IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 22/2018
[2018] NZSC 116

BETWEEN	JEREMY JAMES MCGUIRE Appellant
AND	SECRETARY FOR JUSTICE Respondent

Hearing:	1 August 2018
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	Appellant in person U R Jagose QC and G L Melvin for Respondent P N Collins for New Zealand Law Society as Intervener S W B Foote and T J Mackenzie for New Zealand Bar Association as Intervener
Judgment:	27 November 2018

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS

Elias CJ, William Young, Glazebrook and O'Regan JJ [1]
Ellen France J [90]

ELIAS CJ, WILLIAM YOUNG, GLAZEBROOK AND O'REGAN JJ
(Given by William Young J)

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The appeal

[1] In issue in this appeal is a decision by the respondent, the Secretary for Justice, to decline an application by the appellant, Mr Jeremy McGuire, for approval to provide legal aid services as a lead provider in family law. This decision was made on 7 November 2013 (the 2013 decision).

[2] On 19 September 2016, Mr McGuire, representing himself, issued judicial review proceedings in the High Court in respect of the 2013 decision and also a

certificate of standing issued by the New Zealand Law Society (the Law Society).[1] He subsequently amended his statement of claim to include a challenge to another decision made by the Secretary in 2015 (the 2015 decision) to refuse him approval to provide legal aid services as a lead provider in criminal law and as a duty solicitor. Mr McGuire's challenges to the certificate of standing and the 2015 decision are not in issue in this appeal.

[3] The Secretary applied to strike out the claim in respect of the 2013 decision. This was on the basis of s 83 of the Legal Services Act 2011 (the Act) which 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.

As we will explain, Mr McGuire had a statutory right under s 82 of the Act to seek a review of the 2013 decision, a right which he did not exercise. The position of the Secretary is that as Mr McGuire has not sought and obtained a review under s 82, he is not entitled to apply for judicial review of the 2013 decision.

[4] The Secretary's application was dismissed by Cull J[2] but a cross-appeal against her decision was allowed by the Court of Appeal.[3]

[5] The primary question for this Court on appeal is whether the Court of Appeal was correct to allow the cross-appeal. As will become apparent, however, the case has also given rise to important and controversial issues as to costs which merit consideration.

The legislative scheme

[6] Section 75 of the Act provides that a person must not provide a legal aid service unless approved by the Secretary to do so. Applications for approval are made under

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1 The challenge is to the reference in the certificate to then open complaints to the Law Society against Mr McGuire.

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

3 *McGuire v The Secretary for Justice* [2018] NZCA 37, [2018] 3 NZLR 71 (French, Miller, Cooper, Winkelmann and Clifford JJ) [*McGuire* (CA)].

s 76. Under s 77(1) approval can only be granted "if the Secretary is satisfied that the person meets the criteria prescribed in regulations".[4] Section 77(4) requires the Secretary to provide reasons for his or her decision to give or decline approval.

[7] Section 78(1) provides for the establishment of selection committees to assess applications for approval to provide legal aid services and to advise the Secretary of the suitability of applicants.

[8] As noted above, s 82 allows for review of a decision of the Secretary regarding approval. It provides:

> (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:
>
> …
>
> (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.
>
> (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.

The right of review under s 82 extends to decisions imposing conditions on approvals to provide legal aid services,[5] interim restrictions[6] (imposed under s 101), sanctions[7] (imposed under s 102) and cancellations[8] (made under s 103). This subpart also includes s 83 which we have set out above.

[9] 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

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4 The criteria are prescribed in the Legal Services (Quality Assurance) Regulations 2011.
5 Legal Services Act 2011, s 82(1)(b).
6 Section 82(1)(c).
7 Section 82(1)(d).
8 Section 82(1)(e).

be enrolled as barristers and solicitors of the High Court, and have at least seven years' legal experience.[9]

[10] The Review Authority determines a review by confirming, modifying, or reversing the decision under review.[10] It must provide reasons for its decision[11] and its decision is binding on the Secretary and the person to whom the decision applies.[12]

[11] Regulation 27 of the Legal Services (Quality Assurance) Regulations 2011 provides:

> **27 Conduct of review**
>
> (1) In conducting a review, the Review Authority—
>
> (a) must consider the application and any written submissions made by the person seeking the review; and
>
> (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—
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> (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.

[12] Part 3 of sch 3 to the Act contains further provisions applying to the Review Authority.[13] Clause 19(1) and (2) of that schedule provide that the Review Authority must perform his or her functions independently of the Minister and that the Minister cannot direct the Review Authority in relation to its functions. And cl 20 requires the Review Authority to conduct reviews "with all reasonable speed".

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9 Section 84(3).
10 Section 86(1).
11 Section 86(2).
12 Section 86(3).
13 Section 87.

The background to Mr McGuire's application for approval

[13] Mr McGuire was admitted as a barrister and solicitor in 1992. He practised initially in Wellington and later moved to Palmerston North.

[14] Mr McGuire has faced a number of professional complaints and some of these have resulted in adverse findings by various standards committees of the Law Society. Most of these were of only limited significance. As well, since the 2013 decision, Mr McGuire has achieved a reasonable measure of success in judicial review proceedings challenging those findings. There was, however, one complaint which was of far more moment. It resulted in disciplinary charges before the Lawyers and Conveyancers Disciplinary Tribunal and was of critical significance to the 2013 decision.

[15] In 2008 Mr McGuire entered into contingency fee arrangements with a legally aided client. In late 2008, Mr McGuire's client complained to the Legal Services Agency (LSA) (operating under the now repealed Legal Services Act 2000) that Mr McGuire was seeking the payment of a fee additional to the grant of legal aid. The LSA took the view that the contingency fee arrangements were precluded by the terms of the Legal Services Act. Accordingly, on 13 September 2010 the LSA cancelled his legal aid approvals and terminated his legal services contract. As a result of this decision, Mr McGuire was no longer able to provide legal aid services.

[16] Mr McGuire initiated a review of this decision and, when this was unsuccessful, he sought judicial review in proceedings which were eventually dismissed by Dobson J in the High Court in April 2013.[14] His subsequent attempts to challenge this in the Court of Appeal failed as: (a) his first appeal was deemed abandoned as he did not meet the time limits; and (b) his application for an extension of time for a second appeal was dismissed.[15] Presumably because of the continuing currency of the review and disciplinary proceedings to which we have just referred, Mr McGuire did not initially apply for approval when the Legal Services Act 2011 came into effect.

