IN THE COURT OF APPEAL OF NEW ZEALAND

CA118/2017
[2018] NZCA 37

BETWEEN	JEREMY JAMES MCGUIRE Appellant
AND	THE SECRETARY FOR JUSTICE Respondent

Hearing:	15 August 2017
Court:	French, Miller, Cooper, Winkelmann and Clifford JJ
Counsel:	Appellant in Person G L Melvin and M J McKillop for Respondent P N Collins for New Zealand Law Society as Intervener
Judgment:	9 March 2018 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is allowed.

C The respondent's application for partial strike out of the appellant's first amended statement of claim is granted to the extent that it challenges the selection committee's 2013 recommendation and the respondent's 2013 decision declining approval for the appellant to provide legal aid services.

D The High Court order that the respondent pay the appellant's disbursements is set aside. Costs in the High Court are to be dealt with by that Court having regard to the terms of this judgment.

E The appellant must pay the respondent costs on the appeal, and costs on the cross-appeal, calculated for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] This appeal had its origins in the quality assurance provisions in pt 3 of the Legal Services Act 2011 (the Act), in particular as they apply to practitioners wishing to provide legal aid services.

[2] The appellant, Mr McGuire, made an application for judicial review of a decision by the respondent Secretary for Justice declining his application for approval as a provider of legal aid services. He also sought to review the recommendation of a legal aid selection committee that had preceded the Secretary's decision.[1]

[3] The Secretary applied for an order striking out part of Mr McGuire's statement of claim. The Secretary's application was declined by the High Court.[2] From that decision there is both an appeal and a cross-appeal. The appeal, by Mr McGuire, challenges the High Court decision not to award him costs on the Secretary's unsuccessful application. The cross-appeal, by the Secretary, claims that the

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1 Although Mr McGuire's statement of claim described this as a decision, it is clear from the statute that the selection committee makes a recommendation: Legal Services Act 2011, s 78(1).

2 *McGuire v The Secretary for Justice* [2017] NZHC 365.

High Court wrongly declined the strike-out application and seeks that the relevant part of the claim be struck out by this Court.

[4] Mr McGuire's appeal raises the issue of his entitlement to costs as a self-represented solicitor and in effect seeks to challenge this Court's recent judgment in *Joint Action Funding Ltd v Eichelbaum* in which it was held that the so-called lawyer-litigant exception to the rule that unrepresented parties are not entitled to costs should no longer apply.[3] Mr McGuire considered there was a conflict between the judgment in that case and an earlier decision of this Court in *Brownie Wills v Shrimpton.*[4] He sought that a Full Court be assembled to determine the appeal. Being of the view that the issues raised were of considerable importance Harrison J directed that should occur. He also directed that a copy of his minute be sent to the New Zealand Law Society, which had been cited as a second defendant in the High Court but not named as a party to the appeal. The Law Society was given leave to appear and be heard as an intervenor and we are grateful to Mr Collins for the assistance he was able to provide at the hearing. In the end, however, for reasons that will emerge, we do not consider there is any need to revisit the conclusion reached in *Joint Action Funding*, even if we were prepared to reconsider an issue so recently determined by the Court.

[5] The issue raised by the Secretary's cross-appeal is whether, in declining the strike-out application, the High Court correctly applied s 83 of the Act. Section 83 excludes applications for judicial review of decisions such as that made by the Secretary in this case until the practitioner concerned has sought and obtained, under s 82, a review of the decision by the Review Authority established by the Act. There is no dispute as to the approach to be taken to the strike-out application, which is advanced on the basis that the claim discloses no reasonably arguable cause of action: the pleaded facts are assumed to be true, the cause of action must be clearly untenable, and the jurisdiction to strike out will only be exercised in clear cases.[5]

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3 *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70.
4 *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA).
5 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]; and *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

[6] Because any entitlement to costs turns on whether the High Court correctly dealt with the strike-out issue it is logical to begin with the latter. But first, we briefly set out the background and summarise the High Court judgment.

Background

[7] Mr McGuire's application for judicial review challenged a decision of the Secretary declining his application for approval to provide legal aid services as a lead provider in family law.[6] The Secretary's decision, made on 7 November 2013 (the 2013 decision), was in accordance with the recommendation of a selection committee dated 11 July 2013 (the 2013 recommendation). Mr McGuire had not challenged the 2013 decision before the Review Authority established by s 84 of the Act, a right given to him by s 82.

[8] Mr McGuire made a further application for approval in July 2015. On 12 October a selection committee again recommended that the Secretary decline the application (the 2015 recommendation) and the Secretary did so on 27 October 2015 (the 2015 decision). On this occasion Mr McGuire did apply to the Review Authority for a review. On 22 December 2015, the Review Authority dismissed Mr McGuire's application for review.

