LCRO 106/2018
LCRO 107/2018
LCRO 170/2018
LCRO 181/2018

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 2
BETWEEN	**SY, [SAL] and DT** Applicants
AND	**[AREA] STANDARDS COMMITTEE [X]** Respondent

DECISION

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

Introduction

[1] Ms SY, Mr DT and SA Law (the applicants) have applied to review two determinations made by the [Area] Standards Committee [X] (the Committee).

[2] The determinations followed the Committee's own motion investigation into the conduct of the three applicants whilst acting in the administration of an estate.

[3] SA Law [(SAL)] is an incorporated law firm, and at the time to which these events relate, Ms SY and Mr DT were two of its directors and principals.

[4] The Committee's first determination (the liability determination) is dated 9 May 2018. The Committee made two findings of unsatisfactory conduct against Ms SY, four

findings of unsatisfactory conduct against Mr DT and two findings of unsatisfactory conduct against [SAL]. Fines were imposed on each.

[5] The second determination is dated 13 August 2018 (the compensation determination). The Committee awarded compensation to a Mr IO (I), payable by the applicants individually in percentages set by the Committee. The Committee also ordered the applicants to pay costs to the New Zealand Law Society.

Background

[6] Mr AO(A) and Mrs O farmed in rural northern [District/City]. They did so through a company, incorporated in 1962 (the farm company). Both were directors of the farm company.

[7] (A) owned 87.5 per cent of the shares in the farm company and Mrs O owned the remaining 12.5 per cent. (A) and Mrs O also owned a holiday home in [Town] as tenants in common in equal shares.

[8] (A) died in February 2015. Mrs O had been diagnosed with dementia and went into secure residential care shortly after (A)'s death.

[9] (A) and Mrs O had five children, four daughters and one son: RB, NO, GO, EO and IO. All were independent adults with their own families at the time of (A)'s death.

[10] RB was (and is) married to Mr UB. RB was also her mother's attorney pursuant to an enduring power of attorney as to property.[1]

[11] At the time of (A)'s death, NO and her husband were voluntarily maintaining the farming operation, with assistance from other family members. The farm was run-down.

[12] Mr UB, a Mr FD and Mrs O were the executors and trustees (executors) of (A)'s will. At the time of (A)'s death, Mr FD, a former director of [SAL], had retired from the law and lived elsewhere. He nevertheless accepted the executorship. Mr FD is now deceased.

[13] Mrs O did not have capacity to carry out her duties as one of the executors.

[14] The two remaining executors (Messrs UB and FD) instructed [SAL] to act in the administration of (A)'s estate.

[1] It is not clear (and nor is it relevant for the purposes of this matter) whether RB was also her mother's attorney as to welfare.

[15] Within [SAL], Mr DT was the principal responsible for the management and oversight of the firm's estate and litigation work.[2] A legal executive (Ms Z), who reported to Mr DT, had the role of estates administrator.

[16] Ms SY was, at the relevant time, a principal in [SAL] with expertise and experience in property law.

(A)'s will

[17] (A) executed his will in February 2011 and at a time when Mrs O had capacity. Mr FD, then employed at [SAL] (though by then no longer a partner), took (A)'s will instructions and drafted the document. Mr FD retired altogether from the law later in 2011.

[18] It was a straightforward will. (A) left personal items to Mrs O, and a life interest to her in the residue of his estate. The residue amounted to (A)'s 87.5 per cent shareholding in the farm company, and his half-share in the [Town] holiday home.

[19] Joint bank accounts passed to Mrs O by survivorship.

[20] There was a gift over of some stock to a grandson, as well as a gift over of some vehicles to (I).

[21] (A)'s 87.5 per cent shareholding in the farm company passed to (I) on Mrs O's death.

[22] (A) left the balance of his residuary estate to his four daughters, equally. To all intents and purposes, the balance of (A)'s residuary estate was his half-share in the holiday home.

[23] As it transpired, the gift over of stock to (A)'s grandson failed as the stock was owned by the farm company. That may also have been the position with the vehicles gifted over to (I), though nothing turns on that for the purposes of these applications for review.

[24] The will also contained a standard clause empowering the executors to "sell, let or lease … in their absolute discretion … any part or parts of [(A)'s] estate".

[25] Mrs O's will left her 12.5 per cent shareholding in the farm company to (I).

[26] The effect of both wills was that (I)would eventually inherit the farm.

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[2] Mr DT resigned his directorship in SAL on 30 October 2015.

[27] Probate of (A)'s will was granted by the High Court on 18 May 2015, some three months after he had passed away. The grant appointed Messrs UB and FD as executors and reserved power to grant probate to Mrs O if she appeared and applied. The order granting probate noted that Mrs O had not applied "due to incapacity".

The sale of the farm

[28] (I) had spent most of his early working life farming with (A), although that ended unhappily in the late-1980s. Litigation ensued, which was settled. As part of that settlement it appears that (A) and Mrs O told (I) that he would eventually inherit the farm.

[29] After (A) passed away the five children had discussions about selling or leasing the farm. The concern was that cash had to be freed to fund Mrs O's ongoing care requirements.

[30] Advice was provided at various times to the executors by Ms SY, Ms Z and Mr DT. Either RB or her husband Mr UB appeared to be the contact point between the lawyers, the executors and the family.

[31] There was initial agreement by the five children to sell the farm. (I) subsequently withdrew his agreement. His view was that the farm should be leased. As well, (I) had a legal interest in the farming operation and the farm as he was the vested owner of (A)'s shares in the farm company, subject to Mrs O's life interest.

[32] EO tended to support (I)'s position that the farm should be leased and not sold.

[33] As well, at least one of the three daughters (RB) had concerns about whether (A)'s will had treated the five children fairly.

[34] Despite this background, the executors proceeded to list the farm for sale with a real estate agent on 8 April 2015. An auction date was set for 21 May 2015. This, despite the fact that when the executors gave the listing and sale instructions, probate of (A)'s will had not been granted.

[35] On 20 May 2015 Mr HS, another principal in [SAL], was appointed the sole director of the farm company for the purpose of signing any sale agreement.

[36] (I) sought independent legal advice about his position from Mr P, who has acknowledged expertise in the area of estate administration and litigation.

[37] Despite Mr P challenging the executors' ability to sell the farm without the consent of all of the beneficiaries of (A)'s will – including (I) – the executors determined to proceed with the auction.

[38] On 20 May 2015, Mr P obtained an *ex parte* injunction and freezing order from the High Court to stop the advertising and sale of the farm. Related orders were made about the farm company.

[39] Nevertheless, the auction proceeded on 21 May 2015 and the farm was sold. Included in the sale terms was a provision making the sale conditional on the approval of the High Court. Mr HS signed the sale agreement as the director of the farm company.

Initial complaint

[40] (I) and EO complained to the New Zealand Law Society Lawyers Complaints Service (Complaints Service) about the administration of (A)'s estate and the decisions made around the sale of the farm, in circumstances where (I) had to take urgent legal steps to obtain an injunction and freezing order.

[41] Their complaints were against Mr DT and [SAL].

[42] After an initial consideration of (I) and EO's complaint, the Committee resolved to inquire into certain matters on its own motion (the investigation).

[43] The Committee initially included the conduct of Mr HS in its investigation although decided at a very early stage of that inquiry, to take no further action against Mr HS, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[44] Because Ms SY had been involved from time to time in advising the executors, her conduct was also included in the scope of the Committee's investigation.

[45] It is the outcomes of the Committee's own motion investigation into the conduct of Ms SY, Mr DT and [SAL] which are the subject of this application for review.

[46] The Committee also separately considered and made determinations about (I) and EO's complaint. Those determinations do not form part of my consideration of these applications for review.[3]

[3] (I) and EO have applied to this Office to review the Committee's determinations on their complaint. That application for review has yet to be considered by a Review Officer.

The own motion investigation

[47] In its liability determination, the Committee identified the issues to be considered in relation to the two practitioners and [SAL]. They were:[4]

> (a) Whether any of Mr DT, Ms SY or [SAL] failed to act competently and consistent with the terms of their retainer and the duty to take reasonable care in the following respects:
>
> (i) Failing to provide initial advice to the executors relating to the options available to provide income for Mrs O without a sale of the farm.
>
> (ii) Failing to advise the executors that they ought not to proceed with the sale until a binding deed of family arrangement or other authority had been signed by all beneficiaries.
>
> (b) Whether Mr DT and/or [SAL] failed to act competently and consistent with the terms of their retainer and the duty to take reasonable care in the following respects:
>
> (i) Failing to advise the executors that they ought not to proceed with the sale once counsel for [(I)] had specifically advised that [(I)] did not agree to the sale.
>
> (ii) The advice, if any, given in respect of the payment of legal accounts from the bank account of [the farming company] at a time when the company had no director.

[48] In responding to the own motion investigation, separate submissions were made by or on behalf of all three applicants.

Mr DT

[49] Through his counsel, Mr ML, Mr DT submitted:[5]

> (a) Mr DT was not involved in any of the advice given to the executors about options to realise the estate.
>
> (b) [SAL] time records indicate that Ms SY and Ms Z acted on the file throughout March and the first half of April 2015. Mr DT was not privy to any discussions between Ms SY and the executors about options, and by the time Mr DT became involved that advice had been given.
>
> (c) Mr DT did not supervise any of the advice given by Ms SY, about options.

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[4] Standards Committee liability determination at [27]. These issues largely mirrored those set out by the Committee in the Notices of Hearing sent to the practitioners and to SAL.
[5] Letters from Mr ML to the Complaints Service (21 September 2016 and 15 December 2016), and Memorandum of Submissions (21 February 2018).

(d) Mr DT's first involvement in the estate file was on 15 April 2015 when he had a brief discussion with Ms Z.

(e) He next became involved on 15 May 2015 when he met Mr UB, after receipt of Mr P's letter on behalf of (I).

(f) By 15 May 2015, the farm had been listed for sale and an auction date had been set. Marketing was underway. Some of the stock had been sold.

(g) Mr DT advised Mr UB on 15 May 2015 that the auction should be postponed to establish whether the farm property could be leased. Mr UB disagreed.

(h) Mr UB indicated that all of the beneficiaries except (I) had signed a document giving consent to the farm being sold.

(i) Mr DT received the relevant High Court documents by email from (I)'s solicitor and counsel on the morning of the auction (21 May 2015) and immediately recognised that the sale of the farm could not proceed, conditionally or otherwise. He advised Mr UB, Mr HS, a Mr VA (the auctioneer) and a Mr NR (RB's lawyer) accordingly.

(j) The "key acts that facilitated the auction (drafting the clause, authorising the auction, signing the agreement) were not undertaken by Mr DT and nor were they authorised by him".

(k) Mr HS informed Mr DT that the sale could proceed despite the freezing order. Mr DT did not have any involvement in suggesting or drafting a clause making the sale conditional on High Court approval.

(l) Mr DT does not accept that he breached the High Court's freezing order. He had never confirmed that the auction could proceed and was not aware that it had done so until after the event.

(m) That being said, Mr DT acknowledged that he could have been clearer about the position in his discussion with the various parties prior to the auction proceeding. Advice he gave was "equivocal" and Mr DT regrets that "he did not take a clearer stance".

(n) In submissions to the Complaints Service, counsel for Mr DT recorded "in failing to effectively advise on the impact receipt of the Court minute

had on the auction process, Mr DT accepts that his actions fell short of his professional and ethical obligations both to the court and to his clients. In this regard he is sincerely apologetic".[6]

(o) In relation to the advice given that legal fees could be met from the farm company's bank accounts at a time when there was no director, Mr DT said that he did not recall giving that advice; however, if he did then the reason would have been that there was a current account due to (A) and Mrs O from the company.

