IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2017-485-000089
[2017] NZHC 2331

BETWEEN	CHERYL YVONNE SIMES Plaintiff
AND	LEGAL SERVICES COMMISSIONER First Defendant
	NEW ZEALAND LAW SOCIETY Second Defendant

Hearing:	4 September 2017
Counsel:	Plaintiff in person F M R Cooke QC for First Defendant S R Jefferson QC and L Theron for Second Defendant
Judgment:	26 September 2017

JUDGMENT OF COLLINS J

Introduction

[1] The issue addressed in this judgment can be distilled to the following question:

> What documents can be provided to the Legal Services Commissioner (the Commissioner) by an applicant or a recipient of civil legal aid (legal aid party), or their lawyer, where the document in question is held on court files as well as by the legal aid party or their lawyer, and where the documents are sought by the Commissioner to assist him discharging his duties under the Legal Services Act 2011 (the Act)?[1]

[1] The Office of Commissioner came into effect on 1 July 2011. Prior to then the Legal Services Agency administered the Legal Services Act 2000. For convenience I refer to the Commissioner as the administrator of legal aid prior to and after 1 July 2011. The term "legal aid party" is a convenient shorthand reference to both applicants for, and recipients of, civil legal aid. Where

[2] The answer to this question depends on the nature of the document that the Commissioner wishes to access. This is because the Commissioner may receive from a legal aid party or their lawyer some of the documents to which the question posed at [1] refers, but he requires the permission of a court to access other documents.

[3] The key distinction between the documents that the Commissioner can receive from a legal aid party or their lawyer and those that he cannot access without permission from a court is that documents in the latter category are commissioned or received by a court which retains control over access to those documents.

[4] The documents referred to in this proceeding that a legal aid party or their lawyer may forward to the Commissioner include:

(1) Copies of judgments, minutes or orders unless the court states otherwise;

(2) Copies of the pleadings, statements of evidence and transcripts of evidence unless the court states otherwise; and

(3) Copies of reports for lawyers for a child or young person unless the court states otherwise.

I explain in this judgment the types of document that the Commissioner cannot access without the prior approval of a court.

[5] Mrs Simes has sought a declaration under the Declaratory Judgments Act 1908. While I am willing to grant a declaration, counsel have asked for an opportunity to confer on the wording of an expanded form of the declaration that I make in this judgment. I am content to allow them an opportunity to agree upon the terms of a broader declaration that reflects this judgment.

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necessary I distinguish between applicants for, and recipients of, civil legal aid.

[6] Counsel have also asked that costs be reserved while they consider this judgment. I am also content to follow that course of action.

Background

The genesis of this proceeding

[7] The Commissioner is appointed under s 70 of the Act. His functions include granting legal aid to qualified applicants in accordance with the provisions of the Act.[2] The criteria for granting legal aid in civil matters include the applicant having "reasonable grounds for taking or defending the proceedings or being a party to the proceedings".[3] The Commissioner may refuse to grant legal aid if "the applicant's prospects of success are not sufficient to justify the grant of legal aid".[4] The Commissioner says he requires detailed information about proceedings in order to make the decisions required of him by the Act concerning, amongst other matters, an applicant's prospects of success.

[8] Mrs Simes is a lawyer who specialises in family law. She currently practices in Canterbury and she has been involved in litigation and disputes concerning her duties and obligations under the Act.[5]

[9] Mrs Simes is an authorised provider of legal aid services under the Act. The terms of her legal aid provider contract require Mrs Simes to notify the Commissioner "of any matter that materially decreases" a legal aid person's "prospects of success".[6]

[10] Mrs Simes is acting for a legal aid person in a proceeding in the Hamilton Family Court (the Family Court proceeding). On 28 November 2016, Mrs Simes received a request from the Commissioner asking her to forward to him certain documents connected with the Family Court proceeding, namely, "copies of the most

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2 Legal Services Act 2011, s 71(1)(a).
3 Section 10(3).
4 Section 10(4)(d)(i).
5 *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044.
6 *Provider Contract for the Provision of Legal Aid Services and Specified Legal Services,* cl 3.10.4.

recent court minutes and directions" and "a copy of the most recent report from [the] lawyer for the children".

[11] On 21 December 2016, Mrs Simes and other members of the Family Law Section of the New Zealand Law Society (Family Law Section) received an email bulletin that read:

> **Request for documents – Legal Aid Services**
>
> Last Friday, myself, the [Family Law Section] Manager and David Howden, Manager National Specialist Advisors, Legal Aid Services (LAS) met Principal Family Court Judge Laurence Ryan to discuss the issue of LAS requesting documentation from family legal aid providers in order to make informed granting decisions. We are now able to advise that the only documentation that family legal aid providers have to make available to the LAS are:
>
> - The legally aided client's application and affidavit; and
> - Any judge's minute where the judge has specifically directed the minute is to be made available to LAS.
>
> In order to obtain any other documentation, LAS are required to apply to the Family Court under Rule 429 of the Family Court Rules 2002.
>
> …

Mrs Simes appreciated the advice from the Family Law Section conflicted with the request she had received from the Commissioner on 28 November 2016. She therefore made further inquiries of the Family Law Section and discovered that the New Zealand Law Society and the Commissioner had, since 2007, been trying to resolve differences of opinion concerning the ability of the Commissioner to obtain from practitioners certain documents created for Family Court proceedings.

Conflicting legal opinions

[12] Mrs Simes' inquiries revealed that the issues which form the basis of this judgment first came to light in 2007. That year the Commissioner sought copies of lawyer for the child reports in a Family Court proceeding in Nelson. That request generated discussions between the Commissioner and the then Principal Family Court Judge, who in turn referred the request to a meeting of Administrative Family Court Judges. On 5 November 2007, the Principal Family Court Judge informed the

Commissioner that the Administrative Family Court Judges were "quite content that the [Commissioner] should have ready access to Family Court files". The exchanges between the Commissioner and the Principal Family Court Judge raised, however, an issue as to whether or not the Commissioner could access psychological reports commissioned under s 133 of the Care of Children Act 2004 because of the statutory provisions governing access to those reports. Sections 132 and 133 of the Care of Children Act are examined at [49]–[52] of this judgment.

[13] In March 2008, the Commissioner requested from a practitioner a copy of a social worker's report prepared under s 132 of the Care of Children Act. That request was referred to Judge D R Brown, who directed the Commissioner file a formal application with the Court supported by an affidavit and memorandum from counsel. This prompted the Commissioner to seek an opinion from Dr G Taylor, a barrister, who advised on 16 April 2008 that there was no basis for denying the Commissioner access to any Family Court documents.

[14] Upon being informed of Dr Taylor's opinion, the Family Law Section sought an opinion from Ms H Cull QC (as she then was). In her opinion, dated 25 June 2008, Ms Cull disagreed with Dr Taylor and advised that the only basis for the Commissioner to access Family Court documents was by him making an application to the Family Court under r 429 of the Family Court Rules 2002, which I explain at [42]–[48] below.

