IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-485-008209
[2015] NZHC 252

UNDER	the Legal Services Act 2011 and Regulations
IN THE MATTER	of an appeal from a decision of the Legal Aid Tribunal dated 30 May 2014
BETWEEN	LEGAL SERVICES COMMISSIONER Appellant
AND	CORNELIS ROBERT ROEST Respondent

Hearing: 11 February 2015

Appearances: L Hansen for Appellant
Respondent in person

Judgment: 24 February 2015

JUDGMENT OF ASHER J

This judgment was delivered by me on Tuesday, 24 February 2015 at 11am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
L Hansen, Wellington.

Copy to:
Respondent

Introduction

[1] The Legal Services Commissioner (the Commissioner) appeals a decision of the Legal Aid Tribunal (the Tribunal) dated 30 May 2014.[1] There is a single issue on appeal. It is whether the Tribunal was correct when it held that for the purposes of calculating a prescribed repayment amount applicable to the respondent, Cornelis Robert Roest, the Commissioner was required to deduct Mr Roest's debts that were provable in his bankruptcy in calculating Mr Roest's capital assets.[2]

[2] There is a lengthy background to this appeal, which is set out fully by the Tribunal in its decision of 30 May 2014.[3] In brief, in 2010 the Financial Markets Authority laid various fraud and security charges against Mr Roest in relation to his actions as a former director of the failed finance company Bridgecorp Ltd. Also charged was the managing director of Bridgecorp Ltd, Mr R M Petricevic.

[3] Mr Roest sought legal aid. Ultimately, just before the trial on 1 September 2011, Mr Roest was granted legal aid and was represented through his criminal trial. He was found guilty.[4] Legal aid was declined for his appeal[5] and he appeared for himself in the Court of Appeal, although his counsel in the High Court trial was appointed amicus curiae.

[4] Mr Roest, as well as his wife and children, are discretionary beneficiaries of the C R Roest Trust, a family trust which had net assets of approximately $440,000 ("the Trust"). Legal aid was granted notwithstanding his interest in the Trust.

[5] Under the Legal Services Act 2011 (the Act) legal aid is a loan and is repayable as a debt due to the Commissioner.[6] In respect of criminal matters a person granted legal aid must repay the lesser of either the cost of services (less any

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1 *Cornelis Robert Roest* [2014] NZLAT 006 [decision under appeal].
2 Legal Services Act 2011, sch 1 cl 1.
3 Decision under appeal at [3]–[57].
4 *R v Petricevic* HC Auckland CRI-2008-004-29179, 5 April 2012. See also *R v Petricevic* [2012] NZHC 665, [2012] NZCCLR 7.
5 *Roest v R* [2013] NZCA 547, [2014] 2 NZLR 296.
6 Legal Services Act 2011, s 34(1).

interim payments or permitted deductions) or an amount known as the "prescribed repayment amount" (less any interim payments or permitted deductions).[7]

[6] The prescribed repayment amount is based on a calculation of capital and income. "Capital" is defined in sch 1 of the Act as meaning a legal aid applicant's total assets after deducting the amount of any debts secured against those assets and the "amount of the actual debts of the person, other than those that are secured".

[7] In a decision dated 16 January 2014, the Commissioner (after detailing the history of decisions and reviews by the Tribunal) determined that Mr Roest was liable to repay the sum of $174,033.41. This was the cost of the legal services that had been rendered and paid for by the Ministry of Justice. This sum was less than the amount repayable as Mr Roest's prescribed repayment amount, which would have been $219,808, but in accordance with s 21(4) of the Act Mr Roest was liable for the lesser of the two sums.

[8] The Commissioner's decision was appealed to the Tribunal. In its decision dated 30 May 2014 the Tribunal found that the Commissioner had not correctly assessed the prescribed repayment amount by not deducting his debts as a bankrupt as "actual debts of the person". On the basis of information provided by the Official Assignee, those provable debts in bankruptcy amounted to approximately $422 million. If those debts were to be deducted from Mr Roest's trust assets in determining his capital there would be no prescribed repayment amount, and he would not have to pay any of the legal aid granted to him.

