid, s 137.

8 It has other options under s 137 Lawyers and Conveyancers Act 2006, such as deciding to take no action or referring the matter for negotiation, conciliation or mediation.

9 Such as giving Notice to the parties involved (s 141), following established procedures and requirements (s 142), and determining an outcome, or need for reference to the Tribunal (s 152).

10 Ibid, s 353(2).

process and procedures for matters which had already commenced prior to 1 August 2008, when LCA commenced and LPA was repealed. The exception is limited to that extent, and is not available for any pre 1 August 2008 conduct involving a disciplinary process commenced after the repeal of LPA. It is a provision that allows continuation of disciplinary matters in train at that time (ie a complaint had been made under s 98 LPA or an own motion investigation has been commenced under s 99 LPA prior to 1 August 2008).

[33] For the Standards Committee's, Mr Upton QC submitted that its position on these transitional matters was effectively that s 351 required the processes and procedures of LCA to be applied in dealing with pre 1 August 2008 conduct the subject of a complaint after that date, and that LPA was relevant only to the extent it addressed the substantive conduct.

[34] For the practitioner, Mr Marshall QC submitted that the practitioner's position was that the operation of LPA was excluded (apart from the limited exception relating to s 353) by the transitional provisions of LCA, s 19 Interpretation Act was unavailable, and therefore all matters were to be dealt with under LCA. As a consequence the charge against the practitioner should be expressed as a charge under LCA (unsatisfactory conduct under s 241(b)) rather than as a charge under LPA (conduct unbecoming a solicitor under s 112(b)). These were the alternatives in which the two charges were presented. Mr Marshall QC confirmed that his client admitted the conduct, whichever of the alternative charges was found to be applicable.

[35] The Tribunal has invariably interpreted s 351 as requiring that pre 1 August 2008 conduct, the subject of a complaint post that time, be dealt with under the provisions of LCA as to process and procedure, and that the substantive charge be expressed in a way that describes the conduct complained of in LPA terms. That does not mean that the charge is laid under LPA. It is laid using the processes and procedures of LCA, but describes the conduct in LPA terms, showing clearly that it is conduct which could have been subject to disciplinary proceedings under LPA.

[36] Section 351 refers to "conduct", and that can only be conduct that would have supported the bringing of a charge under LPA, but s 351 requires the complaint process to proceed under LCA. That supports a requirement that process and procedures be undertaken via LCA, but the conduct may be described in LPA terms. Section 350 LCA prevents use of LPA for undertaking a disciplinary process in these circumstances, and s 351 mandates the use of LCA for that purpose.

[37] In the current case the charges refer to "*conduct unbecoming a solicitor under section 112(b) of the Law Practitioners Act 1982*". The Tribunal treats that as describing the conduct which thereby qualifies as a matter to be taken forward under LCA pursuant to s 351. It is "conduct" that could have been the subject of disciplinary proceedings under LPA, not a charge that could have been made under LPA. A complaint post repeal of LPA can be made about such conduct, but the matter is to be dealt with under the processes and procedures of LCA.

[38] It is useful to compare conduct in respect of which proceedings of a disciplinary nature could have been commenced under LPA, with conduct which may be charged under LCA.

[39] Under LPA, proceedings of a disciplinary nature which could be brought in respect of practitioners, were[11]-

(a) misconduct in the practitioner's professional capacity;

(b) conduct unbecoming a barrister or a solicitor;

(c) negligence or incompetence in the practitioner's professional capacity, of such a degree or so frequent as to reflect on fitness to practise or tending to bring the profession into disrepute;

(d) conviction for an offence punishable by imprisonment where that conviction reflects on fitness to practise or tends to bring the profession into disrepute.

[40] There was also a special misconduct charge available under LPA, which could arise from any non-compliance with a lawful requirement of a District Law

[11] Sections 99(a) read with 106(3)(a)(b)(c) and (d) Law Practitioners Act 1982.

Society Tribunal or Complaints Committee,[12] but it is not relevant for current purposes.

