BEFORE THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2009] NZLCDT 19

LCDT 16/09 and 17/09

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

AND

IN THE MATTER of **MAUA JAMES FALEAUTO** of Auckland, former Barrister

CHAIR

Mr D J Mackenzie

MEMBERS OF THE TRIBUNAL

Mr J Clarke
Ms S Sage
Mr P Shaw
Mr B Stanaway

HEARING on 19 November 2009, at Auckland

APPEARANCES

Ms J McCartney SC and Mr M Treleaven for the New Zealand Law Society
No appearance for Mr Faleauto

DECISION

Introduction

[1] Mr Faleauto faces four charges of misconduct in his professional capacity. The particular charges are:

1.1 Without lawful justification or excuse, he refused or failed to comply with the lawful requirement of the Auckland District Law Society or Complaints Committee No. 2 to provide specified documents, relating to the investigation of a complaint against him by Mr G S, for inspection under s.101(3)(d) Law Practitioners Act 1982. ("the S Charge");

1.2 Between July 2005 and July 2007, in breach of Rule 11.03 of the Rules of Professional Conduct for Barristers and Solicitors, he accepted instructions from a lay client, Mr P, without having an instructing solicitor. ("the First P Charge");

1.3 Between July 2005 and July 2007 he received approximately $155,045 in fees from Mr P and/or Mrs P and failed to render an invoice or bill of costs ("the Second P Charge");

1.4 In December 2007 and January 2008 he obtained or attempted to obtain money from Mr A and/or Mr A's family while Mr A was the recipient of legal aid ("the A Charge").

[2] The charges were heard by this Tribunal under the transitional provisions contained in ss.353 and 358 Lawyers and Conveyancers Act 2006 ("the LC Act"). Mr Faleauto did not attend the hearing, claiming on-going ill health in an email sent to the Tribunal on 18 November 2009, but expressed the wish that the hearing proceed in his absence.

[3] The Tribunal was conscious of the time that had passed since the complaints were originally made, due to delays in the investigation and hearing of the charges caused by Mr Faleauto's failure to respond or answer the charges in a timely way, his failure to provide an address for service, his decision not to attend a pre-trial tele-conference, his failure to observe timetable directions, and obfuscation by Mr Faleauto through the various processes involved.

[4] Taking into account this history, the clear warning given to Mr Faleauto in the Tribunal's minute of 16 September 2009, and Mr Faleauto's request that the matter proceed in his absence, the Tribunal considered it appropriate to proceed, and accordingly went ahead with the hearing as set down, on 19 November 2009.

Amendment to Charges

[5] The first issue the Tribunal had to deal with was an application on behalf of the New Zealand Law Society ("the Society") to amend the P charges.

[6] In July 2009 the Society had noted an error in respect of both P charges, advised the Tribunal, and lodged amended charges with the Tribunal.

[7] The amended charges had also been served on Mr Faleauto, who was directed in the Tribunal's minute of 16 September 2009 to advise if he objected to the amendment, and, if he did object, to notify his grounds of objection. No notice of objection was received from Mr Faleauto.

[8] The First P Charge and the Second P Charge had both been laid by Complaints Committee No. 2 of the Auckland District Law Society ("CC2") in December 2008. The charges were supported by an affidavit (dated 11 December 2008) of Mr Laubscher, the Professional Standards Director of the Society's Auckland Complaints Service.

[9] In respect of both P charges Mr Laubscher deposed in his affidavit of 11 December 2008 that CC2 considered the complaints that gave rise to the charges and after investigating, resolved, on 22 September 2008, to prosecute Mr Faleauto before the New Zealand Law Practitioners' Disciplinary Tribunal.

[10] The reference to CC2 in Mr Laubscher's affidavit was in error so far as it related to the charges in respect of Mr P, as it was in fact Complaints Committee No. 1 ("CC1") which considered both P charges and resolved to prosecute those charges before the New Zealand Law Practitioners' Disciplinary Tribunal.

