

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 118

Ref: LCRO 68/2021

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

BU

Applicant

AND

**APPLICATION FOR REVIEW OF
A PROSECUTORIAL DECISION**

DECISION

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

Introduction

[1] Mr BU has applied for a review of a decision by the [Area] Standards Committee [X].

Background

[2] Mrs VL passed away on [date] 2013.

[3] She was survived by her three daughters Mrs TH, Mrs OE and Mrs SW.

[4] Mr BU was named in Mrs VL's will as executor of her estate.

[5] The sale of Mrs VL's house had been finalised by [Month] 2014, and the majority of her assets realised to enable distribution.

[6] Mr BU rendered an account for work completed on administering the estate and received payment on 15 August 2014.

[7] On 1 June 2018, Mrs OE made complaint to the Lawyers Complaints Service (LCS) that Mr BU had failed to implement the transfer of shares held in Mrs VL's estate to the beneficiaries.

[8] In a decision delivered on 21 February 2019, the Standards Committee determined that Mr BU was guilty of unsatisfactory conduct for failing to facilitate the transfer of the shares. The Committee directed that Mr BU was to finalise the transfer of the shares within three months of the date of its determination.

[9] On 1 October 2019, Mrs OE filed a further complaint against Mr BU. Her complaint was that Mr BU had failed to comply with the order to transfer shares.

[10] In its determination delivered on 14 October 2019, the Standards Committee made a further finding of unsatisfactory conduct against Mr BU, this arrived at on the back of its finding that Mr BU had failed to comply with its earlier order.

[11] In the course of liaising with Mr BU's legal executive on matters relating to the process for transferring the shares from her later mother's estate, Mrs OE was informed that Mr BU's firm was retaining funds from her mother's estate in the sum of around \$20,000. This prompted Mrs OE to lodge a further complaint, being complaint that Mr BU had retained funds from her mother's estate and failed to disclose this to the beneficiaries.

[12] On 17 July 2020, the Complaints Service made inquiry of Mr BU as to what he intended to do about the funds he was holding.

[13] Mr BU responded as follows:

It will be disbursed. The Beneficiaries were aware of it being held for Tax and Accounting purposes. It was clearly identified in statements provided. I won't comment on the fact that none of the sisters ever followed up with us about the balance held. It has earned interest so is a lot more than we retained originally"

[14] On 21 July 2020, the Complaints Service forwarded to Mr BU a copy of what it described as Mrs OE's residual complaint, being her complaint that Mr BU had retained estate funds.

[15] On 24 August 2020, 31 August 2020 and 7 September 2020, the Complaints Service forwarded follow up correspondence to Mr BU, seeking a response to Mrs OE's complaint.

[16] In a response to the Committee of 7 September 2020, Mr BU stated that he had resolved matters arising from the first complaint. It was his view that the Complaints Service had then encouraged Mrs OE to file a further complaint. He noted that “the three beneficiaries knew funds were retained and they never asked about them”. He observed that his trust account ledger for the estate of Mrs VL, was one of a number of ledgers that had been addressed in a disciplinary hearing that had been before the Lawyers and Conveyancers Disciplinary Tribunal. He noted that he had been “unable to close the account because of input errors which were finally corrected”. Mr BU advised that the balance of funds held had been paid out to the beneficiaries on 14 August 2020.

[17] The Complaints Service responded to Mr BU on 7 September 2020. In that correspondence, the Complaints Service advised that it had not been instrumental in encouraging Mrs OE to file a further complaint, but rather that Mrs OE had “filed a new complaint upon learning from your legal executive that there was a relatively significant amount of money left over from Mrs VL’s estate that was still being held by your firm”. Mr BU was informed that a fresh complaint file had been opened, and that the subject of this complaint related to Mrs OE’s concerns regarding Mr BU’s apparent failure to distribute funds that had been retained in his firm’s interest-bearing deposit account for several years. Mr BU was asked to clarify when he had advised the beneficiaries that funds were being retained.

