IN THE SUPREME COURT OF NEW ZEALAND SC 22/2018

BETWEEN **JEREMY JAMES McGUIRE**
Appellant

AND **SECRETARY FOR JUSTICE**
Respondent

Hearing: 1 August 2018

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: Appellant in Person
U R Jagose QC and G L Melvin for the Respondent
P N Collins for the New Zealand Law Society as Intervener
S W B Foote and T J Mackenzie for the New Zealand Bar Association as Intervener

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CIVIL APPEAL

MR McGUIRE:
May it please the Court, I'm the appellant.

ELIAS CJ:
Yes, Mr McGuire.

SOLICITOR-GENERAL:

E nga kaiwhakawā, tēnā koutou. Kei kōnei māua ko Mr Melvin mō te Karauna. Your Honours, if it helps the Court, I've conferred with my friends about the order, and of course subject to the Court's own wishes, we thought that it might be to deal with firstly the strike-out appeal, which involves Mr McGuire and the Secretary, and then deal with costs?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Mr McGuire's filed some response submissions in this Court which we would object to so that might be preliminary matters.

ELIAS CJ:

We'll just take the appearances first Madam Solicitor, thank you.

MR COLLINS:

May it please the Court. Collins for the Intervener New Zealand Law Society.

ELIAS CJ:

Thank you Mr Collins.

MR FOOTE:

Tēnā koutou e nga kaiwhakawā. May it please the Court, ko Foote tōku ingoa, ko Aotearoa mō te New Zealand Bar Association i waenganui i ngā pāti māua ko tōku hoa, ko Mr Mackenzie. Counsel's name is Foote. I appear for the New Zealand Bar Association as Intervener with my learned friend Mr Mackenzie.

ELIAS CJ:

Thank you Mr Foote, Mr Mackenzie. Yes, now I'm sorry, Madam Solicitor. Yes, we would like to hear the strike-out appeal first. That would, of course,

mean that if counsel involved in the other case want to go for a walk, they may and then we'll hear the other following.

SOLICITOR-GENERAL:
Thank you Your Honour. Mr Melvin will address the Court for the strike-out.

ELIAS CJ:
All right, thank you. Yes thank you Mr Melvin. Mr McGuire sorry.

MR McGUIRE:
The structure of my oral submissions will be as follows. Hopefully they're not too long. There are no changes to my written submissions. I just want to emphasise specifically one or two sections of the Legal Services Act 2011 in particular. But the structure of the oral submissions will be firstly I will briefly provide an overview or a recap of my general argument and then following that what I intend doing is to, as I say, specifically examine some features of the Legal Services Act that I think are relevant to this appeal, and then I lastly want to make a very quick comment about costs.

So turning to the –

ELIAS CJ:
And we have, of course, read the written submissions, so you can assume that Mr McGuire.

MR McGUIRE:
Thank you Your Honour. So my argument is that I say this is a case about what is required to stop a person from being allowed her or his day in court. I was a legal aid lawyer between early 1995 and early September 2010, and then I then lost that privilege and I tried to recover that first in 2013 and then in 2015, and this appeal is about my first attempt to obtain approval to provide a family law, approval to provide family law legal aid services from the Secretary for Justice.

The application was considered first by a four member selection committee of Ministerially appointed local lawyers and that selection committee declined to recommend me for approval to the Secretary for Justice. The Secretary for Justice then declined the application. I say that the Secretary, the recommendation and the Secretary's decision were both unreasonable and unfair and I also say in particular that the Secretary's decision was unfair because the selection committee miscarried in several aspects and in that regard the, I submit that the most pressing problem was that two selection committee were also concurrent members of the Manawatu Standards Committee.

ELIAS CJ:

Mr McGuire, that's the substance of your, that you wish to argue in the judicial review, but we're really looking only at whether it should be entertained, or whether the strike-out was appropriate.

MR McGUIRE:

Yes Your Honour, I'm leