NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 7
LCDT 017/21 and 018/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NELSON STANDARDS COMMITTEE** Applicant
AND	**GRAEME MARK DOWNING AND ALEXANDER ALAN REITH** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr F Pereira MNZM
Ms G Phipps
Mr T Mackenzie
Dr D Tulloch

HEARING 16 December 2021

HELD AT Tribunals Unit, Wellington

DATE OF DECISION 17 February 2022

COUNSEL
Mr P Collins for the Standards Committee
Mr A Darroch for the Practitioners

DECISION OF THE TRIBUNAL AS TO LIABILITY

Introduction

[1] This decision concerns the level of seriousness in admitted professional failures to a client, in respect of the duty to complete a retainer, and in relation to fee charging practices.

[2] Two practitioners were charged with misconduct,[1] the lawyer who acted directly for the client, and the partner who stepped in to enforce the recovery and terminated the retainer.

[3] By consent, the two proceedings were heard together.

[4] Much of the factual background was undisputed. The real issue was whether the admitted failures constituted misconduct or unsatisfactory conduct.

Issues

[5] The issues to be determined are as follows:

1. Were the actions of either practitioner in ending the retainer in the manner they did either:

   (a) disgraceful and/or dishonourable, so as to constitute misconduct;[2] or

   (b) a wilful or reckless breach of the Act[3] or rr 4.2, 4.2.3 or 4.2.4?[4]

2. Did either practitioner engage in "unfair and professionally irresponsible fee-charging and security arrangements" with the client, such as to be (a) disgraceful and dishonourable conduct or (b) a wilful or reckless breach of the rules of conduct and client care?

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[1] And the lesser alternative of unsatisfactory conduct, which was accepted by them.
[2] Section 7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 (the Act).
[3] Section 7(1)(a)(ii).
[4] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

3. Did Mr Downing fail to properly advise the client about her eligibility for legal aid, the litigation risk, and proportionality of recovery against fees incurred? If so, did this failure reach the standards of misconduct under s 7(1)(a)(i) or (ii) (as set out above)?

Background

[6] Mr Downing acted for the complainant (Ms L) from 2 June 2016 until the retainer was terminated on 22 October 2019.

[7] The attendances related to advice and acting in subsequent litigation concerning Ms L's mother's estate.

[8] The matter was somewhat complicated because Ms L's sister, who was executrix of the estate, refused to apply for probate. Because of that it was necessary for an application to be made to remove her as executor and appoint the estate's solicitor in her place. That was achieved by mid-2017, but further complexities arose because of the actions of Ms L's other sibling, her brother, who had allegedly taken large sums from the estate by means of property which he and his mother, who suffered from Alzheimer's in her later years, owned jointly.

[9] Ms L was provided a letter of engagement which set out the practitioner's hourly rate and the firm's terms of payment when each of the two files was opened for her. These were proforma letters which were not specifically discussed with Ms L.

[10] During 2016, Ms L was invoiced by the firm every few months. She initially made payments by borrowing from a friend, because she was unable to afford legal fees personally. Ms L's evidence is that she made that plain to Mr Downing, and certainly there is a file note on 19 October 2016 recording the conversation with Ms L, where she had clearly expressed concerns about her ability to fund litigation. It was recorded "you not able to pay if it goes to court" and also "I advised we don't do legal aid".

[11] It is conceded that informing Ms L that Mr Downing did not do civil legal aid work was as far as his advice about her eligibility for legal aid went.

[12] In December 2016, a settlement offer of $20,000 was received from Ms L's sister's lawyers. However, this was rejected with Mr Downing advising her in "broad" terms that she could look to recover in the region of $100,000.

[13] At this stage, Mr Downing considered that the mother's estate was likely to be in the region of $600,000 and indeed, following appointment of the replacement executor, Mr Garnham, this assessment appeared not to change. In a letter of 31 October 2017, Mr Garnham set out the results of his investigation about the movement of estate funds and the defalcations by Ms L's brother and said that he was taking steps to rectify the title to recover as much of these funds as possible, but it was noted that at least $250,000 was now in the hands of the brother and his wife. At that stage there was no prediction as to likely recovery of those funds.