[11] In an affidavit accompanying the re-laying of the P charges by the Auckland Section 356 Standards Committee of the Society on 16 July 2009, Mr Laubscher deposed that he had mistakenly referred to CC2, instead of CC1, in his affidavit regarding the First P Charge and the Second P Charge, and that the charges should have been laid by CC1 not CC2.

[12] Mr Faleauto was duly served with the re-laid charges. This Tribunal, in a minute of 16 September 2009, asked Mr Faleauto to advise if he opposed the application for amendment in respect of the P charges. No such objection was received by the

Tribunal, and in his response to all the proceedings, filed on 16 November 2009, Mr Faleauto makes no comment at all on the re-laying of the charges.

[13] This Tribunal has to satisfy itself, after reviewing the transitional provisions of the LC Act, that no jurisdictional issue arises which may affect the ability of the Society to re-lay these charges.

[14] Both of the P charges followed an investigation under s.99 Law Practitioners Act 1982 by CC1 from July to September 2008, after a complaint had been received from Mrs P in November 2007. CC1 resolved on 22 September 2008 to prosecute both P charges before the New Zealand Law Practitioners' Disciplinary Tribunal, which was to continue dealing with disciplinary proceedings under the transitional provisions of s.353(2) LC Act.

[15] As noted above, both P charges were incorrectly laid in the name of CC2 by documentation dated 11 December 2008. The error was noted by the Society, and, in July 2009, the charges were re-laid by the Auckland Section 356 Standards Committee of the Society, by documentation dated 16 July 2009.

[16] With the cessation of the transitional provisions, which preserved CC1 and the New Zealand Law Practitioners' Disciplinary Tribunal until 31 January 2009, CC1 no longer existed post that date, thus could not itself re-lay the charges in July 2009.

[17] Under s.356 LC Act, a Lawyers Standards Committee appointed by the Society may *"... carry out the duties and exercise the powers that (CC1) would have had under (the Law Practitioners Act 1982) in relation to those proceedings if that Act had not been repealed…"*.

[18] The Auckland Section 356 Standards Committee has been established by the Society to succeed CC1 and CC2. We consider that the Section 356 Standards Committee is competent to re-lay both P charges to correct what was effectively an administrative error referring to the incorrect complaints committee and resulting in both P charges being laid by the wrong entity in December 2008.

[19] There is no prejudice to Mr Faleauto. The charges are identical. He has had adequate notice of the relaying of the charges, which were filed in July this year. Mr Faleauto has not objected to the re-laying of the charges. We are satisfied there is no jurisdiction issue. Accordingly we accept that the charges incorrectly laid in

December 2008 by CC2 may be replaced by the charges laid in July 2009 by CC1 successor, the Auckland Section 356 Standards Committee.

The S Charge

[20] This charge is based on the statutory offence created by s.101(6) Law Practitioners Act 1982 which provides:

> *"Every practitioner shall be guilty of misconduct in his professional capacity who, without lawful justification or excuse, refuses or fails to comply with any lawful requirement of a District Council or committee under this section"*.

[21] The evidence of the Society was that, in respect of an investigation by CC2 into a complaint relating to a Mr S under s.99(a) Law Practitioners Act 1982, Mr Faleauto had been asked to provide for inspection pursuant to s.101(3)(d) of that Act, originals or copies of:

21.1 All files, correspondence, file notes and other documents, including all communications with his instructing solicitor.

21.2 All invoices in respect of professional services he had rendered.

21.3 All deposit slips, receipt books, and bank records, including bank statements, in respect of any fees or other remuneration he had received.

21.4 Copies of any of the above materials retained electronically.

[22] The request was made by letter of 10 November 2006 from the Auckland District Law Society ("ADLS"), which was exhibited as part of the Society's evidence. It required Mr Faleauto to comply by 5pm, 28 November 2006. Mr Faleauto's response was to request the Society, on 28 November 2006, to obtain a waiver from Mr S, so that he would be permitted *"… to reply in full and to address all issues – both legal and factual*".

[23] A waiver of privilege was obtained from Mr S and sent to Mr Faleauto on 15 January 2007, asking for his response to the request that had been made in the ADLS letter of 10 November 2006, "*as soon as possible*".

