NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 16
LCDT 021/09

IN THE MATTER of the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982

AND

IN THE MATTER OF **THERESE ANNE SISSON**
Christchurch, Lawyer

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr W Chapman
Mr M Gough
Mr S Grieve QC
Mr A Lamont

HEARING held at Rydges Hotel AUCKLAND on 17 & 18 May 2011

APPEARANCES
Mr G H Nation for Canterbury Standards Committee
Practitioner in Person

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

Introduction

[1] The practitioner faces two charges of misconduct in her professional capacity, the particulars of which are set out below. The misconduct complained of is alleged to have occurred prior to the coming into force of the Lawyers and Conveyancers Act 2006.

[2] Section 351 of the Lawyers and Conveyancers Act 2006 ("LCA") permits such a complaint to be made in respect of conduct which occurred before the commencement of the Act provided it is conduct *"... in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982 ("LPA")"* and provided the conduct occurred not more than six years before 1 August 2008 being the commencement date of the LCA.

[3] The complaint in this matter was made on 28 August 2008 and considered by the Standards Committee (2) of the Canterbury branch of the New Zealand Law Society Complaint Service. On 17 June 2009 the Standards Committee made a determination that the conduct complained about was "sufficiently serious to warrant the laying of a charge to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal".

[4] Pursuant to s.352 of the LCA, if the charges are proven the penalty which must be imposed is that which would have been available under the LPA.

Charges

Charge 1

The Standards Committee (2) of the Canterbury Branch of the New Zealand Law Society Complaint Service charges Therese Anne Sisson of the Edgeware Law Centre, 856 Colombo Street, PO Box 21319, Christchurch with misconduct in her professional capacity (section 106(3)(a) Law Practitioners Act 1982). The particulars of the charge are that:

1. Between approximately September 2004 and July 2008, Therese Anne Sisson was acting as solicitor and counsel for Ms H in property litigation arising out of her de facto relationship with Mr L, and the settlement of that litigation.

2. Ms H applied for and was granted legal aid for the legal work required in relation to those proceedings. Ms Sisson was approved as the lawyer to act for her in relation to the proceedings in that grant of legal aid.

3. On or about 25 February 2008, Ms Sisson received, in her trust account for Ms H, the sum of $89,466.50, monies due to Ms H as a result of the settlement of the proceedings in respect of which Ms Sisson had been acting.

4. On or about 27 June 2008, Ms Sisson charged Ms H a total of $17,454.80 for legal work in relation to the proceedings from 29 June 2007, including a fee of $14,480.00, GST of $1,810.00 and disbursements of $1,164.80.

5. Contrary to section 66 Legal Services Act 2000, Ms Sisson on or about 27 June 2008, deducted from the monies held for Ms H the sum of $17,454.80 in payment of the above costs without seeking or receiving authority to do so from the Legal Services Agency.

Charge 2

The Standards Committee (2) of the Canterbury Branch of the New Zealand Law Society also charges Therese Anne Sisson with misconduct in her professional capacity (section 106(3)(a) of the Law Practitioners Act 1982). In relation to this charge the particulars as stated above are repeated with the following further particulars.

6. Contrary to section 89 of the Law Practitioners Act 1982, Ms Sisson deducted the fees charged by her from the funds held for Ms H without first obtaining authority from Ms H to do so, and in circumstances where Ms H was entitled to have those costs met by legal aid.

7. In breach of Rule 1.01 of the Rules of Professional Conduct for Barristers and Solicitors which then applied, Ms Sisson billed Ms H directly for legal work for Ms Sisson's personal benefit in that Ms Sisson thereby avoided the Inland Revenue Department's right to deduct 20% of the remuneration due to Ms Sisson, such right being in respect of a debt due from Ms Sisson to the Inland Revenue Department.

8. In breach of Rule 1.01 of the Rules of Professional Conduct for Barristers and Solicitors which then applied, Ms Sisson also sought to recover remuneration for the legal work she had done for Ms H in a way which deprived Ms H of the ability to try and avoid personally meeting those costs through asking the Legal Services Agency to waive its right to repayment of the legal costs which Ms H had incurred in relation to the litigation.