[9] The Commissioner now appeals that decision. It is submitted that the Tribunal made an error of law when it decided that for the purposes of calculating the prescribed repayment amount the Commissioner was required to deduct Mr Roest's debts that were provable in bankruptcy.

Is this appeal filed in time?

[10] The Tribunal has considered this issue of law in several previous decisions.

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7 Sections 21(4) and 18(2).

[11] On 23 August 2011, the Tribunal in reviewing a decision of the Commissioner, held that Mr Roest's bankruptcy debts were not debts that were relevant to the assessment of Mr Roest's disposable capital in determining whether he should be granted legal aid.[8]

[12] In a decision of 9 March 2012, the Tribunal reversed that decision.[9] It considered an application for review of certain conditions attached to the grant of legal aid to Mr Roest, and stated in respect of its earlier conclusion as to the bankruptcy debts that "[o]n reflection, that is an error."[10] It held that the debts must be deducted from the totality of assets in assessing the applicant's disposable capital.

[13] On 17 October 2012, it considered the issue in more detail in hearing a review relating to another set of conditions that had been imposed.[11] In a considered decision it held that the debts provable in bankruptcy must be included in the calculation of disposable capital.

[14] Mr Roest says that having failed to appeal the 9 March and 17 October 2012 decisions, the Commissioner is now out of time.

[15] I do not consider that the Commissioner is out of time. It is correct that the Tribunal has considered this issue of how the debts provable in bankruptcy should be treated on three previous occasions, and in the latter two has adopted the same approach that it adopted in the decision under appeal.

[16] However, the decision under appeal is a standalone decision reviewing a previously unreviewed decision of the Commissioner of 16 January 2014. While it draws on and refers to the earlier decisions, it is a new decision.

[17] Under s 59 of the Act, if the Commissioner or an applicant considers that the Tribunal's determination is wrong in law, that person may appeal to the High Court

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8 *Cornelis Robert Roest* [2011] NZLAT 001 at [59].
9 *BN (Criminal)* [2011] NZLAT 053.
10 At [53].
11 *Cornelis Roest* [2012] NZLAT 091 at [64]–[68].

on the "question of law". The appeal "must be dealt with in accordance with the rules of court".

[18] The High Court Rules at r 20.4(2)(b) provide that an appeal must be brought "within 20 working days after the decision appealed against is given". The decision appealed against was the decision of the Tribunal of 30 May 2014, and a notice of appeal was filed within 20 days. The notice of appeal was therefore filed within time and in accordance with the rules of Court.

[19] The fact that there were earlier decisions on the same point (both for and against) is not material to the issue of whether this decision has been appealed in time. Decisions will often refer to other decisions and restate propositions taken from other decisions. This is irrelevant for the purposes of the assessment of time.

[20] Although it was not canvassed in argument, it is arguable that the Commissioner is estopped from raising the issue having failed to appeal the point following the 9 March and 17 October 2012 decisions. However, in respect to that possibility it is relevant to record that the Commissioner had relied on a short oral judgment in *Gibson v Legal Services Agency*, in which Priestley J considered that a decision to reconsider was not a "determination" to which s 59 applied.[12] In applying this decision the Commissioner had considered that while he could appeal a determination made by the Tribunal under s 56 of the Act, no appeal was available to him against the direction to reconsider a decision under s 57 of the Act.

[21] The issue of the right of appeal was revisited in 2013 in *C v Legal Services Commissioner*.[13] In that case Mallon J did not follow *Gibson v Legal Services Agency*, and held that when the Tribunal had referred a matter back to the Commissioner for reconsideration on the basis the Commissioner had made an error of law, the Commissioner could appeal the Tribunal's decision. That was a determination that could be appealed even though it did not confirm, modify or

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12 *Gibson v Legal Services Agency* (2006) 18 PRNZ 284 (HC) at [9].
13 *C v Legal Services Commissioner* [2013] NZHC 1758, [2013] NZAR 1290.

reverse the decision under review.[14] This decision, which is accepted by the Commissioner, has led to the filing of this appeal.

