IN THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No: [2012] NZLCDT 28

LCDT 010/11

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of Cheryl Simes of Hamilton, Barrister

TRIBUNAL

Chair
Mr D J Mackenzie

Members
Mr C Lucas
Mr P Shaw
Mr W Smith
Mr S Walker

COUNSEL
Mr W C Pyke for Canterbury/Westland Standards Committee 2
Mr P F Gorringe for the practitioner, Ms Simes

Determined on the Papers

COSTS DETERMINATION

Introduction

[1] On 16 February 2012 the Tribunal heard two charges against Ms Simes. The charges had been laid by Canterbury/Westland Standards Committee 2. Subsequently, by its decision of 5 April 2012,[1] the Tribunal dismissed both charges.

[2] In its decision dismissing the charges, the Tribunal said that any issue of costs should be addressed by memoranda filed with the Tribunal, and that the Tribunal would consider that matter on any papers so filed. Subsequently, memoranda on costs were prepared by the parties and filed with the Tribunal, the last such memorandum being a second memorandum filed by Ms Simes on 12 September 2012.

[3] Ms Simes is seeking the full costs of her counsel in respect of the substantive proceedings, an amount of $20,724.15. In addition, in respect of the costs application now being determined, she seeks her counsel's costs of $1,932.

[4] Also, Ms Simes is the sole director and shareholder of a company named Kiwilaw Advocates Ltd, which is an incorporated law firm. She has advised that, through this company, she undertook legal and factual research for the purpose of defending the charges she faced. Ms Simes seeks $14,232.52 [2] in respect of this work, plus the costs of completing her submissions in support of the costs claim regarding her work via Kiwilaw Advocates Ltd. The latter sum is not expressly quantified, but on the basis it involved 4 hours work a further $1000 plus GST and disbursements is indicated.

[5] The Standards Committee opposes Ms Simes application for costs. It makes no application against Ms Simes for its own costs. The Standards Committee submits that costs on the substantive matter should lie where they fall, and that the application for costs involving Kiwilaw Advocates Ltd has no proper legal basis. It also considers that counsel's costs sought in respect of the application for costs itself were not justifiable.

[6] The Committee submitted that if the Tribunal was minded to order costs against it on the substantive matter, then the appropriate range was $7,500 - $10,000.

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1 *Canterbury/Westland Standards Committee 2 v Simes* [2012] NZLCDT 4.

2 Ms Simes indicated that some of this amount is to be attributed to unrelated proceedings she has in the Court of Appeal, and accordingly she intends to reduce this claim by $1,330.

Tribunal's costs discretion

[7] The Tribunal's power to order costs is contained in s 249 Lawyers and Conveyancers Act 2006. That section provides that the Tribunal:

> "…may, after the hearing of any proceedings, make such order as to the payment of costs and expenses as it thinks fit."

[8] The Tribunal's costs discretion, of course, must be exercised judicially, in a fair and measured way.[3]

[9] Section 249 goes on to provide that, in particular, costs may be awarded by the Tribunal to any person to whom the proceedings relate, payable to that person by the Law Society.[4]

[10] Where any proceedings involving charges are considered by the Tribunal to have been justified, then, notwithstanding no finding of guilt, the Tribunal also has a power to order the person charged to pay costs to the Law Society, provided it considers it just to do so.[5]

[11] Under s 257 Lawyers and Conveyancers Act 2006, the costs of an hearing incurred by the Crown in operating the Tribunal are to be recovered from the Law Society. The Tribunal chair is to certify the amount so payable. That is a cost or expense incurred by the Law Society which the Tribunal may make the subject of a costs order against the charged practitioner under s 249, if the Tribunal considers that appropriate in the exercise of its cost discretion.

[12] In its substantive decision[6] the Tribunal certified costs payable by the Law Society, under s 257, at $12,700. As the Standards Committee has indicated that it does not seek any costs orders against Ms Simes, we need not address further the amount payable to the Crown by the Law Society under s 257.