9. At a meeting with the Standards Committee on 11 March 2009, Ms Sisson advised the Committee that she had told Ms H after a failed Settlement Conference in June 2007 that she would not be continuing with the litigation with Ms H on legal aid and that she would be charging her privately for the work which she was doing. If Ms Sisson's statement to the Standards Committee was correct then in breach of Rule 8.01 of the then Rules of Professional Conduct for Barristers and Solicitors, Ms Sisson misled the High Court in submitting to the High Court in December 2007 in support of an application for waiver of fees, documents confirming that Ms H was relying on a grant of legal aid in her litigation before the High Court. If Ms Sisson's statement to the Standards Committee was not true then in breach of Rule 6.01, Ms Sisson deliberately made a statement to the Standards Committee which was misleading.

Background

[5] Ms Sisson first met with the complainant Ms H in October 2004 and was instructed formally by her in December 2004, at which stage she completed a legal aid application. The instructions related to Ms H's claim for relationship property in respect of a relatively lengthy de facto relationship which she had left some three to

four years previously. Ms H and her de facto partner had two children together and had acquired a property in their joint names. She sought the sale or realisation of her share in that property. She had previously been represented, shortly after separation in respect of domestic violence matters by Ms Moran who subsequently was appointed as a Family Court Judge. She instructed a further solicitor, however little was done for her before that solicitor retired from practice and she took her file to Ms Sisson. In the meantime a valuation of the former home had been obtained. This home was in Invercargill and occupied by Ms H's former de facto partner, while Ms H and the children lived in rented accommodation in Christchurch.

[6] On the legal aid application Ms H was asked whether she had any interest in her home. As she was residing in Christchurch in rental accommodation at this time, she answered in the negative. We refer to this fact because in her evidence and initially in cross examination of Ms H, Ms Sisson made a great play of this error, suggesting that it showed the level of dishonesty of her client. Given that Ms H was seeking legal aid in order to pursue a relationship property claim in a property of which she was a registered proprietor, it is hardly likely that she would have attempted to mislead the Legal Services Agency ("LSA") in this way. In cross examination she indicated she must simply have misunderstood the question and thought of the rental property that she was residing in at the time as her "home". In her evidence Ms Sisson stated *"... I gained the impression that Ms H had deliberately not disclosed the interest in the property as a way to avoid repayment of her costs. I did not probe the matter."*

[7] Notwithstanding that view sworn in an affidavit dated 11 February 2010, and her strong approach along these lines to the Tribunal, Ms Sisson had on 1 March 2005 written a letter to the LSA, following a query by them, in which she stated *"on review of the application for legal aid it is apparent that the applicant has not disclosed the legal interest in the property situated at X Street, Invercargill. Ms H did not understand the question on completion and, clearly, her claim is in respect of issues related to the division of the home."*

[8] Following further inquiries of Ms Sisson about the rateable value of the client's relationship property, legal aid was eventually granted on 6 January 2006. In the application Ms Sisson had stated her estimate of the total likely cost of services for which aid was sought to complete steps one and two in the proceeding, including a

High Court filing fee of $1400. On 1 February 2006 LSA advised Ms Sisson that Ms H had been granted legal aid, with a maximum grant of $1730 in respect of steps one and two, the request for High Court filing fee grant was declined on the basis that the client could seek waiver from the High Court itself. Ms H's contribution to the grant of $1730 was set at $1729.

[9] Ms H's evidence was that when she had consulted Ms Moran in 2005, she had been told that a legal aid grant might carry a charge which required repayment from funds recovered but that an application could be made to waive or defer such a payment.

[10] In February 2006 and May 2007 Ms Sisson rendered invoices and sought amendments to grant for additional funding. The second amendment was in respect of preparation for and attendance at a settlement conference which took place in June 2007. That conference apparently lasted for half a day and settlement was not achieved. Ms H's evidence was that the highest offer made at that conference was $60,000, which was well short of what she considered to be a fair division of property. She says her impression following that conference was that her former partner "would not budge" from that figure and she felt that the matter would need to proceed to a hearing. To the contrary, Ms Sisson's evidence is that she thought a settlement was likely and indeed she thought her client was much more optimistic than she was now prepared to state about the possibility of a settlement.