[9] Mr McGuire had previously issued separate proceedings against the Law Society and the Manawatu Standards Committee based on the way complaints against him had been handled. Those proceedings were subsequently settled following a successful mediation. On 31 August 2016 the President of the Law Society wrote a letter to Mr McGuire apologising for "the stress, inconvenience and embarrassment" caused to McGuire by errors that resulted in three censure orders for unsatisfactory conduct in 2012 and 2014. She also expressed the Law Society's regret for the "deep distress" caused by the disciplinary prosecution in 2008–2011.

[10] Mr McGuire was also issued with a new certificate of standing dated 1 September 2016. The certificate recorded that Mr McGuire had been admitted as a

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6 Mr McGuire's application sought approval in respect of other legal aid services but his application for review was confined to his application to be a lead provider in family law.

barrister and solicitor on 4 September 1992, held a current practising certificate and was entitled to practise on his own account. It also noted that on 20 October 2011 he had pleaded guilty to a charge of unsatisfactory conduct, and referred to two "open complaints" before standards committees, and one complaint where there had been a finding of "no further action" by a standards committee that was currently "on review with the [Legal Complaints Review Officer]". It concluded with the words: "The New Zealand Law Society considers Mr McGuire is of good standing."

[11] Mr McGuire then engaged in correspondence with Ms Amy Davis, an advisor to the Ministry of Justice: they exchanged a series of emails on 15 September 2016. Mr McGuire attached a copy of the new certificate of standing and also the apology he had received from the Law Society. He asked whether these events had changed his position with respect to obtaining a legal aid contract and continued:

> Is this certificate of standing sufficient for me to be considered for a contract?
>
> What do I need to do for this given I have applied twice before and been unsuccessful largely because of the former certificates of standing that has now radically changed?

[12] Ms Davis replied referring to other outstanding complaints still being reviewed. She said they meant the Secretary would not be able to make an assessment of whether or not Mr McGuire met the criteria for approval. She expressed the hope the outstanding complaints could be resolved promptly. This elicited a further response from Mr McGuire, which included the following:

> I made it quite clear at mediation that the certificate of standing had to be sufficient for me to be able to apply for a contract (I am not saying "and necessarily get one"). If I can't even apply with this certificate then serious questions need to be asked.
>
> I look forward to hearing from you about this now crucial issue.

[13] Ms Davis replied as follows:

> You are not prevented from applying.
>
> My advice is that any application from you, with that certificate of standing, will be premature and will likely be declined for the same reasons your first application was declined. As I have stated before, it is impossible for the Secretary for Justice to assess whether or not anyone meets the fit and proper person requirements when complaint determinations are outstanding.

[14] On 19 September 2016 (just under three years after the 2013 decision was notified) Mr McGuire commenced his application for judicial review. Initially he challenged only the 2013 decision, and the certificate of standing of 1 September 2016. The Secretary applied to strike out the claim to the extent that it challenged the 2013 decision. The basis of the strike-out application was that the statement of claim disclosed no reasonable cause of action against the 2013 decision, and was frivolous and vexatious. The Secretary relied on s 83 of the Act and the fact that Mr McGuire had not sought a review of the 2013 decision under s 82 of that Act.

[15] Subsequently Mr McGuire amended the claim so as to add a challenge to the Secretary's 2015 decision. That part of the claim remains on foot and will be considered on its merits, Mr McGuire having made an unsuccessful application for a review under s 82 of the Act.

The 2013 recommendation and decision

[16] The relief sought in Mr McGuire's amended statement of claim included a declaration that the Secretary for Justice's decision on the 2013 application was unlawful and invalid, and an order setting aside that decision.[7]

[17] The Secretary's decision was given in writing. It included a summary of the reasons for the decision, which was in the following terms:

> **Does not meet** the criteria for approval as a lead provider for Family for the following reasons:
>
> - **does not meet** the Professional Entry Requirements;
> - **does not have** the Service Delivery Systems that support the applicant to provide and account for legal aid services or specified legal aid services in an effective, efficient and ethical manner;
> - **has not provided** references that support the applicant's experience and knowledge in the area of law and category of proceedings to which the application relates; and
> - **has not demonstrated** experience and competence in Family.

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7 The same relief was sought in relation to the 2015 decision.

[18] The statement of claim made various allegations against the members of the selection committee who made the 2013 recommendation. There were allegations of bias, predetermination, conflict of interest, taking into account of irrelevant considerations and failure to take into account relevant considerations, as well as claims that the decision was wrong in law and fact. These allegations were fully particularised in some 21 paragraphs, which we need not set out. Other allegations were that the selection committee had applied the wrong legal test and misdirected itself in making its decision that Mr McGuire lacked the necessary experience for approval.