[13] So far as the statutory costs discretion in s 249 is concerned, the legislature clearly envisaged that there would be circumstances where the Law Society may have costs ordered against it, to be paid to the charged practitioner. That is mandated by the power in s 249(2) (a) of the Lawyers and Conveyancers Act 2006.

[14] Similarly, the legislature has recognised that despite a finding that a charge has not been proven, there will be circumstances where a legal practitioner

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3 For example see *Black v NZ Law Practitioners Disciplinary Tribunal* [1999] NZAR 40.
4 Section 249(2)(a).
5 Section 249(3).
6 Above, n 1.

may still be required to pay costs to the Law Society, as set out in s 249(3) of the Act.

[15] The question is, of course, in each situation, what are those circumstances? We need only deal with the former situation in this case (ie whether there are circumstances that would justify an order of costs against the Law Society in favour of the practitioner), as the Standards Committee has conceded that it seeks no costs from Ms Simes. In the circumstances of this case that is an appropriate concession.

Submissions of the parties

[16] For the Standards Committee, it was submitted that the case against Ms Simes was prepared, presented and argued efficiently, and that nothing justified an order of costs against the Committee.

[17] It noted that the costs claimed in that part of Ms Simes' application which was based on her counsel's costs regarding the costs application itself, were not properly itemised. The Standards Committee also said that the costs application was unnecessarily wide ranging, and could not justify an additional award.

[18] The costs claimed in respect of Kiwilaw Advocates Ltd were said to have no proper legal basis. Ms Simes was represented by counsel the Committee noted, and Kiwilaw Advocates Ltd was not a party to the proceedings.

[19] For Ms Simes reference was made to the fact that the Tribunal had found that there was insufficient evidence to prove the charges.

[20] The point was also made for Ms Simes that, contrary to the particulars alleged as part of the first charge Ms Simes had faced (relating to breaches of r 11 of the Conduct and Client Care Rules[7]), the Tribunal had noted there was evidence that showed Ms Simes had adopted a conscientious approach to ensuring proper administration of her practice while out of her office, overseas, for 14 days. That manner of administration had been known to the Standards Committee as part of its investigation into the complaint made, before charges were laid, it was said for Ms Simes.

[21] It was also noted for Ms Simes that after hearing the charge involving an allegation of a breach of r 11, the Tribunal had found there was not sufficient evidence before it that Ms Simes had breached the rule. The prosecution of the

[7] This Rule requires a practitioner to administer their practice in a way that ensures the practitioner's duties to the court and to clients are adhered to and the reputation of the profession is preserved.

charge relating to a breach of r 11 had proceeded on the basis that given the method of administration used in Ms Simes' practice, some work undertaken at her practice while she was away for 14 days must have been completed in a way that meant she had not observed her duties to clients and the court. For Ms Simes, it was noted that the Tribunal had found that there had been no specific evidence before it relating to any particular duty in respect of a particular client, or issue at court, which arose from Ms Simes' method of administration of her practice during the 14 days concerned. There was also no evidence to satisfy the Tribunal that her administration methodology did not comply with r 11.

[22] With regard to the second allegation made as part of the first charge (that Ms Simes had also breached r 11.3 of the Client Conduct and Care Rules[8]), there were similar evidential deficiencies it was submitted for Ms Simes. It was noted that the Tribunal had found the evidence said to support this part of the first charge had failed to show that Ms Simes had not competently supervised her practice and employees while she was away for the 14 day period concerned. The Tribunal had accepted Ms Simes' evidence as to the practices and procedures she had put in place, and had found that she had taken a reasonable and responsible approach to supervision during her short absence.

[23] So far as the second charge was concerned (comprising allegations that Ms Simes was a party to offences under ss 24 and 26 Lawyers and Conveyancers Act 2006), Ms Simes relied on the Tribunal's finding that this could not be proven where there was no evidence of an actual offence to which she could be a party.

