NEW ZEALAND LAWYERS
AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2009] NZLCDT 9

LCDT 08/2009

IN THE MATTER of the Law Practitioners Act 1982

BETWEEN **CANTERBURY DISTRICT LAW SOCIETY**

AND **DAVID ALAN WOOD**

CHAIR

Mr D J Mackenzie

MEMBERS OF TRIBUNAL

Mr W Chapman
Ms J Gray
Mr A Lamont
Ms S Ineson

HEARING: at CHRISTCHURCH on 27 July 2009

APPEARANCES

Mr G Nation for the Complaints Committee of the Otago District Law Society, acting as a Complaints Committee of the Canterbury District Law Society
Mr D Wood for himself

DECISION

[1] This matter involved the hearing of charges against David Alan Wood, a barrister at Timaru, who was charged under the Law Practitioners Act 1982 with:

[a] Misconduct in his professional capacity (s.112(1)(a)); and, in the alternative;

[b] Professional negligence to such a degree as to reflect on his fitness to practise as a barrister and solicitor (s.112(1)(c)).

Background to Charges and Process

[2] In March 2008, the Canterbury District Law Society (CDLS) received a complaint, from Mr C A McVeigh QC, concerning Mr D A Wood, a Timaru practitioner.

[3] Mr McVeigh QC had been acting as counsel for CDLS in opposing a non party discovery application made by Mr Wood. Mr McVeigh advised CDLS that in the course of those proceedings, matters had come to his attention which he believed warranted investigation.

[4] After considering the issues raised, CDLS decided that there was reasonable cause to suspect that Mr Wood had engaged in conduct of a kind specified in s.106(3)(a) and (c) of the Law Practitioners Act 1982. As a consequence, CDLS, of its own motion under s.99 of the Law Practitioners Act, arranged for an investigation of the matters raised.

[5] The complaint was referred to the Complaints Committee of the Otago District Law Society for investigation on behalf of CDLS, presumably to avoid any suggestion of conflict by CDLS. The tenor of Mr Wood's response to the Complaints Committee (Bundle reference; 0144) indicates that this was an appropriate course.

[6] Four complaints were formulated against Mr Wood. After considering the complaints, and Mr Wood's explanations, the Complaints Committee declined to uphold three of those complaints.

[7] The fourth complaint, that Mr Wood had misled the Court and a practitioner, was upheld, and, in its decision of 19 November 2008, the Complaints Committee decided that charges should be laid against Mr Wood pursuant to s.101 of the Law Practitioners Act 1982.

[8] As a consequence Mr Wood was charged with:

[a] Misconduct in his professional capacity (s.112(1)(a) of the Law Practitioners Act 1982); and, in the alternative;

[b] Professional negligence of such a degree as to reflect on his fitness to practise as a barrister and solicitor (s.112(1)(c) of the Law Practitioners Act 1982).

[9] The particulars of these charges laid against Mr Wood are set out in the Notice of Charges filed in this matter.

[10] In essence, it is alleged that Mr Wood, in breach of Rules 6.01 and 8.01 of the rules of professional conduct, misled an Associate Judge of the High Court, and another practitioner, by giving the Judge and practitioner incorrect information.

[11] The charges have been heard by this Tribunal, in place of the New Zealand Law Practitioners Disciplinary Tribunal, pursuant to ss.353 and 358 of the Lawyers and Conveyancers Act 2006, which came into force on 1 August 2008.

Factual Background

[12] Mr Wood was acting for a client, Mr M, in a civil proceeding in the High Court at Christchurch - *BJM v S & Co. CIV* 2003 409 001965. ("Substantive Proceedings") In April 2004 Mr M had been granted legal aid for the Substantive Proceedings.

[13] On 31 August 2006, Mr Wood filed a non party discovery application in the Substantive Proceedings, in respect of two banks and CDLS. Mr C A McVeigh QC was instructed as counsel to CDLS on the discovery application.

[14] Mr McVeigh gave Notice of Opposition to the non-party discovery application on 27 September 2006. The application was set down to be heard on 1 November 2006.

[15] On 30 October 2006, Mr Wood contacted Mr McVeigh and advised him that he was abandoning the application. Mr Wood filed a Memorandum in the High Court recording this abandonment, and including the following statement:

> *"The Plaintiff is legally aided and cannot take this matter through a defended hearing and wishes to discontinue the application letting costs lie where they fall" [Bundle reference 0034]*

[16] The next day, 31 October 2006, Mr McVeigh filed a Memorandum in response, stating that costs would be an issue and that neither he nor CDLS had been aware that Mr M was legally aided, as no notice had been given as required by the Legal Services Act 2000. *[Bundle reference 052]*

[17] A judicial conference was convened on 1 November 2006, at which the question of costs was discussed. There was some uncertainty on the part of Mr Wood as to whether Mr M's legal aid had been extended for the non-party discovery application that had been made and discontinued. He was to check his file and advise Mr McVeigh of the correct position. This was recorded by Associate Judge Christiansen in a minute of the conference. *[Bundle reference 0055]*