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[14] *McGuire v The Ministry of Justice* [2013] NZHC 894.
[15] *McGuire v The Ministry of Justice* [2014] NZCA 556.

[17] There were also civil proceedings between Mr McGuire and his client in which Mr McGuire unsuccessfully attempted to recover the fees he claimed he was entitled to under the contingency fee arrangements. In the High Court he was ordered to pay indemnity costs.[16] A separate decision as to quantum was delivered later.[17] Mr McGuire appealed against both judgments. His appeal against those judgments was dismissed by the Court of Appeal which made an increased costs order against him on the basis, inter alia, that his appeal was "completely lacking in merit both factually and legally".[18]

[18] As we have noted, he was prosecuted before the Lawyers and Conveyancers Disciplinary Tribunal in respect of the contingency fee arrangements. In October 2011, he pleaded guilty before the Tribunal to a charge of unsatisfactory conduct.[19] The proceedings were adjourned to allow mentoring and supervision arrangements to be put in place with a view to the eventual imposition of a rehabilitative sanction. Eventually, on 3 October 2013 he was censured by the Tribunal and ordered to pay $14,700 in costs.[20]

The 2013 decision

[19] Mr McGuire's application for approval as a lead provider of family law services was made on 13 May 2013, around a month after the dismissal of his review proceedings in respect of the termination of his contract under the 2000 Act. At this stage, the Tribunal had not imposed a sanction in respect of the charge of unsatisfactory conduct to which Mr McGuire had pleaded guilty. He had, however, presumably either completed or largely completed the mentoring and supervision arrangements put in place after the October 2011 hearing.

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16 *McGuire v Sheridan* HC Wellington CIV-2009-485-1901, 15 April 2010 at [77].
17 *McGuire v Sheridan* HC Wellington CIV-2009-485-1901, 12 May 2010.
18 *McGuire v Sheridan* [2011] NZCA 15 at [18]. Leave to appeal to the Supreme Court was declined: see *McGuire v Sheridan* [2011] NZSC 40.
19 *Wellington Standards Committee (No 1) v McGuire* [2011] NZLCDT 28.
20 *Wellington Standards Committee (No 1) v McGuire* [2013] NZLCDT 41.

[20] Mr McGuire's application was referred to a selection committee for recommendation to the Secretary on 9 July 2013. That committee recommended that the application be declined. It considered that Mr McGuire:

(a) had not met the professional entry requirements;

(b) did not have service delivery systems to provide and account for legal aid services in an effective, efficient and ethical manner;

(c) had not provided references that supported his experience and knowledge in family law; and

(d) had not demonstrated experience and competence in family law.

[21] The selection committee's recommendation was provided to the Secretary as part of the Secretary's decision on Mr McGuire's suitability to provide legal aid. The October 2013 decision of the Tribunal as to the penalty and costs resulting from the disciplinary charges against Mr McGuire was also made available to the Secretary. Mr McGuire also made further submissions in respect of the recommendations of the selection committee.

[22] The Secretary's decision addressed the recommendations of the selection committee, the decision of the Tribunal, and the additional material supplied by Mr McGuire. In the event, the Secretary's views coincided with the recommendations of the selection committee. It is, however, clear that the Secretary gave the application independent consideration and engaged directly with Mr McGuire's submissions and additional material (including references) which he had supplied.

Subsequent events

Challenges to the result of the disciplinary proceedings

[23] Mr McGuire sought judicial review of the Tribunal's decisions and he was partly successful before Mallon J.[21] She considered that the censure imposed by the

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21 *McGuire v Wellington Standards Committee (No 1)* [2014] NZHC 3042 [*Wellington* (HC)].

Tribunal went beyond the sanction contemplated when Mr McGuire had pleaded guilty and reflected not just the disciplinary offence which he had acknowledged but also concerns about his subsequent behaviour, most significantly, his apparent inability to accept that he had been in the wrong.[22] As a result, she quashed the censure.[23] She later awarded Mr McGuire costs of $14,700, effectively cancelling out the Tribunal's costs award.[24]

[24] Mr McGuire's appeal against the judgment of Mallon J was dismissed, with the Court of Appeal awarding increased costs by 50 per cent given the untenable nature of most of the arguments advanced, coupled with Mr McGuire making serious allegations without evidential foundation.[25]

The 2015 decision

[25] On 24 July 2015, Mr McGuire applied to the Secretary for approval to provide legal aid services in criminal law and as a duty solicitor. This application was declined by a decision conveyed to Mr McGuire by letter on 27 October 2015. Mr McGuire exercised his statutory right of review but the decision of the Secretary was upheld.

Mr McGuire's claim against the New Zealand Law Society

[26] In his pleadings and affidavits, Mr McGuire has referred on a number of occasions to a settlement between himself and the Law Society which was entered into in August 2016. Due presumably to a confidentiality agreement, the nature of Mr McGuire's claims is not completely apparent. It is, however, clear that he was dissatisfied with the way in which complaints against him had been dealt with and in respect of which he had been successful in subsequent judicial review proceedings.[26]

[27] As a result of the settlement, the Law Society wrote to Mr McGuire on 31 August 2016 apologising for "the stress, inconvenience and embarrassment caused

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22 At [84]–[89].
23 At [92].
24 *McGuire v Wellington Standards Committee (No 1)* [2015] NZHC 448.
25 *McGuire v Wellington Standards Committee (No 1)* [2015] NZCA 569 at [52].
26 *Wellington* (HC), above n 21; *McGuire v Manawatu Standards Committee* [2015] NZHC 2100; *McGuire v Manawatu Standards Committee* [2016] NZHC 1052 [*McGuire* (Gendall J)]; and he was partly successful in *McGuire v New Zealand Law Society* [2017] NZHC 2484.

to you by the errors which resulted in three censure orders for unsatisfactory conduct in 2012 and 2014". The letter also stated: "The Law Society also regrets the deep distress the disciplinary prosecution in 2008–2011 caused you." And on 1 September 2016, the Law Society issued him with a legal aid provider certificate of standing which recorded that it considered that "Mr McGuire is of good standing" but referred to his plea of guilty to the disciplinary charge in October 2011 and to two open complaints against him.