[24] These matters reflected, it was submitted for Ms Simes, a failure by the Standards Committee to consider the affirmative defence she had put forward in her detailed responses to the allegations prior to the charges being laid. It was also said that the Standards Committee had failed to properly analyse and assess the material before it, and had proceeded with the charges with no solid evidential base. It was inevitable that the charges would be found not proven by the Tribunal it was submitted.

[25] The significant cost to Ms Simes in defending herself against the charges was also noted in her submissions to the Tribunal, including the impact on her resources given the modest profitability of her practice. It was said that the facts had shown that Ms Simes had applied herself conscientiously to ensuring her professional obligations were observed, and that as a consequence of the charges she had suffered undue financial prejudice.

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[8] This Rule requires a practitioner to ensure that at all times the conduct of the practitioner's practice and employees is competently supervised and managed.

[26] Ms Simes sought costs on an indemnity basis. That arose as a consequence of the dismissal of the charges, based on what was described as an "evidential vacuum". The construction of the charge, in the circumstances, was said not to reflect well on the Standards Committee given the affirmative defence detail provided, the Committee's alleged lack of rigorous analysis of the issues, and its alleged failure to adequately consider what had to be proven. In these circumstances Ms Simes submitted that it could not be said that the Standards Committee had acted properly in discharging its regulatory function.

[27] As noted, the Standards Committee's position was that while it opposed Ms Simes' application for costs, it considered a sum in the range of $7,500 - $10,000 would be a fair and reasonable figure if the Tribunal determined to order costs against it. It described the total sum sought by Ms Simes against it as "extraordinary", and noted that it included the sum attributable to Kiwilaw Advocates Ltd, which it considered had no legal basis, noting also that Kiwilaw Advocates Ltd was not a party.

[28] In answer to submissions for Ms Simes that she had given the Standards Committee a range of material and information which should have resulted in a more fulsome analysis by the Committee, likely resulting in a decision not to lay charges if properly analysed, the Committee said that its duty was to enquire into the matter and to seek an explanation from Ms Simes. It said it did not have to rebut or respond to Ms Simes' position. Its role was to evaluate all the information and to decide if it was a matter that should be considered by the Tribunal.

[29] There was no suggestion by Ms Simes, the Standards Committee noted, that the prosecution was brought in bad faith or for some other improper purpose. It also noted that Ms Simes had advised the Committee that she had little left of her practice, so it did not consider her suggestion that the Committee's failure to request certain files and detail was a material matter. This was in response to Ms Simes' allegation of inadequate investigation and consideration of her affirmative defence by the Standards Committee. The Committee also noted that Ms Simes had been free to supply anything she wished in support of her affirmative defence, noting the important role a practitioner under investigation has in co-operating and assisting an inquiry.[9]

[30] The Committee said that Ms Simes, in her submissions on the financial affect of the charges, was trying to introduce irrelevant matters such as her income-producing ability being adversely affected. It suggested they were matters relevant to a compensation claim, not to a determination of costs and expenses under s 249 Lawyers and Conveyancers Act 2006.

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[9] *Parlane v New Zealand Law Society Waikato Bay of Plenty Standards Committee 2* HC Hamilton, CIV 2010-419-1209, 20 December 2010.

[31] There was no issue of lack of jurisdiction to bring the charges the Standards Committee said, and it was a proper exercise of its disciplinary function to lay the charges after investigation. The Committee, in noting that there was no limitation to its jurisdiction to bring the charge, recorded the very recent decision of Heath J in *Orlov v New Zealand Law Society and Ors,*[10] which of course post-dates the proceedings against Ms Simes, so her case is unaffected by the suggestion of a threshold raised in that case.[11]

[32] There was sufficient evidence to warrant the charges in the view of the Committee, despite Ms Simes' suggestion to the contrary. In noting this the Committee said that the detail Ms Simes had provided regarding her supervision, her use of staff resources, and the level of her general involvement day to day in her practice, was properly analysed, and considered to support the particulars alleged. The Standards Committee said it had analysed the issues from a legal and evidential perspective, and that it was open to it to ask the Tribunal to reach a conclusion on the matters it put before it, given the material the Committee had investigated.