[14] In a memo setting out a summary of Mr Garnham's advice as to the position of the estate, Mr Downing recorded that the likely gross value was approximately $600,000 and that after deduction of costs, even with litigation, $500,000 to $550,000 appeared to be a realistic assessment of the net estate. He then talked about equal division among the three children. Mr Downing went on to point out that the brother ought to receive nothing because of his fraudulent conduct which would disentitle him from a Family Protection Claim and therefore there was an argument that the estate ought to be divided 50/50 with her sister, so that Ms L could possibly receive between $250,000 and $270,000. It does not appear that any real consideration was given by Mr Downing, or at least none was passed on to Ms L, of the difference between what the estate should have been worth and what was actually realisable.

[15] This was the advice set out, despite the fact that the will had not made any provision for Ms L at all. While Mr Downing went on to properly record that there was "no legal assumption of equal sharing between children", his final advice to his client was that if she were to receive $200,000 it would be a very good result and that they ought to be looking for a settlement in the region of $150,000. In forwarding this memorandum to Ms L, Mr Downing properly pointed out that there was:

> …still a large degree of uncertainty around the factual and legal issues that would need to be resolved if your Family Protection Claim were required to be litigated in court. However, the position is substantially different from when you first came to see me; and your case is substantially stronger than what appeared to be the position when you first came to see me.

[16] Regular invoices were still being rendered to Ms L throughout 2017 and 2018 but her last payment, when her friend who was loaning her money could no longer assist, was made in February 2018.

[17] Ms L's Family Protection Claim was filed in July 2018 and by the time Mr Reith met his client in December, a further five invoices had been rendered for almost $19,000.

[18] Ms L met with Mr Downing on 10 and 11 December 2018 to review her affidavit and reply to that of her sister's, in the family proceedings matter. Ms L points out that this affidavit included detailed information about her financial circumstances which were that she had a very limited income (approximately $26,645 gross in the preceding 12 months), debts of over $60,000 and her only asset was her home, which had increased in value significantly over the previous few years.

[19] Mr Downing says that the Deed of Acknowledgement of Debt, which is one of the significant features in this case, was prepared and shown to his client on the first of those two days.

[20] Ms L does not recall that, but rather recalls that on the second day when she returned to swear the finalised affidavit, the Deed was also given to her to sign. There had been discussions about unpaid fees, and it appears that Mr Downing and Mr Reith had decided that they required some security for the unpaid fees in order to continue representing Ms L. Thus, the Deed of Acknowledgement of Debt was prepared by Mr Reith. Ms L signed this document on the understanding that it was the only way in which she could secure the ongoing services of her lawyer in proceedings that were well underway.

[21] It is acknowledged that at no time was Ms L invited or requested to obtain independent legal advice on this document. The Deed provided authority for the firm (MMP[5]) to not only lodge a caveat against her property but also execute a second mortgage against her property. Ms L did not understand the implications of her granting authority for the registration of the mortgage or that that could lead to the eventual sale of her property, in the event of default on her part.

[5] The acronym for the law firm.

[22] Ms L had recorded in her affidavit that she had a personal loan of $17,000 with her bank and in addition owed approximately $40,000 to the law firm and to the friend from whom she had borrowed funds to pay the earlier legal fees.

[23] Because of this information needing to be provided to the Court in relation to the Family Protection Claim, Ms L was clear that Mr Downing understood her financial position and inability to pay further fees until she recovered some funds from the estate.

[24] Within days, on 13 December 2018, the executor confirmed that the net value of the estate was a little under $250,000. In an email to Ms L on 29 January 2019, Mr Downing recorded:

> Net assets of the Estate are significantly less than what I had imagined at the beginning of this process. [Brother's] misconduct has devalued the assets of the Estate significantly more than what I imagined. It also seems from what Mike Garnham has been able to find out, that it would be uneconomic for the estate to pursue [Brother] for the money he has taken.
>
> I am conscious of the fees accumulating that you owe us in this litigation. It is probably a good time in the process of this litigation to consider making a settlement offer to [Sister]… .

[25] In a subsequent email two days later, Mr Downing suggested a settlement offer be made of $120,000. He then met with his client on 7 February, updated his memorandum in which he had set out the legal points relating to the Family Protection Claim and his view about the likely prospects of success, and then made the offer to Ms L's sister's lawyers seeking a settlement of $140,000.

[26] On 31 March 2019, Mr Downing retired from the partnership and continued as a consultant. Mr Reith then became a sole practitioner and thereby responsible for the firm's fee charging practices. However, Mr Reith did not take an active role in this matter until October 2019.