Mr McGuire's later interactions with the Ministry of Justice

[28] On 15 September 2016 Mr McGuire sent his new certificate of standing to Ms Amy Davis at the Ministry of Justice and asked if this would change his position in terms of legal aid approval. She responded by saying that as the open complaints referred to were "still on-going":

> … the Secretary for Justice will not be able to make an assessment of whether or not you meet the criteria for approval.

He responded by saying that:

> If I can't even apply with this certificate then serious questions need to be asked.

Ms Davis responded by saying:

> 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.

The grounds upon which the 2013 decision is challenged

[29] The challenge to the 2013 decision as pleaded in the amended statement of claim rests on complaints about both the selection committee and the Secretary.

[30] As against the selection committee, there are the following contentions:

(a) Two of the three legal members of the selection committee had been on a Law Society standards committee which had earlier censured Mr McGuire, a censure which was set aside in the High Court in 2016.[27]

(b) One of the legal members had refused to provide Mr McGuire with a reference on the basis that she did not know him well enough, but she was the source of adverse comments in the selection committee's recommendations on his ability and experience as a family lawyer.

(c) For these reasons and because of pervasive hostility toward Mr McGuire, the committee was biased against him.

(d) What are said to be mistakes of law in the recommendations as to a requirement for recent relevant legal experience and the view that Mr McGuire did not have such experience.

[31] As against the Secretary, there are contentions that the decision was unreasonable and unfair because it was based on the recommendations of the selection committee and that the Secretary had made a number of legal and factual errors.

[32] The pleading relies on events which post-dated the 2013 decision, in particular the results of subsequent litigation in which Mr McGuire was involved. That apart, the factual basis for all the contentions, including those relating to the legal members of the selection committee, was known to Mr McGuire in 2013.

The High Court judgment

[33] 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.[28] If s 83 did not oust the right to judicial review, then Mr McGuire's failure to exercise his statutory review rights under the Act would

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27 See *McGuire* (Gendall J), above n 26.

28 *McGuire* (HC), above n 2, at [31(1)].

be of no moment. In approaching this question, she referred to s 6 of the Bill of Rights and considered whether she could interpret s 83 of the Act in a way which rendered it consistent with s 27(2):[29]

> 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. 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.

[34] She considered that it would have been futile for Mr McGuire to seek a review of the 2013 decision by the Review Authority.[30] That finding was based on the correspondence set out above between Mr McGuire and Ms Davis that took place in September 2016.[31] Cull J 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.[32]

[35] Cull J 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.
>
> [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.

Something appears to have miscarried in [41]. The evidence to which she referred – the correspondence in September 2016 – could not have been material to the decision made by Mr McGuire in 2013 not to seek a review.

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29 At [38] (footnote omitted).
30 At [40].
31 See above at [28].
32 *McGuire* (HC), above n 2, at [40].

[36] Accordingly, Cull J dismissed the Secretary's application to strike out the challenge to the 2013 decision.[33]

The Court of Appeal judgment

[37] The Court of Appeal started its analysis with its view of the natural and ordinary meaning of s 83:

> [44] … 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 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. … 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), 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. …
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> [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.
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> [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. … This means s 83 impinges on the right affirmed by s 27(2) of the New Zealand Bill of Rights Act.
>
> (footnotes omitted)

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33 At [56].

[38] The Court then turned to whether, on this interpretation, s 83 was, for the purposes of s 5 of the Bill of Rights, a justified limit on s 27(2):

> [48] … 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 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.

[39] The Court of Appeal noted that although Cull J made reference to *R v Hansen*,[34] she did not undertake the approach adopted in *Hansen*.[35] She had considered whether s 83 could be interpreted in a manner that was consistent with the right to judicial review pursuant to s 6 of the Bill of Rights, without first determining whether any limitation on the right was demonstrably justifiable. Although disagreeing with this approach to analysing purported limitations on rights under the Bill of Rights, the Court of Appeal considered that even if s 6 was applied in that way, Cull J's interpretation of s 83 was not possible.[36] It said:[37]

> 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.

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34 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
35 *McGuire* (CA), above n 3, at [51].
36 At [51].
37 At [52].

[40] On that basis, the Court of Appeal concluded that the High Court was wrong not to strike out the challenge to the 2013 decision.[38] It accordingly struck out that part of Mr McGuire's claim.

Our approach

The process provided for by s 83

[41] Section 83 is expressed in slightly awkward terms but the underlying policy and purpose are apparent. A statutory review process is provided and the scheme of the Act is that dissatisfaction with a decision made by the Secretary should be addressed pursuant to that review process before judicial review proceedings are commenced. The statutory review is carried out by the Review Authority, being a legally qualified person who acts independently of the Minister. There is nothing in the Act or regulations to suggest that the Review Authority should defer to the decision of the Secretary. If of the opinion that the Secretary's decision is wrong, the Review Authority will reverse or vary it. We read s 82 as providing for a fresh consideration of the application.

[42] In the course of argument, Mr McGuire referred to the relevant Operational Policy of the Ministry of Justice which provides:

> The scope of any review is limited to the information originally submitted in the application and assessed by the Selection Committee. If new information is submitted by the applicant, it is considered to be a new application and therefore must be submitted to the Ministry for assessment in accordance with the application for approval process.

Where the circumstances relating to an application change significantly after consideration by the selection committee or the Secretary, it may be sensible for the new circumstances to be addressed in a fresh application to the Secretary. This would be particularly so if the new circumstances relied on relate to experience (or other factors) which differ materially from those addressed by the selection committee. That said, the statement in the Operational Policy is wrong. As noted earlier, reg 27 provides that the Review Authority must consider "any written submissions made by the person seeking the review". We see no justification for confining the review

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[38] At [59].

process to the material which was before the selection committee and no basis at all for preventing an applicant for review complaining about the processes and recommendations of the selection committee or the decision of the Secretary.

The privative effect of ss 82(3) and 83

[43] Given the constitutional importance of judicial review, reinforced as it is by s 27(2) of the Bill of Rights, the courts approach privative clauses cautiously and in particular will give anxious consideration to their interpretation and application.

[44] Section 83 is a channelling provision which operates privatively by deferring judicial review until the statutory review process has been completed. Further, where a s 82 review has not been sought and, by reason of s 82(3), can no longer be sought, the apparent effect of s 83 is to exclude judicial review.