[41] Under LCA, proceedings of a disciplinary nature may be brought against practitioners for –

(a) misconduct in the practitioner's professional capacity (ie occurring at a time when the practitioner is providing or in connection with the provision of regulated services[13]);

(b) misconduct unconnected with the provision of regulated services but justifying a finding that the practitioner is not a fit and proper person or is otherwise unsuited to engage in practice;[14]

(c) unsatisfactory conduct occurring at a time when the practitioner is providing, or in connection with regulated services (including conduct unbecoming a lawyer and unprofessional conduct);[15]

(d) negligence or incompetence in the practitioner's professional capacity, of such a degree or so frequent as to reflect on fitness to practise or tending to bring the profession into disrepute;[16]

(e) conviction for an offence punishable by imprisonment where that conviction reflects on fitness to practise or tends to bring the profession into disrepute.[17]

[42] The definition of "misconduct" in LCA is particularised in a number of respects by s 7 of that Act, in addition to it being defined therein as conduct considered "disgraceful" or "dishonourable" by practitioners of good standing.[18]

[43] Under LPA, misconduct arose from an assessment of the standard of conduct the subject of charges, made by the body hearing the matter, and there was no statutory definition of it,[19] as in LCA.

---

[12] Ibid, s 101(6), and this is the only disciplinary provision in LPA that actually proscribes conduct and treats a breach as an offence.

[13] Section 241(a) and 7(1)(a) (2) and (3) Lawyers and Conveyancers Act 2006.

[14] Ibid, s 241(a) and s 7(1)(b)(ii).

[15] Ibid, s 241(c) and s 12.

[16] Ibid, s 241(c).

[17] Ibid, s 241(d).

[18] This latter definition reflecting decisions such as *Myers v Elman* [1940] AC 282 and *Auckland District Law Society v Atkinson*, New Zealand Law Practitioners Disciplinary Tribunal, Auckland, 15 August 1990; and see *Shahadat v Westland District Law Society* [2009] NZAR 661 at 670 [31] where the High Court discussed the nature of "dishonourable" behaviour as involving a wide range of disgraceful, unprincipled, wrongful acts or omissions comprising breaches of duties owed by a lawyer.

[19] Except for the special misconduct charge arising from non-compliance noted at n 12 above.

[44] Whether the conduct charged under LPA was misconduct depended on it falling within the range of behaviour assessed by the courts or Tribunal as comprising misconduct, such as conduct that was "*a deliberate departure from accepted standards, or such serious negligence, as would portray indifference to and an abuse of the privileges and responsibilities of a legal practitioner*".[20]

[45] There was no charge of unsatisfactory conduct under LPA. This is a new concept introduced by LCA, as recognised by Parliament at the time the relevant Bill was being debated following its second reading. At that time it was noted that two different concepts were contained in the Bill, misconduct and unsatisfactory conduct, the latter being a new concept to address conduct falling short of the required professional standard, but not amounting to misconduct.[21]

[46] As will be noted from the foregoing, the discrete charge of conduct unbecoming a barrister or solicitor available under LPA no longer exists in LCA. Conduct unbecoming is now an element of a charge of unsatisfactory conduct under LCA, a form of charge that did not exist under LPA. Also, under LCA, the conduct said to be unbecoming has to arise in the course of the provision of regulated services,[22] something not required for the discrete charge of "conduct unbecoming" under LPA. Also unsatisfactory conduct is prefaced by a statutory definition that it is conduct that would be regarded by lawyers of good standing as being unacceptable.[23] Conduct unbecoming now sits firmly within the new disciplinary provisions relating to unsatisfactory conduct, and cannot be considered as automatically addressing the same conduct as it might have under LPA.

[47] These circumstances support the view that the practitioner's pre 1 August 2008 conduct in this case, while required to be dealt with under LCA by s 351 of that Act, is properly described for the purposes of the current proceedings as conduct unbecoming a solicitor, using the terminology of LPA to describe the conduct. We

---

[20] *Re A (Barrister and Solicitor of Auckland)* [2002] NZAR 452: and see also *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105.

[21] Christopher Finlayson (National) is recorded as stating this in Hansard when the House resolved itself into committee after the second reading of the Lawyers and Conveyancers Bill (28 February 2006) 629 NZPD 1489.

[22] Section 12(b)(i) Lawyers and Conveyancers Act 2006.

[23] Above, n 22.

consider that is what s 351 allows when requiring that a complaint be made about pre 1 August 2008 conduct, that could have been the subject of disciplinary proceedings under LPA, is to proceed utilising the mechanisms of LCA.