[18] In responding to the Complaints Service on 10 September 2020, Mr BU advised that:

- (a) Mrs OE was aware that funds were being retained; and
- (b) issue relating to retention of funds were not appropriately the subject of complaint; and
- (c) delays in releasing funds were linked to issues Mr BU had with his trust account which had been the subject of a separate complaint.

[19] In summarising his position Mr BU said this:

The point is – yes I am at fault but the three sisters knew of the funds and as has been shown did not follow up with me and nor did they with their sister Mrs SW.

It has all been resolved now and they have not lost because the money was well looked after on IBD.

[20] Mrs OE responded to the explanation Mr BU had provided to the Complaints Service. She advised that:

- (a) she had not been instructed by the Complaints Service to file a further complaint, she had taken that step on her own initiative after learning from Mr BU's legal executive that estate funds had remained undisbursed for a period of approximately 7 years; and
- (b) she considered that it was Mr BU's responsibility to promptly attend to finalising distribution of funds from her late mother's estate; and
- (c) neither she nor her fellow beneficiaries had ever received any information from Mr BU as to where estate funds had been invested; and
- (d) her experience in dealing with Mr BU was that he persistently neglected to respond to her requests to provide information; and
- (e) she had never received an account from Mr BU which had provided explanation of the work that had been done.

[21] The Standards Committee resolved to set the matter down for hearing. The issue for determination, as identified in the notice of hearing was:

Whether, owing to delays in distributing funds belonging to the estate of the late Mrs VL, Mr BU could be said to have failed to act competently and in a timely manner in his capacity as executor of, and lawyer for the estate, and if so, whether Mr BU breached Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, and/or any other Rule or enactment.

[22] In responding to the notice of hearing, Mrs OE submitted that Mr BU's retention of funds for a period of almost 8 years, was "tantamount to theft". She reiterated that she was unaware that Mr BU was retaining estate funds and that neither she, nor the other beneficiaries, had ever received information from Mr BU as to where estate funds had been invested.

[23] Mr BU, in his response, submitted that Mrs OE was aware that funds had been retained. He considered that the issues raised by Mrs OE were "not properly the subject of a complaint". He noted that issues of delay in disbursing funds were connected to problems he had had with his trust account which had been the subject of a previous complaint. Mr BU conceded that he was "at fault" for the delay in disbursing the funds, but it was his view that all of the beneficiaries were aware that the funds were being retained, and none had elected to follow-up with him. Mr BU considered that the issue had been resolved. He was confident none of the beneficiaries had suffered loss, as the funds had been "well looked after on IBD".

[24] The Committee issued its decision on 7 April 2021. The Committee directed that the complaint be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

Application for review

[25] Mr BU filed an application for review on 21 May 2021.

[26] He submits that:

- (a) it was not correct that Mrs OE was unaware that funds were being retained; and
- (b) following the sale of Mrs VL's home and closing of her bank accounts, a statement was forwarded to Mrs OE's lawyer which disclosed that Mr BU was retaining funds to settle outstanding tax liability; and
- (c) he had for a period of time, experienced difficulty reconciling figures in his client ledgers with figures disclosed on the client ledger print out; and
- (d) these difficulties with management of his trust account records were not resolved until after his appearance in the Disciplinary Tribunal to answer charges arising from the management of his trust account; and
- (e) funds held on term deposit received a reasonable level of interest; and
- (f) the beneficiaries had not suffered loss; and
- (g) there was a "certain amount of double jeopardy and res judicata which should have been considered by the Committee" but was overlooked because of the jaundiced view the Committee had of him; and
- (h) he had been fined and censured by the Disciplinary Tribunal for failing to comply with requirements for annual reporting; and
- (i) if he was to appear before the Disciplinary Tribunal, it would be for the same offence; and
- (j) the Committee's decision was based on irrelevant considerations and the decision reflected a degree of bias and prejudice on the part of the Committee members.

Review on the papers

[27] An applicant only hearing proceeded on Tuesday 13 July 2021.

Nature and scope of review

[28] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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.

[29] More recently, the High Court has described a review by this Office in the following way:²

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.