[45] We propose to leave open the questions whether ss 82(3) and 83 are properly regarded as privative and inconsistent with the right of judicial review provided for by s 27(2) of the Bill of Rights and, if so, whether they are justified limits for the purposes of s 5 (on both of which questions there is scope for debate). We also leave open the question whether s 83 is capable of any meaning other than that applied to it by the Court of Appeal. This is because on any conceivable approach to the questions just identified, the application for review of the 2013 decision is misconceived.

The application for review of the 2013 decision is misconceived

[46] A restrictive reading of a privative clause so as to permit judicial review will usually (and perhaps always) represent a conclusion by the court that the decision in question is not a decision of the kind preserved, on the proper interpretation of the statute, from review or perhaps that the particular challenge in issue is not of the kind precluded. Neither condition is satisfied in this case. The decision to refuse Mr McGuire approval to provide legal aid services was clearly just the sort of decision for which the statutory review process was established.

[47] It will be recalled that Cull J held that Mr McGuire had received indications from the Ministry that "seeking a review before the Review Authority would have

been a waste of its and his time".[39] In reaching this conclusion, she referred to the 2016 correspondence which, of course, could have had no bearing on the decisions taken in 2013. It is, however, probably the case that Mr McGuire did consider that a review would be pointless while the disciplinary proceedings were pending and that this is why he did not exercise his s 82 rights in respect of the 2013 decision.

[48] That Mr McGuire had pleaded guilty to a disciplinary charge associated with his dealings with a legally aided client was plainly material to whether he should be granted approval. Also material was his general complaints history. There were also other reasons why approval was declined. It may well be that the prospects of success of a s 82 review were as limited as he feared. It remains the case however that he was perfectly entitled to have all of the issues reassessed by the Review Authority. In any event, because s 83 operates primarily by deferring the right to seek judicial review, the principal issue for us is whether it was impracticable for him to exercise his statutory review rights first and then issue judicial review proceedings later. As will be apparent, we do not see that course of action as impracticable.

[49] Although Mr McGuire referred us to the extract from the Operational Policy, he did not suggest that the Ministry's policy of limiting the scope of review was the reason why he did not seek review of the 2013 decision. As noted earlier, he sought review of both the original cancellation of his approval and the 2015 decision.

[50] The statutory scheme amounts to a form of licensing. The appropriateness of a particular lawyer being able to provide legal aid services has to be determined in light of the actual circumstances as they are at the time of the application. That this is so is reflected in the time limits imposed by s 82 and the "reasonable speed" requirement imposed on the Review Authority by cl 20 of sch 3 to the Act. It is also consistent with the limited currency (three months) of a certificate of standing from the Law Society. Given this, it seems inescapable that, in this case, the statutory review process initiated promptly after the 2013 decision, providing for fresh consideration of the application and conducted with "reasonable speed", offered a far better mechanism for challenging the 2013 decision than judicial review commenced

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[39] See above at [35].

nearly three years later. This is all the more so given the entitlement of Mr McGuire to re-apply for approval, an application which would be assessed in light of the circumstances then current. In a practical sense, the 2013 decision has been overtaken by the 2015 decision. Further, the judicial review proceedings raise no point of general principle. In these circumstances and, in light of the effluxion of time, no sensible remedy could be provided in these proceedings.

[51] Mr McGuire did not exercise his statutory review rights at the time and we see no justification for him now being permitted to challenge the 2013 decision so long outside the time limits provided by s 82(3). It follows that his application for judicial review must fail and can therefore be struck out.

Costs

How the issue arose

[52] Although Mr McGuire successfully opposed the Secretary's strike-out application in the High Court, Cull J did not award him costs.[40] Mr McGuire appealed against the judgment of Cull J on this point; an appeal which was unsurprising given: (a) the then usual practice of awarding costs to lawyers who had successfully sued or defended in person; and (b) Cull J not having given reasons for departing from this practice.

[53] Before the appeal came on for hearing, the Court of Appeal in *Joint Action Funding Ltd v Eichelbaum* decided that lawyers who appear in person are not entitled to costs if successful.[41] If correctly decided, *Joint Action Funding* was fatal to Mr McGuire's appeal. As it turned out, his appeal was overtaken by subsequent events; this because the Secretary's cross-appeal against the substantive judgment of Cull J was successful and therefore the basis for Mr McGuire's claim for costs fell away.

[54] When leave to appeal was granted in the present case, the correctness of *Joint Action Funding* was put in issue and, as a result, there were interventions from the

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[40] She did, however, direct that he recover his disbursements: see *McGuire* (HC), above n 2, at [57].
[41] *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70.

Law Society and the New Zealand Bar Association (the Bar Association). As well, the Solicitor-General, who appeared for the Secretary, also engaged extensively with the issue.

The position as it was understood to be before Joint Action Funding

[55] Until the Court of Appeal judgment in *Joint Action Funding*, the general understanding was that a successful litigant in person was entitled to recover disbursements but not costs.[42] We will refer to this as "the primary rule". As an exception to the primary rule, a litigant in person who was also a lawyer could recover costs. We will refer to this as "the lawyer in person exception". A party who had conducted litigation using an employed lawyer could also recover costs. We will refer to this as "the employed lawyer rule". Whether the employed lawyer rule was properly seen as an application of the primary rule (in the sense that such a party was not to be regarded as self-represented) or an exception may be open to debate. As will become apparent there is some practical overlap between the employed lawyer rule and the lawyer in person exception where the litigant is a lawyer but is represented by a lawyer whom he or she employs.

[56] The primary rule can be traced back many centuries – in fact to passages in Coke's *Institutes* explaining the Statute of Gloucester 1278[43] – and has been

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42 Although it upheld the primary rule, the Court of Appeal in *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at 441–442 noted that there may be exceptional circumstances which justify departing from the application of the rule. Disbursements have been held to include expenses incurred by a McKenzie friend: see *Knight v The Veterinary Council of New Zealand* HC Wellington CIV-2007-485-1300, 31 July 2009. We leave open whether there is an exceptional circumstances exception and express no opinion as to the disbursements allowed in *Knight*.