[18] A further judicial conference was convened on 31 January 2007. By that time, Mr McVeigh for CDLS, had still not received confirmation from Mr Wood about Mr M legal aid for the non-party discovery application, despite continuing enquiry. Accordingly, during the judicial conference, Mr Wood was asked by Associate Judge Christiansen to confirm the position. Mr Wood advised the Judge and Mr McVeigh

that Mr M did not have legal aid for the application. The Judge recorded this in a Minute of the conference. *[Bundle reference 0118]*

The Allegation

[19] The Complaints Committee alleges that Mr Wood, by making the statement at the 31 January 2007 judicial conference that Mr M did not have legal aid to pursue the non-party discovery application with CDLS, misled Associate Judge Christiansen and Mr McVeigh QC, as Mr M did have legal aid for that application at the time. The position of the Complaints Committee is that by letter of 29 November 2006 to Mr Wood ("Amendment Letter"), the Legal Services Agency had approved legal aid for Mr M discovery application against CDLS. *[Bundle reference 0077]*

[20] Mr Wood denies the charge. He acknowledges having received the Amendment Letter, but says that he was correct when he stated at the judicial conference of 31 January 2007 that his client did not have legal aid for the non-party discovery application. He said he believed his client would not accept the terms on which the legal aid had been offered, and in those circumstances it was correct for him to say that his client was not legally aided for the application.

Tribunal's approach

[21] We consider the first question for this Tribunal is whether, in fact, Mr M did have legal aid available for the non-party discovery application at the relevant time. That is ascertained by considering the Amendment Letter and whether Mr M rejected the legal aid by refusing to accept conditions which Mr Wood said were attached to the grant.

[22] For the reasons set out later in this decision, we are of the view that Mr M did have legal aid for the non-party discovery application at the time Mr Wood stated to the Court and Mr McVeigh QC that Mr M did not have such aid. As a consequence of that incorrect statement by Mr Wood, Associate Judge Christiansen and Mr McVeigh QC were misled as to Mr M true legal aid status for the non-party discovery application.

[23] This Tribunal then has to consider whether Mr Wood, in making the statement, has been guilty of misconduct in his professional capacity, or whether he has been negligent to a degree that reflects on his fitness to practise.

[24] In considering the allegation of professional misconduct, we have to consider whether Mr Wood misled the Judge and Mr McVeigh QC intentionally, knowing that his statement was untrue, or, if not intentionally misleading them, whether in making the untrue statement he was guilty of negligence so gross as to reflect an indifference to his responsibilities as a practitioner. *[Complaints Committee No. 1 of Auckland District Law Society v C – 2008 3 NZLR 105]*

[25] If we find no professional misconduct, it would then be a matter of this Tribunal considering the alternative charge of negligence. This involves considering whether Mr Wood, after he had considered the issues, carelessly reached an incorrect conclusion which resulted in the Judge and Mr McVeigh QC being misled, but absent

such a significant departure from the acceptable standards of conduct for practitioners as to amount to misconduct.

Mr Ms' true legal aid status for the non-party discovery application

[26] Mr Wood gave evidence that in April 2004 his client, Mr M, had received a letter from the Legal Services Agency offering a grant of legal aid to assist with the Substantive Proceedings, and that on 3 November 2006, Mr Wood had applied for an amendment to that legal aid, extending it to cover additional work.

[27] In his application of 3 November 2006 to the Legal Services Agency *[Bundle reference 0057]*, requesting an amendment to Mr M then existing legal aid, Mr Wood requested that it be extended for two matters, which he noted as follows:

> *"1. Discovery against non parties. Two Banks and the Canterbury District Law Society.*
>
> *2. The completion of discovery and inspection of documents."*

[28] In his letter of application, Mr Wood acknowledged that in respect of the first matter, the non-party discovery, he had already completed the work, and had overlooked the need to obtain consent from the Legal Services Agency. He was applying for the amendment to extend the grant of legal aid retrospectively. Mr Wood lodged details of time he had spent on the non-party discovery matter, as part of the application for the extension to Mr Ms' legal aid. He also noted in his letter that because of opposition from CDLS he had terminated the discovery application.

[29] The second matter for which legal aid was sought in the letter of application of 3 November 2006 was supported by memoranda attached to the application by Mr Wood *[Bundle reference 0061-0063]*, explaining the legal issues and actions required to complete and prospects of success. The memoranda clearly related to future work, not the completed work for the non party discovery applications.

[30] The Amendment Letter granted a retrospective extension to Mr Ms' legal aid entitlement, as the work had already been undertaken by Mr Wood. The letter responded to Mr Wood's two part application of 3 November 2006 (incorrectly referred to as *"13"* November in the Amendment Letter). It granted legal aid (retrospectively) for the completed non-party discovery application, and it noted some issues about the merits of the Substantive Proceedings and future actions, requesting further information.

