IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007-485-698

BETWEEN	KEVYN RAYMOND NESBITT BRON Plaintiff
AND	THE ATTORNEY-GENERAL First Defendant
AND	CROWN HEALTH FINANCING AGENCY Third Defendant

Hearing: 21 September 2009

Counsel: S Cooper and A T S Benton for plaintiff
D Ward for first and third defendants

Judgment: 23 September 2009

RESERVED JUDGMENT OF DOBSON J
(Application by plaintiff's counsel for leave to withdraw)

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[1] In form, this was an application by Ms Cooper for her firm to withdraw as solicitors on the record, and for her to withdraw as counsel for the plaintiff in these proceedings.

[2] In substance, the argument she advanced was focused very much as a further plea for an adjournment of the pending two day fixture set down for 28 and 29 September 2009, for the hearing of the plaintiff's application for leave to proceed with the present claims. Mr Bron's case is one of a very substantial number of historic abuse claims brought against government agencies and others alleged to be liable for the consequences of physical and psychological abuse suffered, in Mr Bron's case, between 1976 and 1986.

[3] When the proceedings were commenced in April 2007, they were accompanied by an interlocutory application for leave to proceed with them. That has been opposed. The plaintiff's application was originally allocated a two day fixture in March 2009, but was adjourned. The application has more recently been allocated the 28 and 29 September 2009 dates.

[4] Mr Bron commenced the proceedings and has pursued them on a legally aided basis. However, on 2 July 2009, counsel on his behalf filed a Memorandum advising that the Legal Services Agency had decided to withdraw legal aid. As a result of that, an adjournment of the 28 and 29 September 2009 fixture was sought, pending determination of an appeal on behalf of Mr Bron being pursued with the Legal Aid Review Panel. That application was opposed and, after hearing counsel, I declined to adjourn the fixture in a Minute issued on 17 July 2009.

[5] Since then, a further application for adjournment of the 28 and 29 September 2009 fixture was pursued by way of Memorandum dated 31 August 2009. That application was refused by the List Judge on 3 September 2009.

[6] Ms Cooper's argument proceeded on the premise of an entitlement to withdraw as solicitor on the record once there had been a withdrawal of legal aid. Without providing any communication from the New Zealand Law Society in writing, Ms Cooper repeated the effect of a passage in the affidavit sworn by Mr Benton in support of the application to withdraw in the following terms:

> Cooper Legal has received advice from the New Zealand Law Society that withdrawing as counsel is the appropriate course of action to take in these circumstances. The New Zealand Law Society takes the position that counsel is not required to undertake work when a client is unable to pay counsel's fee.

[7] Ms Cooper cited r 4.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which recognises an exception to a lawyer's duty to complete a retainer where the lawyer has terminated the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination. Rule 4.2.1(b) recognises "good cause" as including the inability or failure of the client to pay a fee.

[8] In the regulation of the relationship between a legal practitioner and client, a withdrawal of legal aid in such circumstances may exempt the practitioner from what is otherwise her or his obligation to complete the retainer. However, that cannot determine the entitlement of a solicitor on the record to withdraw from proceedings. With respect to whatever the terms of the view conveyed on behalf of the New Zealand Law Society to Ms Cooper may have been, the discrete obligation of a solicitor on the record to the Court is likely to reflect quite different considerations, and additional constraints on the liberty of a practitioner to withdraw.

[9] Although such considerations are not explicit, the terms of r 5.41 of the High Court Rules require a solicitor to apply to the Court for an order declaring that the solicitor cease to be the solicitor on the record. All of the responsibilities assumed as solicitor on the record continue until the final conclusion of the proceedings unless and until the solicitor has obtained such an order. Further, r 5.41(6) emphasises the distinction between the obligations assumed to the Court, and those regulating the relationship between solicitor and client. The rule specifies that an order declaring a solicitor to have ceased to be the solicitor on the record "does not affect the rights of the solicitor and the party for whom the solicitor acted as between themselves".

[10] There will be circumstances in which the Court will not be prepared to relieve a solicitor of her or his obligations to the Court, at least until further steps have been taken, for instance, where an application is made inappropriately close to the taking of a further step in the proceeding. In the present case, solicitors for Mr Bron signalled in early July 2009 that the unavailability of legal aid would preclude their completing the work necessary to present argument on the application for leave to proceed, and that stance has been repeated periodically since then.

[11] There can be no hard and fast rules for the circumstances in which the Court will deny a solicitor on the record leave to withdraw. In the present case, Ms Cooper submitted that not only is it the time required by her own firm, but that adequate preparation on behalf of Mr Bron would include the briefing of Dr Barry-Walsh to consider the psychiatric evidence filed in late July 2009 on behalf of the Crown, with a view to having Dr Barry-Walsh prepare an affidavit in reply. On the one hand, it might be said that the work already done on a legally aided basis would represent the

majority of what is needed to adequately present argument, and that if leave to proceed is not granted, then Mr Bron has had his day in Court (putting aside the prospect of an appeal from an unsuccessful application). On the other hand, the pattern of historic abuse cases is that they are all beset with a degree of legal complexity and certainly have their own intricacies on the facts. The circumstances in which this case has got to the present point render it one in which I would not be prepared to require Ms Cooper to prepare for and argue the application for leave to proceed on an unfunded basis.