[33] So far as the party offence charges were concerned, the Standards Committee suggested that Ms Simes may have benefitted from the fact that a recent Supreme Court decision, *Stewart (Lynette) v R,*[12] had not been drawn to the Tribunal's attention at the hearing of the substantive charge. That case was said by the Committee to make it clear that there will be some cases where a conviction can be entered for a party offence notwithstanding that the evidence left a reasonable doubt as to the guilt of the principal offender.

[34] In summary, in respect of the first charge (alleging that Ms Simes did not administer her practice in a manner that ensured a proper discharge of her duties to clients and the court and did not competently supervise and manage the conduct of her practice and employees), the Committee submitted that on the information available to it about Ms Simes' methods of practice administration and supervision it was reasonable to put the matter before the Tribunal for consideration.

[35] In its submissions the Standards Committee also recorded its view that it appeared from the Tribunal's decision that the Tribunal differed from some of the opinion expressed by the Full Court in *D'Allessandro & D Angelo v Bouloudas* (1992) 10 WAR 191, relating to the required extent of supervision and the need to avoid complete delegation. If that is intended to suggest that the Tribunal takes a

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10 *Orlov v New Zealand Law Society and Ors* [2012] NZHC 2154.

11 *Orlov* suggests that unless matters are likely to result in suspension or striking off, the issue should not come to the Tribunal, but be dealt with by a Standards Committee. That may raise some practical issues, as a Standards Committee cannot deal with misconduct charges under the Act, and not all conduct of a type specified as misconduct in the Act would be likely to result in such a sanction.

12 *Stewart (Lynette) v R* [2012] 1 NZLR 1.

different position from the court in that case, then that is a failure to recognise the essence of the points the Tribunal made in dismissing the first charge against Ms Simes. The charge was dismissed because of insufficiency of evidence to prove inadequate practice administration or failure of supervision, not because the Tribunal did not agree with the view of the Full Court that complete delegation was not acceptable when assessing matters relating to the discharge of professional obligations.

[36] So far as the second charge was concerned, the Committee's position was that evidence regarding the way Ms Simes conducted her practice, oversaw her practice, and delegated work, was sufficient to show that an offence against s 24 or s 26 Lawyers and Conveyancers Act 2006 would have been committed by her staff members. It considered that against that background it was competent to find such an offence had been committed, and that Ms Simes was a party to that offence.

Discussion

[37] There are clearly circumstances where costs may be ordered against the Standards Committee. The Lawyers and Conveyancers Act 2006 makes that clear by giving not only a wide discretion to the Tribunal,[13] but also by specifically providing for such an order.[14]

[38] A similar provision has been the subject of judicial commentary in the United Kingdom. The principles applied there may be summarised as;

(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 born 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.

[13] Section 249(a).
[14] Section 249(2)(a).

[39] These principles were laid out in *Baxendale-Walker v The Law Society*[15] where the Divisional Court said, in respect to a similar provision to s 249 Lawyers and Conveyancers Act 2006;

> "The principles, in relation to an award of costs against a disciplinary body, were not in dispute. A regulator brings proceedings in the public interest in the exercise of a public function which it is required to perform. In those circumstances the principles applicable to an award of costs differ from those in relation to private civil litigation. Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party has succeeded*."*

[40] The Divisional Court also noted[16] that a relevant consideration was;

> "……the need to encourage public bodies to exercise their public function of making a reasonable and sound decision without fear of exposure to undue financial pressure, if the decision is successfully challenged."

[41] On appeal from the decision of the Divisional Court, the appellate court approved the approach taken by the Divisional Court, noting that the Law Society had a role to advance the public interest and to ensure that investigation of alleged professional misconduct was properly undertaken, and charges laid if appropriate. It said that unless proceedings were improperly brought, or not adequately pursued,[17] an order for costs would not ordinarily be made against the Law Society where its prosecution had failed. Costs did not automatically follow the event, but had some relevance as a factor to be considered.

