

LCRO 36/2015

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee [X]

BETWEEN

SK and RM

Applicants

AND

GJ

Respondent

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

DECISION

Introduction

[1] Mr SK and Mr RM (the lawyers) have applied to review a decision of [City] Standards Committee [X] dated 22 December 2014, in which it made findings of unsatisfactory conduct against each of them.

[2] The lawyers are principals in a firm which was involved in administering the estates of Mr and Mrs MT, a husband and wife who had died approximately 14 months apart. They were also the trustees of Mr and Mrs MT's wills.

[3] Mrs GJ was a niece of the couple, and a beneficiary under Mr MT's will.

Background

[4] Mr and Mrs MT were clients of the lawyers. Much of the couple's legal work was carried out by the lawyers' registered legal executive, Mrs HY.

Mrs HYs background

[5] By 2010 Mrs HY had 40 years' experience working in law offices and during that time she qualified as a legal executive. In 2004 she became a Fellow of the New Zealand Institute of Legal Executives.

[6] Mrs HY had significant experience in drafting wills, the administration of estates and conveyancing.

[7] Mrs HY began working for the lawyers' firm in 2003. At that time she had accumulated 33 years of experience working in law firms.

Mrs HY's relationship with Mr and Mrs MT

[8] Mrs HY first met the MTs in 1997 when she was working for another lawyer. She assisted with drafting their wills in that year.

[9] In 1999 Mrs HY's employer sold his practice to another law firm, and Mrs HY was employed by that firm. The MTs became clients of that firm and again Mrs HY took fresh will instructions from them.

[10] In 2004, by which time Mrs HY was employed by the lawyers, the MTs entered into a written agreement, drafted by Mrs HY, with a family member in connection with a home that the MTs had built on that family member's property.

[11] In 2004 and in 2005 the MTs made further wills which were once again drafted by Mrs HY.

Mr and Mrs MT's 2009 wills

[12] Mr and Mrs MT consulted Mrs HY about and made their final wills in May 2009.

[13] Mr and Mrs MT owned their family home as tenants in common in equal shares. All other property, including bank accounts, was owned by them as joint tenants.

[14] According to Mrs HY, the couple's prime concern by May 2009 was to ensure that the survivor of the two was taken good care of. After the death of the survivor their

home should go to Mrs VW, a niece of Mr MT who for some years had taken care of the couple, and did not have a home of her own.¹

[15] Mr MT's last will appointed the lawyers as trustees. The essence of the will was that:

- (a) Mr MT left his half share in the family home to his trustees who were to allow his wife its use and occupation during her life.
- (b) Upon her death that half share was to pass to Mrs VW "for her kindness and care" and, should Mrs VW have predeceased him (which she did not) it was to be shared equally amongst her children and his nieces living at the date of his death.
- (c) All else over which Mr MT had a testamentary power of disposition was left to Mrs GJ (the residue).

[16] Mrs MT's last will, also executed in May 2009, mirrored her husband's will including that her half share in the family home went to Mrs VW. However, she provided for the residue of her estate to go to the SPCA and not to Mrs GJ.

[17] The key differences between the couple's wills was in relation to the residue of their estates: Mr MT left his to Mrs GJ, and Mrs MT left hers to the SPCA.

Mr and Mrs MTs deaths and the administration of their estates

[18] By May 2009 Mr MT's health was failing. He died on 16 July 2011. Mrs MT died on 21 September 2012.

[19] When Mr MT died the couple had accounts with the [Bank] totalling \$156,724.55, from which various expenses were paid and payments made. The balance was then held for a time on term deposit.

[20] As those accounts had been jointly held by the couple, when Mr MT died the funds in them passed to Mrs MT by virtue of her survivorship.

[21] In April 2013 Mrs GJ spoke to Mrs HY about whether she stood to inherit from Mr MT's will.

¹ Affidavit of HY sworn 21 August 2014, provided by the lawyers as part of their response to the complaint.

[22] Mrs HY wrongly concluded that the [Bank] bank accounts were owned by the couple in equal shares (as was the family home) rather than jointly. She thus concluded that Mr MT's half share of the bank accounts reverted to his estate after Mrs MT's death, for distribution to Mrs GJ as part of the residue of Mr MT's estate.