[12] Ms Cooper produced a three page handwritten letter addressed to the Court from Mr Bron and dated 20 September 2009. That letter demonstrates an appreciation of Ms Cooper's position, acceptance of her inability to continue with his case other than on a legally aided basis and, consistently with Ms Cooper's submissions on this application, made an extensive plea for an adjournment of the application for leave to proceed until the availability of legal aid has been resolved by the Legal Aid Review Panel.

[13] Assuming that this is a situation in which the plaintiff's solicitors are entitled to an order declaring that they had ceased to be solicitors on the record, then Ms Cooper suggested the Court was confronted with three options. First, to proceed with the matter without counsel. Mr Bron is a sentenced prisoner at Hawke's Bay Regional Prison and there is no realistic prospect of his either appearing for himself, or instructing anyone else. The second option is to appoint counsel as amicus to assist the Court. The third option, being the one Ms Cooper still strenuously pursued, was to grant an adjournment.

[14] Ms Cooper would be the obvious choice to be appointed as amicus to present argument on behalf of Mr Bron. That course might appear superficially attractive in that it meets the Court's concern that the protracted course of at least one of the historic abuse cases would be progressed, and an amicus would facilitate Mr Bron's access to the Court. However, I do not see the situation of a previously legally aided plaintiff whose case is now viewed by the Legal Services Agency as not having sufficient prospects of success as an appropriate situation in which to facilitate argument on behalf of such a plaintiff by the appointment of an amicus. Typically

the Court is justified in appointing an amicus to enhance the quality of argument of an otherwise unrepresented interest. The role of amicus is not readily adapted to that of stepping into the breach for an unfunded plaintiff.

[15] The reality therefore is that the plaintiff's application for leave to proceed would be determined on 28 September 2009 with the plaintiff unrepresented. The provisions of r 7.40 of the High Court Rules provide that in those circumstances a Judge may determine the application in any manner that appears just. An application determined in the absence of a party may be the subject of a recall before it is drawn up and sealed, and a Judge may in any manner that the Judge thinks just reinstate an application that has been struck out for non-appearance.

[16] Since I declined a request for adjournment of the 28 and 29 September 2009 fixture in my Minute of 17 July 2009, I have had the benefit of thorough argument in the Legal Services Agency's appeal from reinstatement of legal aid in numerous historic abuse cases by the Legal Aid Review Panel (*Legal Services Agency v E & Ors* HC WN CIV 2009-404-3399 6 August 2009). The volume and scale of these cases present a range of most unusual case management problems. The Court is justifiably concerned to progress those proceedings that are viable in a prompt and efficient way. Defendants cannot be expected to simply stand ready to defend those of the cases in which legal aid continues to be available or is reinstated, as contested decisions on the availability of legal aid are eventually made. As Ms Cooper points out, the process of review of Legal Services Agency decisions to terminate legal aid is time consuming. Ultimately, however, the Court must make all reasonable accommodations to ensure that the claims are dealt with in a just manner.

[17] In presenting argument that had far more to do with a further plea for adjournment than justification for her withdrawal, Ms Cooper urged that I hear from her in the absence of the defendants' counsel. Mr Ward appeared, having acknowledged by way of Memorandum that the defendants simply abided the Court's decision on the application by Ms Cooper's firm to withdraw as solicitors on the record. However, he indicated an interest in the terms upon which that was argued for, and a greater interest in any incidental plea that might be made for an adjournment of the 28 and 29 September 2009 fixture. Predictably, Mr Ward

signalled that the defendants were opposed to any adjournment, and he claimed that there was prejudice to the interests of the defendants if that course was to be followed.

[18] Ms Cooper submitted that she should be entitled to make submissions in the absence of the defendants that went to her professional responsibilities, relevant to her application to withdraw and that would traverse privileged matters. She suggested that her responsibility in obtaining consent to withdraw ought not to compromise Mr Bron's position and that the defendants did not have a legitimate interest in having access to matters affected by solicitor/client privilege that only became relevant to the Court because of the solicitor's application to withdraw.

[19] I acceded to Ms Cooper's request, and invited Mr Ward to withdraw on the basis that I would have him return to Court as soon as Ms Cooper had traversed the matters she considered to be affected by solicitor/client privilege, and that I would review, in his presence, any matters she raised in his absence that were not entitled to be conveyed on an ex parte basis. Mr Ward agreed to that course.

[20] In the event, I did not consider that any of the matters traversed in Mr Ward's absence were matters that went to solicitor/client privilege between Ms Cooper and Mr Bron, and I accordingly summarised the essence of what Ms Cooper had said to Mr Ward on his return.