[24] The next day, 16 January 2007, Mr Faleauto wrote to ADLS stating that the complaint by Mr S was "*bizarre and untrue*" and that it was "*contrived*". He alleged that Mr S had mental health issues. He stated that he required all information held

by ADLS, including meeting minutes, so that he could be "*fully and fairly informed*".

[25] In a further letter to ADLS dated 12 February 2007, Mr Faleauto indicated that he had lent Mr S $300 which had been repaid, that a Ms R had provided $1,500 to pay for a psychologist's report and *"... beyond that there was nothing".* Mr Faleauto did not produce any records relating to these transactions he described in his letter of 12 February 2007, either at that time or in response to subsequent enquiry by ADLS.

[26] On 12 March 2007, ADLS again wrote to Mr Faleauto asking for an explanation as to why he had not complied with the request to produce under s.101(3)(d) Law Practitioners Act 1982. Mr Faleauto's response was to advise that Mr S could access copies of receipts relating to monies deposited to his account while at Mt Eden, and that Ms R had the psychologist's receipt. He asked ADLS if it would like him *"… to obtain a copy"*.

[27] ADLS responded on 29 March 2007 by asking for detail about the deposits to Mr S's account and whether Mr Faleauto's response had been intended as his response pursuant to s.101(3)(d) Law Practitioners Act 1982. There was no reply to that letter.

[28] In his affidavit filed with the Tribunal on 16 November 2009, Mr Faleauto stated that:

> "… (he) *had acted pro bono for Mr S. There were no fees or remuneration. Friends of (*Mr S*) paid for a psychologist's report and reimbursed me for depositing money in his weekly shopping account. Apart from the trial file sent to Mr G after which there were no communications, I held no documentation. Mr S and the High Court had originals of all documents. Ms R had been given the receipt from Ms C, psychologist, for her report on Mr S*."

[29] Mr Faleauto had made similar comments to ADLS in his email of 8 November 2006 (S Bundle at 012), his letter of 12 February 2007 (S Bundle at 017), and his email of 26 March 2007 (S Bundle at 029).

[30] We consider that no fees were actually charged or received by Mr Faleauto regarding his work for Mr S, so we do not consider his failure to produce items noted at paragraphs 21.2 and 21.3 above to constitute misconduct under s.101(6) Law Practitioners Act 1982. Those items were predicated on remuneration for professional services being charged.

[31] The items (or at least some of them) referred to in paragraphs 21.1 and 21.4 must have existed and should have been made available by Mr Faleauto in response to the formal request made. His email of 8 November 2006 to ADLS acknowledges that he must have had some material as he said that he had sent Mr G *"… a large portion of Mr S's file"*. The corollary of that is that he still had the balance of the file.

[32] Also, we consider it unlikely that there was no administrative file that would be retained by Mr Faleauto on passing over the client to alternative counsel. Further, we do not accept that it is reasonable for Mr Faleauto to claim that no electronic copies of documents related to Mr S existed in Mr Faleauto's possession or control.

[33] We couple this with Mr Faleauto's deliberately obtuse responses to ADLS enquiries over an extended period and have little trouble in finding that Mr Faleauto failed to meet the requirement to produce in respect of items noted in paragraphs 21.1 and 21.4 above. Requests were properly made and there was no lawful justification or excuse for not producing the items referred to in those paragraphs which was put before this Tribunal in evidence.

[34] We find this charge proved in respect of the items noted in paragraphs 21.1 and 21.4 above.

The First P Charge

[35] Under this charge of misconduct in his professional capacity, Mr Faleauto is alleged to have accepted instructions direct from a lay client, Mr P, without having an instructing solicitor. This was said to have occurred between July 2005 and July 2007 and to be in breach of Rule 11.03 of the Rules of Professional Conduct for Barristers and Solicitors.

[36] This matter arose following receipt of a complaint made by Mrs P, whose husband had been represented by Mr Faleauto in a lengthy and serious criminal case. Mrs P's complaint was that Mr Faleauto had overcharged, had acted unprofessionally, and had never rendered an account.