[23] Mrs HY proceeded to pay out half of the bank balance as at April 2013 to Mrs GJ, in the sum of \$53,900.

[24] This was an error. In fact the entire proceeds ought to have remained in Mrs GJ's estate and formed part of the residue of that estate.

[25] The error was discovered after Mrs GJ instructed lawyers to challenge some of the deductions that had been made from the bank account funds.

[26] When the lawyers discovered what had happened, they asked Mrs GJ to return the funds that had been mistakenly paid to her.

[27] Mrs GJ initially refused to do so. The lawyers issued proceedings against her for the return of the funds.

[28] After receiving legal advice, in May 2014 Mrs GJ agreed to judgment being entered against her in the District Court.

[29] She no longer had the funds and could not repay them, and so ultimately she was adjudicated bankrupt.

The complaint

[30] Against that background Mrs GJ complained to the New Zealand Law Society Complaints Service on 27 March 2014 about the conduct of the lawyers.

[31] Her complaint was that the lawyers had:

- (a) Failed to advise her of the contents of Mr MT's will prior to a grant of probate thus depriving her of the opportunity to contest it.
- (b) Failed to notify her as a potential beneficiary of her interest in Mr MT's estate.
- (c) Failed to inform Mr MT of the need to change the structure of his assets to reflect his wish to leave Mrs GJ an inheritance.

- (d) Failed, in a statement provided to her on 4 April 2013, to correctly identify and account for the assets of his estate (including chattels or any other property).
- (e) Breached her privacy by discussing her enquiries concerning the estate with another person.
- (f) Failed to provide information concerning the administration of the estate.

The lawyers' response

[32] In their letter responding to the complaint the lawyers, said that:²

Mr [MT] was clearly advised and informed, and was fully aware that on his death the money in the joint BNZ bank accounts would pass to his wife, by right of survivorship, and would not fall into the residuary estate ... The complete focus for both Mr and Mrs [MT] was that the survivor would be looked after financially and cared for after the other's death. Mr [MT] was concerned that Mrs [MT] would be able to stay in the house, looked after by [VW], for as long as possible and then go into care. He wanted to be sure that the maintenance of the house as well as the costs of their care and living expenses were provided for. He understood and so it was in accordance with his wishes that the cash assets would all be hers by right of survivorship, should she survive him. Mrs [HY] raised the possibility that he might survive his wife, and asked, in that eventuality, who he would want his residue, if any, to go to. It was in this context that he named Mrs [GJ]. He understood and fully intended that if he predeceased his wife, his wife would receive all of the assets, apart from his share of the house (in which she was to receive the life interest).

...

[Mr MT] fully understood and intended that it was only in the event that his wife predeceased him that Mrs GJ might ever benefit under his Will.

The Committee's decision

[33] The Committee made the following findings:

- (a) There was no question of Mrs GJ being deprived of an opportunity to make a claim against the estate because she was not somebody able to do so under the Family Protection Act 1955.³
- (b) Whilst the lawyers probably ought to have notified Mrs GJ of the contents of Mr MT's will, including that hypothetically she was a beneficiary, in the circumstances no action was called for on that

² Letter [Law firm] to Complaints Service (28 April 2014).

³ At [20].

account because as Mr MT had pre-deceased Mrs MT, his bequest to Mrs GJ was of no effect.⁴

- (c) Insofar as Mrs GJ had claimed that the lawyers had failed to inform Mr MT of the need to change the structure of his assets to protect his wish to leave her an inheritance, his will had in fact properly reflected Mr MT's wishes, so no action was called for that account.⁵
- (d) The Standards Committee recognised that the \$53,900 pay-out to Mrs GJ was an error but, accepting the fact of considerable distress to Mrs GJ, held that error to constitute unsatisfactory conduct.⁶
- (e) As a result of that finding of unsatisfactory conduct, the lawyers were jointly fined \$2,000 and jointly ordered to pay costs of \$1,000.
- (f) Mrs GJ complained that there had been discussion of the case with Mrs VW. But as Mrs GJ had never been a client of the lawyers no issue of breach of confidentiality arose. Moreover the lawyers had been bound to report the matter to Mrs VW who was a beneficiary in both estates. So no action was called for on that account.⁷