[15] Ms Cull referred in her opinion to the decision of Hansen J in *L v Family Court at Dunedin*.[7] In that case, police officers investigating a suspected crime wished to access a Family Court file. They approached the lawyer for the child in that proceeding, who in turn applied under r 429 of the Family Court Rules on behalf of the police to enable them to access the Family Court file. Hansen J held that:[8]

> … if a person wishes to bring an application pursuant to r 427(1)(d)[9] it should be made by that person direct to the Family Court and not through an intermediary such as counsel for the child.

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7 *L v Family Court at Dunedin* HC Dunedin CP2/03, 9 April 2003.

8 At [19].

9 In April 2003, r 427(1)(d) of the Family Court Rules 2002 referred to "a person who satisfies the Registrar that the person has a proper interest in the proceedings". The current section as amended by r 21 of the Family Court Amendment Rules 2014, r 427(2)(d), refers to "a person

Ms Cull advised that the approach taken by Hansen J meant that if the Commissioner wished to access a Family Court file then he needed to apply to the court pursuant to r 429 of the Family Court Rules.

[16] Over the ensuing years many practitioners, such as Mrs Simes, simply provided Family Court documents to the Commissioner on request, without appreciating that there was any potential difficulty in doing so.[10] In the meantime, the Commissioner made unsuccessful attempts to bring about legislative solutions to the issues that had led to the conflicting opinions from Dr Taylor and Ms Cull.

[17] On 8 December 2014, the New Zealand Law Society sought an opinion from another barrister, this time from Ms E Parsons (as she then was). Her opinion was substantially the same as that of Ms Cull, namely that practitioners were not able to provide Family Court documents to the Commissioner without authority from a Family Court Judge pursuant to r 429 of the Family Court Rules. Ms Parsons also concluded that a practitioner who releases documents to the Commissioner without the leave of the Court risks breaching s 11B of the Family Court Act, which I explain in my analysis at [36]–[41] below.

[18] The Commissioner then sought an opinion from Mr Cooke QC. In his opinion dated 2 March 2015, Mr Cooke concluded the law did not preclude practitioners providing to the Commissioner most documents on a Family Court file, although he acknowledged in his opinion that the position was not so clear-cut in relation to reports prepared pursuant to ss 132 and 133 of the Care of Children Act.

[19] The New Zealand Law Society then asked Ms Cull to reconsider her 2008 opinion. She reconfirmed her earlier opinion.

[20] On 10 February 2017, the Family Law Section sent a replacement bulletin to its members, substantially replicating the advice it had sent on 21 December 2016. In its 10 February 2017 bulletin, the Family Law Section included its "two most

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who has been permitted access to a document or court file on an application made under r 429".

[10] Affidavit of DM Howden, 4 April 2017 at [22]: "From the Commissioner's perspective, over 90 per cent of all Family lawyers continue without demur to supply requested Family Court documentation to the Commissioner to assist with granting decisions on their client's file".

current legal opinions" obtained from Ms Parsons and Ms Cull. It was acknowledged the Commissioner "does not agree with the position that [Family Law Section] has taken on this issue". The Family Law Section said it remained committed of the view that the only documentation parties were required to send to the Commissioner were:

> (1) The legally aided client's application(s) and affidavit(s); and
>
> (2) Any judge's minute where the judge has specifically directed the minute is to be made available to [the Commissioner].

The Family Law Section said that in relation to all other documents, the Commissioner was required to apply pursuant to r 429 of the Family Court Rules, to the Family Court for permission to access the documents in question.

The philosophical divide

[21] Mr Howden, who has a senior management role in relation to the administration of legal aid, explained in his affidavit that the Commissioner seeks to obtain information contained in Family Court reports in order to properly assess an applicant's prospect of success and to evaluate how legally aided litigation is being conducted. Mr Howden said that in his experience:[11]

> … when it comes to assessing the proceedings there is no better source of information than the documents filed in the court by the parties, and the judgments, minutes and directions of the Judges. In considering merits and funding the Commissioner often needs to look at the case as a whole and not just from the perspective of the lawyer acting for the legally aided person. The legal aid provider is acting for his or her client. Documents filed by the parties, including the aided person's opponent or directions or judgments from the Judge, provide a fuller picture of matters relevant to the legal aid decision.

[22] Mr Howden explained that the Commissioner wished to access information held on the files of lawyers acting for legal aid parties in order to enable the Commissioner to discharge his statutory responsibilities, and not to trespass upon the role of judges. Mr Howden stressed that the Commissioner acted in the public interest when discharging his responsibilities under the Act and that he appreciated the boundaries between his responsibilities as a provider of legal aid and the

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[11] Affidavit of DM Howden, above n 10, at [14].

constitutional function of courts to hear and determine proceedings. Mr Howden also emphasised the confidential nature of the Commissioner's role and that although the Commissioner was an employee of the Ministry of Justice, he was required to act independently when performing his key functions.[12] These points also form the basis of the submissions advanced by Mr Cooke on behalf of the Commissioner.

[23] Mrs Simes substantially agreed with the approach taken by the Commissioner. She submitted it was in her client's interests to do all she could to assist the Commissioner so as to ensure those clients who qualified for legal aid received the support to which they were entitled. Mrs Simes also said that the Commissioner played a useful role in identifying cases which had defects that may not be appreciated by the client or their lawyer. In this respect, Mrs Simes said the Commissioner provided a useful "reality check" for clients and lawyers in cases that did not qualify for legal aid.

[24] Mr Jefferson QC and Ms Theron, who appeared for the New Zealand Law Society, helpfully explained that the approach advocated by the Commissioner was not necessarily endorsed by all law practitioners or Family Court Judges. Many Family Court Judges are concerned that highly sensitive and confidential information that is produced for Family Court proceedings should be strictly controlled. For example, in *Poynter v Bastion*,[13] the Family Court considered an application to release certain documents from Family Court proceedings so as to enable those documents to be used in criminal proceedings. The documents that were sought included reports prepared pursuant to ss 132 and 133 of the Care of Children Act. In granting most of the application, Judge I A McHardy said:[14]

> The application for release of evidence must be determined with regard to the *ethos of the Family Court* and the competing public interest factors …

[25] The ethos referred to in *Poynter v Bastion* reflects the role of the Family Court in exercising control over confidential and often sensitive documents held on Family Court files and ensuring they are not released unless there is sound reason for doing so. The jurisdiction of the Family Court to act in this way is

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12 Legal Services Act 2011, ss 70(2) and 71(2).
13 *Poynter v Bastion* [2013] NZFC 3448.
14 At [20] (emphasis added).

derived, in part, from the inherent powers that are necessary to enable the Family Court to act effectively within its statutory jurisdiction.[15]

[26] The differences of opinion between the parties, and their respective legal opinions, had diminished by the time this case was heard. For example, the parties now agree that s 11B of the Family Court Act did not prohibit disclosure to the Commissioner. The main differences in the parties' submissions revolved around the application of the Family Court Rules in respect of different categories of documents.

The pleadings

[27] Faced with the conflicting views of the Commissioner and the Family Law Section over her obligations to release the documents sought by the Commissioner in the Family Court proceeding, Mrs Simes commenced this proceeding for a declaration as to what her obligations are under the relevant legislation and regulations.