[31] According to Mr Wood, the extension granted to cover the non-party discovery application was subject to three *"conditions"*;

> [a] he was required to convince the Legal Services Agency of the merits of his case;
>
> [b] Mr M was required to update his financial position; and

[c] Mr M was to agree to an increase in the amount secured by the charge over his property to secure his personal contribution.

[32] Mr Wood said that Mr M would not accept the conditions and as a result he considered that, effectively, his client did not have legal aid for the discovery application.

[33] Putting to one side for the moment what Mr Ms' true attitude to any conditions was, we do not consider that the terms of the Amendment Letter apply conditions to the non party discovery application in the way Mr Wood claims.

[34] An amendment to Mr Ms' legal aid was granted retrospectively, extending legal aid to the discovery application, that work having already been undertaken by Mr Wood. References in the Amendment Letter to the merits of the case, and to the requirement to update Mr Ms' financial position, clearly relate to further legal aid extensions that may be sought in future, not to the completed non-party discovery matter.

[35] Not only is that the plain meaning of the letter, it is the meaning that responds to the form of application prepared and submitted by Mr Wood on 3 November 2006. He had divided his application into two parts. The memoranda he attached on issues, actions proposed, and merits, all related to the second part of his application, that is, proposed future work, not the abandoned discovery application, that work having been completed.

[36] The third "condition" noted by Mr Wood, was the need to agree to an increase in the amount secured by the already existing land charge. The Amendment Letter simply records that the amount will be increased to cover the amended personal contribution, recognising that a further grant has been made to assist Mr M, and as previously agreed by Mr M.

[37] In the Legal Services Agency letter of 15 April 2004, granting legal aid to Mr M for the Substantive Proceedings, Mr M was advised that to secure his personal contribution a statutory land charge was required. At that stage his contribution had been set at $3,274. The Legal Services Agency advised him that if he subsequently obtained an increased grant, the amount of his personal contribution may also change. *[Bundle reference 0012]* Mr M accepted that offer, consenting to the arrangements regarding a statutory land charge, as he took up the original legal aid grant and a statutory land charge was subsequently registered. *[See Supplementary Bundle]*

[38] On its plain and ordinary meaning, we do not accept that the Amendment Letter imposed conditions on the availability of legal aid for the non-party discovery application as suggested by Mr Wood. The requirement for information on case merit and financial position was in respect of further work, not the completed discovery application for which legal aid was retrospectively granted. The notification of the increase to the statutory land charge reflected nothing other than the fact that Mr Ms' revised personal contribution requirement was to be secured under the existing instrument, following the increased grant for the discovery application. This revised personal contribution attached to the newly approved legal aid, and was to be

secured, as previously agreed by Mr M, in the same way as his earlier personal contribution assessment under the original grant of legal aid in 2004.

[39] We do not consider that the conditions Mr Wood claims apply to the extension of legal aid for the non-party discovery application in the Amendment Letter do in fact apply, for the reasons set out at paragraphs 34 – 38 above.

[40] Even if there had been such conditions affecting the availability of legal aid for the discovery application, we note that there was no direct evidence from Mr M that he did not accept such conditions. To the contrary, part of the evidence from Mr McVeigh was that Mr M, after Mr Wood ceased acting for him, was able to show the High Court (when Mr M later resisted the CDLS costs application), that he had been legally aided on the discovery application. This was evidenced to the High Court by Mr M producing Mr Wood's letter and application of 3 November 2006, and the Amendment Letter which had approved extension of legal aid for the non party discovery proceedings on 29 November 2006.

[41] Mr Wood did refer to an affidavit of 25 January 2007 lodged by Mr M, claiming that this evidenced Mr Ms' refusal to accept the legal aid on the terms it was offered. He said that paragraph 19 of that affidavit indicated that Mr M would not accept the requirement of an increase to the amount secured by the statutory land charge, one of the conditions he said was applicable to the extension of legal aid for the non-party discovery application.

[42] That affidavit was filed at the direction of Associate Judge Christiansen, to assist his consideration of a costs application by CDLS. Mr M confirms in paragraph 4 of his affidavit that he understood he was legally aided. Read as a whole, we consider that Mr M is referring, in paragraph 19, to future legal aid, not the legal aid retrospectively granted for the non-party discovery application work already completed.

[43] Also, in cross examination, Mr Wood was unable to give a satisfactory answer as to why, if paragraph 19 of the affidavit was a reference to the legal aid retrospectively approved for the non-party discovery application, the affidavit made no comment on the Amendment Letter. This Tribunal considered Mr Wood's answers on this affidavit evasive and unprofessional.

[44] We note as well that Mr Wood did not raise any of these concerns about "conditions" attaching to the retrospective grant with the Legal Services Agency, despite the clear requirement to notify any dissatisfaction with the Agency's decision on legal aid within 20 working days of receipt.

[45] Neither did Mr Wood produce any evidence of correspondence about the *"conditions"* with Mr M, although Mr Wood did point to some correspondence (referred to in Mr Wood's affidavit filed in defence, Exhibits 6 and 7) which he says indicate Mr Ms' refusal to agree.