[34] The Standards Committee made the following observations:

- (a) Because Mr MT had predeceased his wife "his bequest to Mrs GJ was without effect. Mrs GJ would only ever have collected under Mr MT's Will had he outlived his wife".⁸
- (b) Mr MT's instructions to Mrs HY about his May 2009 will were "unequivocal. He clearly intended, in the event that he predeceased his wife, for her to receive all his assets by way of survivorship".⁹

Explanation of unsatisfactory conduct finding

[35] The Standards Committee said the following:¹⁰

The Standards Committee accepted that Messrs [SK] and [RM] had failed to properly account for the assets of Mr [MT]'s estate. A human error clearly being

⁴ At [19].

⁵ At [28].

⁶ At [39] – [42].

⁷ At [46].

⁸ At [19].

⁹ At [28].

¹⁰ At [39]–[41].

made by Mrs [HY] who appears to have misinterpreted Mr [MT]'s will and overlooked the fact that all of the assets (both chattels and cash funds with the notable exception of his half share in the house) had already passed to Mrs [MT] by survivorship.

Although the Standards Committee was sympathetic towards Mrs [GJ] it noted that Mr [MT]'s will was unambiguous. The fact that had Mrs [MT] predeceased Mr [MT] [*sic*]¹¹ meant that Mrs [GJ] never became entitled to the residue of his estate. Although the payment of \$53,900 to Mrs GJ was the result of human error, the Standards Committee was of the view that it was nonetheless unfortunate and that it was ultimately the responsibility of Messrs [SK] and [RM] as the [Law firm] partners responsible for supervising Mrs [HY]'s work.

The Standards Committee noted the possibility that such occurrences might erode public confidence in lawyers. Members of the public ought to be able to rely without reservation on representations made by solicitors. Mrs [GJ] has doubtless experienced considerable distress as a result of the oversight on the part of the practitioners, something the Standards Committee considered to be particularly regrettable.

Review application

[36] The lawyers' review application sought to have the findings of unsatisfactory conduct against them overturned. They raise three arguments:

- (a) As the lawyers were acting as trustees and executors of both wills, the error in paying funds to Mrs GJ did not involve the provision of regulated services as that is extensively defined in the Lawyers and Conveyancers Act 2006 (the Act) (the regulated services argument).
- (b) If that argument is unsuccessful, the lawyers were relying upon their experienced and registered legal executive, and were entitled to expect her to carry out the administration of the MT estates competently, accurately and without their supervision. Requiring supervision of a qualified and experienced legal executive to the degree and extent that appears to have been contemplated by the Committee, engages a level of oversight that would preclude lawyers from having staff, and this was not what the Act intended. It was therefore wrong to make findings of unsatisfactory conduct against the lawyers for the actions of Mrs HY. Moreover, public confidence in lawyers would not be eroded by errors made by legal executives (the competent employee argument).
- (c) It was wrong to take Mrs GJ's distress into account (the complainant distress argument).

¹¹ In fact, the reverse was the position, Mr MT was survived by his wife. But the Standards Committee accurately recorded the consequences.

Mrs GJ's response to the review application

[37] Mrs GJ considers that the lawyers had got off lightly given “the damage to [her] that is a direct result and the possible eventual cost to the SPCA that has resulted from it”.¹²

[38] Then, after repeating her views about Mr MT’s true intentions – those being that he had in fact wanted her to benefit under his will – Mrs GJ went on to say that as a result of an inability to repay the monies sent to her in error (she having used those to pay off debts) she had been adjudicated bankrupt.

[39] She urged that the review application be dismissed and suggested that the penalties perhaps be increased.

Review on the papers

[40] The parties agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[41] I have carefully read all of the material that the parties provided to both the Complaints Service and to this Office. I am satisfied that this review can be adequately determined in the absence of the parties.

Nature and scope of review

[42] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹³

... 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

¹² Letter GJ to LCRO (19 February 2015).

¹³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

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.

[43] More recently, the High Court has described a review by this Office in the following way:¹⁴

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.

[44] Given those directions, the approach on this review will be to:

- Consider all of the available material afresh, including the Committee's decision; and
- Provide an independent opinion based on those materials.

