LCRO 272/2016

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

DECISION

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

Introduction

[1] Ms XK has applied to review the determination of the [Area] Standards Committee [X] (the Committee) to take no further action on three issues of complaint she had raised with the New Zealand Law Society Complaints Service (the Complaints Service).

[2] The complaint concerned Mr JB's conduct as a co-executor with Ms XK in her late father's estate (Mr B), as well as Mr JB's conduct in acting for the estate.

Background

[9] Mr B passed away on 2 June 2008. He had four children: three sons and a daughter, Ms XK.

[10] Mr JB and Ms XK were co-executors of Mr B's estate.

[11] Mr JB was also acting in the administration of Mr B's estate.

[12] An asset in Mr B's estate was a vendor mortgage (the mortgage) dated 11 December 2007, in which Mr B was the mortgagee. The principal sum under the mortgage was $65,000; its initial term was for two years. It was eventually discharged in August 2015.

[13] The mortgagors were Mr and Mrs Z.

[14] On 25 May 2008, about a week before he passed away, Mr B gave a registered legal executive in Mr JB's law firm, instructions about the mortgage as well as instructions to update his will.

[15] Mr B's instructions were to transfer ownership of the mortgage from himself to Ms XK, with an Acknowledgment of Debt from Ms XK to Mr B in relation to the sum owing under the mortgage by Mr and Mrs Z.

[16] Mr B's will instructions included forgiving Ms XK's acknowledgment of debt. In effect, this gifted the mortgage to Ms XK.

[17] However, Mr B passed away suddenly and before the necessary legal work could be done.[1]

[18] The will in existence at Mr B's death was one he had executed in August 2007. It pre-dated the mortgage. In the 2007 will, Mr B left specific gifts to Ms XK.

[19] The mortgage formed part of the residue of Mr B's estate. The will directed the residue to be shared equally between Mr B's surviving children.

[20] Ms XK argued that Mr B had intended her to eventually own the mortgage, however her three brothers would not agree to the mortgage being gifted to her outright.

[21] In 2009, Ms XK brought Testamentary Promises and Family Protection proceedings against Mr B's estate.[2]

[22] This led to a judicial settlement conference in the Family Court in March 2010, at the conclusion of which the four children agreed to share in the monies represented by the mortgage, with Ms XK's share being roughly 70 per cent.

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[1] No conduct issue arises out of this.
[2] Pursuant to the Law Reform (Testamentary Promises) Act 1949 and Family Protection Act 1955.

[23] Mr JB opened a single trust ledger in his firm's trust account to deal with the administration of the mortgage, which included repayments made by Mr and Mrs Z. Those payments were erratic. The term of the mortgage was extended.

[24] Ms XK had concerns about the way in which Mr JB administered the mortgage. In particular, that he recorded all repayments on a single trust account ledger, whereas she maintained that he had been required by the judge to create separate ledgers for each of Ms XK and her three brothers.

[25] Ms XK also queried Mr JB's legal fees and whether some should have been charged to Mr and Mrs Z.

Own motion investigation and complaint

[26] The procedural background to the complaint and application for review is unusual.

[27] In September 2015, Mr JB self-reported to the Complaints Service his conduct concerning the manner in which he had dealt with a sum of money ($3,000) retained from Mr B's estate.

[28] In summary, in 2010 Mr JB retained $3,000 in his trust account from the administration of Mr B's estate, against anticipated final fees and disbursements. He rendered invoices in July and August 2010 for approximately $1,850 and deducted those fees from the money retained.

[29] The balance remained in his trust account.

[30] Mr JB did not give Ms XK a copy of the invoices.

[31] In March 2015, Ms XK queried the retained funds. Realising that he had not sent her copies of the 2010 invoices, Mr JB generated a new, single, invoice in March 2015 to replace the earlier two (for a slightly greater amount). He did not inform Ms XK of what he had done.

[32] As indicated, Mr JB self-reported that conduct to the Complaints Service several months later, after others in his law firm became aware of his actions. Shortly thereafter he surrendered his practising certificate (although he has since resumed practise).

[33] As a result of the self-report, the Committee launched an own motion investigation into Mr JB's conduct. It advised Ms XK of this, which prompted her to make a complaint about other aspects of Mr JB's conduct.