[28] All parties agree that this is an appropriate case for the Court to exercise the jurisdiction conferred by s 3 of the Declaratory Judgments Act 1908 to issue a declaration concerning the meaning of the relevant legislation and regulations. I agree.[16] Mr Howden has explained that if Mrs Simes had not applied for a declaration then the Commissioner would, in all likelihood, have made a similar application to that which Mrs Simes has initiated.

[29] The dispute between Mrs Simes as the Commissioner requires interpretation of provisions in the following Acts and Regulations:

- Legal Services Act 2011;
- Family Court Act 1980; and

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15 *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) at 276; and *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 (CA) at [16].

16 Refer generally *Mandic v The Cornwall Park Trust Board (Inc)* [2011] NZSC 135, [2012] 2 NZLR 194.

- Family Court Rules 2002.

[30] Since Mrs Simes commenced her application, the parties have expanded the scope of their submissions to include consideration of the powers of the Commissioner to seek documents and reports that are created under the auspices of other "family law" statutes and regulations, namely:

- Care of Children Act 2004;
- Oranga Tamariki Act 1989;
- Protection of Personal Property Rights Act 1988; and
- Evidence Regulations 2007.

Relevant legislation and regulations

[31] It is convenient to first examine the relevant provisions of the Act and then consider the provisions of the Family Court Act relating to publication of reports of Family Court proceedings. I then consider the Family Court Rules governing access to Family Court files and the status of documents and evidence that may be on the court files, which are governed by specific statutes. Thereafter, I shall examine the provisions of the other statutes and regulations referred to at [30] above.

Legal Services Act 2011

[32] Section 108 of the Act governs the disclosure of information by persons who are "bound or privileged by an enactment or a rule of law to maintain secrecy about a matter".[17] Under s 108(3) of the Act the Commissioner is:

> … allowed to require a person who is bound or privileged … to maintain secrecy to breach that secrecy if—
>
> (a) the breach relates to an applicant for legal aid for a civil matter; and
>
> (b) the applicant has given consent in writing to the breach.

[17] Legal Services Act 2011, s 108(2).

[33] Under s 108(5) of the Act:

> … a person may disclose to the Commissioner any communication between the aided person and his or her lawyer, or sent to or by the aided person to his or her lawyer (whether or not the communication is marked "confidential" or "without prejudice"), if—
>
> (a) the aided person's grant of legal aid is in respect of a civil matter; and
>
> (b) the purpose of the disclosure is to inform the Commissioner of matters relevant to the withdrawal or amendment of legal aid on the grounds set out in section 30(2)(d).[18]

[34] Thus, s 108(3) of the Act provides the Commissioner with authority to obtain information, notwithstanding a statutory requirement or rule of law which otherwise prevents disclosure, if the information in question relates to an application for civil legal aid and if the applicant for civil legal aid provides his or her consent to the disclosure. Section 108(5) empowers the Commissioner to obtain documents that are governed by legal professional privilege and litigation privilege where the withdrawal or amendment of civil legal aid is in issue. The effect of s 108 of the Act is considered in further detail at [86]–[99] below.

[35] The discretionary powers conferred upon the Commissioner by s 108(3) and (5) of the Act can be compared with the mandatory duties placed upon a lawyer who is being audited under the Act. A lawyer who is being audited must:[19]

> (a) ensure that the auditor is given access at all reasonable times to all documents under the control of the provider that relate to the claim under examination, or to matters for which the provider has claimed or may claim payment … ; and
>
> (b) use his or her best endeavours to ensure that questions relating to the claim being examined, or to any matter to which the audit relates,

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[18] Section 30(2)(d) is in the following terms:

30 Withdrawal of, or amendment to, grant of legal aid: civil matters

…

(2) In relation to a civil matter, the Commissioner may at any time withdraw legal aid from, or amend a grant of legal aid to, an aided person in any of the following circumstances:

…

(d) the Commissioner considers that the aided person no longer has reasonable grounds for taking, defending, or being a party to the proceedings, or that it is unreasonable or undesirable in the particular circumstances for the person to continue to receive legal aid:

…

[19] Section 92(1).

are answered fully, frankly, promptly, and in the form (written or oral) required by the auditor; and

(c) permit, and if necessary assist, the auditor to copy any document or to reproduce, in usable form, information recorded or stored in a document.

Publication of reports of Family Court proceedings

[36] The Family Court is frequently engaged in considering very private and sensitive issues. It is a court that is required to function, in the main, beyond the view of the public. In order to protect vulnerable members of society the Family Court must guard against unnecessary public access to its hearings and files.[20] Family Court proceedings and files are, however, not completely secret. Section 11B of the Family Court Act is one of a number of measures enacted in 2008 to introduce an element of transparency to Family Court proceedings.[21]

[37] Section 11B(3) provides:

11B Publication of reports of proceedings

…

(3) A person may not, without the leave of the Court, publish a report of proceedings in the Family Court that includes identifying information where—

(a) a person under the age of 18 years—

(i) is the subject of the proceedings; or

(ii) is a party to the proceedings; or

(iii) is an applicant in the proceedings; or

(iv) is referred to in the proceedings; or

(b) a vulnerable person—

(i) is the subject of the proceedings; or

(ii) is a party to the proceedings; or

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20 *White v Hewett* [2015] NZHC 1749 at [28]–[29]; *R v District Court, Kaitaia* [1994] NZFLR 558 (DC) at 562; and *K v K* [2005] NZFLR 28 (HC) at [62].

21 Family Courts Matters Bill 2007 (143-2), Commentary, "The changes introduced by the bill are intended to enhance the public's confidence in the Family Courts by making them more open to scrutiny".

(iii) is an applicant in the proceedings.

[38] Reports of proceedings in the Family Court to which s 11B(3) of the Family Court Act relates may be published with the leave of the Court, or may be published without leave, in professional or technical publications and provided any report does not identify certain people referred to in s 11B(4)(a)(ii) of the Family Court Act.[22]

[39] The Supreme Court's judgment in *ASG v Hayne* is relevant to determining the scope of the term "publication" in s 11B of the Family Court Act.[23] In *ASG v Hayne*, the Supreme Court explained that the suppressed name of an offender was not "published" in breach of s 200 of the Criminal Procedure Act 2011 when the offender's name was passed between officers of the employer of the offender. The Supreme Court said:[24]

> The section does not encompass the dissemination of information to persons with a genuine need to know or, as the Court of Appeal put it, "a genuine interest in knowing", where the genuineness of the need or interest is objectively established.

[40] Applying the Supreme Court's reasoning to the text of s 11B(3) of the Family Court Act leads to the conclusion that provision restricts the publishing of reports of Family Court proceedings by limiting the circumstances under which information about Family Court proceedings can be disseminated. The legislative restrictions encompass the dissemination of reports of Family Court proceedings to the public at large, or to others who have no objectively genuine need to know the information that is the subject of the publication.