[48] We do not consider that s 351 LCA requires that the conduct complained of here, occurring before the commencement of LCA, is to be the subject of a charge of unsatisfactory conduct under LCA. Such a charge, while including "conduct unbecoming" did not exist under LPA, and its elements are not the same. We think the better approach is that while LCA is the applicable Act in respect of the various processes and procedures to be followed when a complaint is made, and the charge should reflect conduct as defined by LPA, the Act applicable at the time of the conduct. That does not mean that the charge is laid under LPA, the reference to, in this case, s 112(b) LPA, being only part of the description of conduct that could have been the subject of disciplinary proceedings pre 1 August 2008.

[49] Section 112(b) LPA does not create an offence. It simply notes the powers available to the former Tribunal if that Tribunal considered, after inquiring into matters, that the various professional standards described in that section had not been observed. The former Tribunal was then able to impose various sanctions as specified by LPA.

[50] Section 112 LPA describes conduct that may be the subject of sanction, and "conduct unbecoming" is such a type of conduct. Section 112 does not create its own offence, which allows s 351 to operate as suggested for the Standards Committee, but with no need to rely on the Interpretation Act which is excluded in our view on the basis submitted by Mr Marshall. We also consider that it does not apply because LPA in this situation is not dealing with "offences" that may be committed ("breached"). The reference to s 112(b) LPA in the charge in this case is descriptive of a type of conduct, not of an actual offence resulting in a "breach" of s 112(b). It is conduct that could have been the subject of proceedings under LPA, as required for s 351 to operate. The Interpretation Act does not need to apply to allow the transitional provisions of LCA to operate in this case.

[51] That was also the position of the Tribunal in *Auckland Standards Committee 1 v Ravelich*[24] where it examined the transitional provisions of s 351 LCA. Although involving a different context in that case, the Tribunal's view then was that pre 1 August 2008 conduct the subject of a complaint or own motion investigation after that time, while dealt with by it under LCA, was properly described in the charges by reference to the relevant sections that would have applied to that conduct under LPA.

[52] We see no basis for dealing with a charge under LPA itself, except for the limited circumstances as described regarding s 353 LCA, and consider s 351 LCA allows the process the Tribunal has followed.

[53] In *Ravelich,*[25] the Tribunal expressed the view that s 351 adequately addressed the situation. That section allowed charges referencing conduct that could have been the subject of disciplinary proceedings under LPA to be dealt with under LCA. The Tribunal in *Ravelich* doubted the applicability of s 19 Interpretation Act, because it was conditioned on there being "*an offence"* or committing a *"breach of an enactment",* matters that did not sit well with the fact that LPA did not legislate offences or contain disciplinary provisions that could be breached.[26] LPA provided a framework for disciplinary investigations and hearings where conduct could be assessed. We also observe that Parliament has expressly provided transitional mechanisms in LCA dealing with conduct which occurred while LPA was in force,[27] which themselves militate against reliance on the Interpretation Act.

[54] We noted Mr Upton's arguments regarding issues of offence and breach of enactment referred to s 19 Interpretation Act, and that non-technical meaning should be assigned to such words. We remain of the view that such words indicate that s 19 is not necessarily available regarding LPA matters, but if we are wrong about that there still remain the other matters noted, which we consider would operate to exclude s 19 Interpretation Act 1999.

---

[24] *Auckland Standards Committee 1 v Ravelich* [2011] NZLCDT 11.
[25] Above, n 24 at [22] and [23].
[26] Apart from the provision referred to in paragraph [40] above which is inapplicable in this present case.
[27] Sections 351, 352(1) and 353 Lawyers and Conveyancers Act 2006.

[55] Section 351 provides the necessary mechanism, and LCA makes it clear that LPA is not to be used, particularly by s 350. Additionally, LCA makes a particular exception to allow the use of LPA, as noted earlier regarding s 353 LCA, and that would not be necessary if the application of LPA pursuant to the Interpretation Act was envisaged. The matters addressed in s 19(2)(a)(b) and (c) Interpretation Act 1999 are all adequately provided for in LCA, so those provisions need not be availed of for any of those purposes. In addition, and having regard to Mr Upton's submissions regarding *Mackay,*[28] we consider the changes to the nature of the conduct which is chargeable under LCA, compared to LPA, with new standards and expanded definitions, increased penalties, and revised processes following complaint (including mode of hearing), justify a view that there has been movement in the rights and obligations of a charged practitioner, between LPA and LCA, of a significant degree. All of these factors indicate that use of s 19 Interpretation Act should not apply, relying on s 4 of that Act.