Analysis

Mrs GJ's views

[45] Before I turn to the specifics of the review application, I will deal with Mrs GJ's views about Mr MT's intentions and the effect they had on his will when he died with his wife surviving him. I accept that Mrs GJ's views would have been encouraged by Mrs HY's error in paying her the \$53,900.

[46] It is important to note that as Mr MT's niece, Mrs GJ was not within the range of claimants covered by the Family Protection Act 1955. She was unable to challenge his will, or indeed Mrs MT's.

[47] Further explanation is required concerning the assets in which Mr MT had an interest when he died, and the effect of his will on those assets.

[48] In her complaint Mrs GJ wrote:¹⁵

His will allowed for my cousin VW to inherit his share of his house and for me ... to inherit his share of the contents and his share of any money he had.

[49] At the time of Mr MT's death, apart from the family home all assets, from money in the bank to furniture, were jointly owned by Mr and Mrs MT.

¹⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475, at [2].

¹⁵ Mr MT's Will did not specifically refer to "the contents and his share of any money he had"; it simply referred to the residue.

[50] The automatic legal effect of joint ownership is that the surviving spouse assumes sole ownership of the jointly owned property, by virtue of the principle of survivorship.

[51] The only asset that Mr MT owned in his own right, and over which his will was effective when he died, was his half share in the family home which the couple owned as tenants in common in equal shares and not as joint tenants.

[52] Mr MT's will could not change that state of affairs. He could only bequeath what he owned outright at the time of his death; specifically his half-share in the family home.

[53] Although the bulk of their wills was identical, the way in which Mr and Mrs MT dealt with the residue of their respective estates was different. Mr MT left his to Mrs GJ, and Mrs MT left hers to the SPCA.

[54] Because Mr MT died before his wife, there was no residue to bequest to Mrs GJ.

[55] I agree with the Standards Committee that Mr MT's intentions were clear when he made his will in 2009. Those were to ensure that his wife was properly taken care of if he died first. He put those intentions into place by leaving her a life interest in his half-share of the family home.

[56] He was clearly aware that all other property was jointly owned, and was advised that it would automatically become Mrs MT's if he died first.¹⁶

[57] As indicated, Mrs HY made a fundamental error in making the \$53,900 payment to Mrs GJ. Her explanation was that she overlooked that the bank accounts were jointly owned.¹⁷

[58] The payment that Mrs HY made to Mrs GJ should have gone to the SPCA, as part of the residue of Mrs Harmer's estate.

[59] The lawyers wrote to Mrs GJ's legal advisers about this and provided them with a copy of a letter from the [Bank] confirming that all accounts were joint accounts.

[60] Mrs GJ's legal advice, which was copied to the lawyers, was:¹⁸

¹⁶ See affidavit of HY at [17]–[18].

¹⁷ At [25].

¹⁸ Letter from TP to GJ (19 June 2013).

... we had assumed that you refunded the monies after deducting our fees, but today we have received a further fax which indicates that the solicitors acting for the estates are still requesting the refund of the monies. As indicated previously, I do not see that there is any other avenue to question the estate administration further. An error has been made and unfortunately a refund of the monies is required.

[61] Mrs GJ later consulted another legal firm. When she still refused to refund the \$53,900, proceedings were issued for recovery of the funds in the District Court at Tauranga.

[62] In response to those proceedings, Mrs GJ had said:¹⁹

I am a beneficiary of the Estate of [Mr MT]. [Mr MT] died on about 16 July 2011, leaving assets. A statement of the estate dated 2 September 2011, drafted by the plaintiffs shows the estate assets after expenses were \$134,440. I received funds of \$53,900 from the plaintiffs on the understanding it was [MT]'s estate funds. The will provided I am entitled to these funds. I have no evidence from the plaintiffs to the contrary or that the funds I received were from the estate of [Mrs MT].

[63] However, the parties ultimately agreed to settle the proceedings and on 27 May 2014 judgment was entered against Mrs GJ.

[64] I acknowledge that this error has had serious consequences for Mrs GJ. But it was an error that the applicable principles of law could not allow to stand.