[50] Mr DT also swore two affidavits during the course of the injunction proceedings. Both have been referred to by counsel for Mr DT (although only the second, or supplementary, affidavit was provided as part of Mr DT's review application).

[51] In very general terms, the submissions made by Mr DT and his counsel, summarised above, corroborate the evidence sworn by Mr DT in his affidavits. However, some points bear referring to.

Supplementary affidavit sworn on 5 June 2015

[52] Mr DT swore:

(a) He spoke to Mr P on the morning of 20 May 2015 and was informed that (I) was intending to apply for an injunction to prevent the sale of the farm.

(b) The shareholders of the farm company appointed a new director (Mr HS) later that same day.

(c) At 9am on 21 May Mr DT opened an email sent to him by Mr P, and counsel who appeared to seek the injunction. The email attached the High Court's Minute setting out the terms of the injunction.

(d) "[I]t was absolutely clear to [him] that the practical effect of the minute, notwithstanding that [he] had not received a sealed order, was that the farm could not be sold".

[6] Letter from [Law firm A] to the Complaints Service (21 September 2016) at [26].

(e) He spoke to Mr NR – a lawyer representing Mrs O, RB and two of her sisters – and informed Mr NR about the injunction "which prevented the sale of the farm".

(f) He emailed Mr UB about the injunction.

(g) He spoke to Mr UB and RB whilst they were driving to Hamilton on the morning of 21 May 2015 and informed them about the injunction "preventing the sale of the farm". Mr UB said that he wanted to speak to the auctioneer.

(h) Mr DT forwarded Mr VA a copy of the varied auction terms; not because he (Mr DT) considered that the auction could proceed, but because Mr VA had mislaid the one sent to him the previous day (20 May 2015).

(i) At approximately 9.30 am on 21 May 2015 Mr DT spoke to Mr HS and informed him about the injunction.

(j) There are differences between Mr HS's and Mr DT's recollections of discussions between them during the morning of 21 May 2015 but Mr DT considers that they were talking at cross-purposes; Mr DT believed that Mr HS was aware that an injunction had been issued and Mr HS believed that Mr DT had nevertheless approved the auction taking place, with a proviso that any sale was conditional upon High Court approval.

(k) Mr DT's "dealings with all the parties on 21 May 2015 were premised on [the] understanding" that the injunction prevented the marketing and auction/sale of the farm.[7]

Ms SY [and SAL]

[53] In a letter to the Complaints Service dated 25 October 2017, Ms SY responded to the questions asked by the Committee. She did so on her own behalf and also on behalf of [SAL].

[54] In summary, Ms SY said:

(a) She did not agree that Mr DT's involvement in the file began in mid-April 2015. She produced file notes prepared by Ms Z, an email from Mr DT

[7] At paragraph [54] and following.

and an email from Ms Z all prepared during February 2015 and all showing that Ms Z consulted with Mr DT during that month about estate administration issues.

(b) Ms SY's involvement began on 27 February 2015 when RB contacted her.

(c) Thereafter Ms Z conferred with Ms SY about the estate.

(d) Ms SY and Ms Z met the three named executors (or their representatives) on 13 March 2015. Mr DT did not attend that meeting although Ms SY believed that the executors would have been told that he would be overseeing the administration of (A)'s estate.

(e) Ms SY considered that this was in the nature of an initial meeting, to enable Ms Z to take down basic details using a pre-prepared form that [SAL] had devised for estate administration.

(f) However, Ms SY recalled that at this meeting the executors informed her that "the beneficiaries had unanimously agreed to sell the farm and other assets in order for the interest on the proceeds to be available to pay for [Mrs O's] care in a severe dementia unit". This apparently resulted from a family meeting that had taken place on 4 March 2015.

(g) On 23 March 2015, Ms SY prepared the first draft of a schedule of options available to the executors to provide income for Mrs O's care on the sale of the farm (the options advice). She based this on her discussions with the executors on 13 March 2015. The schedule was amended by Ms SY on a couple of occasions in consultation with Ms Z.

(h) The options advice was sent to RB and Mr UB on 27 March 2017 "for the executors to review and comment on".

(i) On that date, Ms SY and RB spoke by telephone and Ms SY advised RB that the executors should "obtain the authority and/or agreement in writing from the beneficiaries to consent to the executors selling the farm".

(j) Ms SY was not involved in obtaining the consents for the sale of the farm.

(k) Although Mr DT was not involved in drafting the options advice, as "the director [of SAL] responsible for estate matters" he would have been supervising Ms Z.

(l) Ms SY had no further involvement with the file after 27 March 2015, until (approximately) 11 May 2015 when Mr DT asked her to review the terms of the auction.[8]

(m) Ms SY took, as her instructions from the executors, advice that the family had considered various scenarios together and had decided that the farm had to be sold. Ms SY advised the executors that there could be no sale of any asset without the consent of all of the beneficiaries.

(n) The options advice prepared by Ms SY had been requested by the executors. It was made clear to the executors that in the event of a challenge to the will, neither RB nor Mr UB could remain as executors because of a conflict. They were also advised that if there was a challenge, no sale could proceed until the claims were resolved. This confirmed initial advice given by Mr DT.

(o) The executors were in direct contact with the beneficiaries and as between all of them, were dealing with administrative issues as well as looking after the farm and its accounts. RB was regularly reporting to all family members.

(p) In April 2015, [SAL] became aware that there was disagreement amongst the beneficiaries about selling the farm. There had been discussions about the possibility of leasing it, but because it was run-down the view was that this would not provide sufficient income to pay for Mrs O's ongoing care needs.

(q) (I) withdrew his consent to the sale of the farm in early to mid-April 2015.

(r) Mr UB's view, as one of the executors, was that sale of the farm was in everyone's best interests as it would provide funds for Mrs O's care, notwithstanding the disagreement amongst the beneficiaries.

[55] As well, on 5 February 2018, counsel for Ms SY provided submissions on her behalf. In summary:

[8] Ms SY does not indicate the date in May on which Mr DT asked her to review the auction terms. Emails from Ms SY to Mr DT, Ms Z and the sales agent on 11 May would suggest that it was on that date, or slightly earlier, that she was approached by Mr DT about the auction terms.

(a) When Ms SY first met with the two executors and RB (representing Mrs O as the third executor) on 13 March 2015, Ms Z had already spoken to RB and had sent an email to her on 27 February 2015, setting out preliminary advice about the administration of the estate.

(b) At the 13 March 2015 meeting with Ms SY and Ms Z, the executors informed them that the beneficiaries had unanimously agreed to sell the farm and other assets, enabling the interest from the sale proceeds to fund Mrs O's care needs in a severe dementia unit.

(c) The family had also discussed leasing the farm but had decided against it.

(d) For that reason, Ms SY did not believe she was being instructed to provide options advice for Mrs O's care without a sale. Had the beneficiaries not agreed on a sale, Ms SY would have provided advice on other available options.

(e) The options advice sought by the executors included a consideration of (I)'s position, and options that might avoid claims against the estate by beneficiaries.

(f) Ms SY assisted Ms Z to draft the options advice reflecting these instructions. She was not asked to provide further options and it was not necessary for her to do so because of the executors' instructions which were in turn based on unanimous family agreement to sell the farm.

(g) Ms SY had no further involvement after 27 March 2015, until (on or about) 11 May 2015 when Mr DT asked her to review auction terms that had been drafted by the auctioneer. That was the limit of her involvement until after the auction.

(h) Ms SY was not the principal in [SAL] responsible for the file. Her standard of competence when involved with the file at all times met the standard of a reasonably competent lawyer.

Liability determination

[56] The Standards Committee delivered its liability determination on 9 May 2018.

The options advice

[57] The Committee made findings of unsatisfactory conduct against each of Mr DT, Ms SY and [SAL] in relation to this issue of the investigation. The Committee found that their conduct breached s 12(a) of the Act in that it fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[58] In Ms SY'S case the Committee considered that:[9]

> [I]n providing advice to the executors, Ms SY could not operate in a vacuum. She was required to familiarise herself with all relevant circumstances. Ms SY was aware that there was a conflict between (I) and his sisters over the terms of the will, and that his sisters were considering challenging the will. … In the circumstances, she ought to have considered whether there were other assets which could cover Mrs O's care and whether sale of the farm was the only option.

[59] The Committee said that as Mr DT was "the director with overall responsibility for the matter, he also ought to have ensured that the executors were given comprehensive advice [and he] failed to do so.[10]

[60] As both Ms SY and Mr DT were directors of [SAL], the Committee held that it also bore responsibility.

The Deed of Family Arrangement advice.

[61] Again, the Committee found that each of Mr DT, Ms SY and [SAL] breached s 12(a) of the Act in relation to this issue of its investigation.

[62] The Committee expressed the view that the sale of the farm "ought not to have proceeded without a signed Deed of Family Arrangement or, at the very least, signed consent of all beneficiaries" and that (I)'s consent was crucial to the sale proceeding.[11]

[63] Ms SY had submitted that she had advised the executors on 27 March 2015 to ensure that they had the consent of all beneficiaries before proceeding to sell the farm.

[64] However, the Committee rejected her argument that she had no further involvement in the estate administration after 27 March 2015 and noted that she had been later asked to review the terms of the auction and at that point "a competent

[9] Standards Committee liability determination at [35].
[10] Standards Committee liability determination at [36].
[11] Standards Committee liability determination at [38].

solicitor would have checked whether her advice had been followed and whether written consent of all beneficiaries had been obtained". The Committee described her failure to do so as "a blinkered approach that was not appropriate".[12]

[65] The Committee found that Mr DT as the director of [SAL] ought to have ensured that all beneficiaries consented to the sale, and that his failure to do so amounted to unsatisfactory conduct.

[66] Because both Ms SY and Mr DT were directors of [SAL], the Committee made a finding of unsatisfactory conduct against it as well.

Failure to advise the executors not to proceed after (I) withdrew consent to sale

[67] This issue of the Committee's investigation concerned the conduct of Mr DT and [SAL] only.

[68] The Committee made findings of unsatisfactory conduct against both Mr DT and [SAL], for what it held were their breaches of s 12(a) of the Act.

[69] The Committee did not accept Mr DT's argument that, when he spoke to Mr UB, he was advised that all beneficiaries had agreed to the farm being sold, he suggested that the auction should be postponed to see whether the farm could be leased.

[70] The Committee's view was that Mr DT ought to have been aware that Mr UB was in a position of conflict and that "a competent solicitor would have given firm advice to Mr UB that the sale of the farm should not proceed without (I)'s consent [and that] it should not have been necessary for (I) to be required to apply to the High Court for injunctive relief".[13]

Advice that fees could be paid from the farm company's bank accounts

[71] The Committee noted that this issue of inquiry was part of (I) and EO's original complaint against Mr DT and [SAL].

[72] The suggestion had emerged in an email from Ms Z to RB on 24 April 2015 in which Ms Z passed on what Mr DT had said.

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[12] Standards Committee liability determination at [41].
[13] Standards Committee liability determination at [47].

[73] In responding to this issue, [SAL] had submitted that Mr DT's suggestion that legal fees be paid by the farm company from its bank accounts was practical and was a company management issue and not a conduct issue.

[74] Mr DT's response to this issue was that he did not recall suggesting this to Ms Z, but if he had done so it would have been on the basis that he was aware that there were "large current accounts for [(A)] that could be used to draw out money".[14]

[75] The Committee said that it was not "appropriate for Mr DT to have suggested to the executors that they use company funds to pay estate legal fees, especially at a time when probate had not yet been granted". The Committee said that "a competent solicitor would not have done so".