[56] We note also that s 352(1) LCA provides that pre 1 August 2008 conduct found against a person under LCA can only result in a penalty that could have been imposed in respect of the conduct under LPA. If charges (other than the specific exception noted regarding matters under s 353) were to be laid and heard as if LPA was still in force using the Interpretation Act, that provision would not have been needed to be included in LCA.

[57] As a result, we consider that pre 1 August 2008 conduct, the subject of proceedings commenced after that date, when LPA had been repealed, must be dealt with under LCA. Section 351 LCA requires that, and the other transitional provisions noted above support that view for the reasons stated. That view does not mean that charges must be formulated in LCA terms, so that a charge of conduct unbecoming under LPA must be transformed into a charge of unsatisfactory conduct under LCA. Section 351 requires LCA to be used for all processes and procedures, but does not prevent the conduct being described in LPA terms.

---

[28] Above, n 1.

[58] Accordingly, we record that we consider the correct procedure for charges relating to pre 1 August 2008 conduct, and commenced after that date, is that they should reference the conduct as it is described in LPA. The Tribunal considers that describing the conduct in LPA terms, notwithstanding that the matter is subject to the processes and procedures of LCA, is what is required by the transitional provisions, and in particular s 351. There is no requirement to convert the LPA conduct to a charge under LCA, which is what would be necessary if the practitioner's position was upheld.

[59] We also doubt, for the reasons noted, that conduct which is to be prosecuted under LCA processes and procedures post the repeal of LPA, on the basis that it would have been able to be prosecuted under LPA if that Act had not been repealed,[29] should be described in any charge dealt with under LCA in any other way than it would have been described under LPA. It is not a matter thereby of the proceedings being dealt with under LPA or laid under LPA. It is a matter of describing the conduct, which in this case is conduct unbecoming a solicitor under s 112(b) LPA, something quite different from unsatisfactory conduct under s 241(b) LCA, which is a new concept not in existence prior to 1 August 2008 and with different elements.

[60] The Tribunal does not consider that s 19 Interpretation Act 1999 applies, even if we thought it appropriate despite the point made above regarding "offences" and statutory "breaches", as LCA adequately addresses all matters, for five reasons. First, s 351 provides an adequate transitional regime as noted above, second, issues relating to liability for penalties are adequately dealt with by s 352 LCA, third, where resort to the repealed LPA is required it has been expressly provided for in s 353, fourth, investigation, undertaking proceedings, and imposing penalty are all adequately provided for by the processes and procedures of LCA, and fifth, there are changes between LPA and LCA that are sufficiently significant to exclude the application of s 19. In those circumstances s 4 Interpretation Act 1999 indicates that the Act should not apply to LCA, but as we have noted, we do not consider it needs to and that the transitional provisions of LCA are sufficient on their own.

---

[29] Section 351(1) Lawyers and Conveyancers Act 2006.

Penalty, Costs, and Suppression

[61] The practitioner admitted the conduct alleged and accepted that he was guilty of whichever of the alternative charges the Tribunal found to be applicable. We have found that the applicable charge in each case is conduct unbecoming a solicitor, and we deal with that as the relevant charge.

[62] With regard to the first charge of conduct unbecoming a solicitor as referred to in s 112(b) LPA, relating to an error made in the will of a client, the practitioner failed to disclose the error to other trustees and executors of the will, and he took no proper steps to rectify the error when he became aware of the issue.

[63] As a result of the error, an half share of the home of the testator passed to the testator's wife, instead of to his two sons. The error may not have had an adverse effect in the normal course, but as a result of a Family Protection Act claim it became important.

[64] When the testator's wife subsequently died, she had three sons, two by her late husband, and a third son from a previous marriage. Her estate was the subject of the Family Protection Act claim by her third son, which was settled by payment to that third son of an agreed amount by her two other sons.