[30] 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.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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

Statutory framework for the prosecution decision

[31] In *EB: Application for Review of a Prosecutorial Decision* LCRO 110/2017 (20 November 2017), the Review Officer summarised the approach adopted by Standards Committees when considering a decision to refer a practitioner to the Disciplinary Tribunal. That analysis is summarised in paragraphs [32] to [43] that follow.

[32] The Act provides for two categories of conduct which may attract disciplinary sanction, being misconduct and unsatisfactory conduct.³ The former is the more serious and can lead ultimately to a practitioner being struck off by the Disciplinary Tribunal.⁴

[33] Standards Committees may only make findings about the lesser category of unsatisfactory conduct.⁵ When confronted with a complaint⁶ in which the spectre of misconduct is present a Standards Committee may direct it to be considered by the Tribunal,⁷ and thereafter the Standards Committee must frame and lay any appropriate charge with the Tribunal⁸ and serve them on the practitioner (and any complainant).

[34] Significantly, when directing a complaint to be considered by the Tribunal, a Standards Committee is not obliged to provide reasons. This is evident from the language of s 158 of the Act, which requires reasons to be given only when a Standards Committee makes a finding of unsatisfactory conduct or determines to take no further action.

[35] It is generally a fundamental tenet of natural justice that decision-makers provide reasons. At first blush it may seem inconsistent with that principle that a Committee with a statutory power of decision-making is not obliged to provide reasons for a decision it makes.

[36] In *Orlov v New Zealand Law Society* the Court of Appeal gave careful consideration to the question as to whether a Standards Committee was required to provide reasons for its decision to refer a matter to the Tribunal, and concluded that “it is clear from s 158 that a Standards Committee is not required to give reasons for a decision made under s 152(2)(a) to refer a matter to the Tribunal.”⁹ Further, the Court

³ Lawyers and Conveyancers Act 2006, ss 7 and 12.

⁴ Section 244.

⁵ Section 152(2)(b).

⁶ Including an own-motion investigation under s 130(c) of the Act.

⁷ Section 152(2)(a).

⁸ Section 154.

⁹ *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [98].

noted that if Parliament had intended that a Committee be required to provide reasons for its decision to refer, then it would have expressly said so.¹⁰

[37] It is also important to note that in *Orlov* the Court of Appeal held that there is no threshold test to meet before a Standards Committee makes a prosecution decision.¹¹

[38] Moreover, because Standards Committees may not make findings that particular behaviour is misconduct, the decision to prosecute is not a merits-based decision. In effect when directing the prosecution of a practitioner a Standards Committee is saying, “this behaviour may constitute misconduct; if so, only the Tribunal may determine that question”.

[39] Furthermore, the Tribunal may make that determination only after charges have been laid and a hearing conducted in that forum. The hearing will include parties giving evidence and being cross-examined – indeed, a traditional first-instance hearing procedure. It is only at the conclusion of that process that a merits-based decision may be made by the Tribunal.

[40] Nevertheless, whilst a Standards Committee is not required to provide reasons for its decision to refer a matter for prosecution before the Tribunal, there is an express right of review conferred by the Act.¹²

Role of the LCRO on reviewing a prosecution decision

[41] In *Orlov* the Court of Appeal commented “there is now oversight of the referral decision by the independent LCRO”.¹³

[42] More recently the High Court was asked to review a decision of this Office in which it had dismissed an application for review of a Standards Committee’s decision to prosecute a practitioner. Fogarty J held the following:¹⁴

- (a) The purpose of a review by the LCRO is to form a judgment as to the appropriateness of the charge laid in the prosecutorial exercise of discretion by the Standards Committee. It is as simple as that. ... I agree ... that “a review by the LCRO (should be) 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. I agree also there is room in that review for the LCRO to identify errors of fact.

¹⁰ At [99].

¹¹ Above at [53].

¹² Section 193.

¹³ At [54](d).

¹⁴ *Zhao v Legal Complaints Review Officer* [2016] NZHC 2622.

[43] Fogarty J also observed that “a critical question for the LCRO is whether the degree of gravity of the matter should justify the Standards Committee exercising the power to refer [conduct] to the Tribunal”.¹⁵

Discussion

Was the decision of the Standards Committee to refer Mr BU to the Disciplinary Tribunal unreasonable, in that it arose from a consideration of conduct breaches that had been the subject of previous disciplinary findings?