[76] Findings of unsatisfactory conduct were made against both Mr DT and [SAL] for breaching s 12(a) of the Act in this regard.

Penalties

[77] The Committee expressed its concern at the way in which the applicants had dealt with the own motion investigation, noting that "the lawyers had not taken responsibility for their actions and have each tried to point the finger at each other".[15]

[78] It imposed a fine of $3,000 on each of Mr DT, Ms SY and [SAL], and ordered them each to pay costs of $2,500 to the New Zealand Law Society.

Compensation

[79] In the course of its liability determination the Committee noted that "it may be appropriate for (I) to be compensated … for the cost he had been put to", repeating that it should not have been necessary for him to apply to the High Court for injunctive relief.

[80] With that indication, the Committee called for submissions from (I) about his losses with an opportunity for Ms SY, Mr DT and [SAL] to make submissions on the issue of compensation.

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[14] Standards Committee liability determination at [52].
[15] Standards Committee liability determination at [57].

Compensation submissions:

Mr (IO)

[81] (I) provided the Committee with evidence of his legal fees, which totalled $68,857.28.[16] These included fees to his solicitors, counsel and a firm of solicitors for registration.

[82] (I) received a payment of $25,000 from "the various parties involved" in the wash-up of the injunction proceedings, which he said left him out of pocket in the sum of $43,857.28.

[83] As well, (I) said that he had incurred other costs in relation to post-sale events concerning the lease of the farm, including a loan at a high interest rate and the use of capital earmarked for business machinery, maintenance and repairs.

Ms SY and [SAL]

[84] On behalf of Ms SY and [SAL], counsel made the following submissions to the Committee:[17]

(a) The principles of causation, loss and quantum which apply in civil claims should apply to considerations of compensation orders by Standards Committees.[18]

(b) (I)'s losses were not caused by any act or omission by Ms SY or [SAL]. Any losses arise as a result of decisions and actions taken by the executors who proceeded with the auction and sale.

(c) The executors were determined to proceed with the sale regardless of any advice that might have been given.

(d) There is no causal link between Ms SY'S and [SAL]'s involvement in the matter and any losses suffered by (I).

[16] Letter from Mr O to the Complaints Service (25 May 2018).
[17] letter from [Law firm B] to the Complaints Service (31 May 2018).
[18] Those principles having been set out in *L v Canterbury District Law Society* [1999] 1 NZLR 467 (HC).

Mr DT

[85] On Mr DT's behalf, counsel submitted in a letter to the Complaints Service dated 22 June 2018:

(a) Mr DT was not involved in the decision to auction and sell the farm.

(b) When the executors made that decision, Ms SY advised them to ensure that all beneficiaries consented to that course of action.

(c) Any losses suffered by (I) arise solely from decisions and actions taken by the executors, including the decision to proceed with the auction and sell the farm.

(d) Those decisions were made by an experienced legal practitioner (Mr FD) and "an experienced and senior businessman" (Mr UB).

(e) On 21 May 2015 Mr DT received a copy of the injunction issued by the High Court. His view was that the auction and sale could not proceed on any basis and advised Mr UB accordingly. Despite that advice Mr UB proceeded with the auction. The executors did not rely on Mr DT's advice.

(f) Mr DT's advice to Mr UB was that "the sale of the farm should be cancelled or postponed until the issues with [(I)] had been resolved".

(g) The full and final settlement reached between (I) and various parties in the injunction proceedings, precludes an award of compensation in (I)'s favour.

Compensation determination

[86] The Standards Committee delivered its compensation determination on 13 August 2018.

[87] It had earlier called for submissions from (I) as to "his net position after the costs settlement has been deducted".

[88] (I) informed the Committee that he had incurred legal fees to his solicitors, his barrister and to another law firm for registration of the injunction, totalling $68,857.28. He said that settlement of the injunction proceedings had seen him receive $25,000

from the various parties involved, and that this left him out of pocket in the sum of $43,857.28.

[89] (I) also said that he had suffered significant financial stress as a result of what had happened.

[90] The Committee was satisfied as to the quantum of legal fees incurred but did not consider that (I) had provided sufficient evidence to establish other losses.[19]

[91] The Committee concluded that Ms SY, Mr DT and [SAL] had caused (I) to suffer losses as a result of their unsatisfactory conduct: in particular their failure "to give firm and clear advice and guidance to the executors that the sale should not proceed in the circumstances".

[92] The Committee said that "such advice if given in a proper and clear way would likely have caused the executors to stop and reconsider their proposed actions".

[93] The Committee fixed the amount payable by the two practitioners and [SAL] as being $43,857.28. It apportioned payment of that amount between the two practitioners and [SAL] as follows

(a) Mr DT was ordered to pay (I) compensation of $17,530 (40 per cent of the total award);

(b) [SAL] was ordered to pay (I) compensation of $17,530 (40 per cent of the total award);

(c) Ms SY was ordered to pay (I) compensation of $8,765 (20 per cent of the total award).

[94] The three were also ordered to pay an additional $500 each by way of costs, to the New Zealand Law Society.

Applications for review

[95] The applicants filed separate applications for review, and all have applied to review both the liability and the compensation determinations.

[96] All three filed their applications to review the Committee's liability determination on 21 June 2018.

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[19] Standards Committee compensation determination at [11].

[97] Ms SY and [SAL] filed their application to review the Committee's compensation determination on 13 September 2018; Mr DT filed his on 24 September 2018.

Ms SY'S and [SAL]'s submissions:

As to the liability determination

[98] In large measure, Ms SY'S and [SAL]'s submissions in support of their applications for review mirror the submissions that had been made to the Committee.

[99] The points emphasised in their applications for review included:

(a) When she prepared the draft options advice, Ms SY was unaware that (I) by then opposed the sale of the farm. This was first conveyed to [SAL] on or about 21 April 2015 when Mr P spoke to Ms Z by telephone.

(b) Ms SY pointed out to both Mr UB and RB that they were both in a position of conflict, but that advice was not heeded.

(c) Ms SY made it clear that the consent of all beneficiaries was required before any sale could proceed. The options advice also made that clear.

(d) Ms SY ceased to have any involvement in the matter after 27 March 2015, until 11 May 2015 when Mr DT asked her to look at the auction terms. That request was based on her being an experienced practitioner in property law.

(e) At that time, Ms SY had no reason to make inquiries about whether a Deed of Family Arrangement had been entered into. In that regard, Ms SY was entitled to rely on Mr DT managing his own work in a competent manner.

(f) The executors were advised by [SAL] not to proceed with the auction and sale once Mr P made (I)'s position known.

As to the compensation determination

[100] Ms SY and [SAL] submitted:

(a) Settlement of the injunction proceedings which included a payment to (I) was accepted by all parties as being full and final.

(b) Ms SY'S involvement was limited to providing the options and advice.

(c) The Committee did not consider whether (I)'s legal fees were reasonably incurred.

Mr DT's submissions:

As to the liability determination

[101] Counsel for Mr DT attached very brief submissions to his application for review which in large measure merely expressed disagreement with the Committee's liability determination.

As to the compensation determination

[102] Mr DT's counsel submitted that there was no proper basis for the Committee to have made an award of compensation in (I)'s favour, against Mr DT.

Nature and scope of review

[103] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[20]

> … 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.

[104] More recently, the High Court has described a review by this Office in the following way:[21]

> 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

[20] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[21] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

> 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.

[105] 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.

Statutory delegation and hearing in person

[106] Mr Maidment, as the Review Officer initially responsible for the management of this application for review, appointed me as his statutory delegate to assist in that task.[22] As part of that delegation, on 10 December 2018 at Auckland, I conducted a hearing at which the three applicants appeared, together with their counsel.

[107] The process by which a Review Officer may delegate functions and powers to a duly appointed delegate was explained by me to the parties and their counsel. They all indicated that they understood that process and took no issue with it.

[108] Since concluding the hearing, I was on 7 August 2019 appointed by the Minister of Justice as a Deputy Legal Complaints Review Officer.[23] That appointment means that I now have the function of considering applications for review and issuing decisions about those applications.

Discussion

Some legal principles:

Executor and trustee roles and duties

[109] The terms "executor" and "trustee" are often used interchangeably, although not necessarily accurately. Generally, a person will appoint one or more people to be both executors and trustees of their will.

[22] Lawyers and Conveyancers Act 2006, sch 3, cl 6.
[23] Lawyers and Conveyancers Act 2006, s 190 and sch 3, cl 3.

[110] In very simple terms, the executorship role under a will involves taking steps to secure probate from the High Court and identify the estate pool. Once that has been completed, the trusteeship role involves distribution of the estate.[24]

[111] The duties of an executor are clear and unambiguous. An executor must administer the provisions of deceased person's will so as to ensure that the wishes of the deceased person, as set out in their will, are carried out:[25]

> "… Let others attack that document if they wish. It is not for him or her to aid and abet them and their design of rewriting the testator's directions a little nearer to their heart's desire. It is not for him unwarrantedly to thwart them."
>
> [25] The obligation to perform these duties arises within the special fiduciary relationship which exists between a trustee as a fiduciary to whom property is entrusted, and the beneficiaries entitled to that property.

[112] Whatever personal views an executor may have about the terms of a will – for example whether it is fair – are irrelevant. Their role is to give effect to the terms of a will for which probate has been granted.

[113] This can create difficulties where an executor is also closely related to a beneficiary in the will, and that beneficiary has concerns about the will's fairness. In those circumstances consideration is often given to the executor renouncing their executorship, so that there is no conflict between that role, and their close relationship with the beneficiary claiming unfairness.

[114] Difficulties may also arise if a beneficiary is an attorney for another beneficiary who lacks capacity, and there are competing issues of fairness in connection with the will. Again, consideration ought to be given to the attorney being replaced by an independent person.

[115] As to when distribution may take place, the learned authors of *Nevill's Law of Trusts, Wills and Administration* say:[26]

> By s. 47(6) of the Administration Act 1969, the administrator may distribute the estate six months after the date of the grant of administration, provided he or she has not been served with an application and has no written notice of a claim or an intended claim. …

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[24] For convenience in this decision I will use the term "executor" to encompass the roles of executor and trustee.

[25] *Re Stewart* [2003] 1 NZLR 809 (HC) at [24]–[25], quoting from Julie Maxton (ed) *Nevill's Law of Trusts, Wills and Administration in New Zealand* (8th ed, Butterworths, Wellington, 1985) at 407.

[26] Nicky Richardson (ed) *Nevill's Law of Trusts, Wills and Administration in New Zealand* (10th ed, Butterworths, Wellington, 1985) at 18.1.16.

> It should be noted that an administrator who distributes before six months expires, without prior notice to possible applicants and without giving them details of the estate, may incur personal liability.
>
> [citations omitted].

[116] The above must be read subject to the following:[27]

> By s. 47(2) of the Administration Act 1969, the administrator may make proper payments for the maintenance, support and education of persons totally or partially dependent on the deceased before death, in spite of having notice of an application or an intended application under the Family Protection Act 1955.

[117] When a beneficiary or potential beneficiary mounts a challenge to a will under any of the Property (Relationships) Act 1976, Family Proceedings Act 1955 or Law Reform (Testamentary Promises) Act 1949, it is open to the executor(s) to enter into an agreement with the claimant and the other beneficiaries, to vary the terms of the will. This is generally done by way of a Deed of Family Arrangement, with each party separately represented and advised.

Lawyers' professional duties

[118] Invariably a lawyer will be instructed by the executor to provide advice and carry out the transactional work involved in administering a deceased's estate. The executor thus becomes that lawyer's client, but in their capacity as executor.