[46] We do not think the correspondence he refers to support his position. He has taken oblique references and endeavoured, in our view, to give them a strained

meaning and treat them as relevant to the issue of Mr Ms' refusal to agree to the legal aid. The references do not support that position**.**

[47] Mr Wood accepted in cross examination that on the face of the correspondence nothing was shown regarding the question of conditions affecting legal aid for the completed discovery work. He said that he would have highlighted the relevant parts of the Amendment Letter, which he copied to Mr M, and that there would have been a conversation with Mr M about the *"conditions"*. Mr Wood agreed that he had said nothing of this nature in his affidavit filed in defence of the charges. Mr Wood's claims, that while he had not mentioned the issue in any correspondence, he would have applied highlighter to the Amendment Letter and discussed the issues with Mr M, are not convincing and are unsupported by evidence.

[48] We find it unusual that if Mr Wood was concerned about his client's agreement to conditions he considered applied to the legal aid grant for the discovery application, he was unable to show any evidence that he took the matter up with Mr M or the Legal Services Agency in an endeavour to resolve the issue.

[49] This Tribunal considers that Mr M did have legal aid for the non-party discovery application at the time Mr Wood told Associate Judge Christiansen, and Mr McVeigh, at the judicial conference of 31 January 2007 that Mr M did not have such legal aid. It had been granted to Mr M some two months prior. Our reasons for this view are:

[a] Mr M had received a grant of legal aid. Mr Wood's two part application for legal aid, made on 3 November 2006, was approved retrospectively by the Legal Services Agency in respect of the non-party discovery application on 29 November 2006. The Amendment Letter makes this clear;

[b] The Amendment Letter applied no grant conditions to the retrospective approval of legal aid relating to the completed non-party discovery application. There was no evidence of any condition which prevented that legal aid being made available to Mr M;

[c] There was no evidence from Mr M that he would not take up the legal aid grant for the non-party discovery application, in fact we note there was evidence that he used the fact of the retrospective grant in the Amendment Letter to later successfully oppose CDLS seeking costs on that application;

[d] Mr Wood could not point to evidence of corresponding with Mr M about the grant conditions, or dealing with Mr M as to how those concerns might be addressed. We find this lack of evidence about communication with Mr M about the *"conditions"* unusual if what Mr Wood said about his client's attitude to the grant was correct;

[e] Mr Wood gave no evidence to show that he had raised any matter of dissatisfaction with the grant with the Legal Services Agency. If his client was concerned with the conditions, we would have expected Mr Wood to have raised the issue with the Legal Services Agency.

[50] As a result of this finding, we consider that the evidence indicates that Mr Wood has misled the Judge and Mr McVeigh QC. In our view Mr M did have legal aid for the non-party discovery application at the time Mr Wood said he did not have that legal aid. There was no evidence to support that there were conditions which changed that position, nor was there evidence that Mr M would not accept the terms of grant of the legal aid as Mr Wood claimed.

Misconduct or Negligence?

[51] In reaching a conclusion as to whether Mr Wood misled the Judge and Mr McVeigh QC as a result of misconduct or negligence, this issue, this Tribunal has noted in particular the conduct of Mr Wood leading up to the judicial conference of 31 January 2007, what occurred at the conference itself, and the content of a letter written by Mr Wood on 5 February 2007, as well as Mr Wood's explanations about these matters, both in his affidavit filed in response to the charges and what he said in cross examination.

Mr Wood's conduct leading up to judicial conference of 31 January 2007

[52] There is a comprehensive background to this matter, covering the period October 2006 to January 2007. It comprises the first judicial conference, correspondence, memoranda, and actions and inactions by Mr Wood during the period, all of which were in evidence before this Tribunal.

[53] This background enables an insight into Mr Wood's attitude to, and understanding and belief regarding, the true legal aid position relating to Mr Ms' non-party discovery application. The evidence points strongly to Mr Wood, throughout the period October 2006 to January 2007, following a course of conduct which was misleading and deceptive. He adopted an approach that obscured and misled others about the true legal aid position as matters developed throughout the period.

[54] On 30 October 2006, Mr Wood, in withdrawing the discovery application, advised that his client was legally aided. Whether intended or not, that misled Mr McVeigh QC as to his ability to recover costs for CDLS, as it was not clear that the legal aid referred to in the memorandum had no connection to the non-party discovery application.

[55] Mr McVeigh's memorandum of 31 October 2006 made it clear that a costs application was under active consideration by Mr McVeigh on behalf of CDLS. The issues raised in the memorandum were discussed at the judicial conference, which Mr Wood attended, the following day, 1 November 2006.

[56] Associate Judge Christiansen recorded in a minute of that judicial conference:

> *"Mr Wood needs to check his file to find out when legal aid was granted and on what terms it was granted."*

[57] Despite Mr Wood's advice, at the time of and in the context of the discontinuance of the non-party discovery application, that his client was legally aided, there was equivocation by Mr Wood at that judicial conference as to the extent

of Mr Ms' legal aid. This resulted in the Associate Judge acknowledging that Mr Wood was to check his file. The judge also directed Mr Wood to report to Mr McVeigh by 10 November, 2006, to clarify the legal aid issue.