[65] As a result of the error regarding the half share in the home, the estate which was subject to the claim noted was larger than would otherwise have been the case. Effectively the whole value of the family home had to be taken into account in considering a settlement, instead of half the value of that home.

[66] The practitioner had become aware of the error before the death of the testator's wife, but had not taken any adequate steps to resolve the position.

[67] With regard to the second charge of conduct unbecoming a solicitor under s 112(b) LPA, the practitioner failed to act on the instructions of a client (the wife of the testator referred to in the first charge) to complete and have signed her revised will.

[68] A staff solicitor had taken preliminary instructions, and drafted a revised will, but when the practitioner took over the matter, as the staff solicitor concerned was leaving his firm, he did not pursue completion of the new will. There was evidence that the client thought she had made arrangements which were in place to alter her will, mentioning to a grand-daughter that she had left her something in her new will.

[69] While the practitioner saw his client on a number of occasions while visiting his own father who was living in the same retirement home, he did not raise the matter of completing the new will, and it remained uncompleted at her death.

[70] For the Standards Committee, Mr Upton QC sought censure, a fine, costs, and an order for compensation in favour of one of the sons who had specifically sought compensation (the other son did not seek compensation, the Tribunal was advised, as he had a different view about matters).

[71] Costs incurred by the Standards Committee totalled $17,512. The Tribunal certified costs under s 257 Lawyers and Conveyancers Act 2006 as $8,100 at the hearing. Reimbursement of this amount of $8,100, payable by the New Zealand Law Society to the Crown under that section, was also sought from the practitioner by the Standards Committee.

[72] The compensation sought by one of the sons totalled over $13,000, in respect of legal costs and the cost of a settlement incurred by the claimant. This claim for compensation related to the claimant obtaining independent advice about matters arising out of the practitioner's conduct, and being required to settle the Family Protection claim at a level that was higher than might have otherwise been required as a consequence of the practitioner's conduct.

[73] The Standards Committee also opposed continuation of the suppression of the practitioner's name, granted on an interim basis until the Tribunal had the opportunity to consider all the matters put to it at the hearing.

[74] For the practitioner, Mr Marshall QC submitted that censure was not appropriate, but accepted that a financial penalty was expected.

[75] So far as costs were concerned, Mr Marshall submitted that any award should recognise that the matter need not have come to the Tribunal. It was suggested that there should have been an earlier recognition by the Standards Committee that a lesser charge than misconduct was appropriate for the practitioner's conduct.

[76] In respect of the compensation claimed by one of the sons, who based his claim on the fact that he had been obliged to take independent advice and had been required to settle the Family Protection Claim at a level higher than would have been applicable if the mistake in his father's will had not occurred, the practitioner considered that the settlement was more generous than it needed to have been. Also, in the deed signed in respect of that settlement, the son seeking compensation had given the practitioner an indemnity, which meant, the practitioner suggested, that requiring him to pay compensation was not appropriate.

[77] Permanent suppression was sought on the basis that if the matter had been dealt with at a lower level name publication would not have been likely, the practitioner's character and standing (testimonials from various parties were lodged regarding the practitioner's integrity and competence), and his (and his firm's) involvement in community and charitable works in their community. There were also copies of some letters from the practitioner's cardiologist to his general practitioner reporting on the practitioner's cardiac assessments.

[78] Finally, a submission was made that as this matter related to conduct occurring between four to eight years ago, and that internal office procedures had been improved to ensure no repetition, there was no pressing public interest requirement for publication.

Discussion on Penalty, Costs, Compensation and Suppression

[79] So far as penalty is concerned, we consider that the conduct involved does require censure. The clients concerned were particularly reliant on the practitioner to ensure they were informed and advised correctly, and we have some concern that the practitioner has failed to take all practicable steps to remedy matters as

soon as he became aware of the error he had made in the will referred to in the first charge. Under the second charge, his failure to ensure his client's instructions were performed, especially given the nature of the instruction and his client's age and stage in life, is a significant failure.