[21] Ms Cooper made forthright criticisms of the Legal Services Agency. She suggested it had been cynical and unprincipled in withdrawing legal aid for Mr Bron after he had achieved a settlement with the Salvation Army so as to enable recovery of some unspecified part of the funding provided for the case up to that time, and then withdrawing legal aid knowing that Mr Bron was facing a fixture for his application for leave to proceed. Such criticism has no direct bearing on Ms Cooper's application for leave to withdraw. The fact is that her client is now not able to fund the litigation, and that is the extent of the relevant circumstance. Although her criticism could go to the relative prospects of a successful review of the Agency's decision to withdraw legal aid, the Court cannot place any reliance on

this criticism, at least without an opportunity for the Legal Services Agency to respond to it, which is itself inappropriate in the present context.

[22] A second point urged by Ms Cooper in Mr Ward's absence was the important precedent effect of the outcome of the present application. Again, this could not reflect any matter of privilege as between Ms Cooper and Mr Bron, and if at all is only relevant to the adverse consequences for other plaintiffs in historic abuse proceedings whose claims cannot be progressed as Court timetables require them, because of decisions by the Legal Services Agency to withdraw legal aid. Ms Cooper's concern is that, if reviews by the Legal Aid Review Panel ultimately reinstate legal aid, then the rights of plaintiffs to pursue such reviews and to have legal aid reinstated would be rendered nugatory if the Court insists on compliance with timetables in the interim, and does not accommodate adjournments until availability of legal aid is finally resolved.

[23] It may be a mistake for any of the various interests involved in the substantial volume of historic abuse cases to be unduly distracted by the resources required to deal with the huge volume of litigation that it represents. The first priority must be to deal with the case in hand without any acknowledgement that the course charted for it is necessarily a precedent for any one or more of other historic abuse cases that may follow. I am not inclined to evaluate the future of Mr Bron's claim any differently because Ms Cooper sees it as being in a similar situation to some 120 cases in which proceedings have been commenced, but legal aid has then been withdrawn.

[24] Mr Ward correctly observed that the defendants do have an interest in the arguments raised by Ms Cooper to the extent they amount to a further plea for an adjournment. He claims prejudice to the defendants in that they have prepared for the hearing on 28 and 29 September, and those resources would be wasted if an adjournment is granted. The defendants can also claim prejudice in a general sense by the continuing delay in resolution of this claim, as has consistently been raised on behalf of the defendants in numerous of the historic abuse cases. However, the extent of that general prejudice has to be assessed in relative terms. Further delay of a few months does not transform the prejudice from the historical nature of the

allegations in any material way. So, too, the extent of prejudice suffered from preparation for hearing that is wasted to the extent that it would need to be refreshed for a later fixture. In the context of preparation of written outlines of argument and the extent of work in any event necessary to defend the proceedings thus far, these are not significant forms of prejudice to the defendants.

[25] Ms Cooper made repeated reference to the irony that Mr Bron was funded and would have been ready to proceed with the argument of his application at the March fixture, had the defendants complied with the timetable for steps leading to that fixture. It was vacated because the psychiatric evidence for the defendants was not available in time, and indeed an affidavit from Dr Duff has subsequently only been filed on 29 July 2009. As a result of that delay, Mr Bron is now not able to mount argument because of the Legal Services Agency decision in the interim to withdraw legal aid.

[26] In the end, and in light of the better appreciation I have of the context and complexities of these historic abuse cases from argument in the Legal Services Agency appeals, I am persuaded that a further adjournment is justified as being preferable to accepting withdrawal of Ms Cooper as solicitor on the record. There is a high likelihood of the availability of two days of Court time on 14 and 15 December 2009. Failing availability on those dates, 8 and 9 February 2010 would be available for the hearing of this application.

[27] I accordingly decline the application for leave for Ms Cooper to withdraw as solicitor on the record, and instead grant the adjournment she has repeatedly sought, to 14 December 2009.

[28] There is no realistic prospect of any further adjournment from this new fixture date. I direct that Ms Cooper is to confirm her ability to proceed with the argument by ***Monday, 23 November 2009***. I understand from her that the Legal Aid Review Panel is giving priority to the reconsideration of the Legal Services Agency's decision to withdraw Mr Bron's legal aid funding, and that a decision can be expected well before the middle of November 2009. If legal aid is reinstated, then any affidavits in reply are to be filed and served by ***Friday, 4 December 2009***.

Exchanges of outline of argument is then to occur in accordance with the Rules. In the event that the Legal Aid Review Panel does not reinstate legal aid, then the Court is to be advised promptly of that occurring.

[29] I repeat the observation in paragraph [23] above that this outcome cannot be treated as any precedent for case management decisions in other historic abuse cases. Generally the Court will not recognise the loss of, or uncertainty over, legal aid as constituting grounds for non-compliance with timetabling orders, or as justification for adjournment of fixtures.

Dobson J

Solicitors:
Cooper Legal, Wellington for plaintiff
Crown Law, Wellington for first and third defendants