[19] It was then alleged that the 2013 decision to refuse the application was unreasonable and unfair because it was based on the unreasonable and unfair 2013 recommendation. Other allegations were made that the Secretary had applied the wrong test, taken into account irrelevant considerations and was wrong in fact and law.

The High Court judgment

[20] Cull J considered that the principal issue was whether the statutory language in s 83 of the Act ousted the right to judicial review in breach of s 27(2) of the New Zealand Bill of Rights Act 1990.

[21] She was not prepared to read s 83 as a "mandatory requirement" that there must be an application for a review to the Review Authority before an application could be made to the Court for judicial review.[8]

[22] The Judge referred to s 27(2) of the New Zealand Bill of Rights Act, which provides as follows:

> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

[23] She then referred to s 6 of the New Zealand Bill of Rights Act stating that:[9]

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8 *McGuire v The Secretary for Justice*, above n 2, at [42].
9 At [38].

> The interpretation of s 83 of the Act that is consistent with the rights and freedoms of the NZBORA must be the preferred interpretation, as s 6 NZBORA provides.[10]

[24] She continued:[11]

> For this reason, I accept Mr McGuire's argument that the words in s 83 "a person **may** not apply for judicial review" is permissible in circumstances where a person has not met the strict time limits within the Act. If s 83 is interpreted as a mandatory requirement, the statutory provision operates as a privative clause, which purports to oust this Court from its judicial review function. Such an interpretation is inconsistent with the NZBORA.

[25] We infer that when the Judge said that the relevant words were "permissible" that was a shorthand way of saying that in appropriate circumstances the Court would not be bound to apply s 83 in its strict terms.

[26] The Judge then referred to a submission made on behalf of the Secretary that ss 82 and 83 of the Act will operate to ensure the use of the statutory review mechanism before judicial review is undertaken. She considered that in the majority of cases that objective would be met but, in the circumstances of this case, it would have been futile for Mr McGuire to seek a review of the 2013 decision by the Review Authority. That finding was based on the correspondence set out above between Mr McGuire and Ms Davis that took place in September 2016. The Judge thought the correspondence made it plain to Mr McGuire that there was no point in him reapplying or seeking a review until outstanding client complaints against him had been determined.[12]

[27] The Judge continued:

> [41] I accept Mr McGuire's submission that in the face of that clear indication, seeking a review before the Review Authority would have been a waste of its and his time. For that reason, I am unable to accept the Secretary's submission that the operation of the Act provisions, restricting or ousting judicial review rights, could be ameliorated by Mr McGuire making a fresh application, if he had failed to meet the time limits under s 82.

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10 This approach to interpretation is well-established: see for example *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629 (HC) at [49]; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [179]; *R v Poumako* [2000] 2 NZLR 695 (CA) at [37]; and *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272.

11 *McGuire v The Secretary for Justice*, above n 2, at [38].

12 At [40].

> [42] On these facts and in these circumstances, I am not prepared to read s 83 as a mandatory requirement that a person must apply for a review to the Review Authority, before taking the only other step available to him, to challenge the 2013 decision, being judicial review.

The cross-appeal

The issue on appeal

[28] We agree with the Judge that the principal issue is the proper interpretation of s 83. The section provides:

> **83 Judicial review**
>
> A person may not apply for judicial review of any decision made under this subpart until the person has sought and obtained a review of the Secretary's decision under section 82.

[29] In essence, the Secretary argued that unless the right to apply to the Review Authority is exercised, a person cannot apply for judicial review of the Secretary's decision. The legislative intention was to impose a justified limitation on the right to bring judicial review, thereby promoting engagement with a specially constituted administrative tribunal prior to resort to the High Court. There was no restriction on judicial review unless an applicant failed to comply with the statutory review process.

[30] Mr McGuire contended, on the other hand, that an application for judicial review may be made after the period limited for applications under s 82 has expired. He further submitted that, in any event, the requirements of s 82 need not be complied with in the case of allegations of breach of natural justice by what he described as "the administrative body" (referring to the Standards Committee and the Secretary).

Analysis

[31] The Act is the result of a comprehensive review of the statutory provisions affecting the provision of legal aid. Its purposes are to promote access to justice by establishing a system that provides legal services to people of insufficient means and

delivers those services in the most effective and efficient manner.[13] Part 3 of the Act contains provisions designed to ensure that providers of legal aid services and other specific legal services meet appropriate standards. The Secretary has a number of functions under this part of the Act. They include establishing, maintaining and purchasing high-quality legal services in accordance with the Act.[14]

[32] Subpart 2 of pt 3 of the Act is headed "Quality assurance system for providers". Within that subpart is s 75, which provides that a person must not provide a legal aid service or specified legal service unless the person is approved by the Secretary to provide that service and the person complies with the conditions (if any) of that approval. Application must be made for approval to the Secretary under s 76 of the Act. Under s 77(1) the Secretary is empowered to give a person approval to provide one or more legal services or specified legal services "if the Secretary is satisfied that the person meets the criteria prescribed in regulations".[15] The approval must be in writing, and amongst other things state the particular legal aid services or specified legal services that the provider is approved to provide.[16] Section 77(4) states that the Secretary must provide reasons for his or her decision to give or decline approval.