[42] The Court said in this regard:

> "The 'event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage." [18]

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15 *Baxendale-Walker v The Law Society* [2006] EWHC 643 at [43]

16 Ibid, also at [43]

17 This is a reference to professional disciplinary proceedings brought in the case of *Gorlov v the Institute of Chartered Accountants in England and Wales* [2001] EWHC Admin 220 where the proceedings were described by the Court as "*a shambles from start to finish"* at [37].

18 *Baxendale-Walker v The Law Society* [2007] EWCA Civ 233 at [40].

[43] This Tribunal, in exercising its costs discretion against practitioners where charges have been proven under the Lawyers and Conveyancers Act 2006, has taken a view that the costs of prosecuting errant practitioners should fall on those practitioners, rather than the profession as a whole.

[44] This position is of course subject to the Tribunal being satisfied that the costs incurred by the Standards Committee are reasonable, in terms of quantum (requiring a review of time spent to ensure it is justified and proportionate, as well as a review of the actual charge methodology and level applied) and affordability (requiring a review of the practitioner's ability to pay the amount sought).[19] There may also be other factors arising in specific cases which should be taken into account when ordering costs against a practitioner, such as whether all charges were proven and if not the reason for that, and the impact of a large costs order on any rehabilitative proposal, reflecting principles of balance and fairness to which the Tribunal should have regard.[20]

[45] That approach by the Tribunal, requiring practitioners to meet the costs of the Standards Committee concerned where found guilty, is not contrary to the approach followed in the United Kingdom, where costs do not automatically follow the event. The United Kingdom cases reflect the position where costs are sought against the professional body. Even if the cases had been binding on this Tribunal (which they are not), they do not suggest a different approach to costs ordered against practitioners found guilty from that adopted by this Tribunal, notwithstanding that practice reflects costs following the event. Where the cases are helpful, is in setting out some principles for consideration when this Tribunal is considering a costs application against a Standards Committee, as in Ms Simes' case.

[46] For costs to be ordered against a Standards Committee we agree that there would have to be more than a simple failure to successfully prove a charge. More is required, so that an objective assessment would result in a view that the Standards Committee had no sound basis for the charge, or its approach to proving the charge was misconceived. Indeed, that has been the approach adopted by this Tribunal in the past.[21]

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19 As to commentary on the principles of affordability and reasonableness see *Kaye v Auckland District Law Society* [1998] 1 NZLR 15.

20 Above, n 3.

21 See *Waikato Standards Committee v Louth* [2010] NZLCDT 27, where the Tribunal ordered costs against the Standards Committee because of significant errors in formulating the charges (making amendment or withdrawal inevitable in the circumstances), failure of the Standards Committee to ascertain whether certain key facts were accurate (after it had been put on notice), and significant process delays preceding its application to withdraw all charges.

[47] The issue for us now is whether there is something extraordinary about the proceedings against Ms Simes that would take the matter into the category of a case where, weighing up all factors, costs should be paid by the Standards Committee.

[48] The circumstances of the complaints against Ms Simes, the investigation, and the decision to lay charges by the Standards Committee have been well traversed in submissions by the parties which we have noted earlier in this decision. Notwithstanding a residual concern we have regarding the attitude of the Standards Committee to the investigation,[22] we agree with the Committee that it was not unreasonable to proceed against Ms Simes and obtain a definitive view from the Tribunal.

[49] To that point there is nothing which we consider would justify a costs order against the Standards Committee. Where the Tribunal considers that position changes is in the construction of the charges and the evidence provided in support of those charges. It may be that the insufficiency of evidence we noted in our decision dismissing the charges is a reflection of the Committee's apparent decision not to seek further information regarding some of the issues raised by Ms Simes in her response to the investigation, but, as we have noted, that is not something we consider to be a deciding factor.