43 Statute of Gloucester 1278 (Eng) 6 Edw 1 c 1. In Sir Edward Coke's *The Second Part of the Institutes of the Laws of England* (E and R Brooke, London, 1797) at 288 he said: "Here is expresse mention made but of the costs of his writ, but it extendeth to all the legall cost of the suit, but not to the costs and expences of his travell and losse of time, and therefore *costages* commeth of the verb *conster*, and that againe of the verb *constare*, for these costages must *constare* to the court to be legall costs and expences."

consistently applied in New Zealand.[44] Suggestions that the court should abrogate the primary rule have been rejected on the basis that this would properly require legislative action.[45]

[57] The leading case on the lawyer in person exception is *The London Scottish Benefit Society v Chorley*.[46] There Brett MR observed:[47]

> When an ordinary litigant appears in person, he is paid only for costs out of pocket. He cannot himself take every step, and very often employs a solicitor to assist him: the remuneration to the solicitor is money paid out of pocket. He has to pay the fees of the court, that is money paid out of pocket; but for loss of time the law will not indemnify him. When, however, we come to the case of a solicitor, the question must be viewed from a different aspect. There are things which a solicitor can do for himself, but also he can employ another solicitor to do them for him; and it would be unadvisable to lay down that he shall not be entitled to ordinary costs if he appears in person, because in that case he would always employ another solicitor.

The solicitors in *Chorley* were entitled to the same costs as if they had employed a solicitor, except for those items which did not exist by virtue of the fact they were acting for themselves.[48]

[58] In *Chorley*, the work in respect of which costs were recovered may have been carried out by employees of the defendant solicitors (although this is not entirely clear from the report). If so, the case might be thought to exemplify the employed lawyer rule. It is, however, usually regarded as supporting the lawyer in person exception, which is certainly consistent with the reasoning.

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44 *Lysnar v National Bank of New Zealand Ltd (No 2)* [1935] NZLR 557 (CA); *Re GJ Mannix Ltd* (1983) 1 NZCLC ¶95-081 (HC); *McKaskell v Benseman* HC Christchurch CP 381/87, 28 June 1989; *Jagwar Holdings Ltd v Julian* (1992) 6 PRNZ 496 (HC); *Re Cameron* HC Dunedin A56/84, 8 March 1995; *Re Collier*, above n 42; *Pell v Booth* CA259/94, 23 August 1999; *Hotham v Weir* CA228/05, 4 December 2006; *R v Meyrick* [2008] NZCA 45; *Knight v Veterinary Council of New Zealand* HC Wellington CIV-2007-485-1300, 19 May 2009; *The Dunes Café and Bar Ltd v 623 Rocks Road Ltd (in liq)* HC Nelson CIV-2006-442-481, 22 February 2010; *X v X* (2010) 20 PRNZ 803 (HC); *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500; and *Low Volume Vehicle Technical Assoc Inc v Brett* [2016] NZHC 467. In some of these cases, the litigant in person was a qualified lawyer who did not have a practising certificate and for this reason was treated as a lay litigant.

45 *Re Collier*, above n 42, at 441; and *Jagwar Holdings Ltd*, above n 44, at 499.

46 *The London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (CA). *Chorley* was later endorsed in *Buckland v Watts* [1970] 1 QB 27 (CA) and was adopted in the early New Zealand case, *Hanna v Ranger* (1912) 31 NZLR 159 (SC) at 160.

47 *Chorley*, above n 46, at 875.

48 At 876.

[59] *Chorley* was applied by the Court of Appeal in *Brownie Wills v Shrimpton* where the successful litigant, a firm of solicitors, had been represented by an employed solicitor at both trial and in the Court of Appeal.[49] Costs in both Courts were awarded with Blanchard J observing:[50]

> Brownie Wills was represented in the High Court and in this Court by an associate of the firm, Mr Hair. The long-established rule is that, as an exception to the general rule denying costs to a litigant in person, a practising barrister and solicitor who brings or defends a proceeding in person or by a partner or employee of the firm is entitled to the same costs as when acting on behalf of a client. So the lawyer litigant may have the same costs as if another lawyer had been instructed but cannot, of course, charge for consulting, instructing, or attending upon him or herself: *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872. In New Zealand the exception is discussed or referred to in *Hanna v Ranger* (1912) 31 NZLR 159, *Lysnar v National Bank of New Zealand Ltd (No 2)* [1935] NZLR 557 and *Re Collier (A Bankrupt)* [1996] 2 NZLR 438.
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> The High Court of Australia has cast some doubt on this exception (*Cachia v [Hanes]* (1994) 179 CLR 403 at p 412) but, not having been asked to reconsider the question, we do not depart from the practice of allowing costs to a solicitor/litigant.

Brownie Wills exemplifies the employed lawyer rule, albeit that it too is usually seen as an application of the lawyer in person exception.

[60] There is scope for argument whether the lawyer in person exception extended to litigants in person who were barristers.[51] The current view in Australia is that it does.[52]

[61] The employed lawyer rule has received comparatively little analysis in the courts.[53] It was, however, directly addressed by the Court of Appeal in *Henderson*

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49 *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA).

50 At 327.

51 See *Deliu v Hong* [2013] NZHC 1119 at [3]–[8] for a brief discussion of this issue.

52 *Ada Evans Chambers Pty Ltd v Santisi* [2014] NSWSC 538. See also *Bechara (t/as Bechara and Co) v Bates* [2016] NSWCA 294 where the Court awarded costs to a self-represented barrister, but on the basis of a concession.

53 For a recent case in which it was discussed and applied, see *Kasupene v Van Beurden* [2017] NZHC 1106, [2017] NZAR 944. See also *Malkinson v Trim* [2002] EWCA Civ 1273, [2003] 1 WLR 463; *Khan v Lord Chancellor* [2003] EWHC 12 (QB), [2003] 1 WLR 2385; and *EMW Law llp v Halborg* [2017] EWCA Civ 793, [2018] 1 WLR 52.

Borough Council v Auckland Regional Authority.[54] There, Cooke J, with whom Woodhouse P and Richardson J agreed, noted:[55]

> In New Zealand I do not think it can be said to be improper for an employed barrister to represent his employer. Nor did counsel for the appellant so argue. A fortiori an employed solicitor duly enrolled and with a current practising certificate may properly act as solicitor for his employer. Against that background it appears to me that the fact that an employed practitioner has acted for the successful party is not a sufficient reason for denying that party an award of party and party costs: after all, the time of a salaried employee has been occupied.