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[22] **11B Publication of reports of proceedings**

…

(4) However, subsection (3) does not apply to–

(a) a report of proceedings in a publication that– …

(ii) does not include the name of–

(A) any person under the age of 18 years who is the subject of the proceedings, or who is referred to in the proceedings:

(B) any vulnerable person who is the subject of the proceedings:

(C) any parties or applicants in the proceedings where subsubparagraph (A) or (B) applies:

(D) any school that a person who is the subject of proceedings under the Oranga Tamariki Act 1989 is or was attending, or any other particulars likely to lead to the identification of that school.

…

[23] *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777.

[24] At [79] (citations omitted). See also *Television New Zealand Ltd v Solicitor-General* [2008] NZCA 519, [2009] NZFLR 390 at [53].

[41] The text and purpose of s 11B places broad limits upon the publication of reports of Family Court proceedings. It does not, however, apply to the forwarding of information to the Commissioner by a legal aid party or, their lawyer where the Commissioner has an objectively genuine interest in receiving that information. This criterion is satisfied if the Commissioner seeks the information to discharge his duties under the Act.

Family Court Rules 2002

[42] The purpose of the Family Court Rules is to:[25]

> … make it possible for proceedings in Family Courts to be dealt with—
>
> (a) as fairly, inexpensively, simply, and speedily as is consistent with justice; and
>
> (b) in such a way as to avoid unnecessary formality; and
>
> (c) in harmony with the purpose and spirit of the family law Acts under which the proceedings arise.
>
> …

[43] Rules 426–429 of the Family Court Rules govern accessing Family Court files or documents.[26] "Access" is defined in r 426 to mean, inter alia, "to search or inspect any Family Court file or to copy any document or Family Court file" under the supervision of an officer of a court. A court file is defined in r 426 to mean "a collection of documents in the custody or control of the court that relate to a proceeding".

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[25] Family Court Rules 2002, r 3(1)(a)-(c).

[26] Document is defined in r 426 to mean:
- (a) … any written material in the custody or control of the court that relates to a proceeding (including any interlocutory application associated with the proceeding), whether or not kept on a court file; and
- (b) includes documentary exhibits, video recordings, records in electronic form, films, photographs, and images in electronic form; but
- (c) excludes–
  - (i) notes made by or for a Judge or Registrar for his or her personal use; and
  - (ii) any document that discloses the address of an applicant who–
    - (A) is an applicant for a protection order; and
    - (B) has advised the court that he or she wishes his or her address to be kept confidential …
  - (iii) any material that relates to the administration of the court.

[44] Rule 426 defines two periods during which access may be permitted to a Family Court file. The first access period covers the period from the date the proceeding is commenced to six years from the date of either a sealed judgment or order or, if there is no sealed judgment or order, six years from the date of the Judge's reasons or order. The second access period covers the time from when the first access period ends to when the Family Court file is transferred to Archives New Zealand, pursuant to the Public Records Act 2005.

[45] Rules 427(2) and (3) restricts who may access documents or Family Court files during the first access period. Those persons fall into two categories, namely:

(1) In ordinary proceedings in the Family Court, access is limited to a party to the proceeding, their lawyer, a lawyer appointed to represent a child or young person, or a lawyer appointed to assist the Court in the proceedings.

(2) In relation to proceedings under the Oranga Tamariki Act 1989, access may also be exercised by a lay advocate appointed to appear in support of a child or young person who is the subject of the proceedings, a care and protection co-ordinator, a youth justice co-ordinator, or the Children's Commissioner or a person authorised by the Children's Commissioner to act on behalf of that Commissioner.

Thus, in the absence of any other authority, the Commissioner cannot access documents or Family Court files during the first access period. The Commissioner is only likely to be interested in documents during the first access period.

[46] Rule 427 is, however, subject to r 429, which allows any person to access a Family Court file if they make an application to the Family Court. Access may be granted by a Registrar if they are satisfied "that the applicant has a genuine and proper interest" in accessing the Family Court file or document.[27] If the Registrar is in doubt as to whether to authorise access to the Family Court file or not, then he or she may refer the application to a Judge who may authorise access if satisfied the

[27] Family Court Rules 2002, r 429(3)(a).

applicant has a genuine and proper interest in accessing the Family Court file or document.[28]

[47] Rules 426–429 were considered by Hansen J in *L v Family Court at Dunedin*,[29] and featured in the opinions of Ms Cull and Ms Parsons when they concluded the Commissioner could only access documents or a Family Court file by making application under r 429.

[48] Access to a document or Family Court file under rr 426–429 means however access to the document or court file that is "in the custody or control of the court".[30] The Family Court Rules are not directly engaged when the Commissioner is seeking production of documents in the custody of the legal aid party or their lawyer. In this respect, the issue that was before Hansen J in *L v Family Court at Dunedin* was different from the issue that I have had to consider. In that case, the Court was concerned with an application being made to the Family Court by the lawyer for the child on behalf of the police, who wished to access the Family Court file. The police were not seeking documents directly from the lawyer for the child or any party to the proceeding. For this reason, Hansen J directed that it was necessary for the person who wished to access the Family Court file to make that application and to satisfy either the Registrar or the Court that they had a proper interest in accessing the documents in question. Mr Cooke is correct when he submitted that, in the circumstances with which I am concerned, the Commissioner is not seeking access to the Court file. If he was then clearly he would need to make an application under r 429.

Care of Children Act 2004

[49] Section 132 of the Care of Children Act requires the Chief Executive of the Department for Vulnerable Children – Oranga Tamariki (Oranga Tamariki), or a social worker, to comply with directions from a court to submit a report to the court in relation to any application for guardianship or a permanent parenting order.

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28 Family Court Rules 2002, r 429(3)(b) and (4)(a).
29 *L v Family Court at Dunedin*, above n 7.
30 Refer to definitions of "court file" and "document" in Family Court Rules 2002, r 426.

[50] Section 133 of the Care of Children Act permits a court to obtain a medical, psychiatric, psychological or cultural report in relation to any application for guardianship, permanent parenting order or an application under s 105(1) of the Care of Children Act to return an abducted child to New Zealand.[31] Slightly different considerations apply in relation to a court obtaining cultural, medical or psychiatric reports[32] from those that apply to obtaining psychological reports.[33] Those differences are not relevant to the issues I have to consider. What is important is that all reports governed by s 133 of the Care of Children Act are commissioned by a court which is responsible for requesting one from "a person whom the court considers qualified … to prepare [a s 133 report]"; or by directing the Registrar to request a suitably qualified person to prepare a s 133 report.[34]

[51] Section 134 of the Care of Children Act governs the distribution of reports obtained by a court under ss 132 and 133. Under s 134(1) the Registrar must copy a s 132 or a s 133 report to the lawyer acting for each party to the proceeding, or if a party has no lawyer, then to that party. The Registrar must also copy a s 132 or a s 133 report to any lawyer appointed to act for a child. Section 134(2) permits a court to, however, direct a lawyer not to give or show a report to his or her client. A court may also direct that a party without a lawyer not receive a s 132 or a s 133 report if satisfied that providing the report directly "to that party, [would] place the child concerned or another person at risk of physical abuse, sexual abuse, or psychological abuse".[35] Before a report is copied to the lawyer appointed to act for the child "the court must consider whether the report may be given or shown directly to the child for whom the lawyer is acting".[36] Consequently, the lawyer appointed to act for a child may only give a s 132 or a s 133 report to a child for whom he or she is acting, "if the court so orders".[37]

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31 "Application" is defined in Care of Children Act 2004, s 133(1).
32 Section 133(3).
33 Section 133(6).
34 Section 133(2) and (5).
35 Section 134(3).
36 Section 134(4).
37 Section 134(5): "But in every case the lawyer must explain to the child the purpose and contents of the report, unless the lawyer considers that to do so would be contrary to the welfare and best interests of the child".