[44] Mr BU contends that the Committee’s decision to proceed with an investigation into Mrs OE’s residual complaint was unreasonable as the issues engaged by the complaint had been the subject of earlier disciplinary findings.

[45] In advancing this argument, Mr BU focused on the decision of the Disciplinary Tribunal that had issued in [month] 2020, and the complaints advanced by Mrs OE which had culminated in two unsatisfactory conduct findings.

[46] Mr BU considered that he was being punished twice for the same offence. He believed that the Committee’s decision to investigate Mrs OE’s complaint offended principles of res judicata and amounted to double jeopardy.

[47] When conducting a review of a Standards Committee decision it is not common practice (except when turning to issues of penalty) to consider a practitioner’s previous disciplinary record, but in this case it is necessary to do so.

[48] To give proper consideration to Mr BU’s argument that the Committee’s decision to refer him to the Disciplinary Tribunal focused on matters that had been the subject of previous disciplinary inquiries, it is necessary to examine all the disciplinary decisions that involved elements of complaint concerning his management of Mrs VL’s estate.

[49] In November 2017 Mr BU appeared before the Disciplinary Tribunal to respond to charges that he had breached various Trust Account Regulations and Conduct and Client Care Rules.

[50] The trust account breaches addressed by the Disciplinary Tribunal in 2017, included:

¹⁵ At [25].

- (a) failing to keep trust records that clearly disclosed funds held in his firm's trust account; and
- (b) failing to ensure that his trust account was not overdrawn; and
- (c) failing to ensure that trust account records were maintained in a manner that enabled them to be conveniently reviewed by the Inspectorate; and
- (d) failing to provide the Law Society with required certificates; and
- (e) failing to ensure that the trust bank accounts were reconciled with the firm's trust ledger.

[51] Mr BU acknowledged at hearing that the trust account breaches considered by the Disciplinary Tribunal in 2017 included matters relating to his management of funds held for the VL estate.

[52] The Tribunal ordered Mr BU to take steps to implement a new software accounting program for managing his trust account, and to undertake training in the program.

[53] In June 2018, Mrs OE made complaint that Mr BU had failed to provide her with a copy of Mrs VL's memorandum of wishes,¹⁶ and that he had failed to comply with the terms of Mrs VL's will. This was the first of three complaints made by Mrs OE.

[54] As the Committee's investigation progressed, its inquiry concentrated on the question as to whether Mr BU had, in accordance with directions made in Mrs VL's will, taken steps to complete a transfer of shares into the names of the beneficiaries.

[55] The Committee concluded that Mr BU had failed to attend to the share transfer. It noted that "not only did Mr BU fail to complete the administration of the estate, he also disregarded numerous attempts by Mrs OE to ascertain whether, in fact, the shares had been transferred".¹⁷

[56] The Committee determined that Mr BU's conduct had been unsatisfactory and directed that Mr BU was to arrange for the transfer of shares to be implemented as quickly as possible. The transfer was required to be completed within three months of the date of the determination, being 31 May 2019.

¹⁶ It was Mrs OE's view that her mother had provided instructions to draft a memorandum of wishes, contemporaneous with instructions for her will.

¹⁷ [Area] Standards Committee determination 21 February 2019 at paragraph [29].

[57] On 1 October 2019, Mrs OE made complaint that Mr BU had failed to comply with the order that he attend to the share transfers.

[58] On 7 September 2020, Mr BU advised the Complaints Service, that transfers to two of the beneficiaries had been finalised by 11 August 2020. He had been unable to make contact with the third beneficiary.

[59] In its determination issued on 14 December 2020, the Committee made a further finding of unsatisfactory conduct. It concluded that Mr BU's failure to comply with the Standards Committee's order was not only a breach of the Act, but "exhibited a continuing disrespect for Mrs VL's wishes and for her daughters as beneficiaries".

[60] Mr BU was back before the Disciplinary Tribunal in December 2019, this time to respond to charges that he had failed to comply with the undertaking provided to the Disciplinary Tribunal in 2017 and had breached r 3 of the Conduct and Client Care Rules and various Trust Account Regulations.