[37] The Society, after commissioning a costs revision in response to Mrs P's complaint and receiving a report from the cost reviser that there was no bill of costs which could be assessed, then resolved, through CC1, to investigate whether Mr Faleauto had provided a bill of costs to Mr P (and/or Mrs P). It also resolved to

enquire into whether Mr Faleauto had an instructing solicitor for his services to Mr P. This charge deals with the latter issue.

[38] Mr Faleauto did not respond to enquiries made of him by the Society in August 2008 about this issue, limiting his response to a statement that he was *"... not a member of ADLS or any Law Society".* This appears to have been an attempt to claim that there was no jurisdiction for the enquiry. On 12 May 2008 Mr Faleauto had given *"Notice of Cessation of Practise as a Barrister Forthwith"*, which indicated that he was retiring from practice on 12 May 2008. That of course did not affect the complaint jurisdiction which existed under the Law Practitioners' Act 1982.

[39] After due process the charge was laid. In an affidavit filed with this Tribunal, Mr Faleauto stated that he spoke to a solicitor, Mr M, asking if he would be prepared to be the solicitor on the record in a case which would involve Mr P. Mr Faleauto told Mr M that he was due to have an urgent meeting with Mr and Mrs P who wanted a barrister to replace another barrister who had been assisting Mr P, but who was no longer available.

[40] Mr Faleauto deposed that Mr M agreed to be solicitor on the record so long as by doing so he did not assume liability for fees, nor did he wish to hold money on account. Mr M asked for a letter of instruction signed by Mr P, which Mr Faleauto provided.

[41] We accept that Mr Faleauto was asked to make himself available for cross-examination by the Society at the hearing before this Tribunal, and that as a consequence of Mr Faleauto not attending the Society was denied the opportunity to test some of Mr Faleauto's statements. However his failure to attend does not preclude us considering what he has sworn in his affidavit, and, especially when we couple that with other evidence available, we can decide the view we will take of his evidence.

[42] We accept Mr Faleauto's evidence regarding arrangements he said he had with Mr M because:

42.1 A copy of a letter addressed to Mr M from Mr P, dated 21 July 2005 was in evidence before us in the affidavit of Mr Laubscher dated 22 October 2009, and Mr Faleauto had also filed a copy with the Tribunal in April 2009 when he initially responded to the charges by letter.

42.2 The letter from Mr P asked that Mr M instruct Mr Faleauto to represent Mr P. Mr P noted in this letter that Mr M would have no liability for Mr Faleauto's fee. Mr Faleauto added a postscript to the letter confirming that arrangement.

42.3 Mr Laubscher exhibited file notes made by Mr Treleaven, following a meeting between Mr Treleaven and Mr M on 30 April 2009 and a telephone conversation between Mr Treleaven and Mr M on 7 May 2009. The file note recorded that while Mr M could not then recall the particular matter it reflected his usual arrangements (barrister to be responsible for fees and letter required confirming arrangements). The file note of the telephone conversation recorded that Mr M had advised that he had not found his file but that he had no reason to doubt it was a legitimate instruction.

42.4 Mr Treleaven had recorded that in a later voice mail message, responding to some specific questions which had been posed by the Society, Mr M stated that he couldn't recall specific detail of when and from whom he had received the instructions, but thought that it was from Mr Faleauto. Mr M thought that Mr Faleauto had prepared a letter of instruction for him from Mr P, reflecting the arrangements Mr M had told Mr Faleauto he required set out in Mr P's letter.

[43] While the arrangements were not what might be expected, we think that there is evidence that Mr Faleauto put his mind to the requirement that there be an instructing solicitor, and spoke to M and entered an arrangement whereby Mr P requested Mr M to act in the role of instructing solicitor to Mr Faleauto. Mr P was a signatory to the arrangement letter negotiated between Mr Faleauto and Mr M. In those circumstances we do not consider that Mr Faleauto could be said not to have an instructing solicitor at the time, even if that instructing solicitor did not thereafter play an active role, and that it was not clear as Mr M could not find his file.