[33] Section 78(1) provides that the Secretary may establish one or more selection committees to assess applications for approval to provide legal aid services or specified legal services and to advise the Secretary of the suitability of applicants. The Secretary must appoint a representative from the Ministry of Justice as a chairperson of a selection committee.[17] The Secretary must also appoint to the committee a lawyer from a group of lawyers nominated by the Law Society as being suitable for appointment to the committee and who the Secretary is satisfied is suitable for such appointment and has expertise in the areas of law relevant to the committee's work.[18] There is a discretionary power to appoint other suitably qualified people to the committee as the Secretary thinks fit.[19] The statutory role of selection committees

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13 Legal Services Act, s 3.
14 Section 68(1)(a).
15 The criteria are prescribed in the Legal Services (Quality Assurance) Regulations 2011.
16 Legal Services Act, s 77(3)(d).
17 Section 78(2)(a).
18 Section 78(2)(b).
19 Section 78(2).

is clearly limited to giving advice to the Secretary about the suitability of applicants for approval. Such advice has no legal effect. The decision on any given application is for the Secretary to make. That is plain from reading s 77 together with s 78(1).

[34] Consistently with that, the statute provides, as has been mentioned above, for the review by a Review Authority established under the Act of a relevant decision made by the Secretary. The right to apply for a review is set out in s 82, which provides as follows:

> **82 Review of decisions of Secretary regarding approvals**
>
> (1) A person may apply to the Review Authority for a review of a decision of the Secretary in respect of that person—
>
> (a) declining the person's application for approval to provide 1 or more legal aid services or specified legal services:
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> (b) imposing any condition on the person's approval to provide 1 or more legal aid services or specified legal services:
>
> (c) imposing any interim restriction on the person under section 101:
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> (d) imposing any sanction on the person under section 102:
>
> (e) cancelling the person's approval under section 103.
>
> (2) An application for review must be lodged with the Review Authority within 20 working days from the date of notice of the Secretary's decision.
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> (3) The Review Authority may accept a late application no later than 3 months after the date on which notice of the relevant decision was given to the person, if the Review Authority is satisfied that exceptional circumstances prevented the application from being made within 20 working days after the date on which notice is given.

[35] The Review Authority is established by s 84 of the Act. Section 84(2) requires the Minister of Justice to appoint one person to be the Review Authority, and empowers the Minister to appoint one or more Deputy Review Authorities. Such persons must be enrolled as barristers and solicitors of the High Court, and have at least seven years' legal experience.[20] Under s 85(1), the function of the

[20] Section 84(3).

Review Authority is to review decisions of the Secretary set out in s 82(1). It can do so only on the application of a person in respect of whom the decision is made.[21]

[36] The Review Authority determines a review by confirming, modifying or reversing the decision under review.[22] It must provide reasons for its decision[23] and its decision is binding on the Secretary and the person to whom the decision applies.[24] In carrying out the review, the authority must comply with reg 27 of the Legal Services (Quality Assurance) Regulations 2011, which provides:

> **27 Conduct of review**
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> (1) In conducting a review, the Review Authority—
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> (a) must consider the application and any written submissions made by the person seeking the review; and
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> (b) must consider any written submissions made by the Secretary; and
>
> (c) may consider any statement, document, information, or matter that in the Review Authority's opinion may assist the Authority to deal effectively with the subject of the review, whether or not it would be admissible in a court of law.
>
> (2) The Review Authority may—
>
> (a) request further information from the Secretary or the person seeking the review; and
>
> (b) have regard to that information; and
>
> (c) specify a date by which the information must be provided; and
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> (d) refuse to consider any information provided after that date.

[37] The combination of s 86 and reg 27 shows that the Review Authority is set up with all the powers it needs to make its own decision as to the appropriateness of the decision under review. The intent is clearly that the Review Authority will make its decision after a full inquiry involving, if considered appropriate, the provision of information additional to that which was considered by the Secretary, and that may include information whether or not it would be admissible in a court of law. Although

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21 Section 85(2).
22 Section 86(1).
23 Section 86(2).
24 Section 86(3).

referred to as a review, the extensive powers of the Review Authority show that the process is effectively an appeal. As Mr Melvin submitted, the process allows for a broader consideration of the merits than would be permitted to a court in judicial review proceedings: the Review Authority can effectively substitute its own decision for that of the Secretary.