[50] As the Tribunal indicated in its decision on the charges;

(a) In respect of the first charge there was no evidence that satisfied us to the requisite standard[23] that Ms Simes, while overseas for 14 days, had not adequately administered her practice sufficiently to ensure her duties to the court and her clients were observed. While the Committee was able to point to some general methodology normally used by Ms Simes in her practice, it effectively asked the Tribunal to assess adequacy from an high level perspective, and did not show

[22] We found the submissions by the Standards Committee in this costs matter, to the effect that it was for Ms Simes to provide additional material and information regarding the investigation by the Committee that may have helped inform the Committee, and not for the Committee to seek it out, somewhat surprising (see paragraphs 16 – 20 of the Committee's submissions dated 29 August 2012). We do not think that approach sits comfortably with the Committee's determinative powers under s 152 Lawyers and Conveyancers Act 2006. Under that section a Standards Committee has an ability to find unsatisfactory conduct and impose a sanction. Alternatively it can decide that the matter is one for the Tribunal, or is a matter on which no further action is to be taken. The operation of the section requires the Committee to consider all available material before reaching a conclusion. A Standards Committee is given significant investigatory powers, and we would have thought that a Committee would want to ensure that it had gathered and considered all available and relevant material before deciding how it would respond under s 152. This is particularly so, where, as in this case, the practitioner has raised a number of issues in response which indicated the need for the Standards Committee to ensure close analysis, and the availability of adequate prosecution evidence, in respect of the allegations.

[23] On the balance of probabilities – see s 241 Lawyers and Conveyancers Act 2006; and see also *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

that there was a particular breach of a duty in respect of an identified client, or issue at court. Even if it had, as we said in our substantive decision,[24] there would have needed to be an identifiable nexus between her modus operandi and that breach to allow a finding that she did not administer her practice in a way that ensured her duties to clients and the court were observed.

(b) Nor was there sufficient evidence regarding the first charge in respect of the allegations that she did not competently manage and supervise her staff and practice during a period of 14 days when she was absent from her practice. In fact the evidence showed that Ms Simes went to considerable lengths to ensure she did comply with those requirements, and even stood down some employees she felt she could not adequately supervise and manage utilising the procedures and processes she put in place while away for 14 days.

(c) A general description of Ms Simes' practice methodology in the administration of her practice while she was absent for 14 days, juxtaposed with a list of duties applicable to practitioners, does not itself prove a breach of the rule requiring administrative systems and procedures sufficient to ensure adherence to her duties as a lawyer.

(d) The first charge related only to a 14 day period. That was a very narrow window to examine, and in the absence of specifics the Tribunal was asked to conclude that there must have been a breach of the rules the subject of the first charge during that limited period because of the way Ms Simes' practised. The Tribunal was effectively being asked to assess the efficacy of Ms Simes' practice administration and supervision as it related to whatever might have happened during that 14 day period. That assessment was to be undertaken without being given any detail of the results of her administration or supervision methodology – just the fact that she did things in a certain way on some occasions. That itself was not enough to demonstrate a breach of the rules in our view.

(e) In respect of the second charge, relating to an allegation that Ms Simes was a party to offences under ss 24 and 26 Lawyers and Conveyancers Act 2006, there was no specific evidence of activity amounting to an offence to which she could be found to be a party. In our decision on the charge we said that there would need to be a specific matter before us showing that one of Ms Simes' employees had actually committed an offence under one or other of those

[24] *Canterbury/Westland Standards Committee 2 v Simes* [2012] NZLCDT 4, at [52] and [53].

sections. We accepted that it was not necessary to know who a primary offender was, and whether someone had been charged in respect of the offence, but an actual offence had to be shown to have occurred to enable a successful prosecution of Ms Simes as a party to such an offence.

(f) There was no evidence which showed that one of Ms Simes' employees had committed an actual offence. The evidence went no further than showing the work environment in which Ms Simes' employees operated, and a generic description of how the practice was operated generally. While it may have been possible that the way Ms Simes operated her practice allowed an offence under either s 24 or s 26 Lawyers and Conveyancers Act 2006 to occur, at sometime during the 12 month period covered by the charge, there was no evidence that an offence had actually been committed on a specific date and in a specific way during that period. Showing that there had actually been such an offence was of course a necessary precondition to finding that Ms Simes was a party to that offence.

