IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-1541

BETWEEN	LRB Plaintiff
AND	THE ATTORNEY-GENERAL First Defendant
AND	THE SALVATION ARMY Second Defendant

Hearing: 18 November 2009

Counsel: J Elliott for the Plaintiff
D A Ward for the First Defendant

Judgment: 19 November 2009

JUDGMENT OF MILLER J

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[1] At the hearing on 18 November I declined LRB's request for an adjournment of his leave application against the first defendant, which is to be argued on 2 December. I adjourned the application as against the second defendant. These are my reasons.

[2] LRB's application for an order granting leave to commence proceedings out of time was filed on 14 July 2008. The pleadings were completed on 27 March, and evidence, including expert evidence on each side, has been filed for and against the leave application. Discovery has also been undertaken.

[3] At a telephone conference on 30 June, the Associate Judge was told that the Legal Services Agency had withdrawn LRB's aid. Counsel sought a delay in setting down the leave application while the Agency's decision was reviewed. The

Associate Judge set it down for 24 September, reserving leave to apply. On 24 July Dobson J heard an application for adjournment. The application was now supported by the second defendant, which intended to settle. He granted the plaintiff's application on the basis that an adjournment for a relatively short period of time would assist LRB. The fixture was set for 2 December.

[4] On 10 November the first defendant applied for directions as to the filing of submissions. That met immediately with an informal application for an adjournment. No previous notice of this application had been given. The grounds for the application were that settlement with the second defendant was still pending and (contrary to counsel's expectation when the December fixture was set) the Legal Aid Review Panel has yet to determine LRB's application for review, so that his legal aid remains withdrawn. An adjournment would "hopefully enable the plaintiff to be represented at the hearing." The first defendant opposed the adjournment.

[5] I directed that the adjournment application be argued. In a memorandum of 17 November, Mr Elliott (who is employed by Ms Cooper's firm, Cooper Legal) submitted:

> 22. While this court has stated a question over the ability to secure a fee for a party's solicitor is not sufficient reason for adjournment of a hearing date, it is respectfully submitted that the circumstances of the solicitors of the plaintiff can be distinguished from this axiom.
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> 23. Cooper Legal represents a large client base, and the majority of this clientele, estimated to be approximately 600, are legally aided. It is the concern of Cooper Legal that should it be required to proceed with the matter on 2 December, in the absence of legal funding, is that [sic] such a decision will create a precedent, and this firm shall be forced to take on a multitude of similar matters, in the absence of legal aid funding, or cease to act for the affected clients.
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> 24. Consequently, Cooper Legal will be forced to withdraw from acting for the plaintiff, should the matter be forced on to hearing on 2 December 2009.

[6] Counsel added that the plaintiff resides in Thames and the application for leave is legally complex. LRB is unlikely to be able to argue it himself. So far as the second defendant is concerned, it appears that the claim has been settled subject to agreement of the Legal Services Agency. The second defendant accordingly supported the application for an adjournment, through Mr Elliott.

[7] The Crown's position is that there is no indication of any undue prejudice should the hearing proceed, that the settlement with the Salvation Army does not affect the Crown's position, that the absence of legal aid is not a valid ground for adjournment, and that Ms Cooper continues to represent the plaintiff, including in settlement negotiations, so must be able to appear at the hearing.

[8] I begin with the advice that Ms Cooper will withdraw if the leave application is not adjourned. The question is whether she is free to do so. Plainly the Court might feel compelled to grant LRB an adjournment if he would otherwise have to represent himself at short notice. The same issue was raised in *Bron v Attorney-General and Crown Health Financing Agency* HC WN CIV 2007-485-698 23 September 2009, in which Dobson J recorded:

> [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.
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> [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.

[9] Dobson J held that a solicitor on the record may not be free to withdraw notwithstanding "good cause" in the form of failure or inability to pay a fee. Leave is required, and the Court may deny it in a case in which leave is sought too close to the taking of a further step in the proceeding.

[10] Rule 4.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides:

> A lawyer who has been retained by a client must complete the regulated services required by the client under the retainer unless—
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> (a) the lawyer is discharged from the engagement by the client; or

(b) the lawyer and the client have agreed that the lawyer is no longer to act for the client; or

(c) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.

4.2.1 Good cause includes—

(a) instructions that require the lawyer to breach any professional obligation:

(b) the inability or failure of the client to pay a fee on the agreed basis or, in the absence of an agreed basis, a reasonable fee at the appropriate time:

(c) the client misleading or deceiving the lawyer in a material respect:

(d) the client failing to provide instructions to the lawyer in a sufficiently timely way:

(e) except in litigation matters, the adoption by the client against the advice of the lawyer of a course of action that the lawyer believes is highly imprudent and may be inconsistent with the lawyer's fundamental obligations.

