

CONCERNING

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

AND

CONCERNING

a determination of Standards Committee

BETWEEN

AC

Applicants

AND

FV and HU

Respondents

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

Introduction

[1] Mr and Mrs AC have applied for a review of the determination by Standards Committee to take no further action in respect of their complaints against Mr FV and Ms HU.

[2] Ms HU was employed by Mr FV as a legal executive. The conduct complained of took place in December 2007 and consequently the transitional provisions of the Lawyers and Conveyancers Act 2006 determine the outcome of the complaint and this review.

[3] Ms HU had left Mr FV's employment when the complaint was made and no response to the complaint has been received from her. By the time of the review hearing Ms HU was residing in Australia and she took no part in the review.

Background

[4] Mr and Mrs AC owned land and buildings at XX from which they operated the business referred to as the XX Business. In 2007 they negotiated to sell both the land

and buildings and the business to an employee. They say they contacted Ms HU in September 2007 to advise her of their intentions but this is disputed. They also say that they advised Ms HU in late November 2007 that the purchaser was in a position to proceed with the purchase and requested her to prepare the necessary Agreements. They say her advice was that it was the purchaser's obligation to prepare the Agreements and that they should wait for that to be done.

[5] For his part Mr FV advises that the first indication his firm had about the proposed sale was a fax from Mr and Mrs AC's bank to advise loan repayment figures.

[6] The Agreements were prepared by the purchaser's solicitor (Mr JT) and were delivered in person by the purchaser to Ms HU on 19 December. They were declared unconditional the following day and settled on 21 December.

GST

[7] Mr and Mrs AC's complaints are that they expected to receive a combined value of \$300,000 net of GST from the sale of the business and the land and buildings. In an undated file note made by Ms HU, which I understand are notes of her instructions, Ms HU records that the sale price was to be \$300,000 inclusive of GST.

[8] The Agreements prepared by Mr JT provided for a sale price for the land and buildings of \$175,000 plus GST and a sale price for the business of \$91,000, recorded as being "plus GST" but with an additional clause inserted recording agreement between the parties that the sale was to be regarded as zero rated. The price to be paid for the land and the buildings was therefore \$196,875 (including GST) and for the business, \$91,000 (including GST zero rated). These figures combined to make a total payment of \$287,875. Whether including or excluding GST this did not equal the sum of \$300,000 referred to by Mrs AC.

[9] If Mr and Mrs AC's expectation had been reflected in the Agreements, then the combined purchase price for the land and buildings and business should have totalled \$300,000, with both Agreements providing that any GST was payable in addition to that.

[10] The advice received from the accountant (who was acting for both parties) was that the whole transaction would be zero rated while the purchaser's solicitor

commented¹ that the business Agreement would be zero rated and the sale of the land and buildings would attract GST.

[11] The opportunities for miscommunication between the various parties was self-evident. Mr and Mrs AC were discussing matters directly with the purchaser, the purchaser instructed Mr JT, a verbal discussion took place with the accountant (it is not clear with whom) who advised that both transactions would be zero rated, Mr JT prepared the Agreements on the basis of his instructions and then Ms HU was instructed in a pressured timeframe to achieve settlement within two days.

[12] What is clear is that the combined sale prices with the addition of GST came only to \$299,250. Mr and Mrs AC' expectation of \$300,000 net of GST was never going to be achieved on the Agreements as drawn.

[13] Ms HU's file notes and her conduct of the transaction certainly indicate confusion on her part. They also indicate a paucity of instructions which could reflect either that Ms HU was not conversant with the provisions of a business sale Agreement or that Mr and Mrs AC insisted they understood the contracts and were concentrating on having the transaction finalised before Christmas.

[14] Various inconsistencies with what Mr and Mrs AC assert were their instructions are:

- Ms HU's first file note records that the sale price was to be \$300,000 inclusive of GST. Mr and Mrs AC assert their instructions were that they expected to receive \$300,000 net of GST.
- The second page of Ms HU's file note records a sale price of \$175,000 for the land and buildings but with the added note "including GST" and then a further note "no GST".
- Ms HU made a file note dated 7 January 2008 after Mrs AC rang to advise she had not received what she expected. In that file note Ms HU stated:

Instruction was \$300,000.00 inc GST but didn't want to worry about paying GST therefore sale of going concern. It had been \$300 plus GST they would have to pay GST.

Should have been \$300,000 + GST.

¹ Letter JT to FV (19 December 2007).

- Explained where the mis-communication was. Explained what I took my notes of ie \$300,000 inc. GST. Mrs AC said purchaser is aware there is more to pay.

The reason it was done this way was because my initial instructions were \$300k inc GST. But then Mrs AC said they didn't want to worry about having to pay GST so I took this as a going concern zero rated and so taking the GST out of the \$300k as it had been inc GST, which would have meant would have to had been accounted for in that amount. Hence \$266k + GST zero rated.