[44] While we have reservations about the efficacy of the arrangements, we do not consider the evidence to show that Mr Faleauto accepted instructions direct from a lay client without having an instructing solicitor, and accordingly find this charge of misconduct not proved.

The Second P Charge

[45] This charge is that between July 2005 and July 2007 Mr Faleauto received approximately $155,045 from Mr P and/or Mrs P and failed to render an invoice or bill of costs.

[46] This matter arose as a result of Mrs P's complaint referred to above in paragraph 36 and was dealt with by the Society as part of its process noted in

respect of the First P Charge, with Mr Faleauto's responses (or lack of them) to the Society being also referred to in our comments about the First P Charge.

[47] In her complaint, Mrs P stated (Bundle at 018) that it was important to note *"… that we have never seen or been given an account from* (Mr Faleauto)". She also noted (Bundle at 021) that in response to requests for a detailed account of his services Mr Faleauto sent an email (Bundle at 035) noting hours worked and calculating an amount of $148,000 "*for the trial of 20 weeks alone*", and that he would send "*the full bill shortly*".

[48] Mr Faleauto did not to appear at the costs revision initially established by the Society following Mrs P's complaint about Mr Faleauto's charges. The report of the costs reviser was exhibited as part of the evidence. The report reflects adversely on Mr Faleauto's professional conduct, and also notes that it appeared there was no bill of costs in existence which could be revised.

[49] In his affidavit filed with this Tribunal, Mr Faleauto stated that his fee for the trial was $240,000 and showed how that was calculated, and stated that he only received $155,000. He acknowledged that it was *"… a mistake not to render (*Mr and Mrs P*) a bill immediately"*.

[50] Mrs P's evidence that no account was ever received from Mr Faleauto is not contested by Mr Faleauto. The report of the cost reviser confirmed there was no account from Mr Faleauto, after investigation for the purposes of a cost revision. That report also has not been contested by Mr Faleauto.

[51] Mr Faleauto himself acknowledged that no bill was completed before taking fees from Mr and Mrs P. This Tribunal does not consider that Mr Faleauto's hours x rate fee estimate in his email of 3 September 2007 (Bundle at 035) constitutes an account, nor does the preliminary fee agreement (Bundle at 025), or the running fee receipts schedule (Bundle at 026).

[52] We find that Mr Faleauto took fees amounting to a sum of at least $155,000 without rendering an invoice or any bill of costs, and that constitutes misconduct by Mr Faleauto in his professional capacity.

[53] We add, that having regard to the behaviour of Mr Faleauto towards Mr and Mrs P in pressing them for payments, we were surprised that Mr Faleauto was not

facing charges of misconduct on a wider basis than failing to render an invoice for costs. Mr Faleauto's professional behaviour, including suggestions to his client that money was needed to motivate him to review disclosure material received from the police, and that, just days out from Mr P's trial on serious charges, more money was required if he was to continue acting for Mr P (Bundle at 141), is significantly below the standard expected of a barrister and solicitor of the High Court.

The A Charge

[54] This charge arises from an allegation that Mr Faleauto obtained and attempted to obtain money from a client (Mr A) and/or his family while Mr A was a recipient of legal aid. The misconduct was alleged to have occurred in December 2007 and January 2008.

[55] Evidence was given by the Society that Mr Z JP, the Honorary Consul in New Zealand for the Republic of H, had complained to the Society. The basis of the complaint was that notwithstanding Mr A had a grant of legal aid, Mr Faleauto had requested money, and received some payment, from Mr A's family for legal services provided by Mr Faleauto to Mr A.

[56] In evidence before us was material relating to Mr A's application and grant of legal aid, obtained from the Legal Services Agency by Mr Z. It showed that Mr Faleauto applied for legal aid on behalf of Mr A on 10 December 2007. The application for legal aid was granted the next day, Tuesday 11 December 2007 (Bundle at 095 to 106).