Ms XK's complaint

[34] Ms XK lodged her complaint with the Complaints Service on 17 February 2016.

[35] So far as that complaint is relevant to the issues engaged by this application for review, Ms XK said:

(a) At a judicial settlement conference on 19 March 2010, which dealt with her Family Protection and Testamentary Promises claim, agreement was reached that she and her three brothers would share ownership of the mortgage.

(b) The presiding judge directed Mr JB to set up four separate trust account ledgers to administer the (then still unpaid) mortgage.

(c) Mr JB did not do so and has continued "running the loan as part of [Mr B's] estate therefore retaining his control on the funds and over [Ms XK]".

(d) Mr JB charged the estate fees for administering the mortgage, when those charges should have been borne by the mortgagors.

(e) Mr JB did not provide adequate information about the administration of the estate.

(f) Mr JB's role as executor came to an end at the conclusion of the judicial settlement conference.

(g) Mr JB failed to file tax returns on behalf of the estate for the years 2011–2015, which resulted in the estate having to pay penalties and interest.

Response by Mr JB

[36] Mr JB responded to Ms XK's complaint on 9 March 2016. He said:

(a) The consent order made on 19 March 2010 did not vest the mortgage in Ms XK and her brothers. It remained an asset of the estate.

(b) There were difficulties with administering the mortgage from the outset, as the mortgagors made infrequent and imprecise payments. As well, the term of the mortgage was extended on at least two occasions, with differing interest rates including penalty interest from October 2010.

(c) The mortgagors received regular statements from Mr JB showing payments in, shortfall owing and principal amount outstanding.

(d) The mortgage was discharged in August 2005 and the amount settled by the mortgagors was an agreed sum. That sum did not include Mr JB's legal fees nor the accountant's legal fees as the mortgagors would not agree to pay those.

(e) This failure to file tax returns arose because there had been considerable difficulties with administering the mortgage, including defaults by the mortgagors, extensions and payments made by them that were difficult to reconcile.

Standards Committee decision

[37] The Committee delivered its decision on 28 October 2016. Both the outcome of the own motion investigation and the determination dealing with Ms XK's complaint were contained in one decision document.

Own motion investigation

[38] In relation to the own motion investigation, the Committee found that Mr JB's conduct in failing to send Ms XK the 2010 invoices was unsatisfactory conduct, this being a breach of reg 9(2) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

[39] The Committee said that it was:[3]

> unclear … why [Mr JB] did not simply acknowledge his mistake to Ms XK at the time [rather than try to cover up his earlier mistake by creating a subsequent invoice].

[40] The Committee held that Mr JB compounded that breach when he created a fresh invoice in 2015 to cover-up his earlier failure.[4]

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[3] Standards Committee determination, 28 October 2016 at [12].
[4] Lawyers and Conveyancers Act 2006, s 111(1) and Lawyers and Conveyancers Act (Trust Account) Regulations 2008, reg 9(2).

[41] The Committee said the following:[5]

> In misleading his client, [Mr JB] has breached the fundamental relationship of confidence and trust expected between a lawyer and a client. It is conduct that would be regarded by lawyers of good standing as being unacceptable.

[42] The Committee gave serious consideration to referring the self-reported conduct to the Lawyers and Conveyancers Disciplinary Tribunal, but elected to deal with the matter itself, describing it as being "at the upper end of the spectrum of unsatisfactory conduct".[6]

[43] The Committee said that by a "fine margin" it decided not to refer the conduct to the Tribunal, because "there was no dishonesty involved in deducting … fees from the money held in trust [and Mr JB] self-reported his conduct and surrendered his practising certificate shortly thereafter".[7]

Ms XK's complaints:

Tax returns

[44] The Committee upheld this issue of complaint.

[45] The Committee considered that the failure to file the annual returns amounted to unsatisfactory conduct in that Mr JB failed to administer that aspect of the estate in a competent and timely manner.[8]

Competence in administering Mr B's estate

[46] As they relate to the issues now raised on review, the Committee identified the following issue for consideration:[9]

> Whether Mr JB has breached [r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008] in:
>
> i. Generally administering the estate of the late [Mr B] in an incompetent manner and in breach of the duty to take reasonable care.