Mrs HY

[65] Mrs HY had been involved in advising the MTs since 1997. The couple followed Mrs HY when the practice she had been working in was sold in 1999, and then again when she began working for the lawyers in 2003. She remained their point of contact in legal matters for close to 15 years.

[66] It is clear that Mr and Mrs MT regarded Mrs HY as their first-call for legal advice and assistance, and that Mrs HY was very familiar with their personal and legal circumstances. She assisted them with four different wills over a 12-year period. She drafted a deed of family arrangement, and she drafted the 2009 wills.

[67] When she made the payment error in April 2013, Mrs HY's legal experience had reached 43 years, of which ten had been spent working for the lawyers.

[68] Mrs HY was a Fellow of the New Zealand Institute of Legal Executives, with significant experience in wills and estate work. She was undoubtedly vastly experienced.

¹⁹ *SK v GJ*, CIV-20XX-0X0-XXX, Response by Defendant at 6.

[69] The lawyers relied upon Mrs HY's "expertise and for her to carry out her duties diligently".²⁰

Complaint against Mrs HY

[70] The disciplinary reach of the Act extends beyond lawyers and conveyancers. A Complaint may be made by "any person ... about ... the conduct ... of a person who is an employee or former employee of a practitioner".²¹

[71] Disciplinary findings may be made against non-lawyer employees or former employees.

[72] Plainly, Mrs HY was employed by the lawyers. She has acknowledged her error in paying money to Mrs GJ to which she was not entitled. Those actions could have founded a complaint against Mrs HY.

[73] However, Mrs GJ chose not to pursue such a complaint. Nor did the Standards Committee consider it appropriate to launch an own-motion inquiry into Mrs HY's conduct, as it could have done pursuant to s 130(c) of the Act.

[74] Had either course been adopted, it is difficult to say what the outcome would have been. Given Mrs HY's retirement since this event, together with what was obviously a long and rewarding career in the law, from this distance it would seem that little purpose would be served by raising that matter now.

[75] Nevertheless, this was an available option that might more appropriately have reflected the events.

The regulated services argument

[76] This issue was framed slightly differently when the matter was before the Standards Committee. There, it was framed on the basis that the lawyers had failed to properly account for the assets of Mr MT's estate, and that this arose by virtue of them being the partners responsible for supervising Mrs HY's work; Mrs HY having made an error by assuming that the bank accounts were held in equal shares.

[77] The regulated services argument was not before the Standards Committee. It was raised for the first time by the lawyers in their application for review.

²⁰ Submissions of Mr LD to Complaints Service on behalf of the lawyers, dated 22 August 2014.

²¹ Lawyers and Conveyancers Act 2006, s 132(1)(a)(iii).

[78] This argument concerns the definition of unsatisfactory conduct under s 12 of the Act. The lawyers submit that a report by an executor to a potential beneficiary about the assets in an estate does not fall within the ambit of that section. The report referred to by the lawyers is the statement of account that purported to show that Mrs GJ was entitled to the \$53,900.

Discussion

[79] To focus on that report is simplistic. What is principally in issue is the mistaken payment of \$53,900 to Mrs GJ and not any associated document.

[80] Section 12 relevantly provides:²²

Unsatisfactory conduct defined in relation to lawyers and incorporated law firms

In this Act, unsatisfactory conduct, in relation to a lawyer ... means—

- (a) conduct of the lawyer ... that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- (b) conduct of the lawyer ... that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
 - (i) conduct unbecoming a lawyer ...; or
 - (ii) unprofessional conduct; or
- (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules or made under this Act that apply to the lawyer ... , or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7)...

[81] The regulated services argument primarily rests on the reference in (a) to "regulated services". The argument is that only conduct related to "regulated services" can be called into question. Regulated services are defined in the Act, as are "legal services" and "legal work".

[82] Section 6 provides those definitions as follows²³:

regulated services means, —

²² Emphasis added.

²³ Emphasis added.

- (a) in relation to a lawyer ..., —
 - (i) legal services; and
 - (ii) conveyancing services; and
 - (iii) services that a lawyer provides by undertaking the work of a real estate agent; ...

....

legal services means services that a person provides by carrying out legal work for any other person.

