

LCRO 340/2013

CONCERNING

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

AND

CONCERNING

a determination of [AREA] Standards Committee [X]

BETWEEN

NL

Applicant

AND

HC

Respondent

DECISION

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

Introduction

[1] Ms NL has applied for a review of the determination by [Area] Standards Committee [X] to take no further action in respect of her complaint that Mr HC had failed to adequately supervise the work carried out by his father, Mr HC Senior.

Ms NL's complaints

[2] In 2013, Ms NL complained about the fact that Mr HC Senior had instructed Mr YO QC to provide an opinion when Ms NL had not authorised him to do so. Ms NL was at that time, the sole executor of her father's estate and a joint executor with HC Senior of her mother's estate.

[3] Mr YO QC was asked to advise on the potential GST liability of the two estates arising out of land transactions which were to be implemented after Ms NL

exercised an option to purchase her mother's share in farm properties that had originally been owned by her father.

[4] The Standards Committee determined to take no further action as there is no jurisdiction to consider complaints against a deceased lawyer. Mr HC Senior died in 2012.

[5] On receipt of the Standards Committee determination Mr WR, who has acted for Ms NL throughout the complaint and this review, wrote to the Lawyers Complaints Service. He stated, in a letter dated 18 June 2013:

...

At all material times, Mr HC Senior was a consultant to the firm [Law Firm]. Contemporaneous correspondence indicates that his son, HC, was the supervising partner on the matter. Although the complaint form did refer to the late HC Senior, we do wonder if the NZLS should treat the complaint as being against HC as supervising partner in respect of the issues raised by Ms NL including:

1. retaining a QC without instructions or discussion with the client; and
2. paying the QC (who wrote an opinion in relation to tax liability of the A NL estate) by deduction of trust funds from a different estate, the M NL estate, again without instructions. This had the effect of also relieving the firm of liability to the QC.

...

The Standards Committee determination

[6] The Standards Committee carefully detailed its jurisdiction to address the complaints about Mr HC. It referred to the fact that the conduct complained of took place prior to 1 August 2008 and to the requirements of the transitional provisions of the Lawyers and Conveyancers Act 2006 (the Act).¹

[7] It summarised the position in the following way:²

... Accordingly, Ms NL will need to demonstrate either misconduct, conduct unbecoming or negligence or incompetence of such a degree or so frequent as to reflect on HC's fitness to practise or as to tend to bring the profession into disrepute, before intervention of the Standards Committee would be appropriate in respect of pre- 1 August 2008 conduct.

The Committee did not consider the complaints demonstrated conduct that reached this threshold.³

¹ Lawyers and Conveyancers Act 2006 s 351(1).

² Standards Committee determination, 4 October 2013, at [82].

[8] The Committee then considered Mr HC's obligation to supervise Mr HC Senior with reference to r 11.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). The Committee said:⁴

Even if the Committee is wrong in respect of its findings above, it is not satisfied that even if HC Senior instructed and/or paid Mr YO QC without Ms NL's knowledge and consent, that it is indicative of a lack of supervision by HC rising to the level of misconduct, conduct unbecoming or aggravated negligence/incompetence ...

[9] The above comments by the Standards Committee represent the essence of its determination of the complaint.

Review

[10] In conducting this review there are two fundamental elements that must be kept in mind at all times:

- (a) the complaint against Mr HC is that he failed to adequately supervise Mr HC Senior;
- (b) the conduct complained of occurred prior to 1 August 2008.

Failure to supervise

[11] Rule 11.3 of the Rules provides:

A lawyer in practice on his or her own account must ensure that the conduct of the practice (including separate places of business) and the conduct of employees is at all times competently supervised and managed by a lawyer who is qualified to practise on his or her own account.

[12] Mr HC Senior administered the estates of Ms NL's parents. At the time the conduct complained of occurred, Mr HC Senior was a consultant to the firm of [Law Firm].

[13] The duty to ensure that employees are adequately supervised rests with all partners. That duty cannot be delegated so that it becomes a duty of one partner. To that extent, the singling out of Mr HC as the sole person to be considered is not necessarily correct but it is acknowledged that it was open to the Standards Committee

³ At [98]

⁴ At [98].

(and this Office) to pursue an own motion investigation of the complaint as a complaint against the other partners. However, that was, and is, not necessary.

[14] The duty to supervise must be seen in context. The following comments recorded by the Standards Committee are relevant:⁵

- ... HC Senior was a practitioner with almost 60 years experience as a solicitor dealing with estate administration matters and acting in a dual capacity as a solicitor/trustee in estate matters ...
- ... HC Senior was not a junior or even intermediate staff solicitor who would require hands-on supervision ...
- ...Any supervision in these circumstances was merely to ensure correct office and legal procedures were being undertaken ...
- ... It also involved a collaboration and exchange of ideas and information on particular files as issues arose...