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[5] Standards Committee determination, above n 3 at [14].
[6] At [16].
[7] At [16].
[8] At [36]–[39].
[9] At [7]e.

[47] The two competence issues were the consent order made at the judicial settlement conference and whether certain fees charged to the estate should have been paid by the mortgagors.

The consent order

[48] The Committee said that "Ms XK has not fully understood the nature of the mortgage transaction".[10] It noted that the mortgage, which began whilst Mr B was alive in 2007, became repayable in December 2009, but was then extended until October 2010 at which time it was unable to be repaid and penalty interest began to run.

[49] The Committee said that:[11]

> there was very little option for Mr JB in how that loan was managed, and … the communication difficulties between [Mr JB and Ms XK] may have resulted in a misunderstanding of how this loan had been managed.

[50] The Committee concluded that no further action on this issue of complaint was necessary.

Fees

[51] The Committee noted that the mortgagors were in default and had an obligation to pay costs incurred by the estate as a result of any defaults. However, it held that:[12]

> it is quite understandable that the estate will incur legal and potentially accounting costs on matters which are the responsibility of the estate. This is not to say that the borrowers are not liable for those costs and could be pursued for payment of them. However, those costs are the responsibility of the estate in the meantime.

[52] The Committee considered that the issue did not warrant further action as the costs have been appropriately charged to the estate, which has the option of pursuing the mortgagors in due course.

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[10] At [21].
[11] At [22].
[12] At [33].

Penalty

[53] By way of penalty, the Committee censured Mr JB and ordered him to pay a fine of $5,000, together with costs to the New Zealand Law Society of $2,000.

[54] The Committee imposed one fine for its two findings of unsatisfactory conduct, although given its description of the self-reported conduct, it is reasonable to conclude that the bulk of the fine reflected that finding.

[55] Mr JB has not applied to review the own motion determination, nor the single finding of unsatisfactory conduct concerning the failure to file tax returns.

Application for review

[56] Ms XK filed her application for review on 9 December 2016. She said:

> This application concerns the matters identified as "issue E" in the Standards Committee's decision.

[57] Accordingly, Ms XK's application for review is limited to the issue of Mr JB's administration of Mr B's estate and whether he acted "competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care".[13]

[58] Ms XK submits:

(a) The consent order vested the mortgage on herself and her brothers in shares defined as being $45,000 to her and $20,000 to be shared between her three brothers.

(b) It was not logical to administer the mortgage within Mr B's estate. It should have been administered on behalf of Ms XK and her brothers in their respective shares.

(c) It was irrelevant that the mortgage had not been repaid at the time the consent order was made.

(d) The mortgage was administered incompetently, and statements and invoices issued were incorrect and confusing. The estate appears to have been charged fees for legal work that should have been charged to the mortgagors.

[13] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.

[59] Ms XK also seeks a refund of a portion of her own legal fees, which she said were incurred by her having to consistently chase-up Mr JB and seek explanation from him about the administration of Mr B's estate. The sum is $7,475.

[60] As well, Ms XK seeks payment from Mr JB of a shortfall in mortgage payments and interest, as well as reimbursement to the estate of legal fees it incurred in pursuing the mortgagors.

[61] Ms XK has provided substantial documentation to support the ground set out in (d) above, including invoices, statements, time records, trust statements, mortgage payment schedules, copies of emails and copies of parts of the pleadings in her Family Protection and Testamentary Promises claim.

Mr JB's response

[62] In his response received by this Office on 20 January 2017, Mr JB submitted:

(a) The consent order did not vest the mortgage in the four siblings. It referred only to distribution of funds upon repayment. Until repayment of the mortgage it remained an estate asset.

(b) The mortgage was interest-free until the scheduled repayment date in December 2009. It was not repaid.

(c) Interest was payable at 10 per cent from December 2009 until September 2010, when it was to be repaid. It was not repaid.

(d) Interest was then payable at the penalty rate of 14 per cent from October 2010.

(e) Repayments by the mortgagors were inconsistent both as to when they were made and how much was paid.

(f) Repayment occurred in 2015, at which point an accountant reconciled interest that should have been paid, withholding interest that should have been paid as well as the amount of principal and interest. An agreed sum was repaid by the mortgagors, which did not include associated legal costs in administering the mortgage.