[11] It is at this point that the evidence diverges widely between solicitor and client. Ms Sisson says that in the course of breaks from the settlement conference and also after the conference that she had a very detailed discussion with her client about future costs. She says that she indicated to Ms H that she was no longer prepared to represent her on a legally aided basis. She said she provided an estimate of future fees to her client and that there was an agreement that she would be paid privately from funds recovered upon a successful outcome from the application to have the property sold. Ms Sisson contends that Ms H agreed to this course of events despite the fact that she was a beneficiary in receipt of legal aid, and the projected costs were expected to be considerable. Ms Sisson said that she thought that legal aid had been withdrawn at the time. In fact there had been a threat some two days prior to the settlement conference by the LSA to withdraw aid if further information was not provided. That was responded to very promptly by Ms Sisson and likewise by the

LSA who the following day posted a letter, on the very day of the settlement conference, confirming that aid was continued. Ms Sisson did not receive this letter until after the settlement conference and on receipt of it, despite what she alleged was a clear private retainer from that point, applied for an amendment to the grant to cover preparation and attendance at a pre-trial conference. She reported to the LSA in the following terms:

> *"Settlement conference took place. No settlement. Matter to proceed to fixture. Set down for PTC at a date to be advised, further affid (sic) evidence to be provided. Estimated hearing time 2 days*."

[12] Although Ms Sisson initially contended that the private retainer began at this point, at the end of June, she later conceded that since the amendment to the step had been sought and granted, that in fact the private arrangement did not commence until the date of the pre-trial conference, namely 2 August 2007. Despite this, in her subsequent invoice to Ms H the attendances noted began 29 June. Ms Sisson later conceded this was an error.

[13] Ms H denies any agreement whatsoever to surrender legal aid and engage Ms Sisson on a private retainer basis. She recalls broad discussions about where fees had got to from time to time and certainly there were more detailed conversations about fees at a later date around the time the matter ultimately settled, but she denies the June agreement as alleged by Ms Sisson. She recalls that the conversations they had in the course of the settlement conference took place out on the street (while Ms Sisson had a cigarette) and it is common ground that Ms Sisson kept no note of those alleged discussions or of any agreement as to private retainer. Ms H continued to believe she was in receipt of legal aid throughout.

[14] In cross examination Ms Sisson conceded she had not discussed a future hourly rate with her client at June 2007. The private invoice which was later rendered was charged at $200 an hour plus GST, whereas legal aid was charged at $140 GST inclusive. She further concedes she did not make any file note to record the change in remuneration arrangement. Ms Sisson did not write to LSA to surrender her client's legal aid following this conversation in June 2007 rather, as indicated above, she sought an amendment to grant.

[15] Ms Sisson did not however apply for a Step 3 grant to cover hearing, and this was not discussed until her conversations with the LSA in late March and early April of 2008. Ms Sisson gave evidence about considerable difficulties with suitable valuations of the property and the unhelpful approach of the valuer who had been engaged, apparently directly, by Ms H. She indicated that he was not prepared to work on a legal aid basis. No corroborating evidence was called in this respect.

[16] Further negotiations between the parties did not eventuate in any settlement and the matter was set down for hearing. At this point a setting down and hearing fee of $6500 was required to be paid. Ms Sisson, when asked in cross examination how she had thought her client would pay this on a private retainer basis, was unable to supply an answer. What she actually did, at the time, was seek a waiver of the fees from the Registrar of the High Court. In order to do this she had her client complete a number of forms and supply details of her status as a beneficiary. The forms included the following statements:

> *"1. Have you applied for and been granted legal aid?*
> *X Yes I have been granted legal aid for the matter related to this fee."*
>
> (Ms Sisson took the declaration of her client which supported this statement).
>
> And further on the application for waiver of fees:
>
> *"I apply for a waiver of the filing fee of $6500 to file the following documents ... setting down fee, hearing fees, because*
> *X I have been granted legal aid to take this step in the proceeding; or*
> *X I have applied for legal aid to take this step and the application has not yet been determined ..."*
>
> And later in this form:
>
> *"A copy of the letter from the Legal Services Agency granting legal aid."*

[17] That declaration and application is accompanied by a number of documents under cover of a letter from Ms Sisson dated 4 December 2007 which included the following statement:

> "I enclose the following documents: Application for waiver of fees, the hearing fees and setting down fees ... letter from Legal Services Agency confirming grant of legal aid ... ."