[61] It was contended that Mr BU had breached Trust Account Regulations by:

- (a) deducting fees on two occasions without sending an invoice; and
- (b) failing to report to clients about funds held on trust and/or on interest-bearing deposit; and
- (c) failing to reconcile the interest-bearing deposit account.

[62] The breach of the Conduct and Client Care Rules was alleged to have occurred as a consequence of Mr BU's failure to organise payment of funds that had been held dormant for more than 12 months in his trust account.

[63] In an appendix to its decision, the Tribunal provided particulars of the charges.

[64] In describing the breaches that had application to Rule 3 of the Conduct and Client Care Rules, the particulars alleged that:

- (a) in providing regulated services to his clients, Mr BU did not in a timely manner pay money held in his trust account to the clients in Schedule 1; and
- (b) Mr BU did not provide to some or all of the clients for whom trust money was held on interest-bearing deposit as listed in Schedule 2 of these charges, a complete and understandable statement of all trust money handled for the clients, all transactions in the clients' account and the

balance of the clients' account in respect of ongoing investment transactions, at intervals of not more than 12 months.

[65] The particulars referenced in Schedule 1 were detailed under the heading, "Dormant balances not paid to clients – rule 3 Conduct and Client Care Rules".

[66] The particulars referenced in Schedule 2 were detailed under the heading, "Failure to report to clients about funds held on trust – reg 12(7) Trust Account Regulations".

[67] Following the Review hearing Mr BU, at the request of the LCRO, provided the LCRO with a redacted copy of the Schedules that had been attached to the particulars of the charges that were before the Tribunal in 2019.

[68] The Schedules provided by Mr BU disclosed that the VL's estate file was not referenced in Schedule 1 but included amongst the client files referenced in Schedule 2.

[69] Mr BU confirmed that to be the case.

[70] To the extent that the December 2019 Disciplinary Tribunal hearing addressed charges that had relevance to Mr BU's management of Mrs VL's estate, the concerns were that Mr BU had failed to comply with his obligation to provide his clients with an annual statement recording the balance of funds held on interest-bearing deposit.

[71] Mrs OE's third and final complaint which, resulted in the Committee's decision to refer Mr BU to the Disciplinary Tribunal, was lodged on 17 July 2020.

[72] Mrs OE's complaint that Mr BU had failed to disburse funds, was articulated by the Committee as complaint that Mr BU had failed to act competently and diligently in managing the estate. An indication of possible failure to provide competent and diligent representation, was potentially indicated by the length of time that funds had been retained.

[73] I have given careful consideration to Mr BU's argument that he has been unfairly prejudiced by having to respond to a complaint that has been considered and determined in previous disciplinary decisions. In my view there has been no replication such as would raise concern that Mr BU has been prejudiced by having to respond to the same complaint a second time.

[74] The Committee's decision of 21 February 2019, whilst critical in general of Mr BU's failure to complete the administration of the estate, identified the conduct

concern as being Mr BU's apparent indifference to implementing a provision in Mrs VL's will, despite numerous enquiries made of him as to whether he had done so. The disciplinary inquiry focused on the question as to whether Mr BU had attended to the share transfer.

[75] The Committee's decision of December 2020 dealt exclusively with issue of Mr BU's failure to attend to the transfer of shares in the timeframe directed by the Committee.

[76] It is the Disciplinary Tribunal's decision of [month] 2020 on which Mr BU places greatest reliance to support argument that he had been burdened with having to respond to a complaint that had already been addressed.

[77] The trust account breaches addressed by the Disciplinary Tribunal in 2019, involved allegation that Mr BU had failed to provide his clients with a statement of trust monies held, and to comply with regular reporting requirements.

[78] The complaint that has led to this review, is whether, owing to delays in distributing funds, Mr BU could be said to have had failed to act competently and in a timely manner in his capacity as executor of, and lawyer for, the estate, and if so, whether Mr BU had breached Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[79] The complaint, as noted at [21] of this decision, was clearly identified in the Committee's notice of hearing. It is complaint that Mr BU failed to finalise the administration of the estate in a timely manner.