(g) Considerable time spent administering Mr B's estate between 2009 and 2015 has not been charged.

[63] Mr JB does not accept that he should reimburse Ms XK for legal fees she incurred. He noted that she chose to engage lawyers and that this arose because of the breakdown of the relationship between him and Ms XK.

[64] Mr JB does not accept that there has been any error in the calculation of outstanding principal and interest under the mortgage. As to legal fees incurred by the estate, he submits that these were incurred in the process of the estate pursuing the mortgagors for payments under the mortgage.

Nature and scope of review

[65] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[14]

> … 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.

[66] More recently, the High Court has described a review by this Office in the following way:[15]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[67] 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:

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

(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

[68] As the Officer with responsibility for deciding these two applications for review, I appointed Mr Robert Hesketh as my statutory delegate to assist me in that task.[16]

[69] As part of that delegation, on 30 November 2018 at Tauranga, Mr Hesketh conducted a hearing at which Ms XK and Mr JB both appeared in person.

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

[71] At the conclusion of the hearing the parties agreed to meet privately with a mediator to see if the issues between them could be resolved.

[72] Mr Hesketh made timetable directions for that to occur, including requesting the parties to file further submissions if agreement could not be reached.

[73] The parties were unable to meet with a mediator, however exchanged without prejudice correspondence to try and reach agreement.

[74] Agreement was unable to be reached and the parties informed this Office.

[75] Each has since provided further brief submissions about the issues on review.

[76] Mr Hesketh and I have conferred about the complaint, the application for review (including the parties' submissions) and my decision. There are no additional issues or questions in my mind that necessitate any further submissions from either party.

[16] Lawyers and Conveyancers Act 2006, sch 3, cl 6.

Analysis

[67] In what follows I will by no means refer to every aspect of the materials that have been put before me by the parties, although all material has been carefully considered.

[68] The issues for consideration on review concern three matters:

(a) Mr JB's treatment of funds relating to the mortgage;

(b) correct accounting for the mortgage repayments and settlement; and

(c) Ms XK's own legal fees in raising estate matters with Mr JB.

[69] A potentially complicating factor is that Mr JB was a principal in an unincorporated law firm at the time that these matters arose; he now practises on his own account. However, the funds represented by the now-repaid mortgage remain in the trust account of his former firm, which is now an incorporated law firm. I understand that those funds will be dispersed following delivery of this decision.

[70] Mr JB has acknowledged that if there are any "refunds" due to the estate (or to Ms XK) arising out of this application for review, then these will be his personal responsibility. Of course, that must be the case because the complaint is about his conduct.

Mr B's estate

[71] Mr B's estate was modest. It comprised the $65,000 vendor mortgage, his home unit, some family jewellery and paintings, and some family chattels. As well there was a mobility scooter and a concrete mixer. In all, the estate was worth somewhere between $350,000 and $400,000.[17]

[72] Despite its modest size, the administration of Mr B's estate generated litigation in relation to the mortgage and other matters, which led to considerable acrimony between Ms XK and her family on the one hand, and her three brothers and their families on the other hand.

[73] The allegations and counter-allegations made by each in the litigation makes for unhappy reading.

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[17] In a Memorandum of Issues prepared by Ms XK's lawyer for her Family Protection and Testamentary Promises proceedings (16 March 2010), the estate was said to be valued at "approximately $395,000".

[74] It is disappointing — for all concerned — that so modest an estate led to such bitterness amongst the four siblings. There were disagreements about family photos, family memorabilia and general household effects. Art equipment belonging to Mr B's late wife — the four adult children's mother — was also the subject of unhappy disagreement.

[75] There were allegations of undue influence being exerted over Mr B and counter-allegations that other siblings had shown little interest in him. The partners of some of the siblings were singled out for criticism as well.

[76] Agreement could not be reached about a mobility scooter valued at less than $1,000, or a concrete mixer, valued at less than $650. The argument about the mobility scooter was reduced to one about the value and ownership of its batteries.

[77] There was debate between Ms XK (through Mr JB) and her brothers as to whether she could retire as a trustee in Mr B's estate. She endeavoured to do so, but a lawyer representing one of her brothers objected. The position taken by the brother was that Ms XK was not a trustee; rather, she was (at that stage) an executor and could not retire.

