

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2015] NZLCDT 46

LCDT 008/15

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 4**

Applicant

AND

CAROLE SMITH

Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms F Freeman

Ms C Rowe

Ms S Sage

Mr I Williams

ON THE PAPERS

DATE OF DECISION 16 December 2015

COUNSEL

Mr R McCoubrey for the Standards Committee

Mr W McCartney for the practitioner

DECISION OF THE TRIBUNAL ON COSTS

[1] The practitioner has sought costs against the Standards Committee following dismissal of the charges against her.

[2] It is submitted on her behalf that the prosecution was effectively misconceived and contained factual errors in the pleadings.

[3] The practitioner submits that there were a number of points at which the prosecution could have been withdrawn, the latest being following the Tribunal's refusal to amend the charges at the hearing. She seeks indemnity costs in the sum of \$57,990.

[4] On behalf of the Standards Committee it is submitted that the charges were properly put before the Tribunal. It is further submitted that there is a risk of costs awards providing a disincentive to Committees if there is a fear of incurring adverse costs orders.

[5] Furthermore it is submitted that the costs claimed are excessive.

[6] The Standards Committee points out that the New Zealand Law Society will bear the costs of the Tribunal and the prosecution and the costs of the prosecution will form a significant burden to the profession as a whole. The Committee's costs are in the region of \$12,000 and the s 252 costs will be in the region of \$4,000.

[7] The Standards Committee refers the Tribunal to the English Court of Appeal decision of *Baxendale-Walker v The Law Society*.¹

[8] We cited this decision with approval in our decision in *Hall*.² In that decision, having noted the broad nature of the discretion to award costs contained in s 249 of

¹ *Baxendale-Walker v The Law Society* [2007] EWCA CIV 233 at [35].

² *New Zealand Law Society v Donna Marie Tai Tokerau Durie Hall* [2014] NZLCDT 17.

the Act,³ the Tribunal summarised the principles contained in the *Baxendale-Walker* decision 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.”⁴

[9] This matter was initiated by a complaint from a party to proceedings, and following quite critical comments having been made about the relevant transaction, by a High Court Judge. We accept that, while it may not have been necessary, it was proper for the Standards Committee to refer the matter to the Tribunal.

[10] While there is some merit in the argument that the Standards Committee ought to have reconsidered its position once the practitioner’s evidence was received, there were also contrary arguments for the Committee to put forward, and of course the evidence was at that stage untested.

[11] It is, perhaps, unfortunate that the Standards Committee, having been refused an amendment to broaden the nature of the charges, at the outset of the hearing, did not reconsider its position then. However, we would consider it harsh to penalise such a decision, in the course of litigation, which of its nature, has unknown risk factors.

[12] In exercising our discretion we are also cognisant (as we were in the *Hall*⁵ decision) that the profession will bear the costs of the prosecution and the Tribunal costs.

[13] We also weigh the fact that the Standards Committee, as the body charged with the responsibility of pursuing complaints as to professional standards on behalf of

³ Lawyers and Conveyancers Act 2006.

⁴ See above n 2 at [5].

⁵ See above n 2.

and for the protection of the public, ought not to be unduly hampered in its role by a fear of adverse costs awards.

[14] That is not to say that there are no situations where a costs order will be imposed against the prosecution. However we do not consider that this is one of those situations as set out in the *Baxendale-Walker* case where the proceedings were wholly misconceived or “a shambles from start to finish”.⁶

[15] For these reasons the application for costs is declined. The s 257 costs are certified at \$3,323.00 and are to be paid by the New Zealand Law Society.

DATED at AUCKLAND this 16th day of December 2015

Judge D F Clarkson
Chair

⁶ See above n 2 at [8].