[52] Two principles may be extracted from ss 132 to 134 of the Care of Children Act that are relevant to the issues in this proceeding:

(1) It is the court that controls the obtaining of s 132 or s 133 reports in order to properly determine applications relating to the day-to-day care and upbringing of a child and to regulate proceedings so as to ensure they are conducted in a way that promotes the welfare and best interests of children who are the subject of the proceeding. This will usually require the proceeding to be conducted fairly, expeditiously and as inexpensively as possible.

(2) With some exceptions, it is the court that controls the distribution of reports obtained under ss 132 and 133 of the Care of Children Act. Lawyers acting for a party and a lawyer appointed to act for a child have unfettered access to s 132 and s 133 reports. The right of parties and children to receive s 132 and s 133 reports is subject to the court being satisfied that releasing those reports would not create a risk of physical, sexual or psychological abuse to a child or young person who is the subject of the proceeding, or any other person, and that sharing a s 132 or a s 133 report with the child would not be contrary to the welfare and best interests of that child or young person.

Oranga Tamariki Act 1989

[53] Family group conferences are convened in accordance with the provisions set out in ss 20–32 of the Oranga Tamariki Act. A family group conference may make decisions and recommendations and formulate plans in relation to the care or protection of the child or young person.[38] A written record of any decision, recommendation or plan is able to be provided to specified persons in s 32, including the child or young person for whom the conference was convened, every parent or guardian, any person representing the child or young person and any person who will be directly affected by the contents of the record.[39] Records are held by Oranga

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38 Oranga Tamariki Act 1989, s 29.

39 Section 32(1). An appropriate social service or appropriate care and protection resource panel should also have access.

Tamariki and access is granted to those people specified in s 32, any care and protection co-ordinator, the chief executive and any other person who, in the opinion of the protection co-ordinator, has a genuine and proper interest in the matter.[40] Records of family group conferences become relevant to the case before me when those records are filed in Family Court proceedings, at which point they form part of the court record.

[54] Section 128 of the Oranga Tamariki Act also requires a court to obtain plans before making "a services order under s 86", "a support order under s 91", "[a permanent] order … under s 101 placing any child or young person in the custody of any person", "an order under s 110 appointing any person as the sole guardian of a child or young person", or "a special guardianship order under s 113A" of that Act.[41]

[55] Section 132(1) of the Oranga Tamariki Act requires a court to furnish every plan obtained under s 128 to:

(1) "every person entitled to appear and be heard on the application … [including any lawyer] appearing for that person";

(2) "any lay advocate, [lawyer], or other person representing the child or young person to whom the application relates or a parent or guardian or other person who usually [has] the care of the child or young person";

(3) "the Chief Executive [of Oranga Tamariki]"; and

(4) "any other person whom the court considers has a proper interest in receiving a copy of the plan".

[56] Section 133 provides a court with the discretion to withhold the provision of "the whole or any part of a plan" from:

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40 Oranga Tamariki Act 1989, s 33(2).
41 Section 128(2).

> … any person specified in the order where it is satisfied that such disclosure would be, or would be likely to be, detrimental to the physical or mental health, or the emotional wellbeing, of any child or young person or other person to whom the plan relates.

[57] Four other types of reports may be obtained by a Court under the Oranga Tamariki Act that are relevant to the issues addressed in this case:

(1) Section 178 permits a court to obtain "a medical, psychiatric, or psychological report" in "respect of any child or young person to whom the proceedings relate".

(2) Further psychiatric reports may be received by a court under s 181(1)(b) recommending the detention of any child or young person in a psychiatric hospital for further observation.

(3) Section186 requires a court to obtain a report from a social worker before making certain types of custody or guardianship orders.

(4) Section 187 permits a court to obtain a cultural and community report before making certain additional orders in cases where a child or young person is subject to a care or protection order.

[58] Section 191 of the Oranga Tamariki Act provides that, subject to s 192, copies of reports obtained under ss 178, 181, 186 or 187 shall be given to the parties and their lawyers, representatives of a child or young person or their carers, the Chief Executive of Oranga Tamariki and to "any other person whom the court considers has a proper interest in receiving a copy of the report". Under s 192 of the Oranga Tamariki Act, the court may order that the whole or part of a report obtained under ss 178, 181, 186 or 187 not be disclosed to any person specified in the order "where it is satisfied that such disclosure would be, or would be likely to be, detrimental to the physical or mental health, or the emotional wellbeing, of any child or young person or other person to whom the report relates".

[59] Although the court must obtain plans under s 128 in respect of any orders referred to in s 128(2), the court retains some control over the distribution of such

plans to persons to whom the plans relate under s 133 of the Oranga Tamariki Act. As with reports obtained under ss 132 and 133 of the Care of Children Act, the court controls the obtaining of reports under ss 178, 181, 186 and 187 of the Oranga Tamariki Act. The court also has control over the distribution of those reports beyond the parties, their representatives and the Chief Executive of Oranga Tamariki. Thus, for present purposes, plans and reports obtained under the Oranga Tamariki Act should be viewed in the same light as reports under ss 132 and 133 of the Care of Children Act.

Protection of Personal and Property Rights Act 1988

[60] Section 76 of the Protection of Personal and Property Rights Act 1988 permits a court to obtain "a medical, psychiatric, psychological, or other report on the person in respect of whom" an application for a personal or property order is made. The Registrar is to give a copy of the report to the lawyer for each party, or to the party directly if they are not represented, and any appointed lawyer under s 65A.[42] Under s 76(4), "[a] report given to a lawyer … shall not be given or be shown to the person for whom the lawyer is acting if the court so orders". No legislative guidance is given to courts when deciding whether or not to withhold reports for the person in respect of whom an application is made under the Act. The section appears to contemplate that a court would withhold disclosure of a report when satisfied that it would be contrary to the best interests and welfare of the person in respect of whom an application is made under the Act to disclose to that person the contents of any report obtained under s 76 of the Protection of Personal and Property Rights Act.

Evidence Regulations 2007

[61] Regulation 22(1) of the Evidence Regulations 2007 enables the Family Court to obtain from the police a copy of a video tape of a child complainant for the following purposes:

> (a) allowing parties to a proceeding under the Care of Children Act 2004 or a lawyer for any of those parties to view the video record:

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[42] Protection of Personal and Property Rights Act 1988, s 76(3).