[18] It is these statements which have led to the Particular 9 of Charge 2 that Ms Sisson misled the Registrar of the High Court. In cross examination Ms Sisson's conceded that the statements were inaccurate and that she ought to have been more careful in completing the forms, but there was no intention to mislead.

[19] These documents were prepared and submitted to the High Court at a time when Ms Sisson says she considered her client to be no longer in receipt of legal aid and that she was privately retained.

[20] A fixture for the hearing of Ms H's application was duly allocated in early February 2008. Ms Sisson spent considerable time in preparation for the hearing. She regarded the points as novel and complex, although when taxed on this issue before us conceded this was a relatively usual *de facto* property claim. In the week preceding the fixture Ms H's former partner changed counsel and a possibility of settlement arose again. It is Ms Sisson's evidence that she had a telephone conversation about a possible settlement with her client on Thursday evening; however Ms H does not recall any such conversation. The first conversation Ms H recalls about settlement was early on the morning of the hearing when Ms Sisson called her to discuss possible settlement figures. A figure of $90,000 was discussed but Ms H indicated she would not be happy with that amount. Ms Sisson then spoke shortly prior to the hearing with the other parties counsel and had further discussions with her client where Ms H says that she instructed Ms Sisson to seek $105,000 as a settlement figure. Ms Sisson indicated that about 10 minutes prior to the commencement of the hearing she received a final offer of $90,000 and agreed to this on behalf of her client.

[21] Ms H says that she was somewhat unhappy that the amount she had sought had not been achieved, however she did not make any more of the matter at that time because Ms Sisson pointed out to her that had the matter proceeded through the three-day hearing she would have incurred further costs of about $6000.

[22] On returning to Christchurch (the hearing had been in Invercargill) Ms H says she met with Ms Sisson who told her that she was working out the final bill and would have to pay back the legal aid that Ms H had received. In her affidavit Ms H says that she asked if she could have that written off, however the documentary evidence would tend to suggest that this request was made by Ms H to Ms Sisson in a later email in May of 2008. Ms Sisson said a waiver would be most unlikely given the recovery of $90,000. Ms H inquired about the level of the fees and Ms Sisson indicated that it would be around $15,000 but that sounded "a bit steep" and she would try to reduce it. She says that on this occasion they were in Ms Sisson's office and Ms Sisson was scribbling calculations behind her hand. Ms Sisson denies this

was so. However Ms Sisson does confirm that she indicated she thought it would have been unlikely that Ms H would have received a deferral or waiver of repayment from the LSA, which accords with Ms H's evidence of what Ms Sisson told her.

[23] On 28 February 2008, pursuant to the settlement Ms Sisson received into her trust account the sum of $89,466.50, the conveyancing fees in relation to the transfer having been deducted by another firm which had handled that aspect for Ms H.

[24] Ms H contacted Ms Sisson who confirmed that she had received the money and Ms H indicated to her that she was anxious to have it paid to her as soon as possible. Ms Sisson indicated to her that she would hold back about $20,000 until she had worked out the final account. However instead she held back nearly $30,000 and paid $60,000 to her client.

[25] From that point the relationship between solicitor and client appeared to deteriorate because there were a series of telephone calls and emails from Ms H to Ms Sisson inquiring about what was happening to the balance and how soon she could expect to receive the remainder of her money. She says that she received no responses from Ms Sisson and spoke with her receptionist who was unhelpful and abrupt with her. Because of this Ms H directly approached the LSA. She spoke to Ms Swindells at the LSA who advised her that the legal aid costs to that time were approximately $3800 and that there was not going to be a final bill from Ms Sisson.

[26] Ms H queried whether Ms Sisson might be going to charge her privately and was advised by Ms Swindells that Ms Sisson was not allowed to do that. Because of this she expected that she would simply pay the LSA the amount owed to them and would receive the rest of the money from Ms Sisson. Clearly this was not a particularly realistic view of the matter since by her own evidence, Ms H would have realised the costs would have been significantly in excess of $4000. Finally Ms Sisson prepared and sent an invoice to Ms H in July 2008 which was said to include attendances from 29 June 2007 of 74.4 hours at $200 per hour plus GST. This with disbursements meant that the total bill was $17,454.80 in addition to the legal aid charge of $3828.10.