[27] In the meantime, in late May 2019, Ms L left to live with her family in Australia, intending to return for the purposes of the litigation as required. Mr Downing continued to render regular invoices to her.

[28] On 22 July 2019, a judicial settlement conference was fixed for the Family Protection Claim, to be held in Wellington on 19 November 2019. Mr Reith advised

his client of this date. On 9 October 2019, Mr Downing emailed Ms L concerning the Family Protection Claim and reminded her that she had unpaid fees of $19,353 and $24,645 respectively. He stated: “Could we please have a response from you as to the payment of these outstanding fees. As you are aware, these fees have been outstanding for a considerable time now”. On the same day, the caveat against Ms L’s title was withdrawn and a mortgage was registered by the firm as they were entitled to do, pursuant to the Deed of Acknowledgement of Debt.

[29] The wording of the Deed of Acknowledgement of Debt is important because it corroborates Ms L’s evidence about her understanding of the arrangement for fee payment once it had been signed. She was clear that she had to sign the acknowledgement of debt in order to continue to have Mr Downing represent her. But she was also clear that (since Mr Downing knew that her personal circumstances meant that she could make no further payments until she received a settlement or award from the court), signing the Deed removed ongoing obligations to make further payments.

[30] It is the evidence of the practitioner that this was not so, and that, in addition to the security, his client was required to continue making payments in reduction of the debt. How and when that repayment obligation was apparently triggered has not been answered satisfactorily. The recitals at the beginning of the Deed state:

> You have made applications for a credit account to be opened with MMP for legal services provided and to be provided by MMP up to an amount agreed with you from time to time (such legal fees and expenses referred to as “the debt”).
>
> You have agreed to provide security for our legal fees and expenses.

[31] And further the Deed records under the heading “Security” the following:

> In consideration of MMP providing legal services, you hereby provide the following security given by you of payment of all monies at any time owing by you to MMP… .

[32] The last quote would seem to indicate that the consideration, on the firm’s part, was the provision of future legal services.

[33] If Ms L’s understanding was not correct, then in executing this Deed she was putting her house at risk of mortgagee sale from the moment the Deed was signed.

Such a process would have been incompatible with the lawyer client relationship continuing. We cannot accept that Ms L understood the Deed to be anything other than a future security.

[34] Because of her understanding, Ms L did not respond to the portion of the letter which related to the unpaid fees. She saw no point because that had already been covered by the Deed in her view.

[35] Mr Downing asked Ms L to return to Nelson from Australia prior to the settlement conference to prepare for it. She considered that to be an unnecessary expense and informed him that she would have to travel to Wellington directly to save costs. She intended that all preparation could be by email or telephone. It is to be noted that this was a judicial settlement conference, not a defended hearing.

[36] It was at around this time that Mr Reith stepped in, concerned at the outstanding fees, which he stated in evidence were the largest outstanding client debt for the firm. On 14 October 2019, he emailed Ms L to say that she must pay at least $30,000 within seven days, stating “if payment does not occur, you will need to find alternative representation”.

[37] Ms L telephoned Mr Reith and informed him that she was unable to make such a payment and he advised her to seek a loan from her bank. He offered to speak with her bank manager himself. Ms L declined to allow that and made application for a loan immediately. That loan was declined on 22 October 2019.

[38] On the same date, Mr Reith emailed Ms L terminating the retainer and asking her to sign a memorandum concerning change of representation, which he provided to her. Mr Downing was copied into these exchanges.

[39] No advice or assistance was given to Ms L to obtain alternative legal representation in the short time remaining before the judicial settlement conference which was to occur within approximately four weeks. Nor was she given any advice as to the implications of her signing the change of representation or what might have happened had she declined to do so and asked the court to disallow her lawyers’ application to withdraw.

[40] Ms L contacted Mr Downing and expressed her concern about the termination of the retainer and a few days later her friend in Nelson met with Mr Reith to attempt to make some arrangement that would continue the retainer. He was simply invited by Mr Reith to have Ms L refinance her mortgage.

[41] On 4 November, Mr Downing advised Ms L that she could uplift her file in the meantime, with a $200 charge for copying to be met.

[42] Ms L represented herself at the judicial settlement conference, but no settlement was reached.

[43] Ms L advised Mr Reith that there had not been a settlement reached and he replied to her with a further threat of recovery action. On 2 December 2019, Ms L's friend paid a further $5,000 to the firm to attempt to stave off the recovery action against Ms L's home.