(b) assisting a person that the Family Court Judge considers qualified to prepare a cultural, medical, psychiatric or psychological report on the child under s 133 of the Care of Children Act: ….

(c) allowing parties to a proceeding under Part 2 of the Oranga Tamariki Act 1989 or the lawyer for any of those parties to view the video record:

(d) assisting a person to prepare a medical, psychiatric, or psychological report on the child under s 178 of the Oranga Tamariki Act 1989.

[62] The Family Court is required to place a working copy of the video record, and a copy of the working copy, in safe custody.[43] Very tight constraints are placed on access to video recordings of a child complainant that is obtained by the Family Court from the police. Under reg 22(4):

> The Family Court may only show the video record if—
>
> (a) a Family Court Judge is satisfied that showing it is in the best interests of the child who is the subject of the proceedings under the Care of Children Act 2004 or the care or protection proceeding under the Oranga Tamariki Act 1989; and
>
> (b) a Family Court Judge authorises in writing the viewing of it by the person or persons concerned; and
>
> (c) the viewing takes place within the Family Court premises; and
>
> (d) the viewing is supervised by a Registrar of the Family Court or by any person nominated by a Registrar; and
>
> (e) the Family Court Judge is satisfied that showing it is not likely to jeopardise any pending criminal proceeding.

[63] Video records may also be made available to Oranga Tamariki pursuant to reg 21. A transcript to accompany the video record must also be provided and placed in safe custody under reg 23. Regulation 24 provides:

> …
>
> (2) A Family Court may only copy or arrange for the copying of a transcript in its custody under regulation 23 in relation to a purpose specified in any of paragraphs (a) to (d) and regulation 22(1).
>
> …
>
> (3) Despite [subclause 2] … a Family Court may copy or arrange for the copying of a transcript in its custody under regulation 23 if—

[43] Evidence Regulations 2007, reg 22(3).

(a) satisfied that doing so is in the best interests of the child who is the subject of the proceeding…

(b) satisfied that doing so is not likely to jeopardise any pending criminal proceeding; and

(c) a record is kept of every person to whom a copy of the transcript is given.

(4) No person may make a copy of a transcript supplied under this regulation other than as provided for in this regulation.

…

Analysis

[64] The issues raised by Mrs Simes' application are best analysed by applying the relevant legislation and regulations to specific types of documents created under the auspices of family law legislation and regulations. This analysis will then be tested by seeing if s 108 of the Act affects the analysis undertaken at [65]–[85].

Copies of judgments, minutes and orders

[65] Copies of judgments, minutes and orders that have been made available by the court to a legal aid party or their lawyer, may be forwarded to the Commissioner in two circumstances:

(1) Where the Commissioner seeks the document to discharge his duties under the Act; and

(2) Where the court has not made an order preventing the distribution of the document in question to the Commissioner.

[66] The reasons for this can be distilled to the following three points.

[67] First, forwarding these documents to the Commissioner does not breach s 11B of the Family Court Act. When the Commissioner seeks these documents in order to discharge his duty under the Act, he would have an objectively genuine interest in receiving those documents.

[68] Second, forwarding those documents to the Commissioner does not breach rr 426–429 of the Family Court Rules. Although the originals of those documents are likely to be in the custody or control of the court, the copies that the court sends to the parties or their lawyer(s) involves the court implicitly releasing custody or control of the copies of those documents. The copies of these documents are no longer on the court file and the court has ceased to assert any custody or control over the documents once they are released to a legal aid party or their lawyer. Absent the court directing otherwise, this means that those copies may be forwarded to the Commissioner in order to discharge his duties under the Act.

[69] Third, there is nothing in any statute or regulation that clearly prevents a legal aid party or their lawyer from providing these documents to the Commissioner to enable him to discharge his duties under the Act.

Copies of pleadings and affidavits from parties

[70] Copies of pleadings and affidavits from parties may also be forwarded to the Commissioner by a legal aid party or their lawyer where:

(1) The Commissioner seeks these documents to discharge his duties under the Act; and

(2) The court has not made any order preventing the distribution of these documents to the Commissioner.

[71] The reasons for this conclusion can also be succinctly summarised:

(1) Forwarding these documents to the Commissioner does not breach s 11B of the Family Court Act for the reasons set out at [67].

(2) Forwarding pleadings and affidavits to the Commissioner does not breach rr 426–429 of the Family Court Rules for the reasons set out at [68].

(3) The Family Law Section advised its members that copies of a legal aid party's application and affidavit should be forwarded to the Commissioner. There is, however, no reason in principle why a legal aid party or their lawyer cannot also provide the Commissioner with copies of affidavits and statements of evidence filed by other parties in the proceeding as there is no statute or regulation that expressly prevents a legal aid party or their lawyer forwarding these documents to the Commissioner. Provision of documents filed by other parties is also consistent with s 10(4)(d)(i) of the Act, which requires the Commissioner to consider the "applicant's prospects of success". It is hard to see how the Commissioner can form an objective and informed view of a legal aid party's prospects of success without considering the opposing party's case.

Notes of evidence

[72] Notes of evidence are not created pursuant to any statute or regulation. The parties have, however, made submissions about the Commissioner's ability to access notes of evidence. It is convenient to consider the Commissioner's ability to access notes of evidence at this point in my judgment. Notes of evidence may be forwarded to the Commissioner by a legal aid party or their lawyer where:

(1) The Commissioner seeks these documents to discharge his duties under the Act; and

(2) The court has not made any order preventing the distribution of the notes of evidence to the Commissioner.

[73] The reasons for this conclusion are as follows:

(1) First, forwarding the notes of evidence to the Commissioner does not breach s 11B of the Family Court Act for the reasons set out at [67].

(2) Second, forwarding notes of evidence to the Commissioner does not breach rr 426–429 of the Family Court Rules. Notes of evidence are

an extension of the statements of evidence already filed, obtained through the examination-in-chief and cross-examination. While the notes of evidence are, by contrast to affidavits, produced within the court environment, their status is similar. Most relevant is the fact that notes of evidence are made available to lawyers or a legal aid party during the course of proceedings. The same analysis set out at [68] therefore applies in that the copies of notes of evidence are no longer on the court file and, in the absence of directions to the contrary, the court has ceased to assert any custody or control over those copies once they are released to a legal aid party or their lawyer.

(3) Third, there is nothing in any statute or regulation that clearly prevents a legal aid party or their lawyer from providing copies of notes of evidence to the Commissioner to enable him to discharge his obligations under the Act.

Reports from lawyer for a child or young person

[74] Even though s 9B of the Family Court Act defines the role of a lawyer appointed to represent a child or young person, there is no reference in any legislation or regulation to reports prepared and filed in the Family Court by a lawyer appointed to represent a child or young person.

[75] A lawyer who is appointed to represent a child or young person receives his or her appointment from the court if that appointment is necessary.[44] The court maintains some control over the way that lawyer discharges their responsibilities. For example, in exceptional circumstances, a judge may direct a lawyer appointed to represent a child or young person not to meet with that person.[45] Undoubtedly, the court could also give directions to a lawyer representing a child or young person to undertake inquiries or research that the court believes may assist in resolving issues under the Act.

