LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 159

Ref: LCRO 139/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**MX** Applicant
AND	**RJ and DJ** Respondents

DECISION

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

Introduction

[1] Ms MX has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondents, Mr RJ and Ms DJ.

Background

[2] Mr RJ and Ms DJ (the lawyers) were instructed as executors of the estate of Mr AX. Mr AX died on 6 July 2015.

[3] They were the third set of executors appointed.

[4] The trustees were Mr AX's three children.[1]

[5] Achieving expeditious resolution of the administration of the estate proved difficult.

[6] The significant estate asset was comprised of a farm property.

[7] The farm property was sold. The lawyers held the net sale funds, pending resolution of agreement on distribution. Initially the funds were deposited in an interest-bearing account earning interest of 0.75 per cent.

[8] Subsequently, the funds were transferred to an account which returned a higher interest rate.

The complaint and the Standards Committee decision

[9] Ms MX lodged a complaint with the New Zealand Law Society Lawyers Complaints Service (NZLS) on 12 November 2019. The substance of her complaint was that:

(a) the executors had failed to take steps to promptly invest sale proceeds at the most beneficial interest rate; and

(b) this failure had resulted in loss to the beneficiaries in a sum of around $10,000; and

(c) fees charged for a conveyancing transaction were excessive; and

(d) the executors had failed to communicate with the trustees over placement of the sale funds; and

(e) the executors had failed to communicate effectively with the trustees over issues relating to the sale of the farm property; and

(f) the executors had contributed to a delay in settling the sale of the farm property.

[10] The lawyers responded to the complaint on 12 December 2019.

[1] The residue in the estate passed to the [ABC] Family Trust, of which there were three trustees, Ms MX and her siblings.

[11] They submitted that:

(a) the administration of the estate had been ongoing for over four years, and

(b) complex proceedings were before the High Court involving the administration of the estate; and

(c) Mr WT QC was representing the executors in those proceedings; and

(d) Multiple legal advisors had been appointed to represent parties in the proceedings; and

(e) Ms MX was not a client of [law firm] but a trustee of the [ABC] Family Trust, any action on behalf of the trust needed to be taken by a majority of trust members; and

(f) obligations owed by the executors were to the [ABC] Family Trust, not to Ms MX in her personal capacity; and

(g) Ms MX's complaint was not understood to be supported by her fellow trustees; and

(h) the difficult task resolving the administration in the face of a strongly contested family dispute, is reflected in the voluminous amount of correspondence and documentation generated; and

(i) on the sale of the farm property, it was anticipated that an agreement could be promptly reached amongst family members to distribute the estate; and

(j) sale proceeds when received (26 June 2019) were immediately placed on an on-call, interest-bearing deposit account,; and

(k) on 4 September 2019, solicitors acting for the parties were advised that as the hoped-for solution had not been achieved, funds would be placed on a 3 months deposit; and

(l) this was done on 12 September 2019; and

(m) decisions made in relation to the investment of funds were considered by the executors to have been reasonable, considering the circumstances known to the executors at the time; and

(n) the sale transaction had encountered a number of difficulties; and

(o) the sale transaction was managed in context of a situation where two of the trustees were wishing to advance the sale, whilst Ms MX was raising further issues; and

(p) settlement was frustrated by late lodgement of a caveat; and

(q) in managing the conveyance, they were not simply managing a transaction at arm's length, but were more directly involved as the executors of a difficult and contentious estate matter; and

(r) fees charged grossly underrepresented the time that had been spent on the transaction.

[12] In summarising the difficulties they had encountered in the estate administration, the lawyers submitted that this was the worst estate administration experience that either had had in practice, this assessment to be measured against Mr RJ's experience of having 50 years continuous experience in estate administration.

[13] Ms MX provided a comprehensive response to the reply the lawyers had given to her complaint. She considered that the lawyers had provided an inaccurate account of herself, her family, and matters relating to the family estate.

[14] In summary, Ms MX:

(a) contended that the lawyers had endeavoured to diminish the extent of the obligations owed to her, by underplaying the obligations owed to her as a beneficiary; and

(b) were aware that there were proceedings before the High Court when sale proceeds were received; and

(c) submitted that attempts should have been made by the executors to communicate with the beneficiaries of the estate.