[44] The next day a Property Law Act notice was served on Ms L. Apparently, that was in train before the $5,000 had been paid. On that date, the complaint which has led to the present charges was made by Ms L.

[45] The family protection action was, somewhat surprisingly, set down for hearing on 22 January 2020, only two months after the unsuccessful judicial settlement conference. Ms L had in the meantime been able to find alternative lawyers to represent her, funded by legal aid. As an outcome she only recovered 10 per cent of the estate, approximately $23,000. An appeal to the High Court was taken, led by an experienced practitioner, Mr Zindel. The appeal was also unsuccessful.

[46] Her costs therefore greatly exceeded the recovery. Despite the huge reduction in the anticipated size of the estate, Mr Downing did not appear to have revised his predictions of Ms L's likely award or settlement.

[47] Mr Downing is an experienced litigator who has appeared in one of the leading cases in this area of family protection.

[48] These charges were filed on 26 July 2021 and in late September 2021, the firm discharged their mortgage against Ms L's title and refunded the $5,000 that had been paid by her friend in the preceding December.

Discussion of issues

Issue 1 – Charge 1 for each practitioner

[49] The duty to complete a retainer is set out in the rules of conduct and client care as follows:

> **Duty to complete retainer**
>
> 4.2 A lawyer who has been retained by a client must complete the regulated services required by the client under the retainer unless—
>
> (a) the lawyer is discharged from the engagement by the client; or
>
> (b) the lawyer and the client have agreed that the lawyer is no longer to act for the client; or
>
> (c) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.
>
> …
>
> 4.2.3 A lawyer must not terminate a retainer or withdraw from proceedings on the ground that the client has failed to make arrangements satisfactory to the lawyer for payment of the lawyer's costs, unless the lawyer has—
>
> (a) had due regard to his or her fiduciary duties to the client concerned; and
>
> (b) given the client reasonable notice to enable the client to make alternative arrangements for representation.
>
> 4.2.4 A lawyer who terminates a retainer must give reasonable assistance to the client to find another lawyer.

[50] It is submitted for the Standards Committee that the two practitioners were not entitled to terminate the retainer for non-payment of fees, because of the Deed of Acknowledgement of Debt which they had her enter into. It is submitted that Ms L "legitimately understood" that this had disposed of the obligation to pay interim fees and that Mr Downing had sufficient knowledge of her financial affairs to understand that she had no means of paying them other than from any recovery in the litigation.

[51] The practitioners state that they did not understand this to be the case and spoke of their knowledge that Ms L had rented out her property when she went to Australia and ought to have significant funds from that to be able to pay them. It transpired at the hearing that this information arose merely from gossip received by Mr Reith and not verified with Ms L who said that her receipts from renting the property did not even cover the expenses and that she was subsidising it by working part-time in Australia.

[52] It would also seem that Mr Reith, in any discussions that he had with his partner, had not been corrected by Mr Downing, if he had further information about his client's circumstances. Mr Reith did not appear to be aware that the fees to date had been paid from personal borrowings.

[53] We consider that Mr Collins is correct in suggesting that the terms of the Deed of Acknowledgement of Debt itself lend weight to Ms L's understanding of the matter that payment had been agreed to be deferred on the basis of her provision of security as requested by the firm.

[54] The incorporation of future-focused language in the Deed itself, which Mr Reith concedes was prepared hastily, – "…in consideration of MMP providing legal services…" states that in as many words.

[55] Likewise, the email (recorded at [24] above) reads as though fees were awaiting settlement to first occur.

[56] However, even if that were not the case, we would then need to look at whether, if termination been permitted under r 4.2.3, Mr Reith and Mr Downing had "had due regard to his … fiduciary duties to the client …" and whether each had "…given the client reasonable notice to enable the client to make alternative arrangements for representation".

[57] It is conceded by the practitioners in their submissions that *"…the ultimatum in relation to the fees was imposed without any sufficient prior indication or warning to Ms [L]. The unpaid fees had been left for a long period without being directly addressed but the consequences were clearly spelt out for Ms [L] to consider and deal with".* Further they accept that they "*failed to provide adequate advance warning of this decision*" which then meant that the client had "*limited time to consider and then arrange an alternative".*

[58] Mr Collins refers to the text by Webb & Ors in *Ethics, Professional Responsibility and the Lawyer*:[6]

[6] Webb & Ors *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 5.8.3.