[119] If there is more than one executor, the lawyer can only act on the unanimous instructions of them all.

[120] In acting for a client – no matter what the issue might be – a lawyer must give that client clear, objective and competent legal advice based on the lawyer's understanding of the law.[28]

[121] The learned authors of *Ethics, Professional Responsibility and the Lawyer* say:[29]

> The duty to provide objective advice is more than simply giving advice as to the bounds of the law. While a lawyer is unlikely to be disciplined for failing to give objective advice, arguably it can be a significant contributing factor to client wrongdoing. At the heart of the problem lies the manner in which the lawyer approaches the legal issue on which advice is sought. In some cases, lawyers have looked at such issues with a convenient myopia and ignored the wider context in which certain transactions have been located.

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[27] At 18.1.15.
[28] See generally Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), rr 3 and 5.3.
[29] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 5.12.

[122] A lawyer must only act in their client's interests and never be influenced by their own interests, or those of third parties. A lawyer cannot act for more than one client in a matter if there is a more than negligible risk that the clients' interests do not coincide.[30]

[123] When accepting instructions from executors to act in the administration of an estate, consistent with their duty to give competent and objective advice a lawyer must advise the executors that their duty is to administer the will strictly according to its terms.

[124] If a lawyer acting in the administration of an estate considers that the will may be susceptible to challenge (either through their own assessment of the will or some indication given by a third party), then the lawyer must also advise the executors of this and give appropriate advice about whether to enter into a Deed of Family Arrangement with a claimant and the other beneficiaries, to vary the terms of the will.

[125] A lawyer instructed by executors to administer an estate cannot give any other person connected with the estate – beneficiaries or potential beneficiaries – any advice about their rights and entitlements, actual or potential, in relation to the estate. This would involve the lawyer acting for more than one client in a matter, where their interests would clearly not coincide.[31]

Conflicts

[126] I observe at the outset that this retainer – to administer (A)'s will – was complicated by conflicts. Most were recognised by the practitioners.

[127] Those conflicts included:

(a) The fact that Mr UB, one of the executors, was married to RB, one of (A)'s and Mrs O's daughters. RB had intimated the possibility of a challenge to the fairness of (A)'s will.

(b) The fact that RB was also Mrs O's attorney.

(c) Mrs O's position:

(i) she had formerly been a client of [SAL];

(ii) she lacked capacity;

[30] See for example the Rules, rr 5, 5.3, 6 and 6.1.
[31] Rule 6.1.

(iii) she required advice (through her attorney) about her options under the Property (Relationships) Act 1976 and how those options sat with her need to have her residential care funded.

[128] In addition, Mr UB's approach to his role as one of the executors also was clearly problematic (quite apart from the fact that he was married to RB).

[129] For example, in an email to Mr DT dated 6 May 2015, Mr UB said:

> As an executor and as I see it, the only way forward was to sell the farm so that an interest-bearing company could use that interest to provide the funds for [Mrs O's] care. Where else was this money to come from?
>
> As an executor I will carry out my duties which is at present [Mrs O's] welfare.

[130] Three things are immediately apparent from Mr UB's email:

(a) As at the date of his email (6 May 2015), probate had not been granted in relation to (A)'s will. Nothing could be done until that had been accomplished, yet by that date the farm had been listed for sale.

(b) Moreover, the Administration Act 1969 makes it plain that an executor places themselves at personal risk if assets are distributed within six months of the date of probate.[32]

(c) Mr UB's view of his duties as an executor were, in a word, wrong. As executor his first duty is to carry out the deceased's wishes as set out in the will. Apart from issues about (A)'s ability to gift stock and vehicles which belonged to the farming company, the terms of (A)'s will were unambiguous. They may have been unpopular or even susceptible to challenge – but they were unambiguous.

[131] As I have said, Mr UB's approach to his role was legally wrong, and placed himself and Mr FD at risk. I accept that Mr UB was motivated by the family's concern about Mrs O's ongoing care needs and how these could be funded. However, the proper approach was for him to renounce his executorship and advocate for her.

[132] That being said, a lawyer faced with a client who is adopting an unwise or even unlawful course of action, can do no more than advise – albeit that the advice should be couched in robust terms. The lawyer cannot require acquiescence by their client to the advice.

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[32] Administration Act 1969, s 47(4).

[133] I also observe that Mr FD's role – insofar as the materials before me reveal – appears to have been passive. There does not appear to be any record of active engagement by him in the discussions with Ms SY and Mr DT. The fact that he had retired from the practise of law some years earlier and was not living locally, doubtless added to that.

[134] I have set out above some basic legal principles relevant to the administration of an estate. The principles I have identified appear to me to be engaged by the administration of (A)'s estate.

[135] Of course, it is not the role of this Office, when reviewing the determinations of the Committee, to make factual or legal findings about the application of those principles to the estate administration.

[136] My purpose in raising those issues (and, indeed, there may be more) is to provide a legal framework to the administration of (A)'s estate which should have informed all of the advice given to the executors by the lawyers instructed to act in the administration of that estate.

[137] It is against the framework of those legal principles that the conduct of the lawyers (including [SAL]) must be measured.

Chronology

[138] I have prepared a chronology of what I consider to be some of the key events in what was, in reality, a relatively short retainer (less than five months). I have attached that chronology as a schedule to this decision.

Analysis

[139] The Committee identified three aspects of the administration of (A)'s estate which gave rise to conduct issues:

(a) The options advice (involving Ms SY, Mr DT and [SAL]). I consider that this relates to the period between approximately early February 2015 and 27 March 2015.

(b) The Deed of Family Arrangement advice (involving Ms SY, Mr DT and [SAL]). I consider that this relates to the period between 27 March 2015 and 13 April 2015 (the date on which the executors could have cancelled

a sole agency contract they had executed in favour of the auctioneer Mr VA).

(c) The advice after (I) changed his mind about the sale (involving Mr DT and [SAL]). I consider that this relates to the period between 15 May 2015 and 20 May 2015 (the date on which the injunction was issued).

(d) The advice given about the payment of legal fees from the farm company bank account at time when there was no director in place (involving Mr DT and [SAL]).

[140] For completeness, I would add a fifth issue: advice given once the injunction had been issued on 20 May 2015.

[141] I will address each in turn.

Options advice

[142] The issue identified by the Committee and which relates to the options advice was:

> (a) Whether any of Mr DT, Ms SY or [SAL] failed to act competently and consistent with the terms of their retainer and the duty to take reasonable care in the following respects:
>
> (i) Failing to provide initial advice to the executors relating to the options available to provide income for Mrs O without a sale of the farm.

[143] The Committee's focus on the options advice was whether it went far enough. The Committee's view was that this advice should have included "options … which included retaining the farm and leasing it out to provide an income stream for Mrs O's care".

[144] The Committee made findings of unsatisfactory conduct against Ms SY for not providing that advice, Mr DT because of his overall responsibility for the estate administration and [SAL] as both Ms SY and Mr DT were directors.

[145] Ms SY'S position was that she was not instructed by the executors to provide options about leasing as the family had discussed but decided against it. She has said that if the family had not agreed to sell the farm, then her options advice would have been more extensive.

Discussion

[146] It is plain from both the contemporaneous documents and the submissions made by the practitioners, that their professional relationship was at this time strained, if not dysfunctional. Each has distanced themselves from the other's conduct during the retainer and sought to downplay their own roles. Emphasis was placed on units of time in [SAL]'s time records.

[147] An example of that dysfunction is that there does not appear to have been any formal (or even informal) transition of the file between Mr DT and Ms SY (in late February 2015); nor from Ms SY to Mr DT after 27 March 2015.

[148] Ms Z was the common denominator between the two practitioners, in the sense that she was generally supervised in her work by Mr DT, but she also worked closely with Ms SY on the estate matter between late February 2015 and late March 2015.

[149] But Ms Z was a legal executive, not a lawyer, and certainly not a principal. It was unwise of Ms SY to assume that Ms Z would provide a seamless transition over to Mr DT for the carriage of the file from late March 2015. Doubtless this was because of the dysfunction between the two.

[150] That dysfunction should not have been allowed to get in the way of orderly, careful management and oversight of a file in which one principal was the overall manager, yet another did initial and significant work.

[151] As it happens – and perhaps this was more due to good luck than good management – no disciplinary consequences arise as a result of the dysfunction.

[152] However, this self-serving and skin-saving approach by the lawyers to both the own motion investigation and these reviews has unfortunately complicated analysis of the conduct issues. The Committee noted this also in its liability determination noting that "a large amount of time had been expended in the consideration of this matter".[33] I thoroughly endorse those comments.

[153] In a very general sense, I am satisfied that for the first six to seven weeks of the estate administration, matters were proceeding on the basis that the family were in discussion and funnelling the results of those discussions to Ms Z, who at various times either liaised with Ms SY or Mr DT, depending upon the issues that arose.

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[33] Standards Committee liability determination at [57].

[154] It would be fair to describe the family as a whole as being actively engaged in the matter, and with a focus on ensuring that Mrs O's needs were well-able to be met.

[155] Further, during February and for the majority of March 2015, there was a general understanding by the lawyers that the family might agree to vary (A)'s will and an awareness that this could be accomplished by a Deed of Family Arrangement.

[156] That general background provides important context when reviewing the discrete conduct issues identified by the Committee.

[157] The issues concerning the options advice relate to a period of approximately four weeks, between late February and late March 2015.

[158] I deal first with Ms SY'S conduct in relation to the options advice.

Ms SY

[159] Ms SY was approached directly to act in late February 2015 because a friend of one of the O family members had recommended her. By then the file had been open at [SAL] for approximately three weeks.

[160] Ms SY's basic submission about the level of her involvement in the administration of (A)'s estate appears to be that Ms Z had the carriage of the file, and Ms Z was under the management and supervision of Mr DT from the outset.

[161] Ms SY submits that she was peripherally involved in giving the executors options advice, and that she effectively bowed-out on 27 March 2015 when Ms Z emailed that advice to the executors. Thereafter, Ms SY assumed that matters were in hand under Mr DT's stewardship.

[162] I regard Ms SY's submission that she had no more than an arm's-length involvement in the matter, as disingenuous.

[163] Although the file was opened some two to three weeks before Ms SY was even aware of the matter, she was approached directly by RB on a recommendation from someone else. The message passed to Ms SY on behalf of RB, on 27 February 2015, was that "[RB] is wanting to have one lawyer for the estate and other matters for the future".

[164] It is clear that RB – and presumably Mr UB as the executor – wanted the benefit of Ms SY's advice.

[165] Ms SY gave that advice. She, together with Ms Z, authored the options advice and gave this to the executors on 27 March 2015. To suggest that it was in effect mostly the work of Ms Z, in my view significantly understates Ms SY's input and role.

[166] Ms SY was the lawyer (indeed, a principal in [SAL]) and Ms Z was a legal executive. That is not to say that Ms Z was inexperienced or not competent; however, it was Ms SY who was approached, and it was Ms SY who, I am satisfied, took control of the preparation and delivery of the options advice.

[167] I note that in an email from Ms Z to RB and Mr UB on 23 March 2015, Ms Z refers to having "reminded [Ms SY] late last week that you were waiting on the [options advice] … so it should be forthcoming soon".

[168] That email was in response to one from RB in which she referred to "the [options] schedule [Ms SY] suggested..".

[169] In my view this clearly supports the suggestion that Ms SY's involvement was substantive and not merely managerial.

[170] Ms SY would undoubtedly have approved the final version of the options advice before it was sent to the executors. It would have been bordering upon negligent of her not to have done so, as a principal in [SAL].