On this basis, the successful party who had been represented by an employed solicitor was awarded costs in both the High Court and Court of Appeal.[56] This was despite Cooke J also commenting:[57]

> Although an employed barrister may properly represent his employer, it is as well to stress the importance of the independent consideration of a case that will more often be given by a barrister or barrister-and-solicitor whose experience and responsibilities are not confined to representing one client. This kind of professional detachment can be of value to the client in that it is likely to result in the more effective presentation of the client's case. In turn it is of value to the Court. And of course the more important the litigation the more important it tends to become. It is to be hoped that these factors will always be borne in mind by those concerned in deciding whether an "in-house" counsel should take the responsibility of conducting any particular litigation for his employer.

The costs rules

[62] The way in which the power to award costs could be exercised was not dealt with specifically in the Judicature Act 1908 and is likewise not specifically addressed in the Senior Courts Act 2016.[58] Instead, the practice of the High Court has been regulated by rules of court. In the paradigm case which these rules address, the party seeking costs seeks reimbursement (usually only partial) in respect of fees paid to lawyers.[59] Unsurprisingly, costs rules tend to be drafted with this paradigm in mind.

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54 *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA).
55 At 23.
56 At 23–24.
57 At 23.
58 Section 51G of the Judicature Act 1908 conferred jurisdiction on the High Court to award costs in all cases. This section was re-enacted as s 162 of the Senior Courts Act 2016 without substantive change.
59 Costs awarded cannot exceed those incurred: see *Harold v Smith* (1860) 5 H & N 381, 157 ER 1229 (Exch).

[63] The primary rule (which, as noted above, has its origin in Coke's *Institutes* explaining the Statute of Gloucester) and the lawyer in person exception (which was first authoritatively stated in *Chorley*) were not based on a particular interpretation of rules of court as to costs. Thus the High Court of Australia applied the lawyer in person exception in *Guss v Veenhuizen (No 2)*[60] in the context of costs rules which provided for the taxation of "bills of costs and fees which … are payable to barristers and solicitors".[61] As the Court explained:[62]

> [This rule] provides for the method and manner of quantifying awarded costs in the ordinary case. It does not affect the long established rule of practice which gives certain professional costs to a litigant in person who is a solicitor.

[64] On 1 January 2000 a new High Court costs regime came into effect.[63] This was the result of a major project carried out by the Rules Committee.[64] Shortly afterwards – in June 2001 – the Rules Committee decided to address the continuing appropriateness of the primary rule. The Committee also decided to include the lawyer in person exception in its review in September 2001. But, in April 2002, the decision was taken that if any changes were to be made, it was "more appropriate" for those to be effected by legislation. The current costs rules in Subpart 1 of Part 14 of the High Court Rules 2016 are substantially the same as those introduced in 2000.

[65] The general principles as to costs are now provided for in r 14.2:

> **14.2 Principles applying to determination of costs**
>
> (1) The following general principles apply to the determination of costs:
>
> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
>
> (b) an award of costs should reflect the complexity and significance of the proceeding:
>
> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:

60 *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47.
61 At 53.
62 At 53.
63 High Court Amendment Rules 1999.
64 Robert Fisher "The new High Court costs regime" (1999) 532 LawTalk 7.

> (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
>
> (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
>
> (f) an award of costs should not exceed the costs incurred by the party claiming costs:
>
> (g) so far as possible the determination of costs should be predictable and expeditious.

[66] As will be apparent, the current costs regime proceeds on a basis which is largely independent of the actual costs incurred.[65] There is, of course, the limitation in r 14.2(1)(f) that "an award of costs should not exceed the costs incurred by the party claiming costs". The purpose of this provision (which merely restated a principle of long standing) can hardly have been to abrogate the lawyer in person exception. If this had been the purpose more explicit language would have been used.

[67] The Rules Committee is also responsible for the District Court Rules but not the Family Court Rules. The current versions of both sets of rules provide specifically for awards of costs to a lawyer in person. Thus r 14.17 of the District Court Rules 2014 provides:

> **14.17 Solicitor acting in person**
>
> A solicitor who is a party to a proceeding and acts in person is entitled to solicitors' costs.

And r 86(1) of the Family Court Rules 2002 provides:

> **86 Lawyer acting in person**
>
> (1) A lawyer who is a party to proceedings and acts in person is entitled to lawyers' costs.
>
> …

65 See the comments of Chambers J in *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC) at [33]–[34].

Controversies over the primary rule and the lawyer in person exception

[68] As the passages we have cited from *Brownie Wills* suggest, the appropriateness of the lawyer in person exception was questioned by the High Court of Australia in *Cachia v Hanes* – a case where the litigant in person seeking costs was not a lawyer.[66] In that case, Mason CJ, Brennan, Deane, Dawson and McHugh JJ upheld the primary rule but expressed reservations about the lawyer in person exception, albeit that they thought that any review ought not to be carried out by the courts:[67]

> We mention these matters not to express any view, but merely to indicate that there are considerations which must be weighed before any reasoned conclusion can be reached. A court engaged in litigation between parties, even if it were not constrained by the legislation and rules, is plainly an inappropriate body to carry out that exercise or to act upon any conclusion by laying down the precise nature of any change required.

On the other hand, Toohey and Gaudron JJ, in dissent, would have abrogated the primary rule.[68]

[69] In the United Kingdom (by legislation)[69] and in Canada (by judicial decisions)[70] it is the primary rule which has been abandoned.

[70] As far as we are aware, the employed lawyer rule has not attracted controversy.

Joint Action Funding

[71] In issue was an award of costs in favour of a barrister sole who had acted in person in proceedings in the High Court in which he had been successful. The appeal to the Court of Appeal was based on the contentions that the lawyer in person exception should not be maintained in light of the doubts expressed in *Cachia* or, alternatively, that it did not apply to barristers sole.[71] The Court, however, allowed the appeal on the basis that the lawyer in person exception was inconsistent with the

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66 *Cachia v Hanes* (1994) 179 CLR 403.
67 At 416.
68 At 425.
69 Litigants in Person (Costs and Expenses) Act 1975 (UK).
70 The first case to abandon the primary rule was *Skidmore v Blackmore* (1995) 122 DLR (4th) 330 (BCCA).
71 *Joint Action Funding*, above n 41, at [3].

current costs regime in the High Court Rules.[72] It construed r 14.2(1)(f) as if the restriction applied to limit costs to those "actually incurred" and concluded that this meant that an award of costs may not exceed the amount for which the successful party had been invoiced for legal services by a lawyer retained by the successful party.[73] On this basis, because a lawyer in person has no separate legal representation for which payment is required there will be no costs "actually incurred", and thus his or her costs will be zero.[74] Accordingly, on this approach, no award of costs can be made to a lawyer acting in person. We will refer to this as the "invoice required" approach.