> If the client would be unable to obtain legal assistance before a hearing or other important event (such as a scheduled meeting) where assistance was required, the lawyer should refrain from terminating the relationship. …

[59] Further Mr Collins refers us to one of the leading writers, Professor Dal Pont[7] where he states:

> Where a lawyer terminates a retainer for just cause, the prevailing ideal remains that the client not be disadvantaged by reason of the termination. A lawyer who opts to terminate the retainer must accordingly take reasonable care to avoid foreseeable harm to the client, including giving due notice to the client and allowing reasonable time for the substitution of a new lawyer. This aims to ensure that "a solicitor cannot throw his client over at the last moment".

[60] The last payment made by Ms L was in February 2018. In the circumstances as they were in October 2019, with Ms L holding a reasonable belief that fees would be met from settlement, for her to be given seven days' notice in October 2019 for payment of the full amount of fees was arbitrary and entirely unreasonable. In our view the termination of the retainer which then followed did not fulfil the practitioners' fiduciary duties to this client in the circumstances of this case.

[61] Ms L was left stranded without representation. To do so only four weeks out from an important judicial settlement conference (which she had been led to believe by Mr Downing might be expected to resolve such claims) in a matter with such a complicated background as this one placed Ms L in an impossible and disadvantaged situation.

[62] The practitioners were aware of the very limited financial ability of Ms L, particularly at this stage. And the practitioners would or should have known of two obvious difficulties that Ms L would face on termination. First, finding a new lawyer to take over a complicated case at such short notice is never easy. And second, given the reason for termination was inability to pay (to the extent of a Property Law Act sale procedure commencing), most lawyers would have queried why there was a sudden and late change in lawyer and been quite careful in whether to take Ms L on a private basis.

[63] Fortunately, that scenario didn't occur as Ms L was able to instruct lawyers who were registered to provide legal aid services and she then obtained a grant of

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[7] Dal Pont *Lawyers' Professional Responsibility* (7th ed, Law Book Co., 2020) at [3.220].

legal aid. These factors however should have been considered by the practitioners in the proper discharge of their fiduciary duty. The difficulties they could have caused their client in the way that they terminated the retainer were not consistent with the fiduciary duties owed.

[64] We find therefore that the termination of this retainer in the manner in which it occurred constitutes at least a reckless, if not a wilful breach of the relevant rules concerning termination of a retainer.

[65] That having been found, we do not consider it necessary to make a finding on the alternative disgraceful or dishonourable ground of misconduct. We find misconduct established under s 7(1)(a)(ii). We find in relation to this conduct that both practitioners were equally culpable.

Issue 2 – Charge 2 against each practitioner

[66] We consider that this charge has also been made out in respect of each practitioner.

[67] Ms L had been unable to pay the fees as invoiced from February 2018 until she signed the Deed of Acknowledgement of Debt in December 2018. The terms of that Deed, and her understanding that by signing it she was ensuring that Mr Downing would continue to act for her, misled Ms L into thinking she had an agreement with her counsel that further recovery would be from the proceeds of successful litigation.

[68] To demand some 10 months later that she make a substantial payment within seven days was entirely unfair and came as a huge shock to the client. Neither party had adhered to the terms of engagement set out in the standard letters provided to the client at the outset, which arguably had been varied by the Deed of Acknowledgement of Debt in any event.

[69] Ms L considered that the Deed had been sprung on her without warning, although she conceded that Mr Downing may have raised it with her briefly on the first occasion they met in December 2018. However, she was asked to sign it on 11 December and was not provided with any independent legal advice or proper

explanation about the terms of the Deed. We consider this to be a very serious failure in Mr Downing's professional obligations.

[70] At the time of signing of the Deed, the client's interest was clearly divergent from that of the lawyer, given the enforcement provisions in the Deed which could at the end of the day have resulted in the loss of her home. Indeed, the Property Law Act notice had been served on her by the time this complaint was made. The failure to recommend independent advice was a serious one.