[27] In the meantime there was an interesting chain of email correspondence between Ms Sisson and the LSA. It began at 12.31 pm on 1 April 2008 with an email

to Ms Sisson from Ms Swindells of the LSA confirming that she had received a further telephone call from Ms H as to whether Ms Sisson had submitted her final invoice for consideration because she was awaiting the balance of proceeds to be released to her. It went on to say:

> "When we last spoke (just over a week ago) you indicated that your final invoice would be submitted within the week, however we do not appear to have received this yet".

[28] It goes on to request the accounts so that the final debt can be established. The response the same day at 2.57 pm from Ms Sisson advised Ms Swindells that:

> "The last invoice that we have submitted is the final invoice as already advised to you on a number of occasions ..."

[29] To which Ms Swindells responded to Ms Sisson at 3.08 pm:

> "When we last spoke you advised you would be submitting a final invoice ..."

[30] To which the extraordinary response came from Ms Sisson to Ms Swindells at the LSA at 3.31 pm:

> "I am happy to seek a further amendment to cover fixture costs. You have not approved the amendments for the fixture and associated with the High Court litigation. The proposal for settlement was made 10 minutes before the fixture was to proceed. The proceeds are not being disbursed at this point."
>
> It appears issues are still not resolved.
>
> The last bill rendered took matters prior to the settlement conference held.
>
> I am happy to meet with the Agency regarding this matter next week.
>
> The amendment does not go anyway towards costs and does not address the preparation for fixture."

[31] The response from Ms Swindells sent at 4.27 pm on 1 April began:

> "As long as matters haven't concluded (i.e. by way of order/settlement/consent) we will consider a further amendment."

[32] Ms Sisson's 3.31 pm email was extraordinary for a number of reasons. Firstly because she had said she had always intended the cost referred to, to be by way of private retainer. Secondly, because it was significantly misleading in its report as to where settlement of the matter stood and finally, because in cross examination Ms Sisson said she knew she could not seek a further amendment at this stage because the matter was concluded. Her explanation was she was *"just trying to smooth over the waters"*.

[33] In response to an email from her client on 29 April 2008 pleading for a final account and disbursement of the balance of the funds expected by her, Ms Sisson had this to say:

> ... "... I need to be paid for the extensive time I have expended on this work. The last invoice to Legal Services Agency relates to work that does not cover the settlement conference in June 2007 last year. I am happy to discuss the matter with you further. You will appreciate that considerable effort was put into preparing the court for trial (sic). The risk of litigation became high to you after the settlement offer was made. Particularly so now given the downturn in the housing market.
>
> I am writing to Legal Services Agency today in an effort to resolve this finally. My final account has been prepared for some time **however Legal Services have not authorised payment privately of work undertaken by me from June 2007 to fixture."**, (emphasis ours.)

[34] This email is important. It inaccurately refers to the LSA not covering the settlement conference when in fact the practitioner had specifically sought an amendment to the grant to cover that. Furthermore the final paragraph seems to confirm the practitioner's understanding of s.66 accorded with the understanding which has subsequently been advanced on behalf of the Standards Committee by the witness Ms Ridden, and also of the expert evidence given by the witness Mr Stephen van Bohemen.

[35] The issues for the Tribunal to consider are as follows:

(1) Does s.66 of the Legal Services Act 2000 preclude the practitioner in this instance charging her client on a private basis at any point of the process without the consent of the Legal Services Agency?

(2) If the answer to the first issue is "No", did Ms Sisson have any basis on which to deduct the sum of $17,454.80 from funds held on behalf of her client?

(3) If both of the answers to issues 1 and 2 are "No", did Ms Sisson's actions amount to professional misconduct?

(4) Did Ms Sisson breach Rule 1.01 by her actions in obtaining an acknowledged personal benefit, namely the avoidance of deduction by the Inland Revenue Department from remuneration which would otherwise would have been payable by the Legal Services Agency?