[72] In construing r 14.2(1)(f) in this way, that is as if it contained the word "actually", the Court relied on r 14.2(1)(e) in which the expression "costs actually incurred" is used,[75] albeit in a context in which the purpose of that rule is to provide that such costs (that is, as were actually incurred) are irrelevant for the purposes of fixing costs. As such, the Court of Appeal considered that both r 14.2(1)(e) and r 14.2(1)(f) refer to "actual costs"; this notwithstanding the absence of the word "actually" in r 14.2(1)(f).[76] It also referred to r 14.6(1)(b) which provides for indemnity costs (in respect of which there is a necessary focus on what the litigation actually cost the successful party).[77] As will be apparent, we consider that neither r 14.2(1)(e) nor r 14.6(1)(b) provide a sound basis for the interpretation of r 14.2(1)(f) adopted.

[73] The Court of Appeal did not refer to the consideration which the Rules Committee gave in 2001 and 2002 to both the primary rule and the lawyer in person exception and its decision not to abrogate or vary them. There was likewise no reference to the District Court Rules and the Family Court Rules and the provision they make for costs to be awarded to lawyers in person. As well, although the Court referred to *Henderson Borough Council* and, in particular, cited the first of the two passages which we set out at [61],[78] the Court did not explain how its invoice required approach could be reconciled with the result arrived at by the Court in that case.

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72 At [58].
73 At [41] and [43].
74 At [44].
75 At [33].
76 At [33].
77 At [31(c)].
78 At [65].

Indeed, no specific consideration at all was given to the employed lawyer rule which that case exemplifies.

The approach of the Court of Appeal in the present case

[74] As the Secretary's cross-appeal against the judgment of Cull J succeeded, Mr McGuire's complaint that she had not awarded him costs did not require consideration. The Court nonetheless made what it described as "limited observations" as to *Joint Action Funding*.[79] These included the following comments:

> [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 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.

Commissioner of Inland Revenue v New Orleans Hotel (2011) Ltd

[75] This case illustrates the application of *Joint Action Funding*, and in particular the invoice required approach, to the employed lawyer rule.[80]

[76] In issue was whether the Commissioner of Inland Revenue could recover costs in litigation where she had been represented by a solicitor employed by the Commissioner's office. The application for costs was resisted on the basis that costs

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79 *McGuire* (CA), above n 3, at [63].

80 *Commissioner of Inland Revenue v New Orleans Hotel (2011) Ltd* [2018] NZHC 971, (2018) 28 NZTC ¶23-058.

had not actually been incurred in terms of the invoice required approach adopted by the Court of Appeal in *Joint Action Funding* and as further explained by the Court of Appeal in the present case. Understandably, Associate Judge Matthews applied the approach favoured by the Court of Appeal in those cases and rejected the application for costs. He found that there did not "appear to be any principled basis upon which the rules could bear one interpretation in one context and another in a different context".[81] He also considered that the effect of the decisions in *Joint Action Funding* and the Court of Appeal in this case meant that he was "left with no alternative" but to not follow *Henderson Borough Council*, which previously represented "[l]ongstanding authority".[82]

The arguments before us

[77] None of the parties who appeared in this Court sought to uphold the totality of the law as it was before *Joint Action Funding*, that is the combination of the primary rule, the lawyer in person exception and the employed lawyer rule.

[78] Mr McGuire's primary submission on this aspect of the case was that the primary rule should be abrogated.

[79] For the Secretary, the Solicitor-General's position was that the result in *Joint Action Funding* was right but the invoice required approach on which it was decided was wrong. Her primary position was that a government department ought to be able to recover costs when represented by an employed solicitor. On her approach, the work carried out by in-house counsel has economic consequences which can be regarded as "costs incurred" for the purposes of the High Court Rules.

[80] The Law Society did not seek to maintain the lawyer in person exception but did support the employed lawyer rule. It also suggested that r 14.2 could be interpreted so as to allow awards of costs to litigants in person, albeit that its general position was that there was a need for legislative reform.

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[81] At [18].

[82] At [4] and [19]. In *Greer v Klavenes* [2018] NZHC 1504, the liquidator, appearing successfully in person was awarded costs, with Palmer J considering that *New Orleans Hotel* and *Joint Action Funding* were not inconsistent with that award.

[81] The Bar Association's position was that the primary rule should be abrogated.

Our position

[82] There are public policy justifications for the primary rule, albeit that they are distinctly contestable. The practice of awarding costs against a losing party disincentivises potential litigants and thus inhibits access to the courts. Confining costs to those relating to the work carried out by lawyers limits that inhibiting effect. This provides a reasonable basis for not allowing represented litigants to recover costs in respect of their own time and trouble. Mechanisms for fixing costs are calibrated to the assessment of the work which lawyers carry out, as opposed to work carried out by, or the opportunity costs of, litigants in person. These considerations are not of overwhelming weight and they have not prevailed in the United Kingdom and Canada. That said, they are not so inconsequential as to make the primary rule irrational.

[83] Assuming the primary rule remains, there are likewise public policy justifications for the lawyer in person exception. The work in respect of which costs are sought is of a legal character and carried out by a lawyer. It is exactly the same sort of work as would be properly the subject of an award of costs if carried out by a third-party lawyer. The mechanisms for assessing costs provided by rules of court are appropriate for the exercise. Where a lawyer in person can recover costs, the costs exposure of the other party will probably be lower than if a third-party lawyer is retained.

[84] The primary countervailing consideration is that the resulting distinction between lawyers and other people is invidious,[83] a consideration which was very material to the submissions made by the Law Society and the Bar Association. But while all this too is contestable, it cannot be said that the lawyer in person exception is irrational.