[71] In relation to Mr Reith, his peremptory demand for payment of $30,000, when he clearly had no awareness of the client's actual financial position and was misinformed by gossip, was reprehensible. His letters were inappropriate in tone and intent. He did not show proper respect for his client or properly consider his fiduciary obligations to her. We accept the submissions set out in Mr Collins' Opening Submissions as to the four failures on the part of Mr Downing in regard to the charging and security arrangements as follows:

(a) Ensure [Ms L] was advised about her fee-paying obligations and the arrangements to accommodate her when the lawyers knew she was unable to fund interim fees;

(b) Advise about the possibility of an unsuccessful result in the FPA proceeding and what that meant for [Ms L]'s fee-paying obligations;

(c) Advise about the implications of the Deed of Acknowledgement of Debt and the provision of security by Ms L pursuant to that Deed; and

(d) Recommend Ms L get independent legal advice about the Deed.

[72] As to Mr Reith, we have referred to his failures. In addition, Mr Collins submits that he has breached his obligations by failing to ensure that the client had the opportunity of independent advice on the Deed of Acknowledgement of Debt and further that he breached r 11 which states:

> A lawyer's practice must be administered in a manner that ensures that the duties to the court in existing, prospective and former clients are adhered to, and that the reputation of the legal profession is preserved.

[73] Mr Reith breached this provision by the threatening nature of his interactions with Ms L. We record that both practitioners recognise that it was improper for the client not to have independent advice at the time of signing the Deed of Acknowledgement of Debt.

[74] We note that the timing of Mr Reith's demand for payment maximised the pressure upon the client given the proximity of the judicial settlement conference only a month or so away. We accept the submission that Mr Reith "…*had a duty to acquaint himself with the background to the file before stepping in to issue the ultimatum and then terminate the retainer".*

[75] We consider that the standard of misconduct has been proved, in that the actions of both practitioners in relation to the fee paying and security arrangements would be regarded as disgraceful or dishonourable by lawyers of good standing.[8]

Issue 3 – Charge 3 Mr Downing only

[76] This charge relates to Mr Downing's failure to inform Ms L about her possible eligibility for legal aid (r 9.5) and further the failure to advise about litigation risk, particularly in relation to the possibility that recovery from even partially successful litigation might be exceeded by the fees incurred in conducting the litigation.

Legal aid

[77] Rule 9.5 states:

> Where a client may be eligible for legal aid, a lawyer must inform the client of this and whether or not the lawyer is prepared to work on legally aided matters.

[78] Mr Downing accepts that the extent of advice was that he advised Ms L that "we don't do legal aid". Ms L describes Mr Downing as being quite dismissive of her query. In his affidavit Mr Downing states "I did not consider Ms L would qualify for legal aid".

[79] The two assertions by Mr Downing seem mutually exclusive to the Tribunal. If a practitioner is not familiar with the civil legal aid regime, it would be difficult to reach

[8] Section 7(1)(a)(i) of the Lawyers and Conveyancers Act 2006.

a conclusion as to a client's legal aid eligibility. Indeed, even those experienced in the legal aid system may find such predictions difficult.

[80] The obligation cast by the rule is not a high one. The rule does not assume that practitioners are able to assess legal aid eligibility to any precise degree. We note that the assessments, for the large number of lawyers who don't carry out legal aid, are complicated by the fact that there are different legal aid regimes across civil, family, and criminal law and beyond. There will be clients that obviously would not come anywhere close to legal aid eligibility, where it may be sound to consider that the rule is not triggered at all. And there will be clients at the other end of the spectrum where legal aid eligibility might seem obvious. The lawyer's knowledge of legal aid or lack of will also influence the borders of those categories.

[81] But there will be many cases where a practitioner is not sure (indeed even if they are a regular legal aid provider). The current case is an example of what might occur in civil litigation practices regularly. A practitioner is not licensed for legal aid but is anecdotally aware of how it operates.

[82] What the rule calls for is some conservatism and consideration when the practitioner is unsure. The practitioner does not have to mine into the legal aid regulations and provide an opinion on eligibility (nor can a practitioner easily do so). But for the practitioner to comply with the rule the practitioner should err on the side of caution and advise the client generally what legal aid is, that the client may (which we would equate with "could" or "might") be eligible for legal aid, that the practitioner cannot give a certain view either way, and that if the client wishes to explore it further they can try to obtain further information from the Legal Services Agency website, or from a registered legal aid lawyer (and we note that the website contains a search tool to find legally aided lawyers, with practice areas and towns available as search categories).