....

legal work includes —

- (a) the reserved areas of work:
- (b) advice in relation to any legal or equitable rights or obligations:
- (c) the preparation or review of any document that—
 - (i) creates, or provides evidence of, legal or equitable rights or obligations; or
 - (ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property:
- (d) mediation, conciliation, or arbitration services:
- (e) any work that is incidental to any of the work described in paragraphs (a) to (d).

[83] The definition of legal work is not exhaustive.

[84] In this case the lawyers were the appointed executors and trustees of Mr and Mrs MT's wills, the hands-on administration of which was undertaken in their office by their legal executive, Mrs HY.

[85] It is of course not necessary for a lawyer or lawyers to carry out executorship responsibilities under a will. Broadly speaking, there are no restrictions on who may be appointed trustee and/or executor of a will.

[86] But where, as here, the appointees are lawyers and the administration is conducted as part and parcel of their firm's legal practice, it is unrealistic to suggest that in this respect "legal work" is not being undertaken.

[87] As part of that administration, whether carried out by the lawyers directly or through a legal executive, work is done for which lawyers are accountable in various

ways as lawyers, including the handling of trust monies. The lawyers also receive fees for that work.

[88] The work also includes applying to the High Court for a grant of probate, and the documents filed by the lawyers on both occasions identified their law firm as the solicitors responsible.

[89] Relevant to the issue of whether the lawyers are providing regulated services, are the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Trust Account Regulations) made under s 115 of the Act.

[90] I refer to reg 12:²⁴

12 Receipt and payment of trust money

(1) Every receipt, payment, transfer, and balance of trust money must be recorded in a trust account ledger with a separate ledger account for each client ...

...

(3) Any trust money received by a practice must be recorded promptly and accurately in that practice's trust account receipt records and the relevant client ledger account.

(4) For the purposes of subclause (3), each such entry of the receipt of trust money must state—

(a) the amount, date, purpose, and source of the receipt; and

(b) the client for whom the trust money is to be held ...

...

(6) A practice may make transfers or payments from a client's trust money only if—

...

(b) the practice obtains the client's instruction or authority for the transfer or payment, and retains that instruction or authority (if in writing) or a written record of it ...

[91] Later follows reg 16:

16 Trust account supervisor

In this Part, trust account supervisor means—

(a) a partner appointed as a trust account supervisor under subclause (2); ...

²⁴ Emphasis added.

- (2) Every partnership must at all times have a trust account supervisor for each office of the partnership having separate trust account records, and that trust account supervisor must be a person appointed in that capacity by the partnership
- ...
- (4) Every trust account supervisor:
- (a) is responsible for the administration of the trust accounting of the practice:
 - (b) is responsible for ensuring—
 - (i) that the provisions of the Act relating to trust accounts, these regulations, and any practice rules made under section 94(k) of the Act are complied with by the practice;
...
 - (c) must take appropriate measures to verify the correctness of, and sign, all reports required by these regulations (unless prevented by temporary absence or incapacity; in which case another partner or director, if any, may take those measures and sign).
- (5) The appointment of a trust account supervisor does not remove or diminish the responsibilities and liabilities of any partners of the trust account supervisor or other directors of the incorporated firm for financial matters affecting the practice.

[92] So even if estate administration work performed by lawyers might somehow or in some circumstances escape the net of "legal work", there is no avoiding the Trust Account Regulations.

[93] The error was made by Mrs HY. The question is whether the lawyers should carry the disciplinary burden of that error, and I now turn to that issue.

The competent employee argument

[94] The lawyers argue that as the administration work in question related to two uncomplicated estates the lawyers were entitled to rely upon Mrs HY to do it, and were thus personally exonerated.

[95] In other words, the lawyers had discharged their obligations by delegating the tasks in question to an experienced legal executive.

[96] A subsidiary argument is that the Act could not have been intended to require oversight and supervision to such an extent as to make it impracticable for lawyers to rely upon staff, such as legal executives, to do what is within the proper scope of their work.

Discussion

[97] There is no restriction on a legal executive undertaking legal work outside the reserved and conveyancing areas.²⁵ But it is axiomatic that the lawyer employer, for his or her own protection – but most fundamentally for the protection of clients – must ensure that an employed legal executive is adequately supervised, whatever the experience or competence of that legal executive.