[38] It is appropriate also to refer to pt 3 of sch 3 to the Act, which contains further provisions applying to the Review Authority.[25] We note in particular cl 19(1) and (2). The former provides that the Review Authority must perform his or her functions independently of the Minister of Justice. The latter provides that the Minister cannot direct the Review Authority in relation to its functions. So the Review Authority functions as an independent body.[26] We also mention cl 20, which provides that the Authority must conduct a review on the papers, "with all reasonable speed". Clearly, the process is expected to be swift.

[39] It is in this statutory context that s 83 must be construed.

[40] In accordance with the approach required by s 5(1) of the Interpretation Act 1999, the meaning of the section is to be ascertained from its text and in the light of its purpose. Further, s 27(2) of the New Zealand Bill of Rights Act provides that every person whose rights or interests protected or recognised by law have been affected by a determination by any tribunal has "the right to apply, in accordance with law, for judicial review of that determination". That right is affected by s 83 of the Act and it is necessary to take that into account in construing the section.

[41] For present purposes, the proper approach can be taken as that described by Blanchard J in *R v Hansen*:[27]

> … when the natural meaning of a legislative provision and the obvious parliamentary intention coincide, the starting point for the application of the Bill of Rights must be to examine that meaning against the relevant guaranteed right — in this case, s 25(c) — to see if it apparently curtails the right so as to engage the Bill of Rights' interpretive provisions (ss 4, 5 and 6). If these

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25 See s 87.

26 There are equivalent provisions that establish the independence of a selection committee from the Secretary for Justice, and preventing the Secretary from giving any direction to a committee in relation to its functions: see Legal Services Act sch 3, cl 11(1) and (2).

27 *R v Hansen*, above n 10, at [57].

> provisions are engaged, the natural meaning may be adopted only in one of two circumstances. Either an application of s 5 may reveal that, because the limit placed by the meaning upon the right is a "demonstrably justified" one, its adoption will not in fact result in inconsistency with the Bill of Rights or, failing that, the provision may not be reasonably capable of bearing any other meaning.

[42] Under s 5 of the New Zealand Bill of Rights Act the rights and freedoms contained in the Act "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". And s 6 of the New Zealand Bill of Rights Act provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[43] The judgments of Blanchard, Tipping and McGrath JJ in *Hansen* establish that the direction in s 6 is to be applied having regard to s 5. On this approach, where the plain meaning of a statutory provision affects a right or freedom, and the effect constitutes a "reasonable limit" on the right or freedom that can be "demonstrably justified in a free and democratic society", application of the plain meaning will not breach the New Zealand Bill of Rights Act.[28] As Blanchard J put it: "it is only those meanings that *unjustifiably* limit guaranteed rights or freedoms that s 6 requires the Court to discard, if the statutory language permits".[29]

[44] We start with the natural and ordinary meaning of s 83. We think the meaning is clear. The section provides in straightforward terms that there can be no application for judicial review until the applicant has sought and obtained a review of the Secretary's decision by application to the Review Authority under s 82. The result of such a review might be favourable or unfavourable. Obviously, if favourable, there would be no need to make an application for judicial review. It would only be if an adverse decision of the Secretary were upheld by the Review Authority that the applicant would need to apply for judicial review. In other words, at the point when

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28 New Zealand Bill of Rights Act 1990, s 5.

29 *R v Hansen*, above n 10, at [59]. See also at [60] per Blanchard J, [88]–[92] per Tipping J and [190]–[192] per McGrath J.

any relevant rights or privileges had been affected, the practitioner would have the right to apply for judicial review.

[45] Viewing s 83 in the context of the provisions of subpt 2 of pt 3 of the Act, it can be seen as a deferral of the right to apply for judicial review while the special statutory process envisaged by the Act takes place. As cl 19 of pt 2 of sch 3 to the Act provides, the Review Authority performs its functions independently of the Minister of Justice. Its powers are coextensive with that of the Secretary, and it can substitute its own decision for that of the Secretary. It is effectively a right of appeal. The statutory scheme requires the review to be carried out expeditiously. A time limit is provided within which an application for review must be lodged (20 working days from the date of notice of the Secretary's decision),[30] but the Review Authority may accept a late application no later than three months after the date of notice if there were exceptional circumstances that prevented the application from being made within 20 working days.[31] Clause 20 of sch 3 requires the review to be completed with all reasonable speed.

[46] There is nothing in this context that suggests that any interpretation other than the plain meaning would serve the statutory purpose. The preference is for the statutory review process to be followed before resort is made to the High Court.