[78] That debate then became one about whether Ms XK had completed executor duties and had assumed trustee duties.

[79] Ultimately Ms XK did not resign.

[80] Subsequently, Ms XK requested Mr JB to resign his executor and trustee roles — this, some seven years after Mr B had passed away.

[81] All of this required the involvement of Mr JB to a greater or lesser extent. He was both co-trustee with Ms XK and acting as the lawyer administering Mr B's estate.

[82] Both of Mr JB's roles were largely reactive rather than proactive. Ms XK sought to challenge the will; her brothers opposed the challenge. This alone took matters outside any degree of control that Mr JB may have had over, for example, legal fees. It halted ongoing administration of Mr B's estate.

[83] The issue about whether Ms XK could renounce her executorship consumed Mr JB's time. As did correspondence between Mr JB and Ms XK's lawyer.

[84] As both trustee and lawyer acting in the administration of the estate, Mr JB was entitled to charge a fair and reasonable fee for the work he was called upon to do.

[85] Ms XK has gone so far as to say that Mr JB made her "life a living hell". She sought an order that he "should not be allowed to practise again".

[86] For his part, in his response to the complaint Mr JB said that:[18]

> in over 30 years of practising law I have not encountered a more difficult person to deal with. I feel that [Ms XK] was a major contributor to my stress and depression and my subsequent retirement from the law.

[87] Although neither those comments, nor my summary of the litigation events, provide assistance in determining the conduct issues raised, I mention them to illustrate that the fall-out from the administration of what was a modest and straight-forward estate, was extreme.

[88] Moreover, although these were all clearly important matters to Mr and Mrs B's adult children — they mask the conduct issues to be determined.

[89] Ms XK's initial complaint against Mr JB — which concerned his treatment and administration of the mortgage, legal fees and some penalties imposed by the IRD, have reduced down to the mortgage issue and her own legal fees in her application for review.

[90] Yet the material for both the complaint and the application for review, fills more than one Eastlight folder.

[91] Ms XK's attention to detail is, on the one hand, commendable; but on the other hand, does not greatly assist with determining the issues on review, which as I have identified above, are narrow.

[92] I have discerned that a significant aspect of Ms XK's trenchant criticism of Mr JB's conduct arises from the matters about which he self-reported to the Complaints Service. Those included matters of dishonesty and she was right to have been alarmed about that conduct. She was right also to have been vigilant about analysing other work done by Mr JB.

[93] However, it is trite to observe that Mr JB's dishonesty in March 2015 does not mean that any or all of his other conduct in this matter is equally suspect.

The mortgage:

One or four ledgers

[18] Mr JB's 9 March 2016 response to Ms XK's complaint. Mr JB has since resumed practising law.

[94] Ms XK has said that at the conclusion of the settlement conference, the judge directed Mr JB to open four separate trust account ledgers in each of her and her brothers' names, and to administer the mortgage through those four ledgers.

[95] She put it this way in her letter to the Complaints Service dated 24 March 2016:

> the family Court order made no reference that the mortgage remain as an asset of the estate. As already stated in my claim and documentation provided, the judicial hearing was to settle the legal ownership of the loan and that an agreement was reached by all four parties involved. The fact that [the presiding judge] indicated to [Mr JB] at the hearing to set up four separate accounts in my opinion validates this. My legal representative put forward an offer to share the loan to my brothers and with some discussion, and agreement to share the loan was reached by all four parties. I have not and nor would I have agreed for ownership of the loan to remain as an asset of [Mr B's] estate, there was absolutely no mention or acceptance for the loan to remain as such at the judicial hearing. The estate made no claim against the beneficiaries for the loan to remain an asset of the estate.

[96] The litigation that was the subject of the judicial settlement conference was Ms XK's Family Protection and Testamentary Promises claims. In simple terms she had claimed a greater share of Mr B's estate than her three brothers (specifically, the mortgage); alternatively, that Mr B had promised to gift the mortgage to her in return for services she had provided him.

[97] The consent order was made by the Family Court Judge on 19 March 2010. It dealt with all outstanding matters relating to Mr B's estate, including the distribution of a sum of money (unrelated to the mortgage) in Mr JB's trust account.

[98] The consent order was clearly designed to resolve all issues relating to Mr B's estate, so that it could be wound-up (or, more correctly, finally distributed).