4.2.2 None of the matters set out in rule 4.1.1 is good cause to terminate a retainer.

4.2.3 A lawyer must not terminate a retainer or withdraw from proceedings on the ground that the client has failed to make arrangements satisfactory to the lawyer for payment of the lawyer's costs, unless the lawyer has—

(a) had due regard to his or her fiduciary duties to the client concerned; and

(b) given the client reasonable notice to enable the client to make alternative arrangements for representation.

4.2.4 A lawyer who terminates a retainer must give reasonable assistance to the client to find another lawyer.

[11] It can be seen that, a retainer having been accepted, a practitioner must complete the services required by the client under it, unless she has good cause to terminate it. Inability or failure to pay an agreed or reasonable fee supplies good cause, provided the practitioner has had due regard to her fiduciary obligations and has given the client reasonable notice. Reasonable notice requires that the client both be told of the reasons for termination and be given a reasonable opportunity to

make alternative arrangements for representation. When a retainer is terminated, the practitioner must make reasonable efforts to help the client find another lawyer.

[12] Several points may be made. First, Ms Cooper has not terminated her retainer. On the contrary, she wants an adjournment and she proposes to continue to act on the leave application. She is also acting on the settlement with the second defendant, which is evidently part of the same retainer. Second, Mr Elliott naturally did not suggest in the circumstances that notice had been given to LRB terminating the retainer for inability to pay. Third, nor was it suggested that notice, if given now, would be reasonable. Ms Cooper contemplates that LRB would be unrepresented, and he could not reasonably be expected to prepare submissions in time for the hearing, which is only two weeks away. Fourth, legal aid has been terminated but I will not assume without evidence that LRB is unable to pay a reasonable or agreed fee. I do not know the details of the settlement. Nor do I know, for example, whether if given reasonable notice he might be able to arrange other sources of funding or find another lawyer to represent him on some agreed basis. Finally, I have been offered no assurance that Ms Cooper has given him reasonable assistance to find another lawyer.

[13] For these reasons, Ms Cooper is not free to withdraw as solicitor for purposes of the leave application. More than that, her stated intention to do so troubles me, in circumstances where she has not discharged her obligations to the client under Rule 4.2. As the facts of this case demonstrate, such a threat may put the client at risk of having to represent himself at short notice, in circumstances where he has had neither opportunity nor assistance to engage other counsel. It is also incompatible with the practitioner's obligations as an officer of the Court, because the threat attempts to assign to the Court a degree of responsibility for the soon to be unrepresented client's interests. Of course this conclusion does not prevent Ms Cooper from withdrawing at an appropriate time, provided she first complies with her obligations to LRB.

[14] That is not an end of the matter, however. LRB will be represented by Cooper Legal on 2 December, but it might still be unreasonable to deny an adjournment in all the circumstances, having regard to the effort to be required of a

solicitor who must prosecute the retainer but for all the Court knows may go unpaid. I acknowledge that Ms Cooper is in a difficult position, aid having been withdrawn when the application was ready for setting down. There is nothing to suggest that she is responsible for delays in having aid reinstated. On the contrary, it appears that the Legal Aid Review Panel has unexpectedly declined to issue a decision, reasoning that it will await a Legal Services Agency appeal against a Panel decision reinstating aid in a different case.

[15] However, the Court has held that difficulties over the grant of legal aid are not a sufficient reason for failure to comply with timetable directions: *W v Attorney-General* (2008) 19 PRNZ 212. More generally, the Court need not permit a proceeding to be adjourned, in effect *sine die*, while issues over the grant, withdrawal, or scope of legal aid funding are resolved. The repeated setting and late vacating of fixtures adversely affects other Court business, while the Court is reluctant to grant extended adjournments because prejudice to the defendant by reason of delay is normally a significant issue in historic abuse cases.

[16] So far as this case is concerned, the additional investment required of Ms Cooper is not substantial. No further evidence is required, nor are any witnesses wanted for cross-examination. That distinguishes the case from *Bron*, in which Ms Cooper had yet to brief psychiatric evidence. And while the argument requires mastery of some difficult issues, Ms Cooper is an expert in the field and the leave application is set down for only one day. Although the Crown cannot point to any specific marginal prejudice resulting from a further adjournment, the abuse is said to have begun in 1980 and there has already been material delay for legal aid reasons, while there is no assurance that the legal aid position will be resolved within a short time. The adjournment to 2 December was granted at the request of Ms Cooper, and the application for a further adjournment was made belatedly.

[17] I directed at the hearing that the plaintiff's submissions are to be filed and served by 25 November, and the first defendant's by 1 December. The application for leave to proceed against the second defendant is adjourned for mention in the Judge's Chambers list on 15 February 2010.

[18] Costs of the adjournment application are reserved.

Miller J

Solicitors:
Cooper Legal, Wellington for the Plaintiff
Crown Law, Wellington for the First Defendant