[58] Two days after the judicial conference of 1 November 2006, at which Mr Wood had indicated uncertainty about legal aid availability with regard to the non-party discovery application, Mr Wood had no doubt that such legal aid had not been granted. His letter of 3 November 2006 to the Legal Services Agency was an application for legal aid for work completed on the then discontinued discovery application, plus an application for legal aid for other future discovery and inspection work. He submitted details of his time for the work to date on the discontinued discovery application.

[59] To comply with the Associate Judge's direction contained in the Minute of 1 November 2006, Mr Wood wrote to Mr McVeigh on 6 November, 2006, enclosing a copy of the letter of initial grant of legal aid, dated 15 February 2004. This of course did not assist Mr McVeigh in his enquiry as to whether Mr M had legal aid for the discovery application that had been made and discontinued.

[60] Given the importance of the issue of whether or not legal aid was granted for the discovery application, and Mr Wood being aware of that, we find it strange, to say the least, that Mr Wood did not advise Mr McVeigh of the facts Mr Wood clearly knew on 6 November 2006, viz:

[a] Mr M did not have legal aid for the discovery application; and,

[b] On behalf of Mr M, he had recently lodged an application for such legal aid.

[61] These were important issues to disclose to Mr McVeigh, and Mr Wood must have known that, but, instead of properly informing Mr McVeigh, he simply sent the original (2004) grant which he knew was not relevant and did not fairly reflect the position regarding costs as he knew it (i.e. that no legal aid was in place for the discovery application, but that a grant of legal aid was being sought).

[62] Mr McVeigh's memorandum of 9 November, 2006, would have reinforced to Mr Wood the uncertainty Mr McVeigh had and his desire to obtain accurate information to assist CDLS in making its costs decision, given the affect of s.40 Legal Services Act 2000. Mr Wood still provided no updated information to Mr McVeigh or the Court on the issue at that point.

[63] Neither did Mr Wood advise the Court or Mr McVeigh QC of the receipt of the grant on 29 November 2006, retrospectively granting Mr M legal aid for work related to the non-party discovery application already undertaken by Mr Wood, notwithstanding he knew this was a matter of importance.

[64] At all relevant times prior to the judicial conference of 31 January 2007, Mr Wood must have known, from the memoranda filed by Mr McVeigh QC as counsel for CDLS, previous minutes issued by the judge, and correspondence from Mr McVeigh, that the particular issue exercising everybody was whether s.40 Legal

Services Act 2006 would limit the costs that could be sought against Mr M on the abandoned non-party discovery application. *[Bundle references; 0052 at paragraphs 3 – 5; 0055 at paragraphs 3 and 4; 0 067 at paragraphs 5 – 7, 0074; 0076 at paragraph 1; 0 081; and 0101 at paragraph 2]*

[65] This uncertainty for Mr McVeigh about legal aid continued until the judicial conference of 31 January, 2007, when Mr Wood stated in the course of the conference that his client was not legally aided.

[66] In the view of this Tribunal the whole course of Mr Wood's conduct outlined above in paragraphs 54 – 64 demonstrates a deliberate position taken by Mr Wood that he was not going to inform either counsel opposing, or the judge, about Mr Ms' legal aid for the non-party discovery application. That course of conduct is deliberately misleading and deceptive. Mr Wood must have known that as a result Associate Judge Christiansen and Mr McVeigh QC were likely to be misled, especially given the Judge's direction at the 1 November 2006 judicial conference, the clear issue to be resolved, the continuing enquiries by Mr McVeigh QC, and the relevant facts known to Mr Wood that he had decided not to share with the Judge and Mr McVeigh QC.

[67] We think this behaviour set the tone for what was to occur at the judicial conference on 31 January 2007, where Mr Wood is said to have misled the court and a fellow practitioner.

[68] The key issues in reaching the conclusion that this was a deliberate course of conduct are:

[a] Following his legal aid extension application of 3 November 2006, Mr Wood did not inform Mr McVeigh or the Court, that Mr M had no legal aid for the non-party discovery application;

[b] When Mr Wood sent Mr McVeigh a copy of the original (2004) legal aid grant on 6 November 2006, which had no relevance to whether Mr M had legal aid for the non-party discovery application, Mr Wood must have known that it would not assist with the issue he had been asked to clarify at the judicial conference on 1 November 2006. Mr Wood made no mention of the fact that he had just submitted an application for legal aid to cover the non-party discovery application;

[c] After receiving a copy of Mr McVeigh's memorandum of 9 November 2006 filed in the Court, and a copy of Mr McVeigh's letter of the same date to the Legal Services Agency, both clearly indicating uncertainty and the need for information about the legal aid position, Mr Wood again did not tell Mr McVeigh that no legal aid was in place for the non-party discovery application, nor that an application was in train;

[d] Mr Wood also said nothing about the grant of legal aid for the non-party discovery application referred to in the Amendment Letter when that was received from the Legal Services Agency, notwithstanding it was the very issue on which he was required to advise Mr McVeigh and the Court;

[e] When Mr McVeigh again wrote to Mr Wood, on 16 January 2007, asking about a recent amendment to Mr Ms' legal aid, to which some reference had been made by the Legal Services Agency in a letter to Mr McVeigh, and enquiring about the status of legal aid for the non-party discovery application, Mr Wood did not reply.