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44 Care of Children Act 2004, s 7; and Oranga Tamariki Act 1989, s 159.
45 Family Court Act 1980, s 9B(3).

[76] A lawyer appointed to represent a child or young person must act for that child or young person to promote their welfare and best interests.[46] However, the lawyer is also required to act in a way that recognises the lawyer's overarching ethical and professional obligations to the court.[47]

[77] Any report provided by a lawyer appointed to represent a child or young person is normally filed with the court and forwarded to the parties' lawyers or the parties themselves if they are not represented by a lawyer.

[78] While the court may retain some residual control over a report prepared by a lawyer appointed to represent a child or young person, such a report may be forwarded to the Commissioner where:

(1) The Commissioner seeks that report to discharge his duties under the Act; and

(2) The court has not made any order preventing the distribution of that report to the Commissioner.

[79] The reasons for this conclusion can also be reduced to three points:

(1) Forwarding to the Commissioner a report prepared by a lawyer appointed to represent a child or young person does not breach s 11B of the Family Court Act for the reasons set out at [67].

(2) Forwarding to the Commissioner a report prepared by a lawyer appointed to represent a child or young person does not breach rr 426–429 of the Family Court Rules for the reasons set out at [68].

(3) Unlike the other types of report that are considered at [80]–[85], there is no statute or regulation that clearly prevents the Commissioner obtaining from a legal aid party or their lawyer, a report that has been prepared by a lawyer to represent the interests of a child or young

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46 Family Court Act 1980, s 9B(1)(a) and (c).
47 Section 9B(1)(b).

person to enable him to discharge his duties under the Act. The absence of any provision governing the release to the Commissioner of a report from a lawyer for a child or young person does not, however, preclude a court from directing in exceptional circumstances, in advance of the report being forwarded to the parties, that such a report not be released where a court thinks it is appropriate to do so. Absent such a direction, reports from a lawyer for a child or young person may be forwarded to the Commissioner.

Reports prepared under ss 132 and 133 of the Care of Children Act 2004

[80] Reports prepared under ss 132 and 133 of the Care of Children Act are commissioned for a court. While lawyers will receive copies of these reports, they are not necessarily provided to parties or to the child or young person who is the subject of proceedings. Ultimately, it is the court that retains control over access to these reports.[48] It is therefore the court that must decide if a third party, such as the Commissioner, should be able to receive copies of these reports. I am persuaded that access to these reports should be restricted for two further reasons:

(1) There are specific provisions in the Care of Children Act relating to the obtaining of, and distribution of, s 132 and s 133 reports. These specifically enacted provisions indicate the court has custody and control over the reports.

(2) Reports obtained under s 132 or s 133 of the Care of Children Act are prepared by a report writer who is considered by the court to be suitably qualified to prepare the report.[49] Social worker reports under s 132 or medical, cultural psychiatric or psychological reports under s 133 are of a "specialist" nature and are more likely to contain more sensitive material than other documents relevant to court proceedings.

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48 *P v D* (1996) 14 FRNZ 470, [1996] NZFLR 721 (HC) at 724, referring to s 29A of the Guardianship Act 1968, the predecessor provision to s 133 of the Care of Children Act 2004.

49 Care of Children Act 2004, ss 132(2) and 133(2) and (5)(a).

[81] The Commissioner can only therefore initiate access to these reports by making an application to the court under r 429 of the Family Court Rules. Once such an application is made it will be for the court to decide if the Commissioner may access the reports in question.

Reports and plans under ss 132, 133, 178, 181, 186 and 187 of the Oranga Tamariki Act 1989

[82] The same considerations applying to reports under ss 132 and 133 of the Care of Children Act apply to plans and reports commissioned under the Oranga Tamariki Act. Plans are prepared by a court-appointed person. Sections 178, 181 or 186 reports are prepared by suitably qualified specialists,[50] and s 187 reports are prepared by a court-appointed person. Thus, for the reasons set out at [80], the Commissioner can only access the plans and reports under the Oranga Tamariki Act if he makes application to the court under r 429 of the Family Court Rules.

Records of family group conferences under the Oranga Tamariki Act 1989

[83] The provisions governing family group conferences under the Oranga Tamariki Act indicate these reports should not be distributed without reference to Oranga Tamariki. If the documents are within the custody or control of the Court however, I see no reason why they should not be accessed via an application under r 429 of the Family Court Rules, in the same way as the Commissioner must apply to a court for access to plans and reports under the Oranga Tamariki Act.

Reports under s 76 of the Protection of Personal and Property Rights Act 1988

[84] The effect of s 76(4) of the Protection of Personal and Property Rights Act is that the court retains control over medical, psychiatric, psychological or other reports prepared pursuant to s 76 of the Protection of Personal and Property Rights Act. Accordingly, reports of this category are to be treated the same way as reports prepared under ss 132 and 133 of the Care of Children Act.

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[50] Oranga Tamariki Act 1989, ss 179, 181(3), 186(5) and 187(1).

Video recordings under reg 22 of the Evidence Regulations 2007

[85] A video recording of a child complainant obtained by the Family Court pursuant to reg 22 of the Evidence Regulations 2007 can only be accessed for a purpose specified in reg 22(1) which I have set out at [59]. The Family Court does not have a discretion to release a video recording of a child complainant for any other reason. In his submissions, Mr Cooke accepted that s 108 of the Act would not prevail over regs 22–24 of the Evidence Regulations. That was a proper concession by Mr Cooke in light of the strict controls that apply to access to these recordings. Accordingly, if the Commissioner considers he needs to access recordings under regs 22–24 of the Evidence Regulations, he must apply to the court under s 429 of the Family Court Rules.

Scope of s 108 of the Legal Services 2011

[86] The analysis of the effect of the statutory provisions and regulations I have considered at [65]–[85] will now be assessed against s 108 of the Act.

[87] An examination of the text of s 108 of the Act leads to the conclusion that it applies to situations where a legal aid party, or their lawyer, is bound by privilege or confidentiality not to disclose documents to third parties. For the reasons which are set out at [88]–[99], s 108 of the Act does not permit a legal aid party, or their lawyer, to disclose to the Commissioner documents that are under the control or authority of the court without first obtaining the permission of the court to do so.

[88] Section 108(3) of the Act authorises the Commissioner to receive documents from an applicant, or their lawyer, in circumstances where the applicant or their lawyer would otherwise be bound by the laws or rules governing privilege and confidentiality. There are two qualifications to this explanation of s 108(3). First, the document must be relevant to an application for civil legal aid and, second, the applicant must give their consent in writing to the disclosure. Section 108(5), on the other hand, authorises a recipient of civil legal aid or their lawyer to disclose to the Commissioner communications between the recipient of civil legal aid and his or her lawyer and applies even where the communications are marked "confidential" or "without prejudice". There are also two qualifications to this explanation of

s 108(5). First, the legal aid person must be in receipt of a grant of civil legal aid. Second, the purpose of the disclosure must be to inform the Commissioner of matters relevant to an amendment or withdrawal of civil legal aid.