[51] In its submissions on costs the Standards Committee drew the Tribunal's attention to *Stewart.*[25] That case, involving a decision of the Supreme Court, was said by the Committee to clarify that there will be some cases where a conviction may be entered against a person as a party to an offence notwithstanding that the principal offender might have been acquitted (ie there is no primary offence conviction). The Committee suggested that Ms Simes may have been fortunate that decision had not been drawn to the Tribunal's attention, as it may have affected the view the Tribunal formed regarding the party offences.

[52] A careful reading of *Stewart* will show that in fact the case supports the position taken by the Tribunal in its decision dismissing the charge involving allegations of party offences. The finding of the Tribunal was that there was no evidence sufficient to show an actual offence against either ss 24 or 26 Lawyers and Conveyancers Act 2006 had occurred. Without any evidence of an actual offence, Ms Simes could not be a party. While the tribunal agrees that it is not necessary to know who the principal offender is, and whether someone had been charged or acquitted, points made in our decision dismissing the substantive charges, the actual commission of an offence had to be proven, and it was not.

[53] The Supreme Court in *Stewart* said that while there would be circumstances in which a conviction could be entered against a person for secondary liability notwithstanding the principal offender was acquitted, if there is reasonable doubt about whether a primary offence took place at all then conviction of a party to that

[25] *Stewart (Lynette) v R* 1 NZLR 1.

offence would be unsustainable. That is the position here – Ms Simes cannot be found guilty of being a party to a particular offence that has not been proven to have occurred.

[54] The Supreme Court noted some examples of a situation where a person could be convicted of secondary liability, notwithstanding that no principal offender had been convicted. Those included where it was certain that the offence took place, but the principal offender could not be identified, or where the principal offender was found not guilty by way of insanity or infancy. Of course, none of the exceptions noted by the Supreme Court apply in this case. The key issue remains uncertainty about whether there has been any commission at all of an actual offence by one of Ms Simes' employees. The requirement that that there be certainty that an offence took place was not met.

[55] We consider that the Standards Committee has failed, by a considerable margin, to properly organise and present the evidence that was necessary to support the charges. High level claims that the manner and structure of Ms Simes' practice showed that she had failed to ensure her duties were not breached during the 14 day period the subject of the charge, are insufficient on their own. Actual instances of the breaches of duty which were alleged to have occurred during the relevant period had to be proven, and then shown to relate to the structure and manner in which Ms Simes managed her practice.

[56] Similarly, allegations of inadequacy of practice management procedures and supervision during a 14 day absence had to be based on something more specific than a general review of practices and procedures usually employed by Ms Simes. This was particularly so in light of her evidence as to how she maintained an overview while absent for those few days, information she had tendered to the Standards Committee at an early stage.

[57] To be a party to an offence, there had to be proof an offence had actually been committed, and there was no such evidence. Indeed, it was submitted at the substantive hearing of the charges that was not required, something the Tribunal did not accept in its decision on the substantive matter, but nevertheless a position seemingly maintained in the submission re *Stewart* made in the course of responding to Ms Simes' application for costs.

[58] We consider this is a case where the failure of the prosecution is of a nature that some costs against the Standards Committee would be appropriate. The proceedings were not well grounded;

(a) The first charge was limited to a specific period of just 14 days, yet no particular instance of a breach was shown to have occurred during that period, let alone that the manner of administration and

supervision were ineffective and the cause of, or at least a substantial contributor to a breach.

(b) The second charge could only have succeeded if it had been shown that an offence had occurred during the almost 1 year period covered by the charge. There was no evidence of an actual offence having been committed, involving specifics of what had occurred, and when it had occurred, just a manner of practise that the Standards Committee said meant that some offence must have occurred at some time during the period covered by the charge. We record that the Tribunal raised this matter, of showing that an offence had actually occurred, for consideration by the Standards Committee during a judicial issues conference, prior to the hearing.

