

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

DH

Applicant

AND

EI (deceased)

Respondent

SUPPLEMENTARY DECISION AS TO COSTS

Introduction

[1] On 12 May 2017, I issued a decision (the decision) in which I confirmed the determination by [Area] Standards Committee [X] (the Committee) to take no further action in respect of Mr DH's conduct prior to the issue of a declaratory judgment by the court, but reversed the finding of unsatisfactory conduct by the Committee in respect of Mr DH's conduct after the issue of the judgment.

[2] The censure and fine imposed by the Committee, together with an order for payment of costs, consequently fell away.

[3] Mr DH has now applied for an award of costs against the Committee (\$1,800),¹ together with reimbursement of the fee incurred in seeking advice from Mr KL QC (\$4,997.82).

Submissions for Mr DH

[4] Mr DH's firm, OBJ, identified the provisions of the Lawyers and Conveyancers Act 2006 (the Act) which provide authority for this Office to award costs against a

¹ The amount specified in the Costs Orders Guidelines issued by this Office as the amount to be awarded for a complex matter dealt with on the papers.

Standards Committee.² The jurisdiction to award costs against a Standards Committee is not disputed.

[5] OBJ referred to the section of the Costs Orders Guidelines issued by this Office, headed "Costs in favour of practitioner". Paragraph [9] commences:

Such an order would be made only where the conduct of the Society can be criticised.

[6] OBJ then referred to [51] of the decision:³

Mr DH acted reasonably and properly throughout. He sought advice, and acted on that advice. He also followed the suggestion by the Standards Committee to repay the undisputed amount in an effort to resolve the complaint. In the circumstances, it is setting an unfortunate precedent that, even if there are reasonable grounds for a lawyer acting on advice and attempting to resolve the complaint, they are nevertheless subject to an adverse disciplinary finding coupled with a 'serious rebuke.

[7] OBJ consider these comments amount to a criticism of the Standards Committee such as to justify an award of costs.

Submissions for the Standards Committee

[8] Mr DH's application for costs was referred to the Committee for comment. The Committee instructed Mr GK to make submissions on its behalf.

[9] Mr GK noted:

the well-established approach of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal is to impose a high threshold for costs against the New Zealand Law Society because of its status as statutory regulator of the legal profession and the need to avoid deterrence from exercising its functions in the public interest because of concerns about cost orders.

He submitted the same principle ought to be applied to costs awarded by this Office.

[10] In support of this submission, Mr GK referred to the judgment of the UK Court of Appeal in *Baxendale-Walker v The Law Society* which,⁴ he advises, has been referred to by the Lawyers and Conveyancers Disciplinary Tribunal "on a number of occasions, including *New Zealand Law Society v Hall*".⁵

[11] He included the following paragraphs from that decision in his submissions:

² Lawyers and Conveyancers Act 2006, s 210, 210(2)(a).

³ LCRO 263/2015.

⁴ *Baxendale-Walker v The Law Society* [2007] EWCA CIV 233 at [35].

⁵ *New Zealand Law Society v Hall* [2014] NZLCDT 17.

[5] The Tribunal fully considered the power to award costs against the Standards Committee in the decision of Simes where at paragraph [38] it summarised the principles established in the United Kingdom, in particular in the decision of Baxendale-Walker v The Law Society as follows:

- (a) A costs order should only be made against a regulator if there is good reason for doing so (eg: the prosecution was misconceived, without foundation, or borne of malice or some other improper motive);
- (b) Success by the practitioner in defending a matter is not on its own a good reason for ordering costs against a regulator. In the context of whether costs should follow the event, the 'event' is only one of a number of factors to be considered; and
- (c) A regulator should not be unduly exposed to the risk of financial prejudice if unsuccessful, when exercising its public function.

[6] The Tribunal endorses these Baxendale principles. The principles are important because the regulatory body (in this case the Standards Committee of the New Zealand Law Society) has a role in protecting the public, as well as the reputation of the profession, and ought not to be deterred from exercising this role for fear of large awards of costs which in turn have to [be] borne by the profession.

[12] The Court in *Baxendale* went on to note that:⁶

Unless the complaint is improperly brought or proceeds ... as a 'shambles from start to finish' when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not be ordinarily be made against it on the basis that costs follow the event.

[13] Mr GK submitted that the Committee decision did not fall into this category.

[14] In Mr GK's view, the reversal of the Committee finding of unsatisfactory conduct "turned on a difference of opinion" between myself and the Committee as to "where the line was to be drawn" between "reasonable reliance on advice, excusing the lawyer of professional responsibility, and the underlying principle that individual lawyers are responsible for their own actions".

[15] In this regard, Mr GK is referring to the fact that in reaching the decision to reverse the finding of unsatisfactory conduct by the Committee, some weight was placed on the fact that Mr DH had sought advice from counsel and acted on that advice.

Discussion

[16] The first and paramount point to be made in this supplementary decision, is to emphasise the principle in the Costs Order Guidelines that "the mere fact that the

⁶ *Baxendale-Walker v The Law Society*, above n 4, at [40].

Standards Committee's decision is modified or reversed will not necessarily be grounds for a costs award".

[17] A situation where the regulatory body would be exposed to costs, is one that was referred to in *Baxendale* where the proceedings were described as being a "shambles from start to finish".⁷

[18] Otherwise, the general principle referred to in the authorities provided by Mr GK is endorsed, namely, that a regulatory body exercising its statutory functions must not be "exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful".

[19] OBJ differentiated the principles set out in the authorities provided by Mr GK on the basis that they were principles followed by the Lawyers and Conveyancers Disciplinary Tribunal and were not applicable to this Office, being a separate and distinct jurisdiction.

[20] I disagree. The principles referred to by Mr GK are equally applicable to this Office, as part of the regulatory process established by the Act,

[21] There must be some seriously flawed conduct on the part of a Standards Committee, either in its investigation, or its determination, before a costs award against a Committee will be considered. There should only on the rarest occasion be any barrier or disincentive to Committees carrying out their statutory functions.

[22] It is not necessary to address Mr GK's submission concerning the weight afforded in the decision to the fact that Mr DH acted in reliance on KL's advice. That is not promoted as a general principle in the decision and clearly each case must be addressed on its facts, as recognised in the decision itself. It is noted that Mr DH had also taken steps to resolve the complaint by repaying the undisputed amount.

Summary

[23] This Office has, on many occasions, reversed a determination of a Standards Committee. That has not automatically resulted in an award of costs against the Committee for the reasons referred to above.

⁷ *Gorlov v The Institute of Chartered Accountants in England and Wales* [2001] EWHC (Admin) 220.

[24] Mr DH disagreed with the Committee's determination and exercised his right to have the determination reviewed by this Office. The content of paragraph [51] of the decision was not intended to be a criticism of the Committee and on review, somewhat more weight was placed on the steps taken by Mr DH in consulting KL, acting on his advice, and repaying the disputed amount, than was afforded by the Committee.

[25] There were no identifiable serious errors by the Committee, and applying the principles referred to above, the application for costs is declined.

DATED this 20th day of December 2017

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr DH as the Applicant
Mr NO as the Applicant's Counsel
Ms EI as the Respondent
Area Standards Committee X
The New Zealand Law Society