[89] In most cases, the documents that the Commissioner will be interested in will be subject to one of two types of privilege, namely legal professional privilege or litigation privilege. Both categories of privilege vest with the applicant for civil legal aid the authority to disclose the document in question to third parties. It is the applicant for civil legal aid, and not his or her lawyer, who has privilege over the documents.[51] Different considerations may arise in relation to documents governed by confidentiality. Often documents of this type will have come into the possession of the applicant from third persons on the basis that the applicant will not disclose the document without the prior consent of the person from whom the document was obtained.

[90] Section 108(5) of the Act targets a narrower range of documents than s 108(3). Section 108(5) is limited to communications between a recipient of civil legal aid and his or her lawyer. Those communications will normally be governed by legal professional privilege which, as noted at [89], vests with the client and not his or her lawyer.

[91] The purpose of s 108(3) and (5) is primarily directed towards insulating lawyers from the consequences that might otherwise flow if they breach their clients' privilege and rights of confidentiality over documents. At the heart of s 108(3) and (5) is the acknowledgement that it is, under normal circumstances, the right of the lawyer's client to determine who may receive documents governed by privilege and confidentiality.

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[51] For legal professional privilege see Evidence Act 2006, s 54; and *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at [45]: "It is, of course, well established that [legal professional privilege] belongs to the client and not to his lawyer, and that it may not be waived by the lawyer without his client's consent." For litigation privilege see Evidence Act 2006, s 56; and *Jeffries v Privacy Commissioner* [2010] NZSC 99, [2011] 1 NZLR 45 at [21]: "Section 56, like the common law of litigation privilege it replaces, is concerned … with preserving confidentiality in the preparation for a proceeding. What matters is the character of the information made, received, compiled or prepared by or *on behalf of the party whose privilege it is*". (Emphasis added.)

[92] Where a document or information is not governed by privilege or confidentiality, then the terms of a lawyer's contract with the Commissioner may require him or her to notify the Commissioner of matters that materially decrease a legal aid person's prospects of success. This obligation, however, does not override the authority of a court to ultimately determine who may access certain types of documents that are commissioned for the court.[52]

Judgments, minutes and orders

[93] It is axiomatic that a legal aid party does not have privilege over documents or information that are created by the court. Thus judgments, minutes and orders are not subject to an applicant's privilege. Unless stated otherwise, judgments, minutes and orders are not regarded by the court as being so confidential that they cannot be disclosed to the Commissioner. Thus, s 108(3) and (5) do not apply to judgments, minutes or orders of the court. These documents may therefore be supplied to the Commissioner by a legal aid party or their lawyer in order to enable him to discharge his duties under the Act.

Pleadings

[94] The pleadings of any party are not subject to privilege once they have been filed in court. Any requirement to waive confidentiality in relation to pleadings in the Family Court may be waived by an applicant for civil legal aid consenting to the release of those documents to the Commissioner pursuant to s 108(3) of the Act.

Evidence

[95] Once filed in court, an applicant's evidence is not subject to privilege. Evidence given in court is similarly not subject to privilege. The evidence of another party is similarly not governed by privilege once it is filed in court. It is also highly unlikely that a legal aid party's evidence would be subject to some form of confidentiality once it is filed in court. Even if it were subject to confidentiality then that confidentiality could be waived by the legal aid party pursuant to s 108(3) of the

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[52] Family Court Rules 2002, rr 426–429; Senior Courts (Access to Documents) Rules 2017; and *G v G* (1995) 13 FRNZ 194 (DC), refusing to release a psychologist report to the Psychologists' Registration Board under the Guardianship Act 1968.

Act. The evidence of another party, once received by a legal aid party, may be subject to an expectation of confidentiality that can also be waived by the legal aid party pursuant to s 108(3) of the Act. This assessment is subject to two qualifications, namely:

(1) That the evidence is sought by the Commissioner in order to discharge his duties under the Act; and

(2) That a court has not directed in advance that the evidence in question be withheld from the Commissioner.

Reports from lawyer for a child or young person

[96] Reports from a lawyer for a child or young person are, in all likelihood, provided to a legal aid party on a generally confidential basis. There are situations however, when it is appropriate for such reports to be disclosed to a third party who has an objectively genuine interest in receiving such reports. Examples of legitimate third party recipients of reports from a lawyer for a child or young person include the Commissioner who may need to receive such reports, on a confidential basis, in order to discharge his responsibilities under the Act. Another example may be a medical practitioner or a psychologist consulted by the legal aid party who needs to show a report from a lawyer for a child or young person to his or her doctor or psychologist in order to obtain care and treatment.

Summary

[97] In summary, s 108(3) and (5) of the Act allows a legal aid party, or their lawyer, from disclosing the following categories of documents to the Commissioner:

(1) Judgments, orders or minutes unless the court orders otherwise;

(2) Pleadings;

(3) Evidence filed in courts, including affidavits and witness statements and notes of evidence; and

(4) Reports of a lawyer appointed to represent a child or young person, unless the court directs otherwise.

[98] A different conclusion is reached however in relation to the application of s 108 to reports, plans or a video record obtained under:

(1) Sections 132 and 133 of the Care of Children Act;

(2) Sections 132, 133, 178, 181, 186 and 187 of the Oranga Tamariki Act;

(3) Section 76 of the Personal and Property Rights Act; and

(4) Regulation 22 of the Evidence Regulations.

[99] This is because these reports and plans are commissioned or obtained by the court and provided to a legal aid party, or their lawyer, on a strictly confidential basis that can be deduced from the terms of the legislation or regulations governing the control of these reports. Neither a legal aid party, or, their lawyer, can waive the confidentiality that reposes in the court for whom these reports are prepared. It is the court, and not a legal aid party or their lawyer that controls the release of this category of report which can only be released to the Commissioner by a court or registrar under r 429 of the Family Court Rules.

Conclusion

[100] I am prepared to issue a declaration that Mrs Simes can release to the Commissioner the documents he requested from her on 28 November 2016, namely, copies of the most recent court minutes and directions and a copy of the most recent report from the lawyer for the children in the Family Court proceeding. The Commissioner does not need to apply to the Family Court to access these documents.

[101] The parties have asked that I consider issuing a declaration wider than that indicated at [100] which would extend beyond the scope of the current dispute between Mrs Simes as the Commissioner. It is now settled law that there does not

have to be a live dispute or lis for the High Court to issue a declaration.[53] I am therefore willing to give the parties an opportunity to agree on the terms of a wider declaration that reflects the full scope of this judgment. Counsel have 30 days from the date of this judgment to present any other form of direction they believe can be issued as a consequence of this judgment.

[102] Counsel also have 30 days from the date of this judgment in which to reach agreement on costs.

[103] In the absence of agreement, I will issue any further declaration that I consider appropriate and make an order as to costs.

D B Collins J

Solicitors:
Kiwilaw, Oxford for Plaintiff
D Stephens, Legal Services Commissioner, Ministry of Justice, Wellington for First Defendant
Meredith Connell – Wellington Branch, for Second Defendant

[53] *Mandic v The Cornwall Trust Board (Inc),* above n 16, at [8].