[171] I do not regard it as particularly relevant that much of the email correspondence was exchanged between Ms Z and (in particular) RB. It is to be expected that an experienced legal executive would deal with routine correspondence. The difficulty I have is Ms SY's claim that, at most, she was only at the periphery of matters from 27 February 2015 until 27 March 2015.

[172] As indicated, I do not accept this description of her role. Ms SY clearly saw her role as advising the executors, and this was entirely correct. [SAL]'s clients were the executors and not the beneficiaries.

[173] As to whether there are any conduct issues arising from Ms SY's role over that four-week period, I have some reservations about Ms SY (and Ms Z) including RB in their advice to the executors. RB was Mrs O's attorney as well as being a beneficiary and potential claimant in her own right. Mrs O was one of the three executors, a beneficiary and a potential claimant as well. However, it is not disputed that Mrs O lacked capacity and was in fact in care at this time. No serious consideration was ever given to Mrs O assuming the role of executor. Moreover, an enduring power of

attorney does not extend to an attorney assuming a donor's appointment as an executor of a will.[34]

[174] However, it would appear that Mr UB and RB had a joint email address and that email was the usual way in which [SAL] communicated with the executors.

[175] Nevertheless, this highlights a point made at the very outset of the retainer, when Ms Z, on instructions from Mr DT, recommended that Mr UB renounce his executorship because of the potential for conflict between that role and RB's position as both attorney for Mrs O, and beneficiary in her own right.

[176] As a counsel of perfection that point was worth emphasising by being repeated, in writing, together with an explanation of the difficulties that could arise from the apparent conflict. Ms SY must have been alive to that issue.

[177] However, I do not consider that any conduct issues on Ms SY's part arise in relation to that. The conflict advice had been initially given. That advice, having been given, was for the executors to act on and give instructions about.

[178] Ms SY correctly advised the executors that before any substantive steps could be taken which differed from the provisions of the will (i.e. the sale of the farm), full beneficiary consent was required. It is not entirely clear to me whether Ms SY explained why this was necessary (as it could raise potential personal liability for the executors); nevertheless; the advice was given and repeated by Ms SY.

[179] As to the options advice itself, I note that the clients to whom it was given – the executors – have not raised any complaint about the adequacy of that advice. The issue was identified by the Committee when it launched its own motion investigation.

[180] The fact that a client may not have complained about a lawyer's conduct does not mean that there are no disciplinary issues to consider. A lack of complaint can however be a relevant factor.

[181] I also note that on receipt of the options advice, there was no follow-up from the executors requesting clarification or even further advice. Indeed, at the hearing Ms SY submitted that she anticipated that there might be a further meeting with the executors to discuss the options advice.

[182] I am satisfied that if this had been requested, Ms SY (or some other lawyer at [SAL]) would have met with the executors and provided whatever additional options

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[34] Protection of Personal and Property Rights Act 1988, s 106(1)(d).

advice was requested, including an option which reflected a decision to lease rather than to sell the farm.

[183] This is consistent with Ms SY'S assertion that she was only instructed by the executors – one of whom was a retired lawyer who had previously acted for (A) – to provide options advice about a sale of the farm and how that might provide cover for Mrs O's ongoing care needs.

[184] The fact that (I) (and subsequently EO) resiled from the family agreement to sell and instead advocated for leasing, does not mean that Ms SY (or [SAL]) should have anticipated this. Neither (I) nor EO were clients of [SAL].

[185] It is clear that the executors and other family members had rejected the idea of leasing the farm. On the face of it their reasons were considered and not irrational: the farm had become run-down over the years and considerable capital was required to carry out maintenance (let alone any improvements). Those favouring a sale reasoned that the cost of the maintenance would have to be borne by the estate, which would tie-up capital that could otherwise be used for Mrs O's care needs.

[186] It must be remembered that the beneficiaries were not farming novices: they had been brought up on a farm and had all been involved in keeping the operation running in the final stages of (A)'s life.

[187] Ms SY was instructed to provide specific advice by executors (backed by family members) who were well-informed about the subject, and who had firm views about the way forward. Indeed, the decision to formally instruct a real estate agent to market and auction the farm was made by the executors approximately one week after they had received the options advice.

[188] In my view, Ms SY provided advice consistent with her instructions and there was no reason for her to have gone beyond that.

[189] The Committee's finding of unsatisfactory conduct against Ms SY in relation to the options advice, is reversed.

Mr DT

[190] Mr DT maintains that although he had some general awareness of the estate administration, his first involvement was on 15 April 2015 when he had a brief

discussion with Ms Z.[35] His next involvement was not until 15 May 2015 when he spoke to Mr UB about Mr P's letter of the same date.

[191] It presents as puzzling as to why Mr DT would disavow knowledge of the estate administration prior to 15 April 2015, when the document trail quite plainly shows that he was aware of and involved in discussions about it and had been since the file was opened by [SAL] in early February 2015.

[192] Mr DT was consulted about the estate by Ms Z and gave her instructions as to initial correspondence with the executors.

[193] Indeed, it appears to be the case that Mr DT's initial discussions with Ms Z about the estate reveal an approach that was mindful of at least some of the issues that might arise, and with an awareness of the family's dynamics.

[194] In her typed file note dated 11 February 2015, Ms Z refers to discussing the estate with Mr DT. She had added, in what I infer is her handwriting, what appears to be a summary of comments made by Mr DT. These included instructions to check whether stock was owned by the farm company, as well as the following: "[m]ay do [Deed of Family Arrangement] if all agree …".

[195] It has not been suggested that Ms Z incorrectly recorded what Mr DT said to her. The instruction to check the status of the stock ownership and the reference to a Deed of Family Arrangement reflects, in my view, Mr DT's understanding of how to proceed when agreed estate distribution differs from the provisions of a will. It is an indicator of competence, rather than a lack of it.

[196] Moreover, in an email sent by Mr DT to Ms Z on 23 February 2015, Mr DT notes that "[w]e should definitely be suggesting that the 4? [d]aughters seek independent legal advice in relation to the form of this Will and the distribution of this estate."

[197] In what was, in my view, an important piece of correspondence, Ms Z sent an email to RB (to the email address used also by Mr UB), on 27 February 2015. It is important to set out several extracts from that email:

> … I have now had the opportunity to discuss this matter with … Mr DT, and advise the following:
>
> …
>
> We suggest the following:

[35] This discussion assumes relevance when considering the second phase of the estate administration after 27 March 2015.

> 1. [Mr UB] should renounce as executor (to avoid a conflict of interest) and as [Mrs O] lacks capacity that [Mr FD] should seek probate alone.
>
> 2. That the four daughters seek independent legal advice in relation to the form of the will and distribution of this estate.
>
> Please advise whether you wish us to proceed with [Mr FD] applying for probate alone. If so, we will prepare the probate documents and a Deed of Renunciation for [Mr UB] to sign. Can you also please provide us with a letter regarding [Mrs O's] lack of capacity as previously discussed. This will be required in any event.

[198] All of this demonstrates not only familiarity with the estate file, but also an appreciation of some of the issues beginning to emerge.

[199] Further, Ms Z spoke to Mr DT on 30 March 2015 about a query from RB concerning (A)'s will instructions. Mr DT advised Ms Z how to respond to that query.[36]

[200] As observed, it is difficult to understand why Mr DT would claim not to have had any involvement in (A)'s estate until early May 2015 when the documents say otherwise and importantly, when the documents themselves reveal an appreciation of emerging issues.

[201] Be all of that as it may, I have already held that the options advice was sought from and given by Ms SY. She did not consult with Mr DT about that or otherwise seek his input.

[202] I have held that there are no conduct issues arising out of the scope of the options advice that Ms SY gave the executors, and it must follow that there are none for Mr DT either.

[203] The Committee's finding on this issue against Mr DT, is reversed.

[204] The Committee made findings against both practitioners and [SAL] in relation to the options advice and it further follows that the finding against [SAL] on this account is also reversed.

Deed of Family Arrangement

[205] The Committee expressed the issue in the following way:

> Failing to advise the executors that they ought not to proceed with the sale until a binding deed of family arrangement or other authority had been signed by all beneficiaries.

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[36] This was in an email from Ms Z to RB (30 March 2015).

[206] The nub of the issue for the Committee was that both Ms SY and Mr DT (and consequently [SAL]) ought to have ensured that there was unanimous family agreement to sell the farm before any sale proceeded, and that this agreement ought to have been recorded in a Deed of Family Arrangement.

[207] In Ms SY's case the Committee concluded that because she had some further involvement in the matter on about 11 May 2015 (after having virtually no involvement after 27 March 2015), she should have checked to see whether all beneficiaries still consented to the sale of the farm.

[208] Mr DT's liability arose from his position as director of [SAL] with overall responsibility for the file; he should have ensured that all beneficiaries consented to the sale.

[209] Because both were directors of [SAL], a finding was made against it as well.

[210] I deal with each in turn.

Ms SY

[211] I accept that Ms SY had advised the executors that the written consent of all beneficiaries would be required prior to the farm being sold.

[212] The handwritten notes, taken by Ms Z, of Ms SY's meeting with the executors on 13 March 2015 refers to a "DOFA" – a Deed of Family Arrangement.

[213] It seems clear therefore that Ms SY discussed this with the executors; doubtless going so far as to advise that such a deed was at least prudent if not necessary.

[214] The options advice itself contained the following:

> In the event option one or two is agreed to, then a Deed of family arrangement is to be prepared recording what has been agreed and this deed will need to be signed by the trustees of the Estate, all five children being the beneficiaries of the Estate and [Mrs O] (by her power of attorney). In order for the deed to be valid … each beneficiary will be required to obtain independent legal advice before signing the deed and to have their signature witnessed by that independent lawyer.

[215] It is difficult to imagine what more could be expected of Ms SY.

[216] I also accept that Ms SY ceased to have any involvement in the administration of (A)'s estate once the options advice had been sent to the executors on 27 March

2015, until approximately 11 May 2015 when Mr DT asked her to review the auction terms.[37]

[217] I do not agree with the Committee's view that when asked by Mr DT to check the auction terms, Ms SY should have enquired about a Deed of Family Arrangement.

[218] By 11 May 2015 – some six weeks after she had given her options advice – Ms SY was entitled to assume that Mr DT had the carriage of the matter. It was reasonable for her to do so because first, he was the principal in charge of estate administration, and secondly, he clearly had the carriage of the file because he asked her to attend to a discrete aspect of it.

[219] Ms SY's limited role on 11 May 2015 was to check a transactional document.

[220] That being said, Ms SY apparently spoke to RB on 11 May 2015, although that was in relation to administrative matters concerning probate. Ms SY reported that discussion to Mr DT in an email to him on 11 May 2015, suggesting that he should follow it up.

[221] Importantly, in that email Ms SY alerted Mr DT to the fact that RB and Mr UB had instructed a lawyer who would be writing to Mr DT with "concerns about the obtaining of probate".

[222] As a counsel of perfection, she could have raised the Deed of Family Arrangement with Mr DT and, but for the dysfunction in their relationship, she may well have done so.

[223] It is significant also that by the time Ms SY was asked by Mr DT to check the auction terms, the executors had signed the agency contract with Mr VA some four weeks earlier. As I discuss below, this effectively committed the executors to the auction and potential sale.

[224] In my view there are no grounds to say that Ms SY's conduct in relation to her advice about a Deed of Family Arrangement fell below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, after 27 March 2015.

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[37] RB raised a query with Ms SY about Mrs O's power of attorney in early April 2015 and this was answered by Ms Z on Ms SY's behalf. Nothing turns on this.

Mr DT

[225] I accept that in initial discussions with the executors, Ms Z (having spoken to Mr DT) referred to the need for a Deed of Family Arrangement if matters were to be resolved between the family members in a way which varied (A)'s will.