[15] The comprehensive submission in reply filed by Ms MX provided detailed account of a significant number of matters that are not required to be considered or addressed on this review. I appreciate that in electing to provide such a comprehensive response, she was clearly endeavouring to provide the fullest picture she could, but a number of the matters addressed in her response, whilst assisting in

providing a broader understanding of her position on a raft of issues, are of little relevance to the single issue that falls to be considered in this review.

[16] The Standards Committee delivered its decision on 25 May 2020.

[17] The Committee determined, pursuant to sections 137(2) and 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[18] In reaching that decision the Committee concluded that:

(a) the lawyers held a reasonable belief that matters could be resolved quickly so that the decision to place funds in an on-call account was appropriate; and

(b) given the circumstances, the delay that occurred was understandable; and

(c) neither of the lawyers had breached any of their professional obligations; and

(d) the fees charged were fair and reasonable.

Application for review

[19] Ms MX filed an application for review on 30 June 2020.

[20] Her review application focuses primarily on complaint that the lawyers neglected to place proceeds from the farm sale promptly into an appropriate interest-bearing account.

[21] She does not seek to challenge the Committee's finding that fees charged were fair and reasonable.

[22] The submission filed by Ms MX in support of her review application does not, perhaps understandably in view of the comprehensive manner in which she had advanced her position at the Committee stage, raise fresh issues or arguments, but rather reiterates her view that:

(a) the executors had failed to manage the funds prudently; and

(b) there were abundant indicators to the executors at time of sale, that there would be little prospect of imminent settlement of the

administration of the estate, not the least of which was the extant proceedings on foot in the High Court; and

(c) Ms DJ had confirmed in correspondence of 19 July 2019 that she considered that a resolution was likely only to be achieved through the High Court process; and

(d) The executors had provided no sound reasons for their belief that the estate would be wound up within a short time of receiving sale proceeds.

[23] Invited to provide response to Ms MX's review application, the lawyers submitted that:

(a) the residue in the estate being administered passed to the [ABC] Family Trust, of which there were three trustees, Ms MX and her two siblings; and

(b) the trust deed provided for majority rule; and

(c) there was a deep schism between Ms MX and the two other trustees; and

(d) the deep divisions were seemingly resolved at a judicial conference which proceeded on 25 February 2020 at which a settlement agreement was reached; and

(e) parties to the settlement agreement were the executors, the [ABC] Family Trust and Ms MX and her siblings in their personal capacity; and

(f) the agreement provided for the final distribution of the estate; and

(g) subsequent to the settlement conference, Ms MX had continued to make serious allegations against the executors including allegations that the executors had misled the court; and

(h) in light of the allegations made, the executors were seeking to retire as trustees; and

(i) decisions made as to the investment of funds were decisions well within the discretion of an executor to make; and

(j) judgements made as to mode of investment were made with a proper consideration of all the issues; and

(k) Ms MX's fellow trustees have raised no objection to the investment decisions made; and Ms MX does not represent their views in any respect; and

(l) the decision to leave funds on-call was made on the basis of expectation of an imminent resolution but regrettably that did not happen.

[24] Ms MX provided a rebuttal to the lawyers' response to her review application. Some of the issues addressed in that submission traversed issues that are not relevant to this review.[2] She submitted that:

(a) she considered it inappropriate for the lawyers to reference problems within her family to provide explanation for their failure to take appropriate steps to deposit sale funds received to an appropriate interest-bearing account; and

(b) she had made no other complaints to the Complaints Service; and

(c) matters relating to her conduct complaint were separate and not considered at the settlement conference; and

(d) her complaint was genuine and raised a matter of considerable significance for her; and

(e) her fellow trustees were reluctant to become involved in matters that would likely cause more costs to the estate but Ms MX considers that they would be happy to see "funds returned".

Review on the papers

[25] When a review application is filed with the LCRO, an appraisal of the file is completed to address a number of administrative matters, including whether the LCRO considers that the file is suitable for review "on the papers" without requirement for a formal hearing.

[26] With the approval of the parties, direction was made that the review be determined on the papers.

[2] For example, Ms MX raises issues regarding the process by which the executors sold the farm property, concerns that appropriate valuations were not obtained, concerns regarding arrangements recorded in a will.