[47] We think it implicit in the drafting of s 83 that if a person affected does not seek a review of the Secretary's decision under s 82, whether within 20 working days or within a period of up to three months in the case of exceptional circumstances, then the right to apply for judicial review will be lost. Any other interpretation would simply enable the statutory procedures to be bypassed. Once the statutory period within which an application to the Review Authority could be made had passed, the person affected would simply make application for judicial review, as Mr McGuire did (albeit almost three years later). But we do not consider that would be an outcome intended by the legislature, given the wording of s 83. This means s 83 impinges on the right affirmed by s 27(2) of the New Zealand Bill of Rights Act.

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30 Legal Services Act, s 82(2).
31 Section 82(3).

[48] Having reached that position, the next question is whether the inconsistency is nevertheless a justified limit in terms of s 5 of the New Zealand Bill of Rights Act. We consider that it is demonstrably justified for a number of reasons. First, as already discussed, the right to make an application to the High Court is simply deferred, not abridged. If the Review Authority's decision is unacceptable, the applicant can apply to the High Court at that point. The right to do so is only lost where the applicant fails to participate in the statutory procedures set out in the Act. Second, the Review Authority has all the powers necessary to give relief in an appropriate case. The fact that it can substitute its decision on the merits and in a process not attended by delay and cost, thereby providing an appropriate alternative to an immediate application for judicial review, is a further indication that the limits are justified. The fact that there is a statutory process providing for a prompt and thorough reconsideration of declined applications no doubt assists in achievement of the clear statutory objective of ensuring that competent persons are contracted to provide legal aid services for members of the public.

[49] In the result, we consider that the extent to which the right to apply for judicial review is affected by s 83 is rationally connected to the objectives of the legislation. It affects the right to apply for judicial review simply by deferring it pending completion of the statutory review process. It would only be if an applicant failed to engage in that process that the right of judicial review would be lost. In the context of this legislation, we are not persuaded that would be a disproportionate outcome. In our view, the natural and ordinary meaning of s 83 results in reasonable limits, demonstrably justified in a free and democratic society, on the right to apply for judicial review.

[50] The consequence is that in terms of a *Hansen* analysis, the natural meaning of the provision must be adopted.

[51] Although Cull J referred to *Hansen*, her analysis apparently proceeded on the basis that because applying the apparent meaning of s 83 in some circumstances would have the consequence of preventing an application for judicial review, s 6 of the New Zealand Bill of Rights Act required her to consider whether s 83 could be interpreted in a manner that was consistent with the right to apply for judicial review.

That is contrary to the approach required by *Hansen*. However, even if s 6 were to be applied in that way, we do not consider that the Judge identified a rights consistent meaning of s 83 that it was reasonably capable of bearing.

[52] As set out above, she considered that the words used in s 83 "a person may not apply for judicial review" were "permissible in circumstances where a person has not met the strict time limits within the Act".[32] We are unclear what she meant by this other than, as we have suggested earlier, that she was intending to say that in appropriate circumstances the Court would not be bound to apply s 83 in its strict terms. We do not see how that meaning can be found in the statutory language. We consider there is no doubt that s 83 is intended to be prohibitive, and not permissive. The words "may not" admit of no ambiguity, and there is nothing in the context in which they are used that suggests to the contrary.

[53] Nor do we accept that the correspondence that passed between Mr McGuire and Ms Davis could be relevant to the proper interpretation of the statute, as the Judge seemed to imply at one point.[33] The Judge's conclusion based on Ms Davis's advice that it would have been futile for Mr McGuire to seek a review before the Review Authority is really not the point. Such correspondence can hardly bear on the meaning of the statute. And there could be no basis, in any event, for assuming the Review Authority would do other than properly consider Mr McGuire's qualifications to be a provider of legal aid. Ms Davis was not to be taken as speaking for the Review Authority.

[54] We refer for completeness to the decision of the Supreme Court in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*.[34] This judgment was relied on both by Mr Melvin and Mr McGuire. The case concerned the effect of s 109 of the Tax Administration Act 1994, which provides that except in objection proceedings under pt 8 or in a challenge under pt 8A of that Act, no "disputable decision" (a term defined in the Act) could be disputed in any court. The majority held that this prevented disputable decisions being challenged by way of judicial review, unless the

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32 *McGuire v The Secretary for Justice*, above n 2, at [38].
33 At [41]–[42]; quoted above at [27].
34 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

taxpayer could not practically invoke the relevant statutory procedure, or what was in issue was not the legality, correctness or validity of an assessment, but some suggested flaw in a statutory process that needed to be addressed outside the statutory regime because it was not provided for in it. As an example of that kind of issue, Tipping J (who wrote also for Blanchard and Gault JJ) referred to a well-founded concern that a particular Taxation Review Authority should for whatever reason be restrained from considering a challenge.[35] Tipping J gave as an example alleged bias on the part of the Authority. In such a case, it would not be the disputable decision that was being impugned in the Court, but rather the legality of the process by which the challenge to that decision was to be determined. Tipping J observed:[36]

> This is a different matter from a challenge to the legality of the process which led up to the making of the disputable decision. That process and any challenge to it directly puts in issue the disputable decision. Hence the challenge to that decision or its antecedents must follow the statutory procedure.