[226] That particular advice does not appear to have been put in writing to the executors by Mr DT at the time.

[227] I also accept that Mr DT's involvement in the matter until at least late March 2015, was reactive rather than proactive. He was probably aware that Ms SY was providing the executors with options advice and as a co-principal I consider that he was entitled to assume that she had the matter in-hand and that either she or Ms Z would revert to him if the need arose.

[228] Nevertheless, on 27 March 2015, the executors had the benefit of Ms SY's verbal and written advice about the need for a Deed of Family Arrangement.

[229] I consider that from 27 March 2015, responsibility for the management of the estate administration fell to Mr DT. Ms SY's involvement – restricted to providing options advice – had come to an end. As Mr DT was the acknowledged estates administration principal within [SAL], it is proper to draw the conclusion that from that date he now had the overall carriage of the file.

[230] The document trail also supports this conclusion.

[231] An important event in the timeline occurred on Wednesday 8 April 2015 when Mr UB, through RB, forwarded Ms Z a signed agency contract regarding the auction (the agency contract), with an indication that Mr FD would also sign it (which he subsequently did).

[232] On receipt of the agency contract, Ms Z forwarded it in an email to the agent, Mr VA, also on 8 April 2015, authorising him to market the farm for auction.

[233] This was a sole agency contract.

[234] Mr VA had not executed the agency contract when Ms Z forwarded it to him, but that was a matter of form only.

[235] The terms of the agency contract were that the "owner" (the executors on behalf of the farm company) could cancel it by written notice to the agent, by 5pm on

the first working day after the owner received the sole agency contract executed by the agent.

[236] It is not clear from the material before me, but I anticipate that Mr VA would promptly have executed and returned the agency contract to Ms Z. Allowing for minor delays, that was likely to have been by Friday 10 April 2015.

[237] Adopting that timeline, the executors would have had until 5pm Monday 13 April 2015 to cancel the agency contract.

[238] It is clear that they did not do so.

[239] It is not clear however whether Ms Z spoke to Mr DT before authorising Mr VA to market and auction the farm. No enquiries appear to have been made to ascertain whether this still reflected the wishes of all family members, and Ms SY's advice about a Deed of Family Arrangement appears not to have been repeated.

[240] Instructing the agent to begin marketing towards an auction was a significant step. It involved the executors entering into a binding sole agency contract, with limited opportunity to cancel it and consequences if it was breached.

[241] There does not appear to be any record of advice given to the executors about the consequences of entering into a sole agency contract to market and sell the farm.

[242] A significant feature of this was that these steps were being taken before probate had been granted. Clear advice to the executors, about their fiduciary duties to the beneficiaries in those circumstances, was called for.

[243] In my view Mr DT ought to have advised the executors to ensure that there was written agreement – in the form of a Deed of Family Arrangement – before advising Ms Z to authorise the agent to proceed with marketing; or, at the very latest, in time for the executors to cancel the sole agency contract.

[244] It is speculative as to whether giving the executors this advice would have led to the family entering into a Deed of Family Arrangement.

[245] That is not the point however: the executors should have been given emphatic and unequivocal advice about the dangers of committing themselves to a sole agency contract for the marketing and auction of the farm, in circumstances where probate had not been granted and there was no formal record of unanimous agreement.

[246] It matters not that there were two iterations of a consent form signed by some of the family members: (I) did not sign either. His lack of any signature quite clearly meant that there was no unanimous agreement to sell.[38]

[247] I agree with the Committee's finding against Mr DT in this regard. I consider that his failure to give that advice before the sole agency contract had advanced beyond the period of cancellation, amounts to conduct that fell below the standard of competence and diligence that a member of the public would be entitled to expect of a reasonably competent lawyer.

[SAL]

[248] I do not consider it necessary to also make a finding against [SAL] for the same conduct lapse. This was not a situation of a systemic issue affecting the way in which [SAL] operated as a practice. It was a conduct lapse attributable to Mr DT.

[249] I reverse the finding made against [SAL] in relation to the Deed of Family Arrangement advice.

Pre-injunction advice following (I)'s change of mind on 15 May 2015

[250] This concerns only the conduct of Mr DT and [SAL]. It relates to the steps taken by (I) after the sole agency contract had been executed, when he formally indicated that he did not agree to the auction proceeding.

[251] The Committee's view was that Mr DT ought to have given Mr UB "firm advice that the sale of the farm should not proceed without (I)'s consent. It should not have been necessary for (I) to [apply for an injunction]".[39]

[252] Findings of unsatisfactory conduct were made against both Mr DT and [SAL].

[253] At the outset I note that in his response to the Committee's inquiry into this aspect of his conduct, Mr DT acknowledged that he could have been clearer with the parties prior to the auction proceeding, and that his actions (in failing to be clearer) fell short of his professional and ethical obligations to the court and his client.

[254] Despite what appears to have been an acknowledgment by Mr DT that his conduct on this issue was unsatisfactory, it is still necessary for me to independently and objectively determine whether that is in fact the case.

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[38] It is not entirely clear to me whether EO ever signed a consent. That detail is unimportant as because (I)did not, it could not be said that there was family agreement to sell the farm.
[39] Standards Committee determination at [47].

Discussion

[255] Although the Committee focussed this part of its inquiry on the period after Mr P, on (I)'s behalf, "specifically advised that (I) did not agree to the sale" (being Mr P's letter to Mr DT dated 15 May 2015), in my view, that focus is narrow and overlooks evidence that (I) was at the very least equivocating about the sale for several weeks before that.

[256] In mid-April 2015 Ms Z responded to an email from RB, and amongst other things said "hasn't [(I)] said he wants [the farm] sold?" RB's email had referred to minor disagreements between her on the one hand and (I) and EO on the other hand, about the sale process (rather than the sale itself).

[257] On 21 April, Ms Z sent Mr DT (and Mr HS) an email summarising a telephone discussion she had had with Mr P. She informed them that "[(I)] is now saying that he does not consent to the sale of any of the assets".

[258] (I)'s position – that he did not agree to the sale of the farm – was formally confirmed in writing by Mr P in his letter to Mr DT on 15 May 2015. I discuss this further below.

[259] However, it would seem to me that for the purposes of giving the executors advice, the fact that (I) did not sign the consents which were circulated amongst the family members at the end of March 2015, presents as reasonably clear evidence that he was at least having second thoughts.

[260] A number of events are important when analysing the conduct that falls under this heading.

Mr P's telephone call

[261] In my view, one of the key events in the timeline is Mr P's telephone call to [SAL] on 15 April 2015. This is referred to in his letter to [SAL] dated 4 May 2015.

[262] In many respects, this was a watershed event in the administration of the estate.

[263] It is not entirely clear from the material before me, to whom Mr P spoke on 15 April 2015. I infer that it was Ms Z – she also spoke to Mr DT on that date and my conclusion is that she informed Mr DT about Mr P's telephone call.

[264] The only record of what was discussed during that call is contained in Mr P's letter to [SAL] dated 4 May 2015. I accept that his summary of the earlier telephone call is accurate.

[265] It seems that in the telephone discussion on 15 April 2015, Mr P informed [SAL]:

(a) There were issues with the executors appointed under the will and that an independent executor ought to be appointed (the Public Trustee).

(b) The executors had acted precipitately in marketing and selling the farm before probate had been granted and without considering (I)'s interests (and the grandson referred to in (A)'s will). (I) had a vested interest in the shares in the farm company.

(c) He required confirmation that the farm would be taken off the market.

[266] I am satisfied that Ms Z spoke about the telephone call to Mr DT.

[267] It does not appear that the executors were informed about Mr P's 15 April telephone call.

[268] Mr P raised matters of considerable significance to the ongoing administration of (A)'s estate. He questioned the suitability of the executors, and whether they were properly attentive to their fiduciary duties to beneficiaries – particularly at a time when probate had not been granted.

[269] Importantly, he signalled that there was no longer guaranteed agreement that the farm could be sold. Alarm bells should have been ringing.

[270] The contents of Mr P's telephone call should have been relayed to the executors. Rule 7.1 obliges a lawyer to keep their client "informed about progress on the retainer".

[271] Mr DT's knowledge of both estate administration and litigation should have alerted him to two possibilities: proceedings by (I) to have the executors replaced and proceedings by (I) to prevent the sale of the farm. This was the language of Mr P's telephone call.

[272] Whether Mr DT considered and dismissed the prospect of either proceeding being commenced, in my view, he had a duty to inform his clients about the

development and give them advice about the course they had embarked upon and the pitfalls that might lie ahead – including advice about their fiduciary duties as executors.

[273] Such was the significance of the concerns being raised by Mr P, Mr DT ought to have committed his advice in writing and done so in emphatic terms.

Correspondence from and to Mr P

[274] The next event of significance was Mr P's 4 May 2015 letter to [SAL], in which he referred to the 15 April 2015 telephone call.[40]

[275] This letter found its way to Mr DT, who forwarded it to the executors in an email dated 5 May 2015, in which he said:

> However [Mr UB] being an executor may pose an issue in relation to bias or the perception of bias if [Mrs O issues proceedings] under the Property (Relationships) Act. Even though the claim technically would be by [Mrs O], RB is her Property Attorney and the claim is against (A)'s estate of which [Mr UB] is one executor. In those circumstances they may be able to argue some appearance of bias.

[276] Elsewhere in his email Mr DT refers to (I)'s vacillating position about the sale of the farm but does not make any reference to the need for family unanimity before the sale could proceed.

[277] Mr UB's instructions, sent to Mr DT in an email dated 6 May 2015, were that he saw Mrs O's welfare as being his duty as executor. He said that the only way forward was to sell the farm.

[278] Mr DT met with the executors shortly after that, but no record of that meeting has been provided, nor of the advice given.

[279] I have already commented on Mr UB's view of his obligations as one of the executors. It is not clear whether Mr DT gave him clear advice disabusing him of those views, but I tend to think that he may not have, given Mr DT's acknowledgment about the inadequacy of his advice overall.

[280] Mr DT responded to Mr P's letter, on 8 May 2015. That letter is largely unremarkable; it set out the history of the family's agreement to sell the farm and the executors' instructions to proceed accordingly. Mr DT advised Mr P that neither

[40] I attach some significance to the fact that he sent the letter by email to a generic address at SAL ("info") and did not mark it to the attention of any individual in the firm. This suggests to me that Mr DT was not involved in the mid-April telephone call.

executor intended to renounce in favour of the Public Trustee, and he sought confirmation of whether (I) had withdrawn his earlier agreement to sell the farm.

[281] The next event of significance was Mr P's letter to Mr DT dated 15 May 2015. In summary, Mr P:

(a) advised that (I) "does not consent to the sale of the farm and requires it to be withdrawn from auction immediately";

(b) indicated (I)'s preference to lease the farm;

(c) sought confirmation that the auction would be cancelled;

(d) indicated that if that was not forthcoming (I) may lodge a caveat against probate and "seek injunctive and other relief as appropriate"; and

(e) advised that his letter was copied to EO's lawyer as EO was similarly opposed the sale of the farm.

[282] Mr DT responded to that letter on 19 May 2015. He said:

(a) The executors were proceeding with the sale of the farm "as there is no realistic commercial alternative";

(b) (I) had participated in discussions about and initially agreed with the family decision to sell the farm;

(c) His formal withdrawal from that agreement was in Mr P's 15 May 2015 letter;

(d) (I) has not provided an alternative suggestion; and

(e) A copy of his letter must be annexed to any application made by (I) for an injunction.