[27] In the course of conducting an on the papers review, a Review Officer may elect to seek further information from the parties on a particular point or issue.

[28] In this case, despite having the benefit of substantive submissions, following careful consideration of those submissions, I felt it both important and necessary to hear from the parties, and in particular, from Ms DJ and Mr RJ.

[29] I wished to hear directly from the practitioners as to their reasons for delaying the transfer of funds held to a higher interest-bearing account. To that end, a teleconference was convened on Friday, 17 September 2021. The conference was attended by the practitioners and Ms MX.

[30] Ms DJ provided a full account of the reasons as to why the practitioners had refrained from shifting the funds earlier. Ms MX provided a comprehensive response.

[31] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, and having opportunity to hear directly from the parties, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined without requirement to hear further from the parties.

Nature and scope of review

[32] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).

[33] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

[34] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Discussion

[35] There is a single issue to be addressed on this review. Did the lawyers' failure to deposit funds received from the farm sale to a higher interest earning account constitute conduct which was requiring of a disciplinary response?

[36] Whilst the submissions filed in advancing both the initial complaint, and the application for review have been comprehensive, the arguments advanced by the parties can be succinctly summarised.

[37] Ms MX considered that it should have been compellingly obvious to the executors when they received the proceeds from sale of the family farm, that there was a strong possibility that it would be some months before a binding agreement could be reached amongst the trustee/beneficiaries such as would enable the executors to distribute sale proceeds. In the circumstances, a prudent executor would, argues Ms MX, have taken steps to ensure that the funds were invested at the best possible interest-bearing rate.

[38] Against this, the lawyers contend that there were indications, when the sale proceeds were received, of possibility that the parties were close to agreement, hence their decision to ensure that the funds were on-call for distribution if required. They considered the decision they had made to be one which properly fell to them as the estate executors to make, and one that has not been criticised by the other trustees.

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

[39] When advancing her submissions on review, Ms MX frames her submissions in a manner that suggests that she is being supported by others in pursuing her complaint against the lawyers.

[40] Towards the end of her submission, Ms MX suggests that her fellow trustees held particular points of view on matters relating to the administration and expressed the view that her siblings would be pleased to see funds returned.[5]

[41] In advancing her review in this fashion, Ms MX is suggesting that her concerns about the executors were shared by others.

[42] But there is no evidence advanced at any stage of the proceedings that any other party has raised objection to the steps taken by the executors.

[43] The most that can reasonably be inferred from the manner in which Ms MX has advanced her review application is that members of her immediate family may have shared her concern that funds had not been appropriately managed.

[44] But Ms MX's attempts to draw her fellow trustees into the fray are not supported by evidence of either of her fellow trustees having expressed concern at the manner in which the executors had managed the funds received.

[45] In the absence of any indication of the two other trustees raising complaint, I think it reasonable to accept the lawyers' submission that two of the trustees had no quarrel with the investment decisions made.

[46] That said, the fact that no objection was raised by Ms MX's fellow trustees does not dispose of the complaint. But it is a factor to be considered when addressing the broad context of the complaint.

[47] The lawyers accepted instructions to act as executors at the request of the [ABC] Family Trust.

[48] The lawyers noted that the trust deed required any action taken by the trust to be sanctioned by the majority of the trustees.

[49] The lawyers submit that Ms MX was not and had never been a client of their firm. They emphasised that they had been instructed by the [ABC] Family Trust (of which Ms MX was one of three trustees). It is assumed that this argument is advanced

[5] Being the loss Ms MX contends was suffered as a consequence of the sale proceeds not being invested at a higher interest rate.

by the lawyers to suggest that the duties and obligations they owed to Ms MX personally, were limited.

[50] The Committee did not, in its decision, address the issue as to whether the scope of the obligations owed to Ms MX were confined, but I do not consider it necessary to comprehensively address argument as to whether the fact that the lawyers had been instructed by the trust, and the complaint by Ms MX advanced by her in her personal capacity, raised issue as to whether Ms MX's capacity to progress her complaint was limited.

[51] The lawyers were clearly providing regulated services to the Trust. Whilst a majority vote was apparently required for the Trust to implement decisions, I am not persuaded that the voting regime inhibited the capacity of an individual trustee to advance a complaint under the framework of the lawyers disciplinary regime as set out in the Act.