[99] In relation to the mortgage, the consent order reads as follows:

- The mortgage of $65,000 to be distributed upon repayment by or in accordance with the proportions of funds received.
- $45,000 to [Ms XK]
- $20,000 to [Ms XK's three brothers]

[100] From the terms of the consent order it is clear that the parties did not agree that Ms XK would receive the funds represented by the mortgage. The negotiated result reflected an approximately 70:30 split.

[101] At the time of the settlement conference the mortgage was still in place. It was not repaid by the mortgagors until 28 August 2015, several years after the initially agreed term and some five years after the judicial settlement conference.

[102] The mortgagors had been making sporadic and varying payments and continued to do so until it was repaid. The sum agreed to settle the repayment was $88,649.51. Part of this sum included differing rates of interest (including penalty interest) charged to the mortgagors.

[103] I think it highly unlikely that the judge presiding over the settlement conference suggested to or directed Mr JB to create four separate ledgers for each of the four beneficiaries of the sum represented by the mortgage and to pro-rata payments made by the mortgagors into those separate ledgers.

[104] This is because the mortgage remained an estate asset until repaid and distributed. The consent order makes that clear.

[105] I do not agree with Ms XK's submission that the effect of the consent order was to vest the mortgage in her and her three brothers in the shares set out in the consent order. This would have involved a transfer of the mortgage into their four names as mortgagees, and the consent order would have provided for that, if that is what the parties had agreed to.

[106] In my view the consent order plainly refers to distribution of the sum represented by the mortgage, in agreed shares, upon repayment by the mortgagors.

[107] Therefore, the estate remained the mortgagee and Mr JB's client, until repayment by the mortgagors and distribution to the four beneficiaries had occurred. It was into and out of that client's ledger (the estate), that any money relating to the mortgage, was obliged to go.[19]

[108] Mr JB ensured that this occurred.

[109] There is a further issue in relation to Mr B's estate. As indicated, the consent order was designed to settle all estate issues so that it could be finally distributed.

[110] Ms XK maintains that this occurred in March 2010 (at the time of the consent order), and that after then, there was no need for Mr JB to have ongoing involvement as trustee.[20]

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[19] Lawyers and Conveyancers Act (Trust Account) Regulations 2008, reg 12.
[20] Ms XK's complaint to the Complaints Service at [14]d: "[Mr JB had] no legal right to continue to act as an executor and trustee after the Judicial Hearing Settlement".

[111] It is likely that Mr B's estate was finally distributed at that time, March 2010, in the sense that all assets had been distributed or were otherwise allocated.

[112] Final distribution of an estate does not necessarily require an actual transfer of an asset, provided it has been allocated. The sum of money represented by the mortgage could not be distributed as it was unpaid; but the consent order had the effect of allocating it.

[113] Therefore, the trustees of Mr B's estate — Mr JB and Ms XK — had an ongoing fiduciary obligation to the beneficiaries to ensure that the mortgage was properly administered until repayment, at which point it was due be dispersed to the beneficiaries in terms of the consent order.[21]

[114] Mr JB would have been failing in his duties to his client (the estate) and, as one of the trustees of the estate, to the beneficiaries, if he had simply taken no further steps from March 2010.

[115] I cannot see any conduct issues arising out of Mr JB's decision to administer the mortgage through one trust account ledger. His obligation, upon receipt of any funds from the mortgagors, was to pay those funds to the credit of his client (the estate) and to account to the four beneficiaries according to the proportions set out in the consent order; then to finally distribute the principal sum on repayment according to the proportions set out in the consent order.

Correct accounting for interest and principal

[116] There is clear disagreement between Mr JB and Ms XK as to calculation of the principal and interest payments under the mortgage, and whether the correct interest calculation has been applied.

[117] As a first point, I observe that once Mr JB self-reported his conduct to the Complaints Service, the administration of Mr B's estate was taken over by Mr JB's partner (soon to be former) in his law firm (Mr D). The partnership directed that Mr JB was to have nothing further to do with the legal work associated with the administration of the estate. Mr JB remained a co-executor with Ms XK.