[22] Given that the Commissioner and Tribunal were bound by *Gibson v Legal Services Agency*, the change in circumstances resulting from it not being followed in *C v Legal Services Commissioner* means that no estoppel should arise. Circumstances have changed, and it would not be equitable to apply estoppel to a course of action where the Commissioner was unable to challenge the decision, but now can. Moreover, for issue estoppel to arise, the issue must have been determined.[15] On the state of the law as set out in *Gibson v Legal Services Agency*, the decision of the Tribunal had not been final, but a step in a process that was referred back to the Commissioner.

[23] I accept that the Tribunal's proper application of the decision in *Gibson v Legal Services Agency* explains why it did not earlier appeal the Commissioner's decisions on the point of law. It would have been wrong for it to have appealed on the law as it stood. Accordingly I consider that since no appeal was available to the Commissioner at the time of the 2012 decisions, it would be inappropriate to preclude the Commissioner from bringing this proceeding on the basis that he previously failed to appeal.[16]

The substantive appeal - prescribed repayment amount

[24] It is an integral part of the grant of legal aid that there will be a repayment amount, although it may be zero.[17] I have already briefly set out the legal framework giving rise to this issue. The net capital of a legal aid applicant is relevant both in assessing eligibility for legal aid,[18] where the Court has regard to the applicant's "income and disposable capital",[19] and in calculating the amount that a legally aided person must pay to the Commissioner under ss 18 and 21 of the Act.

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14 At [44].
15 *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 37-39.
16 At 38.
17 Legal Services Act 2011, ss 16(2)(a) and 18(2).
18 Section 8.
19 Section 8(3).

[25] The "prescribed repayment amount" is defined in s 4 of the Act as the amount based on income and capital, set by regulations for the purposes of ss 20(1) and 21. Section 20 concerns interim payments whereas s 21 concerns the final amount repayable. Section 21(4) provides that if there are no proceeds of proceedings the repayment payable is the lesser of the costs of services or the prescribed repayment amount.

[26] The relevant regulation is reg 10 of the Legal Services Regulations 2011 (the Regulations), which defines prescribed repayment amount as the total of:

> (a) the maximum amount payable based on capital determined under regulation 11; and
>
> (b) the maximum amount payable based on income determined under regulation 12.

[27] "Income" is not at issue. As already noted "capital" is defined in cl 1 sch 1 of the Act as that person's total assets after deducting:

> (a) the amount of any debts secured against those assets; and
>
> (b) the amount of the *actual debts* of the person, other than those that are secured.
>
> (emphasis added)

[28] The recipient's secured and "actual" debts are taken into account in determining the maximum amount payable based on capital. Regulation 11 states:

> **11 Maximum amount payable based on capital**
>
> (1) The maximum amount payable based on capital is the amount set out in the first column of the table in Schedule 1 that corresponds to the capital thresholds—
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> (a) set out in the applicable column of the table; and
>
> (b) that apply to the applicant's capital at the time that the grant is first approved.
>
> (2) If the applicant's capital exceeds the capital thresholds, the maximum amount payable based on capital is the total of—

(a) the highest maximum amount set out in the first column; and

(b) all of the applicant's capital that exceeds the highest capital threshold amount set out in the applicable column.

[29] Mr Roest has no capital save the assets of the Trust. The value of those assets exceed the reg 11 capital thresholds if the debts on bankruptcy are excluded. This means the maximum amount payable by him based on capital for the purposes of reg 10 would be the highest maximum amount prescribed by sch 1 of the Regulations ($1,270), plus the capital value of his interest in the Trust that exceeds that amount. However, if Mr Roest's bankruptcy debts are included, he would have negative capital for the purposes of sch 1. It would not exceed the lowest capital threshold with the effect that his maximum amount payable based on capital would be zero.

The point of law

[30] It can be seen from this analysis that the core question is how "capital" is to be calculated for the purposes of determining the amount repayable as the prescribed repayment amount. In particular the question on appeal is whether or not at the relevant time when legal aid was granted Mr Roest's bankruptcy debts were "actual debts" for the purpose of the calculation of Mr Roest's capital assets under the Act.[20]

The meaning of "debt"

[31] In considering what "actual debt" means under the legal aid regime, it is necessary to begin with a definition of "debt". In terms of the meaning of the word "debt" it must be recognised that it is a word of wide import, and its meaning in a sentence will depend very much on the way in which it has been used, and the provisions that accompany it.[21] As was stated by Lord Fraser in *Marren (Inspector of Taxes) v Ingles*:[22]

> The meaning of the word debt depends very much on its context. It is capable of including a contingent debt which may never become payable:

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20 The fact that they are now discharged is not relevant as the relevant time under s 18 of the Act is the time of grant.