[52] Section 132 of the Act provides that any person may complain to the appropriate complaints service about the conduct of a practitioner or former practitioner.

[53] The lawyers were clearly providing regulated services to the [ABC] family trust. The trust had three trustees, one of whom was Ms MX. I consider that it would be adopting an unnecessarily restrictive view of the lawyer/client relationship in these circumstances, to contend that the lawyers' duties to the individual trustees were limited, and subsumed by an overarching obligation to the trust.

[54] In *Macalister Todd Phillips Bodkins v AMP General Insurance Ltd*, the Supreme Court reinforced that a trust is "not a person but an equitable obligation to deal with property for the benefit of beneficiaries".[6]

[55] Provisions of the Act that are relevant to Ms MX's complaint are sections 111 and 114.

[56] Section 111(1) provides that:

> If in the course of the practice of a practitioner …, the practitioner … receives or holds money or other valuable property on behalf of any person, the practitioner … must account properly for the money or other valuable property to the person on whose behalf the money or other valuable property is held.

[6] [2006] NZSC 105, [2007] 1 NZLR 485 at [42].

[57] Section 114 provides that:

> It is the duty of every practitioner … to ensure that, whenever practicable, all money held on behalf of any person by that practitioner … earns interest for the benefit of that person unless—
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> (a) that person instructs otherwise; or
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> (b) it is not reasonable or practicable (whether because of the smallness of the amount, the shortness of the period for which the practitioner … is to hold the money, or for any other reason) for the practitioner … to invest the money, at the direction of the person for whom the money is held, so that interest is payable on it for the benefit of that person.

[58] Section 111 of the Act is concerned primarily with ensuring that a lawyer accounts properly for money or property received.

[59] There is no issue here of the executors' conduct remotely requiring an examination as to whether they had failed to comply with s 111 of the Act. Immediately on receipt of funds, the executors deposited funds received to an interest-bearing account.

[60] But it is important to emphasise that s 114, in the manner of its drafting, recognises that a stark mandatory requirement that all funds held by a lawyer be immediately invested would present as quite impracticable when set against the variety of situations and circumstances in which lawyers are called on to manage the deposit and withdrawal of funds to interest-bearing accounts.

[61] The obligation on practitioners to "wherever practicable" ensure funds held on behalf of a person are held on interest-bearing account, manifestly recognises the impracticability of making the requirement to invest mandatory, and flowing from that, the need to consider the particular circumstances of the particular case, when complaint is made that a party has failed to invest funds.

[62] Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) provides that in providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[63] At the heart of the lawyers' response to the complaint that they should have taken steps earlier than they did to put the sale proceeds on a higher interest bearing account, is the argument that they had a genuine belief that at the time the sale proceeds were received, there was, despite the history of prolonged difficulty with the administration of the estate, genuine prospect that the parties would be able to reach agreement.

[64] Sale proceeds were received on 26 June 2019.

[65] On 28 June 2019, Ms DJ wrote to the trustees. In that correspondence she said this:

> We continue perhaps overly optimistically, to hope that a sensible resolution to these matters can be reached by agreement. We continue to believe that that [sic] net proceeds of sale ought to be divided equally between J, K and M and we remain ready and willing to settle matters on that basis if all parties are able to agree.

[66] This immediate indication from Ms DJ that she and her fellow executor had a degree of confidence that matters could be promptly settled must, in my view, be taken as a fair reflection of how the executors saw matters progressing following the sale of the farm property.

[67] I consider it likely that the executors had formed a view that having funds available for immediate release to the trustees would have given some considerable impetus and momentum to the trustees to look to promptly resolve the issues that were in dispute.

[68] The lawyers say that at the time settlement funds were received, deeds of settlement were circulating among the parties and they were encouraged to the view that settlement would be achieved through an equal distribution to the deceased's three children, an outcome which the executors believed properly accorded with the intentions expressed by the deceased in his will.

[69] The executors were also encouraged in their view that matters could, and should, be promptly resolved in a settlement that provided for equal distribution, by an opinion they had obtained from Mr WT QC, whom they had instructed to review the issues that were hampering the executors' ability to finalise the administration of the estate.

[70] On 20 April 2018, Mr WT had provided a view to the executors as to how he thought matters could be best resolved. Mr WT noted that the estate administration had a "messy history" and that it had generated a "good deal of angst", but he considered that the correct approach for the executors to adopt was "straightforward".