[55] As mentioned earlier, it is part of Mr McGuire's pleaded case that the 2013 recommendation of the selection committee was affected by bias, predetermination and conflict of interest. He then claims that in some way the selection committee's bias must have affected the 2013 decision. However, for a number of reasons *Tannadyce* is not authority for the proposition, sought to be advanced by Mr McGuire, that the 2013 decision may be the subject of judicial review when there has been no resort to the Review Authority under s 82 of the Act.

[56] First, the judgment of the majority in *Tannadyce* is about potential bias in the Taxation Review Authority, that is, the body considering the objection that would be advanced by the taxpayer in relation to the disputed assessment. The equivalent body here is not the selection committee, or even the Secretary, but the Review Authority. There is no suggestion of any apprehended bias, predetermination or other indication of any issue with the way the Review Authority would go about its task. In any event, Mr McGuire has chosen not to approach the Review Authority.

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35 At [59].
36 At [59].

[57] Second, the complaints that Mr McGuire has made about the selection committee and the suggestion the Secretary's decision had been affected by the selection committee's bias could be put before the Review Authority, if in fact relevant. But the real issue in which the Review Authority would be interested would be whether Mr McGuire was an appropriately qualified person to be approved as a provider of legal aid services in the categories in which he sought to be approved. If the Review Authority was of that view Mr McGuire's concerns about the process would have been resolved.

[58] Third, and most importantly, s 109 of the Tax Administration Act differs from s 83 of the Legal Services Act in a crucial respect. Section 109 states that "no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever," except in the objection proceedings or a challenge under the Tax Administration Act. Section 83 simply defers judicial review pending completion of the statutory process. It is only when the practitioner declines to invoke the statutory process that the prohibition on judicial review arises. This difference in the statutory process is such as to remove the need to allow for the possibility of judicial review in a residual category of case such as was contemplated in *Tannadyce*.

[59] For the reasons we have given, we are satisfied that the High Court erred by declining to strike out that part of Mr McGuire's claim that challenged the 2013 decision and recommendation. Mr McGuire's claim cannot proceed in the face of s 83 of the Act. It must be struck out accordingly.

The costs appeal

[60] Although Mr McGuire successfully opposed the Secretary's strike-out application in the High Court, the Court did not award him costs. Nor was there any discussion of why costs were not awarded. The Judge simply directed that: "The Secretary is to pay Mr McGuire's reasonable disbursements for attending this hearing."[37]

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[37] *McGuire v The Secretary for Justice*, above n 2, at [57].

[61] The reason for this is unclear, given that this Court's decision in *Joint Action Funding* was not delivered until after the High Court judgment.[38] At the time the High Court judgment was delivered the usual practice, unless there was some disqualifying consideration arising out of the way the litigation had been conducted, would have been to award costs to Mr McGuire as the successful party on the strike-out application, notwithstanding that he was a litigant in person, on the basis of the so called lawyer-litigant exception.[39]

[62] However, the conclusion reached on the cross-appeal means that Mr McGuire would not be entitled to his costs in the High Court in any event. In the circumstances, it would be inappropriate for us to embark on any detailed discussion of the lawyer-litigant exception or the rejection of it in *Joint Action Funding*.

[63] We make these limited observations. First, the cases in which the lawyer-litigant exception has been discussed in New Zealand prior to *Joint Action Funding* have not analysed the reasons for the rule. Rather, they have simply applied it, on the basis of the explanation given for it in *The London Scottish Benefit Society v Chorley*.[40] Further, although this Court applied the exception in *Brownie Wills v Shrimpton*, it did so in a guarded way.[41] Blanchard J, who delivered a judgment in which Gault J joined, referred to doubts that had been expressed about the exception by the High Court of Australia in *Cachia v Haynes*, but noted: "not having been asked to reconsider the question, we do not depart from the practice of allowing costs to a solicitor/litigant".[42]

[64] As Mr Melvin pointed out, each Judge in *Chorley* emphasised a different reason for the lawyer-litigant exception. Brett MR thought it significant that:[43]

> If a solicitor does by his clerk that which might be done by another solicitor, it is a loss of money, and not simply a loss of time, because it is work done by a person who is paid for doing it.

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38 *Joint Action Funding Ltd v Eichelbaum*, above n 3.
39 See *Brownie Wills v Shrimpton*, above n 4, at 327.
40 *The London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (CA).
41 *Brownie Wills v Shrimpton*, above n 4.
42 At 327, referring to *Cachia v Haynes* (1994) 179 CLR 403 at 412.
43 *The London Scottish Benefit Society v Chorley*, above n 40, at 875.