(5) Did Ms Sisson deprive her client of the opportunity of seeking a waiver or deferral of legal aid costs by her actions in charging on a private basis, and if so, did this breach Rule 1.01 of the Rules of Professional Conduct?

(6) Did Ms Sisson mislead either:

(a) The Standards Committee at the meeting on 11 March 2009?; or

(b) The Registrar of the High Court in December 2007?

(7) If Particulars 6 to 9 of Charge 2 are affirmatively established does this constitute professional misconduct?

Issue 1 - Interpretation of s.66 of the Legal Services Act 2000

> "**66 Listed providers not to take unauthorised payments**
>
> No listed provider may take payments from or in respect of a person to whom services are provided under any scheme unless the payments are authorised by or under this Act, or by the Agency acting under the authority of this Act or any regulations made under it."

[36] There are a number of undisputed facts following the conclusion of the evidence:

- Ms H applied for a grant of legal aid in December 2004 which was finally granted in March 2006.

- Ms H did not at any stage formally abandon her grant of legal aid.

- Ms Sisson, following the 29 June 2007 settlement conference sought amendment to grant to cover future attendances for preparation for and until pre-trial conference (2 August 2007).

- Ms Sisson did not at this stage or at any stage prior to the settlement being reached, advise the LSA that Ms H intended to surrender her grant of legal aid.

- Ms Sisson did not formally seek consent of the LSA to approve the payment to her of the fees account rendered of $17,454.80.

Practitioner's argument

[37] Ms Sisson argues that she considered that for a legal aid grant relating to an application grant lodged in December 2004 and therefore prior to the October 2005 amendment, the situation regarding s.66 was different from the current situation. She contends that she legitimately viewed the legal aid staged grant process as involving effectively a separate application for legal aid at every stage that amendment to the grant is sought. She acknowledged that the position was clarified in the decision of *LSA v Black*[1] where the Court rejected the suggestion that each staged request for further funding involved a complete reconsideration of the application and held that there was a legitimate expectation that, in the absence of change of circumstances, the grant of aid will continue to the conclusion of the proceedings.

[38] It is difficult to understand how Ms Sisson argues that in mid-2007, having had the matter clarified in an October 2005 decision, she was able to view the matter differently, insofar as she suggested that she considered her client was no longer in receipt of the grant of legal aid because she had not applied for an extension to cover preparation for the hearing and the hearing itself. Furthermore, she asserts this to be the case in the face of evidence to the contrary as to her own state of mind, namely her application on her client's behalf to the High Court for waiver of setting down and hearing fees. It will be noted from the background that the declaration accompanying that application confirmed that Ms H was still in receipt of legal aid.

Evidence and argument for the Standards Committee

[39] Evidence was given by Ms Briget Ridden who was an Operations Advisor with the LSA, having been employed by them since 2004. She is also a law graduate. She provided to the Tribunal material from the manuals and policy documents for the LSA which are provided to all legal aid providers, one of whom was Ms Sisson. It was her evidence that there had been no change to the policy or implementation of s.66 since the Act came into effect on 1 February 2001.

[40] It is clear from the evidence provided to the Tribunal that the LSA expected to authorise additional payments pursuant to s.66 in exceptional circumstances only

[1] Goddard J, High Court Wellington, CIV-2004-404-2561, 14 October 2005.

and that this is clearly stated in the provider manual. Ms Ridden's evidence was that Ms Sisson's submitted interpretation of the situation as to top-up payments, or variations of the basis on which the provider represents a client, are incorrect. Ms Ridden's evidence confirmed that a client granted legal aid for particular proceedings was in receipt of legal aid for those proceedings and *"... could only be charged privately in respect of any work done in relation to those proceedings ... with the approval of the Agency".*

[41] The rationale behind such policy is clear, indeed is stated in the LSA's Policy documents supplied to each listed provider; namely to ensure that:

> *"Every aided person has the opportunity to: Be considered for eligibility under the same means, merits and interests of justice tests; and; have equitable access to adequate legal representation"*.

[42] The Policy document goes on to record that:

> *"The Agency expects that listed providers accept assignments on the basis that the majority of cases will be funded exclusively through a grant of legal aid. No provider is compelled by the Agency to accept a legal aid assignment. The Agency also has procedures for amendment to the grant or reconsideration..."*.