[80] As to costs, the Tribunal considers that the costs of disciplinary proceedings should fall on the errant practitioner concerned. They should not be an impost on the profession as a whole. Obviously that position will be varied according to circumstances, such as the practitioner's ability to pay, whether a costs order would affect any rehabilitative proposal, an assessment of the costs having regard to the hourly rate and time spent (including issues of proportionality), and any other circumstance particular to any case.

[81] There was no submission that the practitioner was not in a position to pay costs, but Mr Marshall did submit that the amendment of the charges indicated that this was a matter that could have been dealt with by the Standards Committee. He submitted that if this had been recognised earlier, when the practitioner had indicated a preparedness to accept a lower level charge than misconduct or serious negligence, and dealt with by the Standards Committee as it could have been, much of the cost (and certainly all of the s 257 costs) would have been avoided.

[82] The Tribunal does not consider that the fact that charges have been amended to lower level charges at the hearing before us automatically indicates an earlier disproportionate response which should result in a lesser costs order. The Standards Committee was entitled to take the view it initially did regarding these charges after considering all the evidence it had available. The fact that the parties have agreed a different approach to charges has been advantageous to the practitioner, but we do not consider that the amendments also justify a reduction in costs.

[83] As to compensation, we note that the maximum we are able to order for pre 1 August 2008 matters is $5,000. The increased value of the estate subject to the Family Protection claim arose as a result of the practitioner's error, and failure to correct the matter with some subsequent arrangement. He should compensate the

party seeking compensation if that error resulted in settlement at a level that was higher than might otherwise have been the case. The difficulty for the Tribunal is that it cannot have any certainty that the level of the settlement was a consequence of the increased value of the estate arising from the practitioner's error and failure to take steps to correct the matter.

[84] What we can be certain about is that the cost of independent legal advice was incurred as a direct result of the error, so we are prepared to grant compensation in respect of that amount, $3,656.25. We are not prepared to order payment of compensation on the basis that the Family Protection claim settlement was higher than would otherwise have been the case if the value of the estate had not included a part share in the family home. There was no evidence (other than a mathematical calculation based on value of the home) that the settlement was required to be agreed at a level higher than would have been settled without part of the home being included. The requirement of the relevant section is that we be satisfied that the loss for which compensation is sought was suffered by reason of the practitioner's act or omission.

[85] We do not consider the indemnity given by the claimant should affect our ordering some compensation, nor should it be used by the practitioner to seek recovery against the claimant. In any event, we are not sure that the indemnity would allow the practitioner to seek to personally recover such a compensation order made against him as a matter of public policy, and noting also that he had undertook certain matters in his capacity as executor and had taken an indemnity in respect of steps taken by him in that role. It was Mr Logan's improper conduct in another capacity which has caused the legal fee expense to be incurred, not his acts or omissions as an executor.

[86] The Tribunal has power to order suppression of name and identifying particulars under s 240 Lawyers and Conveyancers Act 2006. The exercise of that discretion has been considered on numerous occasions by the Tribunal, applying the principles attaching to suppression as established by judicial precedent in New Zealand.

[87] In *R v Liddell*[30] the discretion to suppress was held by the Court of Appeal not to be the subject of any code or legislative prescription. Instead, when considering an application for suppression, a balancing exercise is to be undertaken, weighing the public interest in knowing against the private interests of the person seeking the suppression. The starting point was said to be the importance of freedom of speech recognised by s 14 New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report court proceedings.[31] This principle was reaffirmed in the Court of Appeal in *Muir v Commissioner of Inland Revenue,*[32] where the Court held that the open justice principle was equally applicable to civil cases.

[88] Factors it is usual to take into account in considering name suppression were noted by the Court of Appeal in *Lewis v Wilson & Horton Limited & Others*[33] included:

> (a) Whether the person seeking suppression has been found guilty of the charge, acquittal allowing a greater possibility of suppression;
>
> (b) The seriousness of the offending, where a truly trivial charge might mean that any particular damage from publication could outweigh the public interest in knowing;
>
> (c) Any adverse impact on the prospects of rehabilitation;
>
> (d) The public interest in knowing the character of the person seeking name suppression (usually relating to cases involving sexual offending, dishonesty, or drugs, but it is a matter of importance in our jurisdiction because of the public protection emphasis);
>
> (e) Circumstances personal to the person seeking suppression, that person's family or co-workers, and impact on financial and professional interests that take matters beyond normally expected distress, embarrassment, and adverse personal and financial consequences. The effects must be disproportionate to the public interest in knowing, if they are to be given weight in displacing the expectation of openness.