[69] There is a consistent theme of non-disclosure by Mr Wood, despite a clear requirement to advise, and his knowledge of the relevance of the issue. We consider that consistency of approach reflects a series of deliberate decisions by Mr Wood to suppress the true position regarding Mr Ms' legal aid for the non-party discovery application during the three months leading up to the judicial conference of 31 January 2007. This behaviour is relevant to our assessment of the allegation of misconduct against Mr Wood which we shall refer to later in this decision.

Judicial conference of 31 January 2007

[70] It was not until the judicial conference of 31 January, 2007, that Mr Wood was, for the first time, definitive about whether Mr M had legal aid for the discovery application. At that conference he advised Associate Judge Christiansen and Mr McVeigh QC, that Mr M did not have legal aid for the application. As a consequence, Mr McVeigh indicated that he would make an application for costs against Mr M.

[71] In his Minute of the 31 January 2007 judicial conference, Associate Judge Christiansen stated:

> *"I infer, indeed Mr Wood confirms, that the grant of legal aid to Mr M did not cover the costs of the application made by the plaintiff for non party discovery against CDLS."*

[72] Mr Wood claimed before us that the word "grant" was not used by him. He says he only referred to legal aid not covering the costs of the application.

[73] The point of importance, in Mr Wood's view, is that when he told the Judge there was no legal aid to cover the application, he was not saying that no grant had been made, but simply that actual aid was not available for the application. Mr Wood's reasoning was that in his view Mr M would not accept the grant in the form offered, so in fact, no legal aid would be forthcoming to his client for the discovery application work.

[74] Mr Wood also said that he did not tell the Judge that legal aid had been granted "conditionally" because in his view conditions applied and were *"fatal"*. In Mr Wood's view there could be no legal aid in those circumstances.

[75] In cross examination Mr Wood accepted that his response to the Judge's question did not fairly inform the Court, but he said he took this approach to the question for the reasons noted. He considered his answer literally correct because of his view that his client did not accept conditions which attached to the legal aid.

[76] In paragraphs 9, 10, and 11 of his affidavit responding to charges, Mr Wood noted that at the time of the judicial conference of 31 January 2007, he and Mr M were no longer communicating, and that Mr M was being uncooperative with both him and the Legal Services Agency. He said his client would not give him instructions.

[77] Mr Wood stated that he had these issues in mind when he said at the judicial conference that his client did not have legal aid for the discovery application. We would have thought that the fact that he could not get instructions would have required Mr Wood to say that to the Judge. That would have been preferable to taking a definitive position that his client had no legal aid, based on what Mr Wood says was his belief concerning Mr Ms' non-acceptance of the legal aid.

[78] When asked in cross examination why he had told the Judge that there was no legal aid available to Mr M for the discovery application, despite having received the grant some two months prior, Mr Wood also said that he had taken the view at the judicial conference that there was too much uncertainty. He was not sure whether Mr M would accept the condition that the Legal Services Agency charge over his property be increased to secure a further amount. As a consequence he thought it more appropriate to say no legal aid was available, rather than that there was a grant but he was unsure whether his client would take it up.

[79] Mr Wood was asked why he did not say to the Judge, when queried about legal aid, that there were some issues to be resolved with his client about conditions, instead of just saying that his client did not have legal aid for the application in question. Mr Wood said that he did not want to risk exposing his client's personal circumstances at a time when he was hoping his client would be able to negotiate a settlement of the Substantive Proceedings. We do not accept that advising the Court and counsel that Mr M had been granted legal aid, but that it was subject to conditions which he was not sure his client would accept, could realistically be thought to prejudice Mr Wood's client's settlement position in the Substantive Proceedings.

[80] Mr Wood also claimed that because Mr Ms' affidavit of 25 January 2007 had been filed before the judicial conference of 31 January 2007, he took the view that the position of Mr M not being prepared to accept a condition of legal aid would be clear both to counsel for CDLS and to the Judge, so an explanation from Mr Wood was unnecessary. Apart from the fact we consider, for the reasons already noted, that the affidavit did not evidence any objection by Mr M to an increased amount of personal contribution under the grant being secured by the land charge, Mr Wood overlooks that neither the Judge nor Mr McVeigh QC knew that Mr Wood had received the letter of grant of legal aid two months earlier. In those circumstances, Mr Ms' comment in paragraph 19 of his affidavit would not assist their state of knowledge in light of Mr Wood's statement to them that there was no legal aid.