First faxed draft agreement for land wasn't going concern. It was changed to going concern and checked with NP. All ok.

- If the expectation that both transactions were zero rated had been reflected in the Agreements then the combined purchase price would have been recorded as being \$300,000 plus GST if any. Neither the Agreements nor the settlement statement for the land and buildings prepared by Ms HU were consistent with this.

[15] There is a fundamental difference between what Mr and Mrs AC say their instructions were, i.e. \$300,000 plus GST (if any) and what Ms HU recorded in her file notes i.e. \$300,000 including GST. Whatever is the case there was certainly no logic for what Ms HU records in her file note as being to "take the GST out of the \$300,000" so that the AC's didn't [have] to worry about having to pay GST thereby creating "going concern zero rated" transactions.

[16] This treatment of GST by Ms HU can be viewed as either serious muddlement, negligence or incompetence. Whichever way it is viewed, the result for Mr and Mrs AC was the same. They received only \$266,000 for the sale whereas they were expecting to receive \$300,000.

Section 351 Lawyers and Conveyancers Act 2006

[17] It is necessary at this point to consider the requirements of s 351(1) of the Lawyers and Conveyancers Act as the conduct in question took place prior to the commencement of that Act.

[18] As identified by the Standards Committee in paragraphs [5] and [6] of its determination, the transitional provisions in s 351 of the Act provide that a complaint against Ms HU can only be made if the conduct is such that disciplinary proceedings could have been commenced against her under the Law Practitioners Act 1982 (the Law Practitioners Act) which was in force at the time the conduct took place.

[19] Ms HU was a legal executive. She was an employee of Mr FV.

[20] The Law Practitioners Act did not regulate the conduct of employees. The only remedies in the Act in respect of an employee's conduct was to direct that they should not be employed by a lawyer (s 114(2)).

[21] Section 101 of the Law Practitioners Act provides that where a complaint is against an employee of a lawyer a charge could have been brought against her before the New Zealand Disciplinary Tribunal if the District Council considered the charge to be of sufficient gravity.

[22] Section 114 limited matters that could be the subject of charges before the Tribunal about an employee's conduct to conduct which in the case of a lawyer, rendered the lawyer liable to being struck off the roll. In the context of this matter that would have been "negligence or incompetence of such a degree or so frequent as to reflect on [the lawyer's] fitness to practice".

[23] The test therefore becomes whether or not Ms HU's conduct was such that if she were a lawyer she could have been subject to a charge seeking to have her struck off from the roll of barristers and solicitors.

Review

[24] A review hearing with both parties took place in [City] on 12 November 2014. Mrs AC was represented by Mr DW who provided written and oral submissions. The jurisdictional issue referred to in the previous section had been communicated to the parties by letter dated 7 November.

[25] Mr DW's submissions were directed to establishing the errors made by Ms HU in dealing with the issue of GST. Whether or not the errors were of sufficient degree to warrant an order that Ms HU not be employed by a lawyer was, he submitted, for me to determine.

[26] That was the only order that could be made. The Law Practitioners Act did not provide for any compensatory order to be made in these circumstances.

[27] In her complaint to the Lawyers Complaints Service Mrs AC sought compensation. She in fact sought to recover the total amount of \$34,000 that she alleges she had lost by reason of Ms HU's conduct. She argued she was entitled to recover up to \$25,000 in respect of each contract because there were two contracts.

[28] I do not accept that argument, but more importantly, the Law Practitioners Act did not provide for any compensatory award to be made in respect of conduct by an employee. In addition, the maximum sum that could have been awarded pursuant to the Law Practitioners Act was only \$5,000. It would seem that Mrs AC may have been under some misapprehension in this regard.

[29] There is also an evidential difficulty. Mr and Mrs AC are adamant that they advised Ms HU they wanted to receive \$300,000 net of GST. Ms HU's file note made when she met with Mr and Mrs AC records a price of \$300,000 including GST. In addition, the file note made by her on 7 January 2008 also notes the price was to be \$300,000 including GST.

[30] The Agreements prepared by Mr JT on the instructions of the purchaser did not reflect a sale price of \$300,000 either including or excluding GST. They recorded a sale price of \$91,000 for the business (zero rated) and \$175,000 plus GST for the land and buildings. These figures combine to a total of \$287,875. Both Ms HU's file note and the contracts as prepared by Mr JT throw doubt on the claims by Mr and Mrs AC that they instructed Ms HU they required to receive \$300,000 net of GST or that was the purchaser's understanding. It was clearly not the figure communicated by the purchaser to Mr JT.

[31] Added to this is the fact that Mr and Mrs AC signed the Agreements as prepared. The sale price is clearly recorded in the Agreements and notwithstanding Mr DW's submissions that they are "simple people who rely on professionals to guide them".² I cannot accept without question that Mr and Mrs AC would sign the Agreements with these amounts clearly shown without some question arising.