[57] ADLS commenced an investigation and asked Mr Faleauto to respond to the complaint. Mr Faleauto's response was to claim that Mr A had asked him not to comment. Mr A subsequently provided a statement that he did not give such an instruction, and, in case Mr Faleauto was in any doubt, confirming that Mr Faleauto was free to respond to enquiries about Mr A's case and Mr Faleauto's contact with Mr A's family in H (Bundle at 088). Notwithstanding this Mr Faleauto did not give an explanation responding to the Society's question as to whether Mr A had legal aid, and if so, the basis on which Mr Faleauto had sought and received funds from the A family for work he was undertaking on Mr A's behalf.

[58] The email correspondence in evidence before this Tribunal indicated significant pressure from Mr Faleauto on the A family to provide funds. It also showed an

extremely unprofessional approach, quite apart from the acts for which he is charged with misconduct, and we note some parallels with his pressure for payments from Mr and Mrs P in the P charges. There is undue pressure, implied threats as to outcome if payments are not made, and there is always urgency. Examples of this were also given in Mr Z's letter of complaint, showing the tactics and pressure used and applied by Mr Faleauto (Bundle at 059).

[59] We also note the following acts by Mr Faleauto, all subsequent to Mr A being granted legal aid on 11 December 2007:

59.1 Wednesday 12 December 2007 11.48 am – email from Mr Faleauto to Ms A (Mr A's sister in H) stating that money should be sent to Western Union Auckland (Bundle at 061).

59.2 Wednesday 12 December 2007 10.36 pm – email from Mr Faleauto to Ms A stating that legal aid is a budget service that pays very little, that Mr A has more chance of being convicted if on legal aid, and that to get funding Mr Faleauto would have to "*show the government our defence*". (Bundle at 062).

59.3 Thursday 13 December 2007 3.32 pm – email from Mr Faleauto to Ms A again requesting "*first lot of money*" together with other comments that would have placed pressure on the family to pay quickly. This was followed by a further email at 3.54 pm repeating his request for the "*first deposit"* and again raising matters that would have placed pressure on the family to respond quickly with payment (Bundle at 063).

59.4 Thursday 13 December 2007 5.14 pm. In yet another email sent that day, Mr Faleauto notes the need to pay other professionals before they will assist and concludes "*... I need to see your faith in action".* In a further email the same day he states that Ms A "… *must transfer money so I can pay prison"* (Bundle at 064). Later that day Mr Faleauto was paid USD3,310 by the A family, being payment towards Mr A's legal costs.

59.5 Thursday 18 December 2007 1.15 pm – email from Mr Faleauto to Ms A requesting that she transfer more money as expenses are mounting (Bundle 065).

59.6 Saturday 5 January 2008 5.53 am – email from Mr Faleauto to Ms A requesting a further payment of USD10,000, so Mr Faleauto could *"… get on with reading all the police files and attending on* (Mr A)" He asked that funds be deposited urgently (Bundle at 066).

[60] In his affidavit filed with this Tribunal Mr Faleauto claimed the email in which he was shown as requiring money to pay the prison (refer paragraph 59.3 above) had been "…*clearly tampered with".* There was no evidence to support that assertion, and we note that while it is not essential to any findings arising out of the demands

Mr Faleauto made in his various emails, it does fit the pattern he established, applying pressure for payments with some unusual claims made to the A family in H (variously, the danger of public officials, cheating by the state and police, the risk of defence lawyers being replaced by other lawyers the state or police could influence, lack of privacy from the government, higher chance of conviction when on legal aid, and the need to disclose defence case to government to get funding). This behaviour is well below the professional standard required of a barrister and solicitor of the High Court.

[61] In his affidavit Mr Faleauto also claimed that the family were eager to pay for Mr A's defence and had assured Mr Faleauto that there were no problems making payments. That is not supported by the email exchange between Mr Faleauto and Ms A, which clearly indicated funding difficulties, confusion, the need for guidance as to legal procedures and costs, and a sense of panic by a family in H struggling to come to terms with what was happening to their son and brother in New Zealand. (Bundle at 062-064). We have some difficulty reconciling Mr Faleauto's claimed view of family funding availability with the fact that he made an application for grant of legal aid during the same period, the application being based on the fact that there was no other source of funds available to Mr A than legal aid.