[98] Delegation of work to a legal executive should not ordinarily release lawyers from their responsibilities as principals of the staff employed to do work on behalf of the firm's clients.

[99] This is particularly so when, as here, the lawyers had personal responsibilities as trustees and executors of their clients' wills.

[100] The requirement to supervise is contained in rule 11.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules), as follows:

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

[101] Registered legal executives have become indispensable employees in many law firms. Becoming a registered legal executive involves undertaking a course of study approved by the Council of Legal Education, and includes passing examinations and satisfying certain character requirements. The result is a Diploma qualification.

[102] Registered legal executives and Fellows of the Institute are able to carry out limited formal duties, such as witnessing enduring powers of attorney or taking statutory declarations.

[103] It is not unreasonable for practitioners to repose considerable confidence and trust in their legal executive. An experienced legal executive often carries out significant legal work, and is given a high degree of autonomy and independence.

[104] In this case for example, three law firms relied upon Mrs HY to take Mr and Mrs MT's various will instructions over 12 years. The wills they completed in May 2009 were prepared by Mrs HY, and those wills are unlikely to have been any different from a will prepared by a practitioner.

²⁵ Lawyers and Conveyancers Act 2006, ss 6, 24 and 32.

[105] Mrs HY had significant experience in administering estates. Taken at face value, the estates of Mr and Mrs MT were very straight-forward and theirs were to all intents “mirror wills”. In the ordinary course of events it would be expected that a legal executive with Mrs HY’s experience would be able to administer and wind-up both estates with a minimum of difficulty or oversight.

[106] In my view that was a reasonable expectation for the lawyers to have. To have insisted upon checking every step of the administration of the MT’s estates would have been to micro-manage to an obsessive degree.

[107] The rule requires “competent supervision and management” by a lawyer of their employees. It does not demand constant supervision, for to expect that would render the point of employing competent and experienced staff, pointless.

[108] This approach does mean that mistakes may not be identified by the managing lawyer, if they are made. Whether the failure to identify an employee’s error should attract a disciplinary response, will depend upon the facts of each case.

[109] By a very fine margin I accept the lawyers’ argument that they relied, and were entitled to rely, upon Mrs HY’s significant experience and general competence in administering the estates of clients known to her for 15 years, and whose wills she had drafted and whose estates were uncomplicated.

[110] I have come to this conclusion with some caution, and mindful that the lawyers were not only providing regulated services to the estates, but that they were also trustees of both wills. Those extra duties, for which they have, potentially, personal liability, perhaps sharpens the need for oversight.

[111] However, in my view the balance tips in favour of the lawyers being entitled to rely upon Mrs HY to carry out her job diligently, and not oversee each step of the estates’ administration.

[112] I do not consider that the public’s confidence in the legal profession would be eroded by this finding. The facts of this matter are distinct, and I have placed considerable emphasis on the undoubted experience and competence of Mrs HY and the reasonable expectations that the lawyers would have as to her diligence when administering these estates.

The complainant distress argument

[113] Lastly, it was argued that the Standards Committee was wrong to take into account the distress allegedly suffered by Mrs GJ.

[114] The points particularly advanced were that:

- (a) Whilst Mrs GJ may have ultimately suffered distress, she had enjoyed the use and benefit of \$53,900 to which she was not entitled for almost two years, an amount which had still not been repaid.
- (b) Mrs GJ's continued failure to repay the money has caused the lawyers considerable stress and financial loss.

[115] I would agree that, in a case such as this, issues of complainant distress can only be relevant to penalty and not to liability.

[116] Because I have concluded that a finding of unsatisfactory conduct is not called for on this occasion, it is not necessary for me to consider issues of penalty.

Conclusion

[117] In my view the Standards Committee was wrong to conclude that the lawyers were guilty of unsatisfactory conduct by virtue of their being Mrs HY's employers.

Decision

[118] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed as to the finding of unsatisfactory conduct, together with all other orders.

DATED this 14th day of December 2016

R Maidment
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 SK and Mr RM as the Applicants
Ms GJ as the Respondent
Ms BC as a related person
[City] Standards Committee [X]
The New Zealand Law Society