[32] There is also the further evidential problem that no direct response has been received from Ms HU. To make a finding against her in these circumstances would require something more than assertions made by Mr and Mrs AC.

[33] Ms HU has clearly not achieved what she recorded as her instructions. The amount received by Mr and Mrs AC including GST paid on the land and buildings was \$287,875. In addition, the GST invoice prepared by Ms HU for the land and buildings referred to that transaction as being zero rated when in fact GST was included as being payable in her settlement statement. A zero rated tax invoice for the sale of the business should also have been provided.

² DW submissions (10 November 2014) at [14].

[34] Overall, I am satisfied that Ms HU was muddled in her dealing with the GST issue. The degree of negligence or incompetence required by the Law Practitioners Act before a finding could be made against her however, is that if she were a lawyer the degree or frequency of negligence or incompetence would have to have been such as to reflect on the fitness of the lawyer to practise, or as to bring the legal profession into disrepute.

[35] Incompetence in a specific area of tax law does not necessarily mean that a lawyer is not fit to practise. The errors made by Ms HU certainly reflect on her personal reputation but if she were a lawyer, I am not sure it would necessarily bring the profession into disrepute.

[36] It would have been helpful for me if Mr DW had provided some examples where findings have been made against a lawyer on this basis. In his text *Ethics, Professional Responsibility and the Lawyer* Professor Webb notes that:³

When a lawyer's incompetence is isolated and due to mere negligence there are no professional implications and clients are left to look to the ordinary law and courts for redress if they have suffered loss. It is only when the incidents of incompetence are repeated, or when isolated, gross, that it will be considered a breach of professional obligations. Only infrequently will such a charge be established without the added presence of more serious wrongdoing entailing an element of dishonesty.

[37] There is no suggestion of dishonesty on Ms HU's part. The case referred to by Professor Webb in his text (*L v Canterbury District Law Society*)⁴ involved serious deficiencies in complying with nominee company lending.

[38] Taking all of these factors into account I am satisfied that Ms HU's deficiencies do not reach a level which are such that if she were a lawyer, would have reflected on her fitness to practise or brought the profession into disrepute. Consequently, I confirm the Standards Committee's determination to take no further action in respect of Mr and Mrs AC' complaints in this regard.

Lack of supervision

[39] Mr and Mrs AC' complaints were made against both Mr FV and Ms HU. The complaint against Mr FV is that he did not adequately supervise Ms HU. Mr DW refers

³ Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, Lexis Nexis, Wellington, 2006) at 347.

⁴ *L v Canterbury District Law Society* [1999] 1 NZLR 467.

to this at paragraph [9] of his submissions where he states: “Ms HU it appears acted without supervision as these errors would have likely been picked up by a competent reviewer, which would have reduced the losses caused”.

[40] The Standards Committee did not specifically refer to a complaint against Mr FV on the basis of a lack of supervision but I will address this issue now.

[41] The same transitional provisions of the Lawyers and Conveyancers Act must be considered in respect of a complaint about a lack of supervision. Mr FV’s conduct must have been such that disciplinary proceedings could have been commenced against him in respect of this conduct.

[42] Disciplinary proceedings could be brought against a practitioner under the Law Practitioners Act for misconduct, conduct unbecoming or negligence or incompetence to the degree previously discussed. The threshold for bringing disciplinary proceedings against a lawyer was higher under the Law Practitioners Act than would support a complaint of unsatisfactory conduct under the Lawyers and Conveyancers Act. Although dishonesty was not necessarily a required ingredient, a degree of recklessness or disregard was.

[43] The complaint against Mr FV was that he did not adequately supervise Ms HU. Mr FV advises that Ms HU was a legal executive of many years experience who did not require close supervision. He says his door was always open for her to come to him with any problems she was experiencing.

[44] I am not sure such an approach to supervision would be adequate under the Lawyers and Conveyancers Act but there is no question in my mind that any lack of supervision in the present instance would not support disciplinary proceedings being brought against Mr FV under the Law Practitioners Act.

[45] Consequently, no further action is warranted in respect of this complaint against Mr FV. I would however sound a warning to Mr FV and to all lawyers that adequate supervision does require something more than just being available for an employee to approach him or her when the employee recognises advice is required. The degree of supervision will of course depend on the employee’s experience, but by its very nature, the word “supervision” requires an active measure of oversight commensurate with the circumstances. If Mr FV employs staff now he will need to address how he supervises these persons to ensure he fulfils his obligations under the Lawyers and Conveyancers Act.

Decision

[46] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed, as modified by this decision.

DATED this 27th day of November 2014

O W J Vaughan
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 and Mrs AC as the Applicants
Mr DW as the Applicants representative
Mr FV as the Respondent
Ms HU as the Respondent
Standards Committee
The New Zealand Law Society