[89] In this case, when weighing up the practitioner's permanent suppression application and considering the factors set out above, we note that: the practitioner admits the charges; the charges are not trivial, representing charges related to

---

30 *R v Liddell* [1995] 1 NZLR 538.
31 Ibid, 546-7.
32 *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 365 (CA) at [29].
33 *Lewis v Wilson & Horton Limited & Others* CA 131/00, 29 August 2000, at [41] and [42].

conduct that has caused some financial difficulty and personal distress for some of the affected family members, and reflect poorly on the profession; there was no compelling matter of rehabilitation being adversely affected put before us; the public protection emphasis of LCA means that the public does have an interest in knowing the character of a person found to have breached professional standards; and the personal impact of publication on the practitioner and those with whom he is associated. Some letters were submitted regarding Mr Logan's health, professional standing, and integrity, but we do not consider that material weighs heavily against the public interests we must consider in this suppression application.

[90] In this professional disciplinary jurisdiction, and having regard to the express purposes of the Lawyers and Conveyancers Act 2006 with its requirements to maintain public confidence in the provision of legal services and to protect the consumers of those services,[34] there would need to be matters of some weight for any suppression which prevented an open and transparent disciplinary process. The question is whether the practitioner has made out a case of sufficient weight to displace the normal requirements of openness in the Tribunal's processes.

[91] On balance, and considering all factors, we do not consider that he has made out such a case. We also do not consider, where suppression has been declined, that it is appropriate to suppress the name of the practitioner's law firm as was requested, except perhaps in the case where the law firm is a victim of the offending, and that is not the case here. It does not seem appropriate to decline suppression of the name of a partner of a law firm but at the same time prohibit publication of the name of his or her law practice. That does not sit well with the openness and accountability required by the law, as we interpret that requirement, and while declining suppression of the firm's name may indirectly affect the practitioner's partners we note also that is the nature of mutual participation in legal practice between associated persons.

---

[34] Section 3 Lawyers and Conveyancers Act 2006.

Determination and orders

[92] The Tribunal determines as follows, and orders accordingly:

(a) The practitioner's admission of each of the charges found against him, conduct unbecoming a barrister or solicitor, is formally recorded;

(b) The practitioner is censured for his failures to properly attend to the needs of clients who, in this case were elderly and relied on him. The practitioner's failure to take steps to attempt to remedy matters once his mistake referred to in the first charge was discovered, is a key matter, as it demonstrates a lack of concern for his clients, perhaps based on hope, in vain as it turned out, that the matter could be addressed in the normal course without it becoming an issue for the family. The Family Protection claim put that hope to an end, and is an example of why practitioners should be meticulous and timely in ensuring clients affairs are properly set up as they require;

(c) We record that we do not consider that any useful purpose would be served by imposing a fine on top of the censure;

(d) Permanent suppression of the practitioner's name is declined, and we will not order suppression of the name of his law firm. The practitioner's medical reports provided to the Tribunal are permanently suppressed;

(e) Compensation of $3,656.25 is to be paid by the practitioner to Hamish Mitchell Wright;

(f) The practitioner is to pay the Standard Committee's costs of $17,512.49;

(g) The practitioner is to reimburse the New Zealand Law Society the amount it has been required to pay under s 257 Lawyers and Conveyancers Act 2006, an amount which the Tribunal certified at the hearing of $8,100.

(h) The Tribunal gave the practitioner interim suppression of his name and identifying particulars at the hearing on 7 November 2012, which the Standards Committee did not oppose. The purpose of that interim order was to protect the practitioner's position until the Tribunal had the opportunity to consider all the material before it. That interim suppression is to lapse one month after the date of this determination. More time than usual is given to the practitioner before interim suppression lapses given the time of the year and the difficulty of accessing the Courts should Mr Logan wish to take the matter of suppression further; and,

(i) The names of the complainant, the testators whose wills were involved, and the children of either of the testators (one of which is the beneficiary of our order for compensation) are also permanently suppressed.

DATED at AUCKLAND this 19th day of December 2012

_____
D J Mackenzie
Chair