[62] There was also evidence before this Tribunal (see affidavit of Mr Laubscher dated 22 May 2009, and affidavit of MM dated 29 June 2009) of an email from Ms A responding to questions put to her by Mr Treleaven on behalf of the Society. That email made it clear that the A family in H had little money available, a point made to Mr Faleauto by the family on a number of occasions according to the evidence of Ms A.

[63] Mr Faleauto noted that he had not received *"… a cent from legal aid"* in his affidavit. That may be so, as confirmed by a letter from the Legal Services Agency in evidence before us, but the issue is whether he was entitled to legal aid for the work he did for Mr A, not whether he actually claimed it. As a result of obtaining money from Mr A's family in payment of his fees, Mr Faleauto has caused the A family to make a payment to him for legal services that should have been paid as part of the legal aid to which Mr A was entitled.

[64] Under s.66 Legal Services Act 2000, and under the form of contract Mr Faleauto had entered with the Legal Services Agency, he was not permitted to

take payment in respect of assignments for which a legal aid grant was available. If that was not the case the integrity of the legal aid scheme, in providing funding assistance to persons who could not otherwise pay legal fees incurred, would be at risk.

[65] In such cases, lawyers could seek payment outside the legal aid scheme for services to a client entitled to legal aid, in circumstances where that client was not obliged to meet such a payment. Apart from the breach of arrangements applicable to legal aid, it is against the interests of the client, who should not have to pay significant amounts privately, direct to the legal service provider who has access to legal aid which is available for the matter concerned.

[66] Mr Faleauto has not raised any issue about legal aid not being available for Mr A in respect of all the legal services Mr Faleauto was providing. Nevertheless we have considered whether Mr A was entitled to legal aid for all of that work.

[67] Mr A's legal aid application was completed and lodged by Mr Faleauto on 10 December 2007. The charges Mr A faced were noted as "*Intentional Damage*" and "*Assault*", in the application. Mr Faleauto also noted on the application, "*murder charge in wings*" and "*murder charge to be laid".* These statements were noted under sections headed *"**Please provide comment on why aid should be granted**" and, "**Describe any other factors about your case that you want the Agency to consider on why aid should be granted**"*, respectively.

[68] The legal services which Mr Faleauto was providing to Mr A arose out of particular circumstances and facts on which Mr Faleauto was advising Mr A. It would not be realistic to differentiate work in respect of the same facts and circumstances by attributing the legal services as either responding to the murder charge or as responding to the initial holding charges, especially where it was known that the initial charges would evolve into the murder charge in any event. Whether the work was notionally in respect of the holding charges or the murder charge is not relevant in these circumstances for the purposes of examining whether Mr Faleauto's conduct in seeking funds direct from the family amounted to misconduct in a professional capacity.

[69] Clearly Mr Faleauto had in mind that legal aid would be available not only for the initial holding charges, but for the more serious charge he knew would be laid in

the next days. That was anticipated in his legal aid application and is also confirmed by his email request seeking funding for a pathologist on 11 December 2007, in which he notes again the murder charge (Bundle 110).

[70] In accordance with its normal practice, the Legal Services Agency, when it granted legal aid to Mr A noted that it was to cover the preliminary charges on which Mr A was held, pending the laying of a murder charge, and as described in the legal aid application form lodged by Mr Faleauto for Mr A's legal aid. Mr Faleauto knew that the matter would evolve into a murder charge, indeed that was one of the reasons he put forward to the Legal Services Agency to support the initial application. The Legal Services Agency also confirmed that *"… there was never any doubt that the murder charge would be added to this (*Mr A's grant of legal aid) *file"* (Bundle at 095).

[71] Mr Faleauto knew that all he had to do in respect of formal approval of legal aid for the murder charge was to apply to extend legal aid as always anticipated by him, and he would be able to obtain legal aid payment for his legal services provided to Mr A.