[85] Depending on the approach taken to the primary rule and the lawyer in person exception, there are a range of arguments available in relation to the employed lawyer

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[83] This is because litigants in person will also incur opportunity costs when conducting litigation instead of concentrating on their own business or professional affairs.

rule, particularly in terms of consistency. If, as the Court in *Joint Action Funding* thought, costs can only be awarded by way of reimbursement for fees actually invoiced, the employed lawyer rule is logically unsustainable. If, however, the employed lawyer rule is to continue to apply, the invoice required approach on which *Joint Action Funding* is based is unsustainable. As well, as demonstrated by *Brownie Wills*, there is a clear overlap between the lawyer in person exception and the employed lawyer rule with the result that there would be practical inconsistency if the lawyer in person exception were to be abrogated but the employed lawyer rule retained.

[86] Plainly the abrogation of the primary rule and the lawyer in person exception was not within the purposes of the costs regime as introduced in 2000. And when the High Court Rules are read in conjunction with the District Court Rules it is also clear that both sets of rules proceed on the basis of the continued operation of both the primary rule and the lawyer in person exception. It would be an odd result if the ability of a lawyer in person to recover costs might depend on whether the proceedings were in the District Court or the High Court. Given the considered, albeit later, judgement of the Rules Committee that reform in this area should be effected only by primary legislation, this is a weighty consideration.

[87] To follow on from the point just made, the way in which this issue has been addressed by the courts highlights difficulties with law reform by judicial decision of the kind that occurred in *Joint Action Funding*:

(a) The analysis in *Joint Action Funding* was, at the very least, incomplete. It is far from clear that the Court would have adopted its invoice required approach if it had: (i) reflected on the approach adopted in the District Court Rules and Family Court Rules; and (ii) addressed specifically the inconsistency between its invoice required approach and the employed lawyer rule.

(b) By its judgment in the present case, the Court of Appeal indicated an intention to follow the *Joint Action Funding*/invoice required approach and treated r 14.17 of the District Court Rules as anomalous. There was still no direct engagement with the employed lawyer rule.

(c) When this appeal was argued before us, we had a broader range of arguments than the Court of Appeal had heard but they were still far from complete. For instance, no-one contended for retention of the pre-*Joint Action Funding* status quo. As well, in the course of argument it became apparent that there were a number of issues which had not been addressed by counsel in any detail before the hearing. By way of example, we were not offered a principled basis upon which we could abrogate the lawyer in person exception but maintain the employed lawyer rule. As we have explained, *Joint Action Funding* proceeds on the basis of an invoice required approach which, as *New Orleans Hotel* demonstrates, would be as fatal to the employed lawyer rule as it was to the lawyer in person exception.

(d) Given the abrogation of the primary rule by legislation in the United Kingdom and by judicial decisions in Canada, there may be empirical evidence as to consequential behavioural effects on litigants which might be material to whether New Zealand should follow suit. If there is such evidence, it has not been put to us. And, in any event, if there was such evidence, using it as the basis for a policy decision would be towards the outer edge of the proper judicial function. Far more consistent with our legal tradition is for such evidence to be used as the basis for legislative action.

[88] Against that background, we conclude that, if there is to be reform to the law as it stood before *Joint Action Funding*, this should be effected otherwise than by the courts. This could be done by the legislature although we think that such reform is probably within the competence of the Rules Committee. In either case, reform would occur only following appropriate consultation. In the meantime, what we have described as the primary rule, the lawyer in person exception and the employed lawyer rule are to be applied. As will be apparent, we consider that *Joint Action Funding* was wrongly decided.

Disposition

[89] The appeal is dismissed. Given that a major focus of the appeal was on the correctness of *Joint Action Funding*, we think it inappropriate to make an award of costs.

ELLEN FRANCE J

[90] I write separately on the question of costs. I agree with the conclusion drawn by William Young J, namely, that if there is to be reform of the law as it stood before the decision in *Joint Action Funding Ltd v Eichelbaum*, that reform should be undertaken following a process which allows for consultation on the approach to be taken.[84] However, I differ in one respect in my reasons for that conclusion as I now outline.

[91] My starting point is that the distinction drawn in the primary rule between the availability of a costs award to Mr McGuire, who happens to be a lawyer, and other self-represented litigants is irrational.[85] It is difficult to see why a solicitor who brings a proceeding challenging a decision of a government department should be treated differently for costs purposes than, say, a chartered accountant bringing the same proceeding.[86] If opportunity costs are seen to be the rationale then, in both cases, the plaintiff would incur the opportunity cost of his or her time.

[92] As to what this means, the High Court of Australia suggested in *Cachia v Hanes* that "the logical answer may be to abandon the exception in favour of the general principle rather than the other way round".[87] The other possibility is, as the New Zealand Bar Association submitted in this case, that the position should be changed to allow costs awards to be made in respect of all unrepresented litigants.[88] Which of those options should be adopted is a question best dealt with by the law reform process.

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84 *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70.

85 Compare William Young J above at [84].

86 See the discussion in G E Dal Pont *Law of Costs* (4th ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [7.31]–[7.38].

87 *Cachia v Hanes* (1994) 179 CLR 403 at 412 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

88 The New Zealand Law Society submitted that Part 14 of the High Court Rules 2016 could be interpreted to allow costs awards for all unrepresented parties.

[93] As I read the judgment in *Joint Action Funding*, the distinction the Court of Appeal had in mind was between someone in Mr McGuire's position and the chartered accountant in my example. The positions of the employed lawyer in a government department or the employed solicitor acting for the firm in a debt recovery action were not to the forefront. In that respect, I agree with the submission for the Secretary for Justice that the focus in *Joint Action Funding* on invoiced costs is wrong. The employed solicitor can recover costs under the High Court Rules 2016 on the basis that the Rules envisage costs being recoverable where legal costs have been incurred.[89] The word "actually" does not require an invoice. On this basis, the removal of the lawyer-litigant exception need not prevent the employed solicitor from recovering costs.

[94] That said, I agree with William Young J that when the legislative scheme for costs is looked at as a whole and in light of the legislative history, it is apparent it was not intended that the High Court Rules would depart from the position as it was prior to the introduction of the Rules. It makes no sense, given the legislative history, to treat the District Court Rules 2014 and Family Court Rules 2002 as anomalies in this respect.[90] Rather, the approach in those two sets of Rules supports the view the lawyer-litigant exception remains.

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89 As Cooke J, with whom Woodhouse P and Richardson J agreed, noted in *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA) at 23: "the time of a salaried employee has been occupied".

90 Compare *McGuire v The Secretary for Justice* [2018] NZCA 37, [2018] 3 NZLR 71 at [73] and see William Young J above at [87](b) above.