There can be no issue taken with any of these statements..

[15] In discussing the duty of a lawyer in practice on his or her own account to supervise, the authors of the text *Ethics, Professional Responsibility and the Lawyer* have said:⁶

...

Principals of firms are also required to supervise the conduct of their junior practitioner employees. If a junior employee is guilty of misconduct through inexperience and insufficient supervision, the principal may be held partly responsible. The duty to supervise is particularly apparent with the growth of suburban branch offices of firms (focused on conveyancing work), often staffed by one practitioner and supported by a legal executive. In such cases, the person in charge of the branch must be qualified to practise on his or her own account, or the branch must be under the effective supervision of a person who is qualified.

To a lesser extent, a partner of a firm is required to supervise the conduct of fellow partners. While partners are not expected to have an intimate knowledge of every aspect of their fellow partners' practice, they are expected to be awake to any irregularities. Such a responsibility extends to actively involving themselves in the management of the firm's affairs and accounting matters. Under the Law Society's Solicitors' Trust Account Regulations 2008, every firm must have one trust account supervisor, such as one partner of the firm, who is primarily responsible for the trust account. However, those rules also explicitly state that all of a firm's partners remain responsible for the firm's financial matters.

Practitioners have a general duty to report suspected defalcations or misconduct of other practitioners to the Law Society. This is particularly apposite in respect of partners, who are more likely to be in a position to observe irregularities in their fellow partners' activities. Commentary

⁵ At [92].

⁶ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 115.

accompanying the previous equivalent rule (r 6.03 of the Rules of Professional Conduct) offered some guidelines as to what might amount to suspicious conduct, such as extravagant living, inexplicable delays in settling transactions, and the dishonouring of cheques. A failure to make such a report in the face of such evidence may well amount to misconduct.

[16] These comments are helpful in understanding the degree of supervision required by the Rules. Taking the experience of Mr HC Senior into account, and the extent to which the duty to supervise extends, the allegations against Mr HC must fail.

Conduct prior to 1 August 2008

[17] In paragraphs [78]–[82] of its determination, the Standards Committee comprehensively addressed the effect of the transitional provisions of the Act and these comments are adopted with approval into this decision.

[18] Even if it were considered that Mr HC had fallen short in his duty to supervise Mr HC Senior, it is even clearer that the allegations against him must fail when the fact that the conduct occurred prior to 1 August 2008 is taken into account.

Supporting reasons for review/Mr WR's submissions

[19] The reasons provided by Ms NL for her application for review were:

- 3 The complaint concerned the unauthorised instruction of a QC and the payment of that QCs invoice from trust funds without authority.
- 4 The Standards Committee made the following findings which I disagree with:
 - (a) That Mr HC Senior was a co-executor of the [NL] Estate – This is completely wrong. I was the sole executor.
 - (b) That I could have terminated the instruction of Mr YO QC – While I found out that YO QC had been instructed at an early stage, the Committee does not appear to have taken into account my point that as a lay person I had no idea how much a QC would cost or anything like that. Costs had not been discussed with me.
 - (c) That Mr YO QC's advice related to both the [NL] and [BL] Estates – This is wrong. It was the NL Estate that owned the land.
- 5 If the correct findings had been made, I believe that the result would have been different.

[20] At this point, it is important to recall that the complaint against Mr HC is that he failed to adequately supervise Mr HC Senior. Having come to the view that his duty to supervise did not extend to the degree suggested by Ms NL, the reasons provided by

her do not advance the complaint against him. Nevertheless, Ms NL's reasons are addressed:

- (a) Whether or not Mr HC Senior was a co-executor is irrelevant.
- (b) For the complaint to succeed it must be considered that HC had a duty to oversee HC Senior to the extent that Mr HC Senior could not have instructed Mr YO QC without discussing and obtaining approval to do so from Mr HC. The estate(s) were potentially exposed to a serious liability for GST in the order of \$300,000. Mr HC Senior had already consulted in some depth with Mr SM, the family accountant, but he was unable to provide the answers required.

Ms NL was the sole executor of Mr NL's estate, and an executor (together with HC Senior) of Mrs NL's estate. The issue is whether or not Mr HC failed to adequately supervise Mr HC Senior when he decided to engage Mr YO QC without discussing the matter with Ms NL. Whether Ms NL could have terminated Mr YO QC's instructions is of limited, if any, significance. In making that observation the Standards Committee strayed to some extent, into a consideration of the complaint against Mr HC Senior.⁷

- (c) Whether or not Mr YO QC's advice related to one or both estates does not affect Mr HC's duty to supervise.