[72] Mr Faleauto sought and obtained some of the money (USD3,310) from the family while working for Mr A on issues relating to the initial charges which at that stage had been the subject of a formal legal aid grant. That is clearly a breach of his obligation not to seek private payment for a matter on which legal aid is available.

[73] The request for further funds - *"… send more money"* contained in a later email on 18 December 2007 and, "*Please send 10,000 US"* in an email of 22 December 2007 - Bundle at 065 -066) came later, after the initial payment of USD3,310, and after the murder charge had been laid. While it appears that no extension of the grant of legal aid had been processed to formally extend legal aid to cover work done in respect of the murder charge, it had always been Mr Faleauto's position that he would extend the legal aid. In fact his application had been predicated on the matter evolving into a murder charge. He knew his client had no funds and was therefore entitled to legal aid for all work Mr Faleauto was carrying out.

[74] We consider that it was in Mr Faleauto's power and control to obtain the expected legal aid entitlement for all his legal services to Mr A, and that he was in

clear breach of his obligations under the Legal Aid Scheme, and his obligations to his client, by seeking funding for work that was able to be paid by legal aid.

[75] Mr Faleauto's demands for, and receipt of, payment from the A family for his work, were inappropriate, given that fees for all of that work could have been paid by legal aid.

[76] Given Mr Faleauto's professional obligations, his knowledge of Mr A's financial circumstances (and that of Mr A's family), his involvement in applying for and obtaining legal aid assistance for Mr A, and the context of his legal services provided to Mr A, we consider that Mr Faleauto has obtained USD3,310, and attempted to obtain USD10,000, from the A family and the charge is proven. These amounts were or would have been available from the Legal Services Agency as legal aid to Mr A, and Mr Faleauto must have known that at the time he sought direct payment from the A family. We note also the circumstances in which he has done this, taking advantage of what must have been a very difficult situation for the A family. We find this charge proved.

Summary

[77] In summary, we find:

77.1 The S Charge proved, as the evidence showed that Mr Faleauto failed to respond to the request by or on behalf of the Society. That is a statutory charge involving misconduct.

77.2 The Second P Charge is also proved, as the evidence was clear that there was no invoice or bill of costs rendered to support the sum of approximately $155,000 taken in fees. That is misconduct, and we note also the unprofessional circumstances in which Mr Faleauto went about collecting amounts that made up the sum taken in fees.

77.3 This Tribunal also found the A Charge proven. We agree with the Society that this is a serious case of misconduct. The circumstances have been traversed above, but the private charging for work for which legal aid was available, and the dishonest circumstances in which it occurred (deliberately misleading a foreign family in H and taking advantage of the situation they found themselves in, to access funds the family could not afford and did not have to pay) is a considerable failing in professional standards.

77.4 We have found the First P Charge not proven.

Penalty submissions

[78] Submissions on penalty are sought from the parties. Given the time of the year, the Society is to file its submissions on penalty by 22 January 2010. A copy is to be served on Mr Faleauto on filing.

[79] Costs under s.112(2)(g) Law Practitioners' Act 1982, and the possibility of Mr Faleauto being ordered to refund USD3,310 to Ms A under s.106(4)(e) Law Practitioners Act, should be addressed in submissions.

[80] Mr Faleauto is to file his reply by 12 February 2010, with a copy to the Society on filing.

[81] This Tribunal will make its penalty decision after considering the submissions. We do not propose to hold a further hearing regarding penalty, being prepared to deal with matters on the papers. If either party wants to be heard then we are prepared to schedule a further hearing. The parties should indicate their preference in this regard in their submissions.

Suppression

[82] At the substantive hearing on 19 November 2009, the interim order for suppression of Mr Faleauto's name was extended, pending our decision on the charges. That order is now further extended until we have made our decision on penalty, and the parties should include any submissions they wish to make on this issue in their respective submissions on penalty. The names of the complainants in the various charges, persons associated with the complainants, and details of the criminal charges out of which the complaints arose in respect of Mr Faleauto, are also suppressed.

DATED at Wellington this 21st day of December 2009

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D J Mackenzie
Deputy Chair
Lawyers and Conveyancers Disciplinary Tribunal