[71] Mr WT's strong recommendation was that an agreement should be finalised on the basis of the deeds that had been prepared by the executors which had provided for equal distribution amongst the three trustees. Mr WT considered this outcome to be "obvious and straightforward". He concluded that if settlement was unable to be agreed, and the dispute had to be determined by the Court, that this outcome would

represent a “triumph of angst and personal hostility over common sense and economics”.

[72] The lawyers submit that Mr WT continued, after the sale of the farm property, to hold steadfast to his view that the issues that were impeding resolution were not intractable, and capable of being resolved in a straightforward manner.

[73] I am satisfied that the decision taken by the lawyers on receipt of settlement funds to organise placement of the funds in an interest-bearing account that allowed opportunity for immediate call on the funds was a decision that was reasonable and open to the executors to make at the time.

[74] It is approaching the trite, but nevertheless necessary to emphasise, that in the course of representing their client, a lawyer will on occasions be called on to make judgement calls in circumstances where there cannot be total certainty as to whether the decision made ultimately presents as the right one for the client. But I am satisfied that the initial decision made by the executors was a decision that properly fell within their discretion to make, and a decision that was reasonably taken on the basis of the executor’s assessment of the circumstances at the time.

[75] On 4 September 2019, Mr RJ wrote to the parties to inform them that his initial expectation that funds would be able to be distributed shortly after sale of the farm property, an expectation which had prompted him to deposit funds on-call, had proven to be unduly optimistic. He suggested that the funds be placed in a higher interest-bearing account for a period of three months, and sought instructions as to whether the parties would be in agreement with that suggestion.

[76] Attention then turns to the question as to whether the executors should have taken steps earlier than they did, to reassess their decision not to place the sale proceeds in a higher interest-bearing account.

[77] Ms MX argues that if it was the case that the executors believed that there was reason for optimism that settlement could be reached, that optimism must have been short lived. She notes, that in correspondence of 19 July 2019, Ms DJ was writing to the parties to advise that “given the absence of any indication from VY that settlement is a reasonable prospect we are proceeding on the basis that a resolution is likely only achievable via the HC [High Court] processes”.

[78] I agree with Ms MX, that Ms DJ’s correspondence of 19 July 2019 would appear to indicate that whilst the executors were initially hopeful that settlement of the farm sale would expedite a resolution of the issues that had impeded resolution, their

optimism that settlement could be promptly achieved appears to have been tempered with an acceptance of possibility that it would fall to the Court to direct how matters were to be resolved.

[79] It would appear to be the case that as the matter progressed, Mr RJ had reduced confidence that a settlement could be achieved. When he wrote to the trustees on 4 September 2019 giving indication of his intention to place funds held on a three-month deposit (this to achieve a higher rate than was being generated with the funds on-call) he indicated that it would be "surprising" if an outcome was achieved in that time.

[80] That assessment must be also measured against Mr RJ's indication to the NZLS in December 2019, that the administration of the estate had accumulated 23 Eastlight folders of documentation and a large archived box of papers, his assessment of the file as being the worst estate administration experience he had encountered in 50 years of working continuously in estate administration, and his indication that frequently in the course of working on the file, both he and Ms DJ had looked to retire from their roles as executors.

[81] Ms MX is emphatic in her view that funds should have been invested on more favourable terms much earlier. She is not alone in her view. The lawyer who was representing her in the Court proceedings considered that the funds could have been managed more efficiently.

[82] With the clarity and certainty that a measure of hindsight inevitably brings, I think it possible that the lawyers themselves may consider that they could have shifted the funds to a higher interest-bearing account earlier than they did.

[83] But the issue I am required to address is the question as to whether the decisions made by the lawyers constituted a breach of their professional obligations, such as would merit or require a disciplinary response.

[84] The complaint Ms MX advances is essentially complaint that the lawyers failed to manage the funds competently.