[118] Mr D and the legal executives who had been assisting Mr JB with both his practice and the administration of Mr B's estate, conducted an audit of — effectively —

[21] See generally *Re Magson* [1983] NZLR 592 (CA) and *Lilley v Public Trustee* [1981] 1 NZLR 41 (PC).

money owing, money in and money out — and satisfied themselves that the trust account records were in order.

[119] The work done by Mr D and his team included arranging for the settlement and discharge of the mortgage. The amount paid by the mortgagors to settle and discharge the mortgage was approximately $88,500. It was calculated by an accountant, who had access to the relevant mortgage records from Mr JB's law firm. The accountant had been initially selected by Ms XK.

[120] Both Mr JB and Ms XK, as co-executors, agreed with the settlement figure as being the full and final amount of principal and interest (including penalty interest) owing by the mortgagors under the mortgage.

[121] Ms XK also sought payment of her legal fees in dealing with Mr JB throughout the administration of the estate; however, Mr D rejected this request.

[122] Ms XK has said that she considers that "Mr JB's actions and handling of our trust funds require further investigation as to where the funds withdrawn have gone to". She maintains that he has managed that money, fraudulently.

[123] She asks, amongst the remedies she has sought, for a direction from this Office that the New Zealand Law Society direct an auditor to audit Mr JB's trust account (or that of his former firm but relating to when he was a principal in the firm), to verify the position one way or the other. She notes in her 7 December 2016 letter to this Office, that her "calculations have been made without the benefit of all information".

[124] For his part, Mr JB is equally as adamant that he has properly accounted for all monies in and out of the trust account. He maintains that the amount finally paid by the mortgagors was the agreed settlement sum and that the calculation of the amount owing was made by an accountant.

[125] As the complainant and now the applicant for review, Ms XK has the task of persuading me that her account and explanation of events is more probable than not.

[126] Mr JB is not obliged to prove a lack of wrongdoing; however, he is expected to meet any allegation made with an explanation. That does not alter the overall position, which is that Ms XK carries the burden of establishing the correctness of her position on the balance of probabilities.

[127] It is not the role of this Office on review, to conduct a line-by-line audit of invoices, statements, trust account statements and trust account records. This Office does not fulfil the function of a forensic trust accountant.

[128] A complainant — whatever the jurisdiction — is obliged to support their claim with evidence to the required standard; in this case, the balance of probabilities. It is not enough for a complainant to provide documents, make allegations and ask questions.

[129] Apart from her own analysis, which I accept carries with it substantial experience in office administration including accounts reconciliation, Ms XK has not provided independent evidence of financial mishandling by Mr JB.

[130] Ms XK maintains that she does not have all of the necessary information and that an audit by the Law Society will answer many questions.

[131] Although this Office has the power to carry out "further inquiries or investigations into … any aspect of a complaint" I am not persuaded that there is a proper evidential basis for me to do so.[22]

[132] First, I am not sure what information Ms XK believes she lacks and what additional information would fill those gaps. My assessment of the substantial records that have been produced, is that they are comprehensive if not complete.

[133] I am also influenced by the fact that the entire complaint process began with a self-report from Mr JB, in which he revealed his dishonest conduct in relation to the 2015 invoice and his failure to give Ms XK the 2010 invoices when they were generated.

[134] The Committee appropriately criticised the conduct in relation to the 2015 invoice as dishonest and firmly dealt with Mr JB for it — noting its view that consideration had been given to referring the matter to the Lawyers and Conveyancers Disciplinary Tribunal.

[135] I have no doubt that in the course of inquiring into Ms XK's subsequent and related complaint, the Committee would have been mindful of the taint of dishonesty surrounding aspects of Mr JB's conduct. I am confident that the Committee would have taken care to ensure that there were no similar taints on other aspects of his conduct.

[136] Ultimately the Committee was satisfied that (apart from delay in making IRD payments) Mr JB's other conduct in administering Mr B's estate did not fall below ethical or professional lines.

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[22] Lawyers and Conveyancers Act 2006, s 205(c)(i).

[137] In the face of the clear conflict in the evidence between Ms XK and Mr JB as to the trust account management of Mr B's estate, and the lack of any evidence tipping the balance in Ms XK's favour, I am not persuaded that it is more probable than not that there are any issues of conduct concern in relation to Mr JB's overall administration of Mr B's estate.