[21] In his submission 21 August 2017 to this Office Mr WR critiques the Standards Committee determination. Criticisms of the decision with regard (for example) to Mr HC Senior's failure to report to Ms NL and her knowledge of the fact that Mr YO QC had been instructed, relate to the complaint against Mr HC Senior. They do not support the complaint against Mr HC.

[22] Mr WR, in his submissions of 21 August 2017, says that "it appears that HC Senior acted as an autonomous lawyer with no supervision or oversight". That assertion is rejected by Mr GB. In a letter to the Lawyers Complaint Service dated 8 July 2013, he says:

[He], HC & RH (who is a senior Estates partner at [the] firm) discussed these issues at length with Mr HC. Mr HC was regularly discussing the NL Estates with the partners, often to get a second opinion or to test propositions." He offered to provide sworn evidence from HC and RH to that effect.

⁷ Standards Committee determination, above n 2, at [46]

[23] To suggest that a practitioner with Mr HC Senior's experience required anything more than general supervision by a practitioner many years his junior defies the reality of the situation. Merely because Mr HC Senior had become a consultant to the firm, as opposed to a partner, does not affect the degree of supervision that was necessary or required. It is helpful to refer to the commentary set out in [15] above, in particular the statement that "while partners are not expected to have an intimate knowledge of every aspect of their fellow partner's practice, they are expected to be awake to any irregularities."⁸ The payment of an account from a barrister for an opinion cannot be termed an "irregularity."

[24] Mr WR, in his submissions of 21 August 2017, alleges that:

The instruction was due to a mistake by [Law Firm] exposing the estate to \$300,000+ GST liability. It can be expected that the partners of the firm would be concerned with their potential liability for this and so would want to be involved.

[25] Mr WR misleads when making this assertion. [Law Firm] does not accept the situation arose because of a mistake by the firm and Mr WR should have made it clear his assertion was not an accepted fact.

[26] The issue was obviously serious for the estate(s) and Mr HC Senior recognised that. Mr SM was unable to provide answers. Instructing a senior tax practitioner to provide an opinion would seem to have been the logical thing to do. It defies the reality of the situation to suggest Mr HC needed to be actively involved in this decision. Ms NL's complaint relates to whether she agreed with the proposal to instruct Mr YO QC with full knowledge of the cost of doing so. That was the complaint against Mr HC Senior. It does not support a complaint about a lack of supervision.

[27] Mr WR's assumptions as to the number of times the firm would have instructed a QC is speculative and somewhat presumptive. In any event, this only goes to whether Mr HC was aware Mr YO QC had been instructed. Even if he was aware that Mr YO QC had been instructed does not mean that anything different would have occurred. Communication with Ms NL was not something Mr HC was required to assume responsibility for.

[28] Mr WR refers to payment of Mr YO QC's account. Presumably a partner would have needed to have either signed a cheque or authorised an electronic payment. There is no evidence Mr HC was responsible for the payment. Even if he

⁸ Webb, Dalziel and Cook, above n 6.

was the person who made or authorised the payment, that does not go to a lack of supervision. It was acceptable for the person authorising the payment to proceed on the request from Mr HC Senior to do so.

[29] To impose a duty in this instance to enquire whether all necessary authorities had been obtained before Mr YO QC's account was paid would be imposing a duty that extends beyond the requirements of r 11.3. The degree of supervision required must be assessed in relation to the particular facts of each case and in this case the person authorising payment was entitled to rely on Mr HC Senior's experience, and respect his position in, and history with, the firm.

[30] Mr WR's submissions of 5 September 2017 refers to the land transaction which triggered the potential GST liability and how it was necessary to restructure the transaction to remove the liability. It is difficult to see how this relates to a lack of supervision.

[31] Mr WR assumes that if Mr HC had fulfilled what Mr WR submits was his duty to supervise Mr HC Senior, that he (Mr HC) would have taken a different approach.

[32] An assumption that he would have done so is illogical. Mr HC Senior had many more years' experience than Mr HC and in any event, the firm did not hold itself out as having expertise in tax issues. It is likely that HC would have agreed with Mr HC Senior's intention to seek an opinion. It would not have been a breach of the obligation to supervise to leave Mr HC Senior to communicate with Ms NL and obtain all necessary consents.

[33] Mr WR's submissions in relation to communications with Ms NL are relevant to the complaint against Mr HC Senior. It is reasonable for Mr HC to object to these matters being raised against when Mr HC Senior is not able to defend himself.

[34] For the above reasons the application by Ms NL must fail.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee to take no further action against HC is confirmed.

DATED this 15th day of December 2017

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:

Ms NL as the Applicant
Mr HC as the Respondent
Mr EM and Mr AO
Mr GB as a Related Person
Area Standards Committee [X]
The New Zealand Law Society