[65] For Bowen LJ, the important issue was the expenditure of professional skill that could be quantified. He said: "Professional skill and labour are recognised and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured."[44]

[66] Finally, Fry LJ gave the following reason based on a perceived public benefit:[45]

> I think that the conclusion at which we have arrived will be beneficial to the public, because if the rule were otherwise a solicitor who is party to an action would always employ another solicitor, and whenever he is successful he would recover full costs; whereas under the rule of practice laid down by us, a solicitor who sues or defends in person will be entitled, if he is successful, to full costs, subject to certain deductions, of which his unsuccessful opponent will get the benefit.

[67] The deductions contemplated by Fry LJ were in respect of matters that would not justify an award of costs where the lawyer-litigant exception applies such as for taking instructions.

[68] However, in *Cachia v Haynes*, a majority of the High Court of Australia described the lawyer-litigant exception as "somewhat anomalous" and described its justification as "somewhat dubious".[46] The justifications were said to ignore the "questionable nature of a situation in which a successful litigant not only receives the amount of the verdict but actually profits from the conduct of the litigation".[47] The majority also pointed out that:[48]

> It has not been doubted since 1278, when the *Statute of Gloucester* introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation.

[69] It went on to say that if costs were to be awarded on the basis of compensating a lawyer for the time spent acting for herself or himself, there could be no logical reason for denying compensation to a litigant who was represented, for that litigant's expenditure, time and effort.[49]

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44 At 877.
45 At 877–878.
46 *Cachia v Haynes*, above n 42, at 411.
47 At 412.
48 At 410 (footnote omitted).
49 At 414.

[70] There is also, in our view, an inherent tension between policies allowing lawyers as one class of litigant in person to claim costs and denying it to all other litigants in person. Yet the rule denying costs to non-lawyers who self-represent has survived, and is in apparent conformity with the current wording of the High Court Rules. As this Court observed in *Re Collier (A Bankrupt)*:[50]

> The general question as to whether a litigant in person should be paid for his time and trouble raises many important considerations of both policy and practice, and as the High Court of Australia has observed, is not really a matter that can be solved by a court.

[71] We note that Mr Collins, appearing for the Law Society, advised us that the Society agreed with the reasoning of the Court in *Joint Action Funding*. He submitted that preserving the lawyer-litigant exception risked being seen as self-serving and as conferring favoured status to lawyers as opposed to other litigants in person, without principled justification. He submitted that would risk undermining public confidence in the legal profession and the administration of justice. The Law Society's views were not available to the Court that decided *Joint Action Funding*, but we think it desirable to record the position taken in argument before us.

[72] The decision in *Joint Action Funding* may be taken as reflecting the fact that the policy justification for the lawyer-litigant exception had clearly been doubted. The case afforded an opportunity, for the first time, for a comprehensive consideration of the proper interpretation of the relevant rules now in pt 14 of the High Court Rules. The position reached as a result of the analysis carried out was consonant with the fundamental idea, recognised for hundreds of years, that costs awards should be for professional legal costs actually incurred.

[73] We note finally that counsel referred to provisions of the District Court Rules 2014 and the Family Court Rules 2002, which appear to have been drafted on the basis that the lawyer-litigant exception is part of the law. Rule 14.17 of the former, which has no equivalent in the High Court Rules, states that a solicitor who is a party to a proceeding and acts in person "is entitled to solicitors' costs". Rule 86 of the Family Court Rules also provides that where a lawyer who is a party to Family Court

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[50] *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at 441.

proceedings acts in person, that person is entitled to lawyers' costs, but subject to the Court's discretion and rr 14.2–14.12 of the District Court Rules. These provisions may well be now anomalous, having regard to this Court's decisions in *Joint Action Funding* and in this case. We have not heard detailed argument on that issue and reach no firm conclusion on it. But those rules do not affect the outcome of this appeal.

[74] For the reasons we have given, Mr McGuire's appeal must be dismissed.

Result

[75] The appeal is dismissed.

[76] The cross-appeal is allowed. The Secretary's application for partial strike out of Mr McGuire's first amended statement of claim is granted to the extent that it challenges the selection committee's 2013 recommendation and the Secretary's 2013 decision declining approval for Mr McGuire to provide legal aid services.

[77] The High Court order that the Secretary pay Mr McGuire's disbursements is set aside. Costs in the High Court are to be dealt with by that Court having regard to the terms of this judgment.

[78] Mr McGuire must pay the Secretary costs on the appeal, and costs on the cross-appeal, calculated for a standard appeal on a band A basis and usual disbursements.

Solicitors:
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