[85] In the course of providing regulated services to their client, a lawyer must act competently, and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.[7]

[86] A lawyer's conduct may be deemed to be unsatisfactory if, in the course of providing regulated services to their client, their conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[8]

[87] The duty to act competently has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help".[9]

[88] The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care or skill that any reasonable lawyer in the same position would have done.[10]

[89] It has been noted that "lawyer competence, though pivotal to public confidence in the profession and the administration of justice, lacks any generally accepted meaning; it instead takes its flavour from the perspective of the observer".[11]

[90] Not surprisingly, neither the Act, nor the Rules, attempt to lay down a definitive definition of competence, a determination of which must inevitably be attempted through an examination of a variety of factors including, but not limited to, the nature of the retainer and the context in which the conduct complaint arises.

[91] It is important to recognise that an obligation to provide competent advice does not impose an unreasonable burden on a practitioner to be always right, or to always provide the right advice.

[92] It has been noted that:[12]

> … while there is an existing professional duty of competence in New Zealand, albeit one which is particularly narrow, there is no duty to provide a high level of service to clients. The duty of competence is, in reality, a duty not to be incompetent and is aimed at ensuring minimum standards of service.

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[7] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.
[8] Lawyers and Conveyancers Act 2006, s 12(a).
[9] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [11.1].
[10] At [11.3].
[11] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [4.20].
[12] Webb, Dalziel and Cook, above n 9 at [11.3].

[93] What may on first reading present as a singularly less aspirational objective for a profession than would be expected is, on closer examination, an affirmation of a reasonable standard of expectation of the level of competency required of lawyers. All lawyers are expected to provide a competent level of service to their clients.[13]

[94] The decision to place the funds in an interest-bearing account that allowed opportunity for immediate call if required, was taken on the basis of what Ms DJ considered was an optimistic appraisal of the chances of an expeditious settlement.

[95] This decision must be considered in the context of the obvious and prolonged difficulties that had resulted in the administration of the estate being unable to be finalised, the problems which had resulted in the need for three sets of executors[14] to be appointed, and the recognition by the lawyers that the problems were so intractable that the intervention of the Court would be required.

[96] Whilst I accept that finalising the sale of the farm property would have been a significant factor in encouraging the lawyers to the view that settlement could be expeditiously achieved, it is difficult at first blush to identify what other factors could have been persuasive in encouraging them to that view.

[97] The administration of the estate had been ongoing for a number of years. The proceedings before the court were described by Mr RJ as complex. There had been multiple legal advisers engaged by Mr MX's children and grandchildren.

[98] Ms DJ's correspondence of 19 July 2019 appears to indicate an acceptance the possibility that settlement of the administration of the estate was some time away. There is no indication, on the file before me, of the proceedings before the Court having been allocated a hearing date when Ms DJ wrote to the trustees in July 2019.

[99] However, in the course of the telephone conference, Ms DJ provided more comprehensive explanation for the practitioners' continuing commitment to the view that settlement was possible, despite the difficult history and the manifest obstacles faced.

[100] Ms DJ confirmed that it was the executors' view that the completion of the sale of the farm property (which realised the major estate asset) had significantly incentivised the parties to push to settlement.

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[13] Paragraphs [87]–[95] from *R and N Family Trust v EL* LCRO 205/2015 at [41]–[49].
[14] Letter from Mr RJ to the Lawyers Complaints Service (12 December 2019) at [4].

[101] She explained that there had, in the month of July, been a considerable amount of “to-ing and fro-ing” between the parties, and some productive discussions on refining the deed of settlement. This had encouraged the lawyers to retain a degree of optimism that settlement could be imminent.

[102] Significantly, Ms DJ emphasised (and I accept her evidence on this point) that both she and Mr RJ constantly had the issue of the allocation of sale funds “on our minds”.

[103] She explained that considerable pressure was being asserted on the practitioners by one of the beneficiaries who was anxious to have funds released. This beneficiary was confronting some difficult personal family circumstances and was in urgent need of funds.

[104] Ms DJ said that the executors had been given indication early in July that a significant impediment to achieving settlement (Ms MX’s reluctance to allow executor indemnities to be included in the deed of settlement) had real prospect of resolution.

[105] Ms DJ explained that the executors were, during the period under examination, continuing to be advised by Mr WT, and that advice received from him at this time was consistent with the initial advice provided, when he had advanced a view that the pathway to settlement was clear and obvious.

[106] I consider it relevant that the executors were taking advice on the issue from senior counsel. That did not inoculate the practitioners from responsibility for decisions made, but it adds grist to the mill of Ms DJ’s argument that care was being exercised with the decisions that were being taken.