[80] This was not complaint that Mr BU had failed to comply with reporting requirements or had neglected to comply with trust accounting obligations.

[81] In providing explanation for his delay in winding up the estate, Mr BU emphasised the problems he had experienced with managing his trust account over a period of time. It was his view that he was gradually and systematically addressing the problems that had been identified by the Disciplinary Tribunal on two occasions, and that he had been allowed a period of time to sort the problems out and was in the process of doing so when Mrs OE lodged her final complaint.

[82] He says that he was unable to attend to a final distribution until he had resolved the issue of the share transfers.

[83] Mrs OE says that she only became aware that Mr BU was holding funds when speaking with Mr BU's legal executive in early June 2020.

[84] Mr BU is emphatic that the beneficiaries knew that he was retaining funds. He says that the beneficiaries were alerted to this in 2014 when he provided them with his statement recording the details of the administration of the estate.

[85] That statement which recorded a balance of funds retained for tax and accounting fees in the sum of \$16,241.27, was accompanied by correspondence in which Mr BU advised the beneficiaries that he had retained funds for those purposes, and that funds held on term deposit would be available once the final tax return for the estate had been filed. Mr BU says that a copy of this statement was forwarded to Mrs OE's lawyer.

[86] Mrs OE says that she did not receive copies of Mr BU's statement.

[87] A copy of Mr BU's statement correspondence was on the Standards Committee file but did not record the contact details of the parties to whom the documents were being forwarded.

[88] Mr BU's PA emailed the beneficiaries on 5 June 2020. In that correspondence she advised that when the share transfers were completed, Mr BU would be in a position to pay out the balance of funds held of approximately \$20,000.

[89] Mr BU also notes, that when complying on 25 May 2020 with the Committee's direction that he apologise to the beneficiaries for unacceptable delays in attending to the share transfers, he had advised the beneficiaries that there was a credit balance held to the credit of the estate which had been disclosed in a statement that had been earlier provided to the beneficiaries.

[90] I am unable to determine with certainty as to whether the beneficiaries received Mr BU's statements but it appears clear that subsequent to finalising the bulk of the estate matters in 2014, Mr BU had taken no steps to finalise the estate until eventually prompted to do when responding to Mrs OE's complaints and a second intervention of the Disciplinary Tribunal.

[91] If Mr BU is correct in his view that the beneficiaries received a statement in 2014 that recorded that funds had been retained and put on term deposit, it was nevertheless his responsibility to report regularly to the beneficiaries, and to attend to finalising all estate matters in a timely fashion.

[92] I do not agree with Mr BU that the third complaint filed by Mrs OE replicated previous complaints.

[93] Nor do I accept that Mr BU can, in providing explanation for the delay in releasing trust funds held on interest-bearing deposit, find safe haven in argument that problems with his trust account provided reasonable explanation for the lengthy delay, or that the order made by the Disciplinary Tribunal in February 2020 provided continuing cover for Mr BU's failure to attend to finalising the administration of the estate.

[94] Mrs VL died in 2013.

[95] The bulk of the administration of the estate was finalised by August 2014.

[96] In 2017 Mr BU's attention was sharply drawn to the fact that he was continuing to retain funds for the VL estate.

[97] It would reasonably have been expected of Mr BU at this point, that he immediately take steps to both comply with his reporting obligations, and address the question as to why a significant sum of funds was still being retained on term deposit.

[98] Resolving issues of dormant balances across a range of files can take time, but funds held on term deposit are readily identifiable and Mr BU accepted at hearing that his monthly bank statements would have provided a clear summary of the funds held in an interest-bearing account.

[99] It could have been expected of Mr BU that he would have carefully reviewed the estate file in 2018 when complaint was made that he had failed to finalise the share transfers, and taken steps to finalise the administration of the estate.

[100] I do not consider that the continuing delay in finalising the estate can be explained, as Mr BU endeavours to do, by explanation of continuing problems with the management of his trust account.