[283] To the extent that Mr DT's letter reflects the instructions he was given by the executors, there is nothing remarkable or otherwise troublesome about his letter. Mr DT was obliged to follow his clients' instructions, and they clearly were that the auction was to proceed.

[284] However, the conduct issue is not about what Mr DT wrote to Mr P; it is the advice he gave his clients about the matters that had been successively and firmly

raised by Mr P since his first telephone discussion with [SAL] (probably Ms Z), on 15 April 2015.

[285] I interpolate here that on the morning of 20 May 2015, Mr P spoke to Mr DT on the telephone and informed him that (I) was applying for an injunction to prevent a sale of the farm.[41]

[286] Thereafter, it appears that Mr DT was present when the shareholders of the farm company signed a resolution appointing Mr HS as the director. The shareholders were (A) and Mrs O: (A)'s position was covered by the executors (Messrs FD (through his attorney) and UB), and Mrs O's by her attorney, RB.[42]

[287] There is no evidence before me of Mr DT having given his clients any advice about their exposure if the sale proceeded.

[288] In my view, the situation called out for Mr DT to give his clients (the executors) "objective advice … based on [his] understanding of the law".[43] That advice needed to be "frank".[44] Consistent with it being objective and frank, it needed also to be robustly couched.

[289] The advice should have left the executors in no doubt about the consequences of proceeding with the auction.

[290] This is all the more important having regard to Mr UB's views about the requirement for the farm to be sold: a view which I have already described as wrong, in terms of Mr UB's duties as an executor. Mr UB made his position clear to Mr DT as early as on 6 May 2015, in his email to Mr DT.

[291] At that early stage, Mr UB's mistaken views called out for emphatic, unequivocal and robust legal advice from Mr DT. Mr UB's approach should not have been permitted to go unanswered.

[292] Instead, it appears that Mr DT merely raised the issue of whether the farm could be leased rather than sold. It is correct that he did so in the context of advising that the auction should not proceed; but this was not emphatic advice designed to correct a client's wrong-thinking.

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[41] Supplementary affidavit of Mr DT (5 June 2015) at [15].
[42] The terms of the injunction required this resolution to be rescinded.
[43] Rule 5.3.
[44] Webb, Dalziel and Cook, above n 34, at 5.12.

[293] Of course, Mr UB could not be prevented by Mr DT from pursuing this path. A lawyer may only advise; not direct. But at the very least and in the face of such a misguided view about powers and duties, Mr DT should have advised Mr UB about what the law expected of him and what potential consequences lay in store if he pursued a different course.

[294] Mr DT has acknowledged that his advice was inadequate and my independent and objective assessment of his involvement between the date on which Mr VA was authorised to proceed with the marketing and auction (8 May 2015) and the date of Mr DT's last letter to Mr P (19 May 2015) confirms that.

[295] I agree with the Committee's finding that Mr DT's conduct in relation to this conduct fell below the standard that a member of the public was entitled to expect of a reasonably competent lawyer.

[296] I must also record that I am troubled by the appointment of Mr HS as a director of the farm company, for the purposes of facilitating the auction and any sale.

[297] Mr HS was a principal in [SAL], and my concern is that Mr DT and/or [SAL] may have been acting for more than one client in a matter in which their respective interests did not coincide, contrary to rule 6.1.

[298] Mr DT's/[SAL]'s clients appear to have been the estate and the farm company.

[299] My concern is that given the developing situation in relation to (I)'s position, made more emphatic with each piece of correspondence received from Mr P, the farm company ought to have been given the opportunity to take independent advice about the auction and sale and, if a director was to be appointed, consideration ought to have been given to that director being truly independent (i.e. someone other than Mr HS).

[300] However, that was not a conduct issue identified by the Committee. It is an issue which, as I have anxiously considered this matter, occurred to me some time after the hearing had concluded. Rather than reconvene the hearing and receive submissions on the issue, in the interests of finalising this matter I have decided to take that matter no further.

[301] As to [SAL], consistent with my other conclusions about its involvement, I reverse the Committee's finding against it. I would add, however, that if the conflict issue I identified above had been pursued and led to a finding of unsatisfactory conduct against one or more of the principals of [SAL], then I would have included [SAL] in that finding on the basis that it was a systemic issue affecting the practises of that firm.

Injunction

[302] The issue under this heading is whether Mr DT's professional conduct once again breached the same standard expected of a reasonably competent lawyer.

[303] The auction was due to proceed on 21 May 2015.

[304] (I) obtained the injunction to prevent the sale of the farm, on 20 May 2015. Copies were emailed to Mr DT by Mr P and (I)'s counsel that evening.

[305] Mr DT apparently saw the email on the morning of 21 May 2015. He forwarded the documents to Mr UB in an email sent at 9.20am. In that email Mr DT said (*inter alia*):

> [I]t is fairly clear that the sale has been injuncted and you should perhaps give a heads up to [Mr VA]. I should point out that you are not theoretically bound by the order until personally served with the sealed order.

[306] That was the extent of Mr DT's written advice to one of the executors.

[307] In the ensuing injunction litigation, several of the parties involved in the auction swore and filed affidavits. This included Mr UB, Mr HS, Mr VA, a Mr NR (who represented Mrs O, RB and two of her sisters) and Mr DT. Indeed, Mr DT swore two affidavits: 27 May and 5 June 2015.

[308] There were apparently several inconsistencies in the evidence between the various deponents, including on some key issues about knowledge and advice.

[309] In submissions to the Complaints Service, counsel for Mr DT said:[45]

> It is apparent from the affidavit evidence that there were significant miscommunications and misunderstandings as to who was acting for the various parties, in what capacity advice was being given and who the advice originated from. Notwithstanding this, Mr DT remains adamant that he did not sanction the auction and that is consistent in particular with the affidavit evidence of Mr UB and Mr VA as to who they relied upon in determining to proceed with the auction (Mr NR and Mr HS). As noted, Mr DT now accepts that he could have taken a stronger stance in relation to advising various parties that there were no circumstances in which the auction should proceed.

[310] As well as the inconsistencies between the deponents in their evidence, there were also inconsistencies between the two affidavits sworn by Mr DT. Dealing with that, counsel for Mr DT said that Mr DT does not accept that "he has provided false affidavit evidence" and that each was sworn by him as being true and correct at the time of execution.

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[45] Letter from [Law firm A] to Complaints Service (16 September 2016) at 1.

[311] Of the deponents, only Mr DT appeared at the hearing before Mr Hesketh. The only affidavit that has been provided to this Office as part of the review process was Mr DT's second or supplementary affidavit.

[312] Although Mr DT had counsel appearing for him at the hearing, he (Mr DT) took an active role in it and dealt directly with me in addressing issues and answering questions.

[313] The consistent thread of Mr DT's position – in his affidavits, in his responses to the Complaints Service and in his submissions to this Office – has been that once he was alerted to the fact that (I) had secured an injunction to prevent the marketing and sale of the farm, he (Mr DT) readily concluded that the auction could not proceed.

[314] That is all very well. It is, in fact, the only conclusion that a lawyer could have come to when faced with an injunction issued by the High Court preventing their client from continuing with the sale of a property.

[315] I am troubled by the email that Mr DT sent Mr UB on the morning of 21 May 2015. Although it was technically correct to indicate that personal service of the injunction triggered its effect, the advice was casual to the point of being glib, and incomplete. On my reading of it, and knowing what Mr UB's views were, I consider that Mr DT's email would have left Mr UB with the impression that the auction could proceed in the meantime.

[316] I say "would have left Mr UB" with that view because it appears that Mr DT's email was never received by Mr UB. The evidence is that it briefly appeared in his email account (on his cell phone) after which it disappeared and he was unable to retrieve it.

[317] Nevertheless, Mr DT would have reasonably presumed when he sent the email, that Mr UB would receive it. As it stood, it was inadequate advice.

[318] However, I accept that Mr DT recovered the position.

[319] In his supplementary affidavit Mr DT deposes the following:[46]

> [On the morning of 21 May 2015] I specifically recall conversing with [Mr UB]. … I recall RB explaining that she and [Mr UB] were driving down to Hamilton and asked me to wait while she "connected the hands free". I then heard a number of clicks and [Mr UB] came on the line.
>
> I explained (effectively to both of them) that an injunction had been issued preventing the sale of the farm. I explained I had received a copy of the

[46] At [29] and following.

> application and a minute from [a High Court judge] which made it clear that an injunction had issued and therefore that the auction could not proceed.
>
> …
>
> It was clear to me that [the High Court Judge's] minute meant that the marketing and auction/sale of the farm could not proceed on 21 May, or at any time thereafter until the freezing order/injunction had been lifted.
>
> My dealings with all the parties on 21 May were premised on this understanding.

[320] It is not clear whether Mr DT also spoke to Mr FD, who was apparently overseas at this time.

[321] By a narrow margin I am not persuaded that the advice given by Mr DT once the injunction was issued raises any conduct issues, warranting a finding against him.

[322] I accept that Mr DT advised Mr UB that the auction could not proceed and that he believed he had also conveyed that to others involved in the process. As I earlier observed, ultimately it is for the client to decide whether they will accept the advice given. A lawyer cannot force acquiescence.

[323] Mr UB's single-mindedness, evident no doubt from the very first of the family meetings not long after (A)'s death, would tend to indicate that he was determined to see the sale proceed. I would hasten to add that Mr UB's motivations were not self-interest; he, and other members of the family, were firmly focused on Mrs O's ongoing needs.

[324] In any event, the significant conduct findings against Mr DT relate to the period of time leading up to (I)'s application for an injunction. There is, in short, a complete lack of any evidence that Mr DT gave any advice – let alone emphatic advice – to the executors about the management of (A)'s estate in the face of beneficiary unhappiness and disagreement.

Payment of legal fees from the farm company bank account when there was no director in place

[325] The directors of the farm company were (A) and Mrs O. They were its only shareholders as well.

[326] It is clear that Mrs O lacked capacity. RB was her attorney as to at least property.

[327] Consistent with the legal requirements of a valid Enduring Power of Attorney, RB as Mrs O's property attorney could not exercise Mrs O's powers as a director of the farm company. She could however deal with Mrs O's shares; these being property.

[328] Therefore, from the time of (A)'s death, the farm company had no working directors.

[329] On 20 May 2015, the shareholders passed a resolution appointing Mr HS as a director. This was to enable the auction (and any sale) to proceed the following day.

[330] The "shareholders" who signed the resolution were the executors as the owners of (A)'s shares, and RB as Mrs O's attorney.

[331] On 24 April 2015, Ms Z sent an email to Mr UB and said:

> Just a quick email to advise that our costs are accumulating quickly on this estate. … This is mainly as a result of the issues which have arisen between the beneficiaries and the time required providing options and making calculations for you to discuss with the beneficiaries.
>
> We will forward our initial invoice to you early next week. Our fees are payable by the estate. Grant has suggested that this should come from the [farm] company bank account (of which 87.5% belongs to the estate).

[332] There is no record of any response to this email from Mr UB. There is also no record of whether the proposal was discussed with Mr FD.

[333] Mr DT has no recollection of having a discussion with Ms Z along the lines set out in her email to Mr UB. He says, however, that if he did have such a discussion his thinking was likely to have been that there were current accounts in the company in favour of (A) and Mrs O, and that (A)'s current account as an asset of the estate could have been used to pay legal fees.

[334] Because this was identified by the Committee as a conduct issue involving [SAL], Ms SY has submitted on its behalf that of itself, this does not amount to unsatisfactory conduct.

[335] Ms SY said that Mr DT's advice was practical and would have been arrived at after assessing (A)'s available assets.