[59] Ms Simes has had a not insignificant issue to face, with professional and financial consequences, and the Standards Committee has failed to prove the charges as a consequence of its approach to the proceedings as noted. While a contribution is justified, indemnity costs are not, in the circumstances. Indemnity costs would be the preserve of bad faith, improper purpose, or perhaps, "*a complete shambles from start to finish.*"[26]

[60] We do not consider that there is a proper basis justifying us ordering any costs against the Standards Committee attributable to the work undertaken for Ms Simes in respect of her application for costs. We consider that, as a matter of principle, ordering costs against a Standards Committee, incurred specifically in preparing argument as to who should bear costs in a professional disciplinary situation, is in a different category from considering costs issues arising in preparing for and undertaking the substantive hearing. Argument on cost liability is something which is sufficiently disconnected from the substantive matter, and any issues around whether the substantive charges involved poor processes, misconception, or lack of proper foundation, as to require a different approach.

[61] In our view, costs on the costs application itself in this professional disciplinary environment, should lie where they fall. Liability for such costs should not become an additional matter the subject of consideration which may result in a regulator facing a liability for those costs as well as costs on the substantive matter. A regulator's contribution to costs on the substantive matter may occur as a result of consideration of the regulator's performance in respect of the substantive matter, and whether as a consequence all or some of the charged practitioner's cost of the substantive hearing should be met by the regulator. We do not favour extending the imposition of those cost obligations on to the regulator

[26] Above, n 17.

in respect of the costs of the practitioner incurred in actually seeking its costs from the regulator.

[62] So far as the costs of Kiwilaw Advocates Ltd are concerned, we also do not consider this part of Ms Simes' claim for costs should be made the subject of an order against the Standards Committee. Ms Simes was represented by counsel. She was not a litigant in person who, as a barrister and solicitor, would have been entitled to costs as if acting for a client. Of course, she would not be entitled to any costs of instructing or attending on herself,[27] even if she had represented herself, rather than being represented by counsel.

[63] We note also that while Ms Simes has kept records of the work she did via her incorporated law firm, Kiwilaw Advocates Ltd, her invoice to her counsel for this work is described as a "pro forma" invoice. That raises an issue as to whether her counsel had himself actually requested that this work be undertaken and whether he would have sought it and paid for it in the normal course as an arm's length matter arranged and incurred by him as counsel. It is not clear to the Tribunal whether these costs are actual costs incurred by Ms Simes' counsel, or simply a record of time spent that could be made the subject of a formal invoice if required, dependent on the Tribunal's decision. There is circularity in the arrangement, as noted in paragraph 13 of Ms Simes' memorandum of 14 August 2012 in support of costs for the contribution of Kiwilaw Advocates Ltd. In any event, we do not think it appropriate to exercise our discretion in favour of Ms Simes regarding these costs.

[64] We make no allowance for the costs of Kiwilaw Advocates Ltd, nor for Ms Simes' counsel's costs in connection with this costs application itself, for the reasons noted.

[65] The Standards Committee should pay some of Ms Simes' costs, but nothing like the total amount she claims, an amount approaching $37,000. In our view, in all the circumstances of this case and for the reasons noted, a contribution of $13,800 to Ms Simes' costs by the Standards Committee would be appropriate. This represents approximately two thirds of her counsel's costs on the substantive matter, which were reasonable, in terms of level of charge and time engaged.

Order

[66] The costs application by Ms Simes is partially allowed, and the Standards Committee is ordered to pay costs of $13,800 to Ms Simes. The costs application, so far as it relates to the other costs claimed by Ms Simes, is denied.

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[27] *Brownie Wills v Shrimpton* [1998] 2 NZLR 320, [1999] PNLR 552 (CA) and *Ponniah v Surveyor-General* HC Auckland M1387-SW01, 20 February 2003.

DATED at Auckland this 17th day of October 2012

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D J Mackenzie
Chair