[43] It is clear that Ms Sisson was well aware of this last aspect of the policy because in this case she successfully applied for increases in the amounts allowed to be charged for various steps.

[44] Ms Ridden's interpretation of s.66 was confirmed by the expert called on behalf of the Standards Committee, Mr Steven Van Bohemen, barrister of Christchurch, who confirmed that his understanding was also contrary to that suggested by Ms Sisson. He confirmed that grant of aid continued until it was withdrawn by the LSA or formally relinquished by the aided person. In this case there was no indication that Ms H, as the recipient, advised LSA either directly or through Ms Sisson, that she had relinquished her grant.

Decision

[45] We have considered the arguments put by Ms Sisson, but find them untenable, particularly in the light of the *Black* decision[2], relied upon by Ms Sisson

[2] Above n.1

herself. Furthermore, Ms Sisson's arguments that she considered her client no longer to be in receipt of legal aid are entirely contradicted by the documentary evidence available, and her own contemporaneous statements to the Registrar of the High Court.

[46] We consider the wording and interpretation of section 66 to be quite clear - once a client is granted legal aid in respect of particular proceedings the listed provider (Ms Sisson) may not take any payment from or in respect of that client, in relation to those proceedings, without prior authorisation of the LSA. It is common ground that no such authorisation occurred. Thus we find the particulars (1 to 5) asserted in support of Charge 1 to be established to the standard required, that is on the balance of probabilities, having regard to the nature and seriousness of the matters alleged.

[47] Because we have found that Ms Sisson did not have the ability to opt out, without the consent of the LSA, there is no need to make a finding of credibility between her and her client, Ms H. However, had this been necessary, we prefer the evidence of Ms H. As submitted by Mr Nation, she: *"...although an unsophisticated person, was straightforward in the evidence she gave and the answers she gave and what is shown on the record is consistent with what she understood the position to be*."

[48] By contrast, Ms Sisson, when challenged with inconsistencies, sought to blame others for how it appeared: the client, her staff, the LSA, the Standards Committee. She said that the declaration to the Registrar of the High Court must have been done in a rush, and that she "was not thinking" when she failed to advise LSA her client had relinquished her grant. Her responses to cross examination about the chain of emails referred to in this decision[3] gave the impression of confabulation, unrealistic straining of content and *ex post facto* justification.

[49] We further note as did the Standards Committee, that there is no written record of Ms H being advised that services would be charged for privately and would not be covered by the grant of legal aid.

[3] Beginning [28]

Professional Misconduct

[50] In a number of previous decisions this Tribunal has followed the dicta in *Complaints Committee No.1 of the Auckland District Law Society v C*[4] which adopted the standard of conduct stated in *Pillai v Messiter*[5], in relation to a medical practitioner:

> *"..includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of privileges which accompany registration as a medical practitioner.."*

[51] We consider that Ms Sisson's conduct in electing to charge her client on a private basis, once there was an indication that money would be available (after the settlement conference), was directly in conflict with her duty to her client to put the client's interests first. We accept the submission of Mr Nation, relying on *Bristol and West Building Society v Mothew:*[6]

> *"The principal is entitled to the single-minded loyalty of his fiduciary... A fiduciary .. may not act for his own benefit ... without the informed consent of the principal".*

[52] Her actions also breached the Legal Services Act. In the course of undertaking these actions Ms Sisson wove a web of misinformation, to put it at the most charitable level. We consider this meets the threshold for professional misconduct and find the charge proved.

Charge 2

Particular 6

[53] Four Particulars are pleaded in support of the second charge of professional misconduct.

[54] We have found that Ms H was entitled at all relevant times to the grant of legal aid. Further it is undisputed that no written authority was received from Ms H to relinquish this aid or to deduct fees charged on a private basis.

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[4] [2008]3NZLR105
[5] (No. 2) (1989) NSWLR 197, 200
[6] [1998]Ch1,18

[55] Further, we reject the suggestion that Ms H agreed to the deduction of privately charged fees by any verbal authority. We consider Ms H only agreed to the deduction of funds that were owed to the LSA, where this was required (a stance that she later modified by requesting Ms Sisson to seek waiver from the LSA). Therefore we find this Particular proved.