[83] Aside from compliance with the rule, as part of a lawyer's overall duty to a client, there is a further reason that the client should be informed of the legal aid regime. If a grant of legal aid occurs in a civil case, there is then a near immunity from costs liability for steps in the proceeding from the date of the grant. It is in the clients' interests to be aware of this as it may make a significant difference to whether they will proceed with a case and have access to justice. The client should be

informed that the grant will be treated as a loan against assets or funds recovered in the litigation.

[84] Turning to the present facts. Mr Downing says he genuinely believed that his client would not qualify for legal aid. He accepts that he might have provided further advice to her, including his lack of knowledge as to eligibility for legal aid given that he did not undertake legal aid work. He accepts that he was aware other firms in Nelson were willing to work on legal aid and he could have provided their names.

[85] We consider that Mr Downing ought to have, at the time that fees were discussed at the outset of their relationship, at least suggested to Ms L (i) that she may have legal aid eligibility, but (ii) that he was not a provider and couldn't take it further, (iii) that if Ms L wanted to consider it further, he could refer her to the Legal Services Agency website and/or to lawyers who undertook civil legal aid.

[86] The facts somewhat speak for themselves here. As it turned out, Ms L did qualify for civil legal aid by the time January 2020 had come around. She may well have, earlier but it will never be known for certain.

[87] What also occurred through the omission to consider legal aid was that Ms L was also left potentially exposed to costs for the proceedings steps prior to her grant of legal aid, when she might not have been. Fortunately, it seems there were no costs sought for that aspect of the case, following the unsuccessful Family Court proceedings.

Litigation risk advice

[88] Mr Downing accepts through his counsel that he was required to advise his client about the prospects of her claim and risks which arose. He submits that "he genuinely believed that she had a good claim and that she would achieve a good recovery". His advice was set out in at least two lengthy memos to his client.

[89] However, as pointed out by Ms L, these pieces of advice referred to recovery in the range of $120,000 to $200,000. What appears evident are two failings. First, Mr Downing premised his initial views on what the estate should have been worth, not what it was actually worth. Regardless of the improprieties that appear to have

been behind the diminished value of the estate, the reality is that the realisation for Ms L would only be a proportion of what the estate actually held. Second, Mr Downing did not revise his advice as to the likely quantum of recovery once the estate had reduced to $256,000 from the anticipated $600,000. In our view, that was a serious oversight. If he had done so however, he would have highlighted that the fees charged had by then exceeded the "at worst" potential recovery.

[90] Mr Downing acknowledged that there was no "at worst" advice.

[91] Mr Downing was also critical in his evidence about Ms L's representation at the hearing following which she recovered, a mere 10 per cent of the estate. It was unfortunate that he chose to make these criticisms of other practitioners, particularly given that they took on the legally aided work at extraordinarily short notice, and immediately following the summer break, for a client who found herself suddenly without representation.

[92] Given his experience in this field, Mr Downing was or should have been well aware that there was no automatic assumption about equal sharing of an estate among siblings and indeed that there was no known formula to be applied, even if a breach of moral duty were able to be established.

[93] While there is a clear breach of his duty relating to advice about legal aid, the matter is somewhat more complex when it comes to the assessment, with the wisdom of hindsight, of his advice about litigation prospects.

[94] The fact that his client ultimately achieved a sum which was a great deal less than the fees incurred by her cannot be a reason in and of itself for finding that the practitioner has erred.

[95] However, his acknowledged failure to provide balanced or "at worst" advice, his basing his advice of an aspirational view of what the estate held, and his failure to readjust his advice once the estate had diminished so significantly, does lead us to find that he has fallen below acceptable standards.

[96] We find that the "practitioner did not competently advise Ms L about her risk that the estate claim would either fail altogether or would fail to produce a worthwhile

recovery, being a recovery significantly exceeding the fees likely to be incurred with this firm" as pleaded.

[97] However, we do not find this to be at the level of misconduct, but rather unsatisfactory conduct, pursuant to s 12(a) being "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".

Summary of decision

1. In respect of Charges 1 and 2 against each practitioner, we make findings of misconduct.

2. In respect of Charge 3 which relates to Mr Downing alone, we make a finding of unsatisfactory conduct.

Directions

1. The Standards Committee is to file and serve its submissions on penalty within 21 days of the receipt of this decision.

2. The practitioners may have a further 21 days to file submissions in reply concerning penalty.

3. Counsel are to confer with the case manager to arrange a suitable half day penalty hearing.

DATED at AUCKLAND this 17th day of February 2022

Judge DF Clarkson
Chairperson