Fees incurred by Ms XK

[138] Ms XK instructed her own lawyers for two reasons. First, she required independent advice about her position as a beneficiary wishing to challenge Mr B's will. Clearly, neither Mr JB nor anyone else in his law firm could provide that advice as Mr JB was both a co-executor and acting as solicitor in the administration of Mr B's estate.

[139] Secondly, Ms XK maintains that it was necessary to instruct a lawyer to deal with Mr JB in relation to estate administration matters because of the breakdown in their relationship.

[140] There is no presumption that an estate will underwrite the legal fees of a beneficiary (or potential beneficiary) who challenges a will. Often, as part of any settlement, agreement is reached that the estate will pay all or some of the legal fees of other parties.

[141] Similarly, there is no presumption that an estate will underwrite the legal fees of an executor who chooses to instruct another lawyer to assist with that executor's dealings with their co-executor. Again, it is possible to reach agreement between executors about that issue.

[142] It is a different matter if the challenge is to the lawyer who is acting in the administration of the estate, and that challenge reveals that the lawyer has committed a conduct breach in the course of that administration. If the only way that this could be brought out into the open and dealt with was by the executor engaging their own lawyer, then an issue does legitimately arise as to whether the lawyer-administrator might have some responsibility to meet the other executor's legal fees (let alone any losses to the estate as a result of the conduct breach).

[143] The only conduct breach found by the Committee concerned Mr JB's failure to administer the mortgage competently and in a timely way by failing to file tax returns for

the estate for a period from 2011 until 2015. Tax penalties (and interest) were incurred as a result.

[144] Mr JB and Ms XK disagree about the amount of penalties and interest incurred. Ms XK suggested a figure of $1,045.94; Mr JB said that the interest and penalty amounts totalled $306.69, of which the IRD remitted $208.35 with a balance owing of $98.34.

[145] Correspondence provided by Mr JB from the IRD would tend to support his figures.

[146] The Committee, although finding that Mr JB's conduct led to the imposition of penalties and interest by the IRD, did not make any compensation order.

[147] There seems to be no reason why I should not make an order directing Mr JB to pay the sum of $98.34 to Mr B's estate. The repaid mortgage funds remain in his former law firm's trust account, awaiting distribution following delivery of this decision. It would seem to me to be a simple matter of Mr JB paying that amount to his former law firm to the credit of Mr B's estate.

[148] The accountant prepared and filed five years' worth of returns in 2015. The penalties and interest were calculated by the IRD.

[149] I do not consider that the preparation of those returns was an additional cost to the estate arising out of Mr JB's lack of competence and timeliness (as found), as the work had to be done in any event whether annually or as catch-up.

Conclusion

[150] A Review Officer is obliged to look at all matters afresh and form a robust view about whether conduct issues appear to be engaged. Ms XK provided both the Committee and this Office with comprehensive and detailed information.

[151] As the Committee noted, Ms XK's complaints were numerous and wide-ranging.[23] It is not necessary in a decision of this nature to set out and address every detail of a complaint and of the information provided in support. The failure to mention

[23] Standards Committee determination, 28 October 2016 at [40].

some particular piece of evidence or document does not mean that those matters have not been considered.

[152] Proper and detailed regard has been had to everything that Ms XK has said. Robust analysis and independent assessment by me has not revealed any error in the Committee's processes, analysis and reasoning.

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

Decision

[154] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is:

(a) Confirmed as to the finding of unsatisfactory conduct by Mr JB for failing to administer Mr B's estate competently and in a timely manner in relation to the completion of annual tax returns resulting in the imposition of IRD penalties and interests BUT MODIFIED to require Mr JB to compensate the estate of Mr B in the sum of $98.34 representing the penalties and interest owed or owing by Mr B's estate to the IRD.

(b) Confirmed as to the determination to take no further action on the other aspects of Ms XK's complaint against Mr JB.

[155] Mr JB must pay the sum referred to immediately above within 10 working days of the date of this decision. The payment is to be made to the estate of the late Mr B, care of the law firm [BT].

Anonymised publication

[156] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, this decision is to be made available to the public but with the names and identifying details of the parties removed.

DATED this 24TH day of June 2019

R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms XK as the Applicant
Mr JB as the Respondent
Mr RN a related person
[Area] Standards Committee [X]
New Zealand Law Society