[336] The Committee only dealt with this issue briefly noting that it had been part of (I)'s original complaint. The Committee considered that it was not appropriate for

Mr DT to have made the suggestion at a time when probate had not been granted and that "a competent solicitor would not have done so".[47]

[337] This is a finely balanced issue.

[338] On the one hand, it is difficult to see how the farm company could have authorised payment of the estate's legal fees at a time when it had no functioning director.

[339] On the other hand, if, as Mr DT has said, (A) had a current account in credit with the company, then that represented an asset of his estate and on the face of it would have been available for the payment of legal fees.

[340] Because of the uncertainty I have about this particular finding by the Committee, which appears to be based in part upon the contents of (I)'s complaint which does not form part of this application for review, I am not inclined to uphold the Committee's finding of unsatisfactory conduct against both Mr DT and [SAL].

Penalties, costs and compensation: Ms SY and [SAL]

[341] Because I have reversed all of the unsatisfactory conduct findings made against both Ms SY and [SAL], it follows that the penalty, costs and compensation orders made against them fall away.

[342] For the avoidance of doubt, this includes the costs order made by the Committee against Ms SY and [SAL] in its compensation determination.

Penalties, costs and compensation: Mr DT

Fine

[343] The Committee ordered Mr DT to pay a fine of $3,000; this for the breaches it found in relation to the options advice, the Deed of Family Arrangement advice, the advice given once (I) had formally indicated he did not consent to the sale of the farm and the advice that legal fees could be met from the farm company bank account.

[344] This was a global fine for all four findings.

[47] Standards Committee determination at [53].

[345] I have upheld two of the four findings of unsatisfactory conduct: one in relation to the Deed of Family Arrangement advice; the other in relation to the advice once (I) withdrew his consent to the sale of the farm.

[346] I regard these two breaches as serious. At the risk of repeating myself, there is a complete lack of any evidence to indicate that Mr DT provided the executors with clear and emphatic, objective advice about their approach to the administration of (A)'s estate.

[347] I do not suggest that had he done so, the administration of (A)'s estate would have proceeded differently and without the need for litigation. But the executors' approach was so fraught with legal peril that it was incumbent upon Mr DT to take an active and indeed robust role in advising them.

[348] I take into account Mr DT's own description of his conduct; expressed frankly and no doubt with a degree of personal discomfort. I conclude from this, that Mr DT has learned a salutary lesson from his management of this client file.

[349] Although the Committee's fine of $3,000 was for more conduct lapses than I have found, I nevertheless consider that it appropriately reflects the seriousness of those that I have upheld.

Costs

[350] It is appropriate to confirm the Committee's costs order against Mr DT in its liability determination.

Compensation

[351] I acknowledge at the outset that (I) suffered losses in the form of substantial legal fees as a result of having to apply to the High Court for an injunction to prevent the sale of the farm. I do not doubt that there were other financial and emotional costs to him as well.

[352] I also agree that (I) should not have had to apply to the High Court for an injunction to prevent the sale of a farm in circumstances where he had a vested interest in its ownership by virtue of the provisions of both (A)'s and Mrs O's wills, the combined effect of which would ultimately have given him a 100 per cent shareholding in the farm company which owned the farm.

[353] I have also found that Mr DT failed to provide the executors with clear, unambiguous, emphatic and objective advice about their decision to proceed with the auction in the face of (I)'s firm position that he objected to the sale.

[354] However, I disagree with the Committee's conclusion that Mr DT's failure to give that advice caused the auction to proceed with the resultant losses to (I).

[355] The Committee could not put its reasoning any higher than saying "such advice if given in a proper and clear way would likely have caused the executors to stop and reconsider their proposed actions".

[356] That is not the same as saying that "such advice if given, would have led to the executors changing their minds about the sale which would have prevented the auction from proceeding". In my view, the Committee could not have framed its reasoning in this way.

[357] There is no evidence before me, and there was none before the Committee, to indicate that if the executors had received advice of that clear and emphatic nature, then they would have called a halt to the auction.

[358] Indeed, I have accepted that Mr DT told Mr UB by telephone on the morning of 21 May 2015 that because of the injunction the auction could not proceed. Yet, despite that advice, Mr UB pressed on.

[359] In my view, Mr DT's failure to give clear advice did not cause the auction to proceed. The executors – in particular Mr UB – determined that this was what they were going to do and had held firmly to that position from the outset.

[360] All family members (including Mr UB as executor and RB's husband) had resolved in early March 2015 that the only way to provide funding for Mrs O's ongoing care needs was to sell the farm.

[361] (I) gradually stepped back from that position, supported by EO, and proposed the alternative of leasing the farm instead. The remaining family members rejected that as being completely uneconomic and continued with their plans to sell the farm.

[362] It is not the role of this Office to say which of those two views (sale or lease) made more commercial sense. However, it is clear to me that the majority of the family were determined to see the matter through to a sale.

[363] It is entirely speculative to say that firm advice would have changed that.

[364] An order directing a practitioner to pay another party compensation for losses, must be made on the basis of clear evidence of a causal link between the conduct breach and the loss suffered. It is, in fact, a "but-for" analysis.

[365] There is no room for the introduction of speculative reasoning, such as I consider the Committee engaged in.

[366] Because I have decided this issue on the basis of causation, there is no need for me to separately consider whether the agreement reached between the parties to the injunction proceedings, which included the payment of $25,000 to (I), operated as a form of *issue estoppel* to the issue of compensation being pursued separately by (I) through the complaints process.

[367] For those reasons I reverse the Committee's order that Mr DT pay (I) compensation.

[368] It follows that the costs order made against Mr DT by the Committee in its compensation determination, also falls away.

[369] Finally, I observe that there is an issue as to whether the Committee was able to structure a compensation award which saw an individual complainant receive more than the regulatory amount of $25,000.[48] I have reservations about the lawfulness of this approach. However, because of my findings about the lack of causation between Mr DT's conduct and the executors' decision to proceed with the auction, I do not need to decide that particular issue.

Costs on Review

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

[371] Pursuant to s 215(3)(a) of the Act, the costs order may be enforced in the District Court.

[48] Regulation 32, Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

Decision

[372] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed as follows:

(a) As to the findings of unsatisfactory conduct against Ms SY in relation to:

(i) The options advice she gave the executors.

(ii) The advice about the need for the executors and the beneficiaries to enter into a Deed of Family Arrangement.

(b) As to the order that Ms SY pays costs to the New Zealand Law Society.

(c) As to the order that Ms SY pays compensation to (IO).

(d) As to the findings of unsatisfactory conduct against Mr DT in relation to:

(i) The options advice given to the executors.

(ii) Advice that legal fees could be paid from the farm company's bank account.

(e) As to the order that Mr DT pays compensation to (IO).

(f) As to the findings of unsatisfactory conduct against [SAL] in relation to:

(i) The options advice given to the executors.

(ii) The advice about the need for the executors and the beneficiaries to enter into a deed of family arrangement.

(iii) Advice given to the executors following (I)'s change of mind about the sale of the farm.

(iv) Advice that legal fees could be paid from the farm company's bank account.

(g) As to the order that [SAL] pays costs to the New Zealand Law Society.

(h) As to the order that [SAL] pays compensation to (IO).

[373] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed as follows:

(a) As to the findings of unsatisfactory conduct against Mr DT in relation to:

(i) The advice about the need for the executors and the beneficiaries to enter into a Deed of Family Arrangement.

(ii) Advice given to the executors following (I)'s change of mind about the sale of the farm.

(b) As to the fine imposed against Mr DT in the sum of $3,000.

(c) As to the costs imposed against Mr DT in the Committee's liability determination.

Anonymised publication

[374] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

[375] For the avoidance of any doubt, I record that unredacted copies of this decision are not to be made available to (I)or EO. Neither was a party to these applications for review, which were lodged by the practitioners and [SAL] in relation to the Standards Committee's own motion investigation into their conduct.

[376] Review proceedings in this Office are presumptively confidential, pursuant to s 206(1) of the Act.

[377] However, because this decision involves the issue of compensation which the Committee ordered the applicants to pay (I), he may be advised by this Office as follows:

> The determination of the Auckland Standards Committee 2 dated 13 August 2018 in which the Committee ordered Ms SY, [SAL] Limited and Mr DT to pay Mr (IO) compensation in the total sum of $43,825 in respective shares each of $8,765, $17,530 and $17,530, is reversed.

DATED this 22ND day of August 2019

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R Hesketh
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 SY and [SAL] as the First and Second Applicants
Mr DT as the Third Applicant
Ms HT as the Representative for the First and Second Applicants
Mr ML as the Representative for the Third Applicant
Mr HS as the Related Person
(IO) to the limited extent provided for in [377].
[Area] Standards Committee [X] as the Respondent
New Zealand Law Society
Secretary for Justice

Schedule

Chronology of key events

• 3 February 2015	Ms Z opens estate administration file with Mr DT recorded as the supervising partner.
• 11 February 2015	Ms Z and Mr DT discuss estate administration. Suggestion that Mr UB renounce executorship because he is married to RB; reference to Deed of Family Arrangement.
• 23 February 2015	Mr DT instructs Ms Z to inform "the four daughters" to seek independent legal advice.
• 27 February 2015	(i) RB telephones Ms SY and asks her to act. (ii) Ms Z writes to executors and suggests Mr UB renounces executorship.
• 4 March 2015	O family meeting and agreement reached to sell farm.
• 13 March 2015	Ms SY and Ms Z meet executors. Advice is sought on options involving a sale of the farm, which would provide income for Mrs O's care.
• 27 March 2015	Options advice circulated to the executors
• Late March 2015	All family members except (I)(and possibly EO) sign a consent to the sale of the farm.
• 8 April 2015	(i) Mr UB provides Ms Z with signed sole agency contract. (ii) Ms Z authorises agent to market the farm for sale by auction.
• 10–15 April (approx.)	(I)resiles from family agreement to sell the farm and seeks legal advice from Mr P. EO supports IO.
• 15 April 2015	(i) RB informs Ms Z that (I)and EO have taken legal advice about the sale of the farm. (ii) Mr P speaks to Ms Z (?) about replacement executors and unauthorised marketing and sale of the farm.

• 21 April 2015	Mr HS writes to RB and emphasises need for beneficiaries to be independently advised and the possibility of a Deed of Family Arrangement being negotiated.
• 24 April 2015	Ms Z informs RB that Mr DT recommends that [SAL] estate administration fees be paid from the farm company's bank account.
• 4 May 2015	Mr P writes on behalf of (I)to [SAL] seeking consent to appointment of Public Trust and confirmation that the farm will be taken off the market for sale.
• 5 May 2015	Mr DT forwards Mr P's letter to Messrs Gribble and Rutherford.
• 8 May 2015	Mr DT replies to Mr P; declines to agree to Public Trust appointment and seeks confirmation that (I)has withdrawn consent to sale.
• 11 May 2015	Mr DT asks Ms SY to review auction terms.
• 15 May 2015	Mr P writes to Mr DT confirming (I)does not consent to sale and requires immediate withdrawal from sale and cancellation of auction; threatens injunctive relief.
• 19 May 2015	Mr DT writes to Mr P and advises that executors consider sale to be the best option and invites alternative proposal from (I).
• 20 May 2015	(i) Mr P rings Mr DT and informs him that (I)is applying for an injunction. (ii) Alternative director (Mr HS) appointed by farm company shareholders.
• 21 May 2015	(i) Mr DT receives by email a copy of the High Court's Minute granting the injunction and emails it to Mr UB noting that it had not been served. (ii) Mr DT speaks to Mr UB by telephone and advises that the auction cannot proceed because of the injunction. (iii) The auction proceeds with a condition that any sale is subject to High Court approval.