21 See *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1 at [16].

22 *Marren (Inspector of Taxes) v Ingles* [1980] 1 WLR 983 (HL) at 990.

> see *Mortimore v Inland Revenue Cmrs* (1864) 2 H & C 838. It is also capable of including a sum of which the amount is not ascertained: see *O'Driscoll v Manchester Insurance Committee* [1915] 2 KB 499 (CA).

[32] In *Colonial Mutual Life Assurance Society Ltd v Commissioner of Inland Revenue*, Hammond J defined debt as:[23]

> A "debt" is something owed by one person to another. In legal (and common) usage, it refers to what arises between the parties by reason of a prior obligation, whether contractual, or statutory. The debtor has an obligation to pay "the debt", *and can be sued on it*.
>
> (emphasis added)

[33] On appeal Gault J observed in the context of whether arrears of premium and interest constituted a debt that there was no sound reason why the fact that the sum could not be sued for precluded it from being construed as a debt, and Thomas J made a similar observation.[24] The other three Judges did not comment on the proposition. The appeal was allowed by a majority. There was no specific comment on Hammond J's statement as to the meaning of "a debt". However, his statement was approved by the Court of Appeal in *New Zealand Venue and Event Management Ltd v Worldwide LLC.*[25]

[34] In this case the adjective "actual" is used before "debt" in sch 1 to the Act. It can be assumed that the legislature put the word in for a reason. The word "actual" indicates something existing in fact or existing now.[26] It is something real and not notional or technical. Whether Mr Roest's bankruptcy debts are "actual" requires a close look at the nature of debts proven in bankruptcy and the purposes of the Act in providing for a prescribed repayment amount.

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[23] *Colonial Mutual Life Assurance Society Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,375 (HC) at [109].

[24] *Colonial Mutual Life Assurance Society Ltd v Commissioner of Inland Revenue* (2000) 19 NZTC 15,614 (CA) at [55] and [122].

[25] *New Zealand Venue and Event Management Ltd v Worldwide LLC* [2013] NZCA 130, [2013] 3 NZLR 329 at [25].

[26] Tony Deverson and Graeme Kennedy (eds) The New Zealand Oxford Dictionary (Oxford University Press, Melbourne, 2015) at 11.

The nature of Mr Roest's debts – the Insolvency Act 2006

[35] When a person is adjudicated bankrupt all property that belongs to the bankrupt vests in the Official Assignee by virtue of s 101(1) of the Insolvency Act 2006 (although property held by the bankrupt in trust for another person does not vest in the Official Assignee).[27]

[36] The debts of the bankrupt are, as the Tribunal has observed, not expunged.[28] They remain in a technical sense the debts of the bankrupt following the adjudication. The bankrupt must file a statement of affairs with the Official Assignee,[29] and the Official Assignee must call a meeting of creditors,[30] and creditors are notified.[31]

[37] Despite the debts not being cancelled, on adjudication all proceedings to recover any debt provable in the bankruptcy are halted[32] (while by leave certain proceedings may continue).[33] Thus the bankrupt cannot be sued for the debts, and as an integral part of the process, and on discharge the bankrupt is released from the debts.[34]

[38] In its 17 October 2012 decision the Tribunal rejected the Commissioner's argument that for a debt to be an "actual debt" for the purposes of the Act it must be recoverable by legal action through the Court, and since the adjudication of bankruptcy ends the bankrupt's ability to be sued, his or her debts are no longer "actual debts" and are in effect expunged.[35] The Tribunal stated:

> [66] [The Commissioner's] analysis is not legally correct. Debts are not released on adjudication. It is only upon the discharge of a bankruptcy that debts can be said to be expunged. Further, debts do not pass to the Assignee on adjudication, notwithstanding the fact the latter administers any repayment. Instead, they remain provable against the estate of the bankrupt and payable by the Assignee on the bankrupt's behalf. It is notable also that

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27 Insolvency Act 2006, s 104.
28 *Cornelis Roest*, above n 11, at [66].
29 Insolvency Act 2006, s 67.
30 Section 71.
31 Section 71(2).
32 Section 76(1).
33 Section 76(2).
34 Section 304(1).
35 *Cornelis Roest*, above n 11 at [65].