Particular 7

[56] In evidence Ms Sisson accepted that there was an order in force whereby the Inland Revenue Department was entitled to deduct 20 percent of any remuneration paid to her by the LSA in respect of the debt said to be owed to the Inland Revenue Department by Ms Sisson. We note Ms Sisson disputed the legitimacy of such deduction but accepted that it existed. She also accepted that by charging privately and not through the LSA she thereby avoided the 20 percent deduction thus receiving a personal benefit.

[57] We consider that this clearly conflicts with her duty to put her client's interests ahead of her own at all times in terms of Rule 1.01 which reads:

> "**1.01 Rule**
>
> **The relationship between practitioner and client is one of trust and confidence which must never be abused.**
>
> Commentary
>
> 1. The professional judgment of a practitioner should at all times be exercised within the bounds of the law solely for the benefit of the client and free of compromising influences and loyalties.
> 2. The practitioner should never seek an advancement of personal interest or position at the expense of a client. ..."

[58] We note that in the decision of the Standards Committee records that Ms Sisson conceded that she had not told Ms H about the issue with the IRD deducting 20 percent of her LSA payments.

Particular 8

[59] While Ms Sisson opined that her client would not have been entitled to a waiver or deferral of the legal aid charge, evidence to the contrary was given by the Standards Committee's expert witness.

[60] Mr Van Bohemen also confirmed that he had successfully sought deferral or waiver of the legal aid charge in a number of cases, even where the client had received a significant sum as a result of the proceedings. For this reason, he considered Ms H had been done a disservice by Ms Sisson's refusal to seek such an outcome, and by her charging privately as she did.

[61] Whilst it is clear that there is no certainty of the outcome of Ms H's request for waiver or deferral, we note that she was a beneficiary attempting to re-house her two children. The Particular is pleaded on the basis that Ms H was "deprived of the ability to try and avoid personally meeting ... costs". We consider that this Particular has been established to that extent.

Particular 9

[62] This Particular pleads in the alternative that if the position was that Ms H was not legally aided, Ms Sisson misled the Registrar of the High Court in submitting the application on behalf of her client in December 2007 in reliance on the legal aid grant. However if legal aid was in place, then her statement to the Standards Committee that her client was not legally aided, was misleading. The Rule 6.01 is relied and states:

> "A practitioner must promote and maintain proper standards of professionalism in relations with other practitioners."

[63] Since we have found that the client was legally aided it is the statement to the Standards Committee that is relevant. We have considered whether Ms Sisson might merely have persuaded herself that such was the correct position, rather than this being an intentionally misleading statement. We have to say that the manner in which the practitioner adopted a blaming and attacking stance in respect of all evidence which did not fit with her interpretation leads us to the view that she was deliberate in her statements rather than deluded or mistaken. We have referred earlier in the judgment to the attacks which she has made on her client's honesty. We note that throughout the hearing she referred to difficulties with the LSA, when clearly their approach was simply to seek further information from her and when they had been significantly accommodating in terms of increase allocation of funds. Her opening shots across the bow of the Law Society in paragraph 2 of her affidavit to the Tribunal was, it transpired, misleading. (Ms Sisson was in fact provided with access

to her files but was simply reminded that any photocopying charges might in due course form part of costs which could be awarded against her).

[64] Ms Sisson advised the Standards Committee that in her view legal aided funding stopped and private work started in August 2007. We note from her account that attendances are billed from June 2007. Overall we consider that Ms Sisson was less than accurate and open in her dealings with the Standards Committee. We find this Particular proved also.

[65] In aggregate we consider that the particulars established under Charge 2 also amount to professional misconduct having regard to the evidence assessed at the standard discussed in paragraph [51] of this decision.

Conclusion

[66] Counsel are to each file submissions as to penalty within 21 days of the receipt of this decision. In the course of those submissions they will need to include a calculation of what would have been a proper amount to have charged under a grant of legal aid in respect of the services which were the subject of the fees account for $17,454.80.

DATED at AUCKLAND this 5th day of July 2011

Judge D F Clarkson
Chairperson