[81] In the circumstances of the judicial conference where the statement was made by Mr Wood that Mr M did not have the legal aid in question, and against the background of the clear issue that the parties and the Judge were dealing with up to and at that conference (whether legal aid would affect the ability of CDLS to seek

costs on the abandoned non-party discovery application), Mr Wood's rationale for not saying more is not convincing.

[82] Mr Wood made no attempt to explain the position clearly. If he did in fact phrase his answer in the way he says, that legal aid did not "cover" the non-party discovery application, we consider that it would have been proper for him to have amplified that reply, by acknowledging that a grant had been approved but that his client would not accept a condition of grant, if that was the case. Not taking that approach could itself be construed as misleading.

[83] Quite apart from the fact that we consider that the evidence does not support Mr Wood's claim that he genuinely held the view that his client did not have legal aid, it is ingenuous of him to suggest that the approach he took was professionally acceptable.

Letter of 5 February 2007 [Bundle reference 0122]

[84] We have some difficulty reconciling Mr Wood's stated reasons for telling the Judge and Mr McVeigh QC at the 31 January 2007 judicial conference that Mr M had no legal aid for the non-party discovery, with Mr Wood's letter of 5 February 2007 to the Legal Services Agency, confirming he knew legal aid was in place and that he intended to lodge a bill.

[85] This letter indicates that five days after that judicial conference, Mr Wood had a different view about the availability of legal aid to Mr M, compared to the view he says he had when responding to the Judge's question at the conference. Mr Wood, in his letter of 5 February 2007, thanked the Agency for the amendment it had made to the original grant and indicated that he would forward his fee. The amendment had of course been approved on 29 November 2006, some two months before the judicial conference.

[86] Mr Wood requested written confirmations in his letter of 5 February 2007 to the Legal Services Agency, to the effect that it was normally expected that legal aid grants would be extended from time to time, and that in fact this had occurred in this case and an extension had been granted. He said in his letter that this would be used by him as part of his resistance to any claim for costs by CDLS. In cross examination he claimed that the request for confirmation was not to give him material to support his resistance to a costs claim, but was indicative of his uncertainty about whether the legal aid had been granted. We think that in the context of the content of that letter, such a position is not tenable.

[87] Mr Wood's answers when questioned about this letter were unsatisfactory. He claimed that a proper reading of the 5 February 2007 letter would confirm that he was uncertain, and that requests for confirmation of grant he made in the letter to the Legal Services Agency support his position.

[88] Our view is that a reading of the 5 February 2007 letter shows quite clearly that Mr Wood considered at the time that legal aid was in place for the non-party discovery application.

[89] Mr Wood noted in the letter:

[a] An amendment had been made to the original grant for the non-party discovery application.

[b] He would prepare and render his fee to the agency.

[c] He would use the fact of legal aid to resist a CDLS costs application on behalf of Mr M.

[90] This letter of 5 February 2007, written five days after the judicial conference at which Mr Wood advised that no legal aid was available, is telling. It shows in our view that Mr Wood was well aware that legal aid had been granted and was available. There was no evidence that his change of position arose from a client instruction following the judicial conference. In fact Mr Wood confirmed he had no such communication from Mr M.

[91] Mr Wood said that the letter supported his claim as to his uncertainty about whether his client would accept the *"conditions"* he claimed attached. Mr Wood's statement that the letter actually reinforces his claim that he was uncertain is contrary to what the letter says. Mr Wood's position in explaining this letter indicates to this Tribunal a continuation of his attempts to place alternative and unsupported meaning on the relevant documents in an attempt to justify his actions. We think his explanations implausible, and do not accept them. The totality of the circumstances surrounding this matter reinforces our view.

Other matters

[92] In concluding this section we should note the affidavit of Mr Eades. This affidavit was filed in support of Mr Wood's defence of the charges. Unfortunately Mr Wood did not serve a copy on counsel for the Complaints Committee, so Mr Nation did not know of it until near the end of the hearing before this Tribunal. Mr Wood apologised for his error. The Tribunal retired for a short time to give Mr Nation the opportunity to read the affidavit.

[93] On recommencement Mr Nation confirmed that while it would have been preferable to have the opportunity to cross-examine Mr Eades, after reading the affidavit he did not think he needed to put the Tribunal to the trouble of an adjourned hearing, nor the Complaints Committee to the additional expense that would result. The Tribunal had offered Mr Nation an adjournment so that Mr Eades could be called and cross-examined, if that is what Mr Nation had wished to do.

[94] In considering what weight to give to Mr Eade's affidavit we note that Mr Eade has not had the opportunity of hearing the factual matters on which he bases his opinion tested at the hearing before this Tribunal, including Mr Wood's answers in cross-examination.

[95] For this Tribunal to reach a conclusion on the charges, we are required to traverse an evidential trail starting in October 2006 and ending in February 2007, and to have regard to Mr Wood's answers in cross-examination. The issue which we

have to decide is what was it that Mr Wood knew, or should have known, concerning the availability of legal aid to his client at the relevant times.