> under section 147 of the Insolvency Act 2006 a bankrupt can be required to make a contribution towards repayment of his or her debts, while under section 304(2) some debts are not released at all.
>
> [67] It is clear, therefore, that an applicant's undischarged debts in bankruptcy remain actual debts and must be taken into account for the purposes of calculating the applicant's disposable capital in accordance with clause 3(1)(e) of Schedule 1.

[39] In the decision under appeal, the Tribunal stated that the Commissioner contested the deductibility of the debts proven in bankruptcy, but noted that it had previously decided in its previous decisions that they are debts to be deducted in determining a recipient's prescribed repayment amount.[36]

[40] A "provable debt" is defined in the Insolvency Act as a debt or a liability that a creditor of the bankrupt may prove in a bankruptcy.[37] It is a debt or liability that the bankrupt owes at the time of adjudication, or after adjudication but before discharge, by reason of an obligation incurred by the bankrupt before adjudication.[38] A debt is proved when it is admitted by the Official Assignee.[39]

[41] Consistent with this, creditors must not begin or continue an execution or other process in respect of the bankrupt's property for any provable debt, or seize or sell any property by way of distress for rent, after advertisement of the adjudication or the provision of notice to the creditors.[40] The role of creditors in the bankruptcy is primarily to attend meetings of the creditors and submit proofs of the debts of the bankrupt.[41] The rights of creditors are thereafter exercised through voting at creditors' meetings,[42] and by exercising other procedures under the Insolvency Act. They are not exercised against the bankrupt.

[42] While, as the Tribunal observed, the bankrupt remains legally responsible for the bankruptcy debts up until discharge, the practical responsibility for payment passes from the bankrupt to the Official Assignee. The procedures of the Insolvency Act subsume the creditor's right to sue the bankrupt personally. As a consequence

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36 Decision under appeal at [91].
37 Insolvency Act 2006, s 231(1).
38 Section 232(1).
39 Section 231(3).
40 Section 77.
41 Section 79.
42 Section 94.

the Official Assignee is empowered to realise the bankrupt's property for the purposes of distributing the proceeds of that property equitably among the bankrupt's creditors according to the statutory priorities set out in the Insolvency Act. The bankrupt's debts in reality change their nature from available choses in action against a person, to rights to claim in a statutory process controlled by the Official Assignee.

[43] The creditor cannot because of the provisions of s 76 actually sue the bankrupt or indeed the Official Assignee to recover payment of the debt. The creditor has no right to enforce a judgment against the creditor and is obliged to prove in the way prescribed by the Insolvency Act.

[44] Mr Roest in his submissions referred to s 147 of the Insolvency Act which gives the Official Assignee the right to require payments from a bankrupt after adjudication. It is correct as Mr Roest observes that the Official Assignee has the power to sue a bankrupt in this regard. However, this power that the Official Assignee has does not affect the change of character to a bankrupt's existing debts following adjudication. Repayment can only be obtained through the proof of debt process, and a claim under s 147 is a new claim, and might indeed be an "actual debt" as there would be an ongoing exposure on the part of the bankrupt. The point is, there were no s 147 claims, and as Mr Roest was in fact discharged from bankruptcy on 9 September 2012, s 147 is no longer available.

[45] What this analysis suggests is that something happens to a debt following a person's adjudication as a bankrupt. The bankrupt's "debts" while still notionally existing have changed their character from choses in action against the debtor personally to rights of claim in a statutory process controlled by the Official Assignee. A bankrupt's debts do not in this sense have the characteristic of "actual" debts. The concept of personal exposure by the debtor to a claim for repayment is missing.

Purposes of the Act

[46] This assessment is supported by the identifiable purposes of the Act. While it is a pillar of the Act that legal services will be funded to promote access to justice for

those who have insufficient means,[43] it is also a requirement that there should be a payment or repayment for legal services in accordance with an applicant's means. Here Mr Roest has received legal aid and thereby obtained representation for his trial, and that is not an issue in this hearing. The issue is what Mr Roest is liable to repay for the cost of the legal services as the prescribed repayment amount.