[107] In summary, Ms DJ submitted that both she and Mr RJ were anxious to ensure that funds were available for immediate release if required, optimistic despite the file’s difficult history and continuing problems that settlement could be achieved, and confronted with pressure from one of the beneficiaries to release funds promptly.

[108] Ms DJ emphasised that neither she nor Mr RJ had overlooked the fact that funds were sitting on-call, nor had they failed to consider the question as to whether they should transfer funds to a higher interest-bearing account. The decision not to transfer was one made by them in circumstances where they were alive to all the competing issues. It was a decision that the practitioners contend was properly left to them as executors to make.

[109] Ms DJ submitted that the event that shifted the practitioners from the position that it was feasible to retain the funds in an on-call account was the decision made by Ms MX to file proceedings in the court against the executors in their personal capacity. Those proceedings were filed in August 2019. This, says Ms DJ, prompted the practitioners to reassess the viability of maintaining the funds on-call.

[110] Against this, Ms MX submitted that it must have been compellingly obvious to the executors in July 2019 that prospects of settlement were remote.

[111] She does not consider that indication of possible agreement on the indemnity issue could realistically have been interpreted by the executors as removing a significant obstacle. It was her view that a number of issues of substance remained unresolved. Further, she reiterated her view that Ms DJ's correspondence of 19 July 2019 gives clear indication that Ms DJ considered that the intervention of the court would be required.

[112] Following the hearing, further submissions were received from the parties.

[113] I have sympathy for Ms MX's position. In my view, her argument was fairly and responsibly advanced.

[114] There were a number of issues in play which would have encouraged Ms MX in her position that there was little prospect that settlement would be achieved. There is much in the argument advanced by Ms MX to support her contention that the resolution of what were clearly intractable and long-held differences would only be achieved with the assistance of the court.

[115] She was best placed to understand what was, or was not, acceptable to her. She had issues that she considered were important to resolve. She was entitled to resist attempts to settle. She did not agree with the terms of the proposed settlement.

[116] I do not however consider that the indemnity issue is critical to the point where it assumes an especial significance amongst the many factors to be considered.

[117] The issue I am required to address is whether the practitioners' failure to transfer funds earlier reflected a lack of competency on their part.

[118] Stepping back, as I am required to do, and bringing to my assessment of the events the robust and independent inquiry that is demanded of me, it is my view that the practitioners' actions were explainable and understandable.

[119] I do not consider that their decision to refrain from moving the funds earlier than they did, was indicative of a failure on their part to act competently.

[120] I see no evidence of a failure to act arising from unexplainable or unreasonable delay or omission, or that any delay that occurred reflected a casual indifference on the part of the lawyers to their obligations and responsibilities.

[121] It is not the role of a Standards Committee or a Review Officer to second guess every decision made by lawyers, or to substitute their judgement for that of the lawyers.

[122] Nor is it the case that even if the decision by the lawyers to retain the funds in an on-call account was determined to have been a mistake or error, that this would necessarily, in the circumstances of this case, demand or require a disciplinary response.

[123] An honest mistake does not provide a proper basis for disciplinary action.[15]

[124] Importantly, I am satisfied that the practitioners, in the course of managing the administration of what was clearly a taxing and difficult estate, brought a degree of conscientious consideration to the issue as to whether they should consider transferring the funds to a higher interest-bearing account.

[125] As I have noted, with the benefit of hindsight, the lawyers may have elected to take steps sooner, but I am not persuaded that the circumstances were so demonstrably and unequivocally demanding of a decision being made to move funds earlier, that the lawyers' exercise of their judgement to retain funds on the basis of concern that funds may have been required for immediate release, can be reasonably criticised to the degree that the criticism would provide reasonable grounds for establishing a breach meriting of a disciplinary response.

[126] No broader issues of consumer protection or public welfare have been raised by this issue.

[127] I see no grounds which could persuade me to depart from the Committee's decision.

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[15] *CW v XB* LCRO 213/2010 at [16].

Anonymised publication

[128] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

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

DATED this 30TH day of SEPTEMBER 2021

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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:

Ms MX as the Applicant
Mr RJ and Ms DJ as the Respondents
[Area] Standards Committee [X]
New Zealand Law Society