[101] Nor do I consider that either the conduct breaches relating to the share transfers, or the trust account breaches, were of sufficient similarity to complaint that Mr BU had failed to act competently and in a timely manner in his capacity as executor of, and lawyer for, the estate, such as could support argument that Mr BU was being prejudiced by having to respond to a complaint that had been previously considered.

[102] Whilst Mr BU acknowledged that his management of Mrs VL's estate was not his best work, he considered that the beneficiaries also bore a degree of responsibility for the delay that had occurred. He was critical of the beneficiaries for not following up with him. In the hearing he alluded to this as engaging a degree of contributory negligence.

[103] I do not consider this to be a compelling submission.

[104] It was Mr BU's responsibility to manage the estate in a competent and timely manner. Suggestion that his failure to wind up an estate which was substantially settled in 2014 until July/August of 2020 was partly attributable to a failure on the part of the beneficiaries to prod him along, is more reflective of Mr BU's apparent lack of recognition both of the significance of the delay and his responsibility for it, than it is a considered and realistic response to the criticism made.

[105] And whilst it was Mrs OE who bore the brunt of the inconvenience of driving the complaints in an effort to bring matters to conclusion, it is clear that the other beneficiaries were labouring under the misapprehension that Mr BU had finalised matters. Ms SW was contacted by Mr BU's legal executive in June 2020, this communication prompted by direction that Mr BU was in the process of finalising the share transfers. In responding, Ms SW informed Mr BU's legal executive that she was "surprised that this administration of the estate has not been concluded in the 7 years since Mum's passing on [date] 2013".

[106] Mr BU suggested at hearing that it was not uncommon for estate matters to take some time to resolve.

[107] I accept that on occasions the task of winding up an estate can take considerable time, particularly in those circumstances where the realisation of assets is complex, the provisions of the will uncertain, and there is disagreement amongst the executors/executrix or beneficiaries.

[108] But in this case, when Mr BU provided his administration statement in August 2014, there were two simple matters to attend to. Transferring shares and finalising the tax liability.

[109] There is nothing in the Standards Committee file to indicate that facilitating the share transfers was difficult or engaged issues of particular complexity. Nor should any problems with attending to issues with the shares have impeded Mr BU's ability to release the funds held on interest-bearing deposit.

[110] Mr BU submitted that the beneficiaries had suffered no loss as a consequence of the funds being retained for a considerable period of time. He suggested at hearing that the funds had been well managed and had earned a good interest rate. It is speculative to postulate as to whether the beneficiaries had or had not suffered loss. What was required, was that the estate be competently managed so that final

distribution could be achieved, and the beneficiaries placed in the position where they could exercise autonomy over the management of their funds.

[111] The issue I am required to consider is whether there is any proper basis for interfering with the Committee's decision to refer Mr BU's conduct to the Disciplinary Tribunal for prosecution.

[112] As Fogarty J held in *Zhao*, I must robustly come to my own view of the fairness of the substance and process of the Committee's prosecution decision.

[113] I am satisfied that the substance of the last of the complaints advanced by Mrs OE, engaged a consideration of the question as to whether Mr BU had managed the estate file in its entirety competently, and in a timely manner.

[114] In determining that it was appropriate to refer the matter to the Disciplinary Tribunal, the Committee had clearly concluded that the conduct concerns identified, raised possibility that the conduct was at a level of seriousness that merited a consideration as to whether it met the threshold to establish a conduct breach at the level of misconduct.

[115] It is not for a Standards Committee or this Office to make findings of misconduct. That is the exclusive domain of the Tribunal. At the most, a Standards Committee and this Office is able to say that there are conduct issues that could – not would – amount to misconduct if the Committee's evidence crosses the threshold required before the Tribunal.

[116] I see no reason to interfere with the decision of the Standards Committee to lay a charge before the Lawyers and Conveyancers Disciplinary Tribunal.

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

Costs

[118] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr BU is ordered pursuant to s 210(1) of the Act to pay costs in the sum of \$1,200 to the New Zealand Law Society within 30 days of the date of this decision.

Enforcement of costs order

[119] Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[120] 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 July 2021

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 BU as the Applicant
[Area] Standards Committee [X]
New Zealand Law Society