[47] If the bankruptcy debts were taken into account in the calculation of capital consistent with the Tribunal's decision, Mr Roest's repayment amount would be zero and he would not be required to repay any of his aid because those debts would far exceed his net assets. However, he would not have to repay those debts as a matter of fact as a bankrupt, and besides a few exceptions on discharge he is released from all debts provable in the bankruptcy.[44] It is submitted by the Commissioner in this appeal that such an outcome that follows the Tribunal's decision was not intended by the Act and would be unfair, as Mr Roest having received legal aid will still have access to the assets of the Trust as a discretionary beneficiary, but no obligation to repay legal aid.

[48] It can be accepted that it is a purpose of the Act to protect the legal aid fund from the claims of those who can find the necessary legal funding, and preserve it for those who genuinely cannot. The Commissioner, the Tribunal and the Courts must interpret the Act with this in mind. I agree with the observations of Wylie J in *Petricevic v Legal Services Agency*, in holding as a relevant asset for legal aid purposes Mr Petricevic's wife's interest in a discretionary trust:[45]

> Otherwise, the unprincipled and avaricious would seek to fund their legal representation via the public purse. The position is no different if an applicant's spouse or partner is the discretionary beneficiary of the trust. Unless a purposive approach to the interpretation of reg 8(4) is taken, the financially unscrupulous will be able to drive a coach and horses through the legislation.

[49] Clearly, it is contrary to the purpose of the Act for a person who has sufficient means to pay for legal services to nevertheless get Government aid. Mr Roest had himself in earlier legal aid hearings submitted that as an undischarged bankrupt there

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43 Legal Services Act, s 3(a).
44 Insolvency Act 2006, s 304.
45 *Petricevic v Legal Services Agency* [2011] 2 NZLR 802 (HC) at [50].

was no likelihood of his repaying the debt that he had to the Trust which should be valued at zero. That was a realistic submission. If a person like Mr Roest, who because his debts are frozen will not have to pay the debts personally, has them taken into account to assess his ability to pay for legal fees, the purpose of the Act is defeated.

[50] If the Tribunal's approach to meaning of "actual debts" was correct, it would mean that if a bankrupt had trust assets of $1,000,000 and on adjudication debts of $1,000,000, that bankrupt if given legal aid could on discharge rely on the $1,000,000 indebtedness to be exempt from repayment, but not have to repay his debts as a bankrupt. This is clearly not a result intended by the legislation.

[51] This is reinforced by the definition of disposable capital which applies when a bankrupt is being assessed for legal aid, and again refers to "actual debts".[46] If the bankrupt claimant had significant assets in a trust, it would be surprising if that debtor could nullify the assets by relying on personal debts, but in fact, because he was bankrupt, have no obligation to repay them.

Conclusion

[52] For those reasons I respectfully differ from the central conclusion of the Tribunal that the debts of Mr Roest on bankruptcy are actual debts to be taken into account for the purposes of calculating Mr Roest's capital, and therefore the amount repayable by him to the Commissioner. His debts on bankruptcy ceased to be "actual debts" in terms of the Act, and should not have been deducted from his assets in calculating his prescribed repayment amount.

[53] It follows that the appeal will be allowed and the Tribunal's decision set aside.

[54] The Commissioner had fixed the prescribed repayment amount at $174,033.41 in her decision. The Commissioner's reasoning in reaching that figure was not disturbed by the Tribunal in its decision of 30 May 2014, save in relation to

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[46] Legal Services Act 2011, sch 1 cl 3.

the "actual debts". Therefore, the appeal being allowed, the Commissioner's decision can be confirmed.

Result

[55] The appeal is allowed.

[56] The Tribunal's decision of 30 May 2014 is set aside.

[57] The Commissioner's decision of 16 January 2014 is confirmed, and the amount of final repayment is set at $174,003.41.

[58] Given the long history of this matter, I reserve leave to the parties to seek further directions.

[59] Mr Roest is still serving his sentence. Given the history of this matter it may be that costs should lie where they fall. However, I reserve leave to the Commissioner to seek costs.

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Asher J