[96] While we acknowledge Mr Eades' bona fides in lodging his affidavit, we take the view that it does not assist us as a matter of evidence on the issues we have to decide.

[97] At the conclusion of evidence, Mr Nation for the Complaints Committee made submissions on the Complaints Committee case, the evidence, and the applicable law. Mr Wood, in reply, then asked for two weeks to prepare submissions in response and to look at the law. This Tribunal took the view that the request should be declined for the following reasons:

[a] The charges and evidential process involving affidavit evidence had been in train for some months, Mr Wood had all the papers, and no new evidence had emerged during the hearing;

[b] The law around the issues was available to be researched prior to the hearing;

[c] As the respondent, Mr Wood was completely familiar with the facts in the case, so no issue of surprise arose.

[98] This Tribunal also took the view that subject to there being no unique matter, or issue of unfairness in doing so, hearings should be completed once commenced, so that matters may reach a conclusion.

[99] The Tribunal allowed a short adjournment to give Mr Wood time to gather his thoughts and then reconvened to complete the hearing by Mr Wood making closing comments.

Conclusion on Charges

[100] Mr Wood's claim that his position was correct, that there was no legal aid, is not supported by the evidence. We also think the evidence indicates more than an innocent or careless mistake, based on wrongly concluding that some preconditions had to be satisfied before his client could obtain legal aid for the non-party discovery application. In fact the evidence supports the position that Mr Wood deliberately followed a course of action that he must have known was misleading and deceptive, and that it would in fact mislead.

[101] Mr Wood's conduct leading up to the time of the judicial conference of 31 January 2007 is marked by a series of deliberate decisions to suppress key information. There is a continuing effort not to inform either Mr McVeigh QC or the Court about issues relevant to the question of whether Mr Ms' had legal aid for the non-party discovery application. We consider this demonstrates a deliberate departure from required professional standards.

[102] At the judicial conference on 31 January 2007 Mr Wood continued that approach. In direct answer to a question from the Judge, Mr Wood deliberately

misled the Judge and Mr McVeigh QC. Mr Wood tried to justify his answer by saying that what he said was his true belief. The evidence before this Tribunal does not support that position. When tested on the issue in cross examination, the reasons Mr Wood gave for not fully explaining to the Judge the position he claimed he found himself in were not plausible. That reflects on the credibility of Mr Wood's claims as to his actual view of availability of legal aid at the time. In any event, we consider the evidence shows a deliberate course of action not to properly inform counsel or the Judge.

[103] As a result of the unacceptable course of conduct Mr Wood followed up to the time of the 31 January 2007 judicial conference, his letter of 5 February 2007 which clearly showed his true belief as to legal aid availability, and his attempts to explain away that letter and other issues noted, relying on unsupportable claims as to what was really meant, we are of the view that in fact Mr Wood knew that what he was saying at the judicial conference of 31 January 2007 was not true and would mislead. We consider that Mr McVeigh QC and Associate Judge Christiansen were in fact misled at the conference by Mr Wood as a result.

[104] As a result we find as follows:

[a] Mr Wood, by his behaviour, has breached Rules 6.01 and 8.01 of the rules of professional conduct under the Law Practitioners Act 1982 which provide:

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

8.01 "In the interests of the administration of justice, the overriding duty of a practitioner acting in litigation is to the court or the tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client."

[105] In particular, the statement made by Mr Wood to the Judge and counsel at the judicial conference on 31 January 2007, either on its own, or against the backdrop of the course of conduct from October 2006 to the time of that conference, represents an intentional breach of the Rules noted. We do not consider Mr Wood made an innocent mistake about the legal aid. The evidence strongly supports a deliberate approach, and an implausible position taken by Mr Wood to justify that approach, by suggesting rationale and interpretations which are not supported by the evidence.

[106] We consider that Mr Wood had decided to be obscure and evasive about Mr Ms' legal aid status in respect of the non-party discovery application from the outset, and consequently he has embarked on a continuing course of behaviour to ensure that position was maintained. The evidence clearly shows that Mr Wood was deliberately misleading, with the inevitable consequence that people would be misled. That conduct falls a long way short of acceptable professional conduct. As a direct result Mr C A McVeigh QC and Associate Judge Christiansen were misled by Mr Wood as to the true legal aid status of Mr M for the non-party discovery application on which Mr Wood acted.

[107] Consequently we find Mr Wood is guilty of misconduct in his professional capacity under s.112(a) of the Law Practitioners Act 1982.

[108] We shall make a decision on penalty after considering written submissions which are to be filed.

[109] We request that submissions on penalty from counsel for the Complaints Committee be filed with the Tribunal by 31 August 2009, with a copy to Mr Wood by that date.

[110] Mr Wood is to file his response with the Tribunal by 9 September 2009, with a copy to counsel for the Complaints Committee on filing.

[111] Submissions should also address the question of costs and expenses, having regard to the provisions of s.112(2)(g) of the Law Practitioners Act 1982.

DATED at WELLINGTON this 21st day of August 2009

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D J Mackenzie
Chairperson