NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 17

LCDT 015/11

IN THE MATTER of the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982

BETWEEN **NEW ZEALAND LAW SOCIETY**
Applicant

AND **DONNA MARIE TAI TOKERAU DURIE HALL**
of Wellington, Solicitor

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr S Maling

Mr W Smith

Ms P Walker

DECISION on the papers following written submissions by counsel

COUNSEL

Mr Turkington for New Zealand Law Society

Ms Cull QC for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL (AS TO COSTS)

Introduction

[1] The parties were asked to make submissions as to costs following the dismissal of charges brought against the practitioner, Ms Hall. The Standards Committee submits that costs should lie where they fall other than the s.257 Tribunal costs ($43,750). The Society has undertaken to meet those costs without seeking a contribution from the practitioner.

[2] The practitioner however seeks costs be awarded in her favour against the Standards Committee.

[3] One matter should be noted. Since the substantive hearing, chaired by Mr MacKenzie, he has retired. In the period of some months between his retirement and a further appointment of a Deputy Chair of the Tribunal, it has been necessary for Judge Clarkson to step in to chair the costs determination.

Principles to be applied

[4] Section 249 of the Lawyers and Conveyancers Act 2006 ("the Act") confers upon the Tribunal a broad discretion in the award of costs. Indeed there is capacity to award costs even against a practitioner who is acquitted of charges.

[5] The Tribunal fully considered the power to award costs against the Standards Committee in the decision of *Simes*[1] where at paragraph [38] it summarised the

[1] [2012] NZLCD 28

principles established in the United Kingdom, in particular in the decision of *Baxendale-Walker v The Law Society,*[2] 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 borne by the profession.

[7] We note in this case the profession is already assuming the burden of over $43,000 in respect of the Tribunal costs of the numerous hearings which were conducted in this matter, partly as a result of what was described as the "unusual" procedural approach of the practitioner[3].

[8] The *Baxendale* case in turn referred to the *Gorlof* case.[4] In that matter an award was justified against a disciplinary body where the proceedings were regarded as "a shambles from start to finish".

[9] That is not the case in this matter, which the Tribunal considered to be finely balanced, albeit ultimately resolved in favour of the respondent practitioner. In its substantive decision the Tribunal held:

> "The investigation and resulting charge were justified on their face, and while some of Ms Hall's conduct in terms of her relationship with other lawyers such as Mr Jensen might be capable of criticism, she has not been shown to breach the relevant rules referred to in that quote …"[5]

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[2] [2006] EW HC 643 at [43]
[3] *Hall v Wellington Standards Committee(No.2)*(Costs)[2013]NZHC1867, Woodhouse J at paragraph [9]
[4] *Gorlof v Institute of Chartered Accountants in England and Wales* [2001] EW HC Admin 220 at [37]
[5] Refer to footnote 1 at [210]

[10] There are a number of other factors which are relevant in the exercise to the Tribunal's discretion. The practitioner failed in her interlocutory applications to have the proceedings stayed and in opposing the amendment sought by the Standards Committee. This added considerable time to the proceedings.

[11] Furthermore the practitioner's overall approach to the proceedings is relevant in two further ways: first, as described by Woodhouse J on appeal from the first hearing of this matter, Ms Hall could have elected to continue that hearing after failing in her "no case" submission. If she had been successful that would have been an end to the proceedings, thereby saving the appeal and rehearing. If not she would have had her rights of appeal and not been disadvantaged in any way. Thus she contributed significantly to the costs escalation.

[12] The second approach which requires some comment, because it departed from the usual practice, is that the practitioner failed to file a substantive affidavit. While we make no comment on this failure before the "case to answer" was found, it was seen by the Tribunal as a hindrance in considering the evidence overall.

[13] In this regard we refer to the comments of the High Court in *Leary*[6] about the expectations as to a practitioner's expected level of cooperation in disciplinary proceedings:

"It is to be remembered that this is not a criminal prosecution. It is a special jurisdiction having the principal protective purpose I have already discussed. That purpose requires that there be a full investigation of allegations of misconduct, and that the Court should be slow to adopt a course which may inhibit such an investigation. The interests of justice extend far beyond the interests of the practitioner……a practitioner against whom a prima facie case is made out must be prepared to answer the charge, and may not simply rely on a submission that it has not been proved beyond reasonable doubt…"

> His Honour then quoted from *re Veron*[7]: *"The jurisdiction is a special one and it is not open to the respondent when called upon to show cause, as an officer of the Court, to lie by and engage in a battle of tactics, as was the case here and endeavour to meet the charges by mere argument"*

[6] Auckland District law Society v E P Leary,(unreported)12 November 1985, Hardie Boys J, M.1471/84 at p18,
[7] Re Veron,ex parte Law Society of New South Wales [1966]1 NSW 511.515

[14] The Tribunal would have been greatly assisted by an affidavit from the practitioner or evidence providing the courtesy of a personal explanation about her role in the transaction. We consider that while these matters are ultimately a decision for the practitioner and counsel representing the practitioner, they can be properly brought into an overall costs assessment.

[15] Finally Ms Cull has submitted that the undue publicity attracted to this case has been detrimental to the practitioner and her professional reputation. We consider that unless this is pleaded to support a submission of depletion of resources to the extent where the practitioner cannot afford costs, that it is otherwise not relevant to a costs assessment.

Decision

[a] We do not consider there ought to be any award of costs pursuant under s.249 in the overall circumstances of this case and that costs ought to lie where they fall.

[b] The New Zealand Law Society is directed to make payment, if this has not already occurred of the certified s.257 costs.

DATED at AUCKLAND this 29th day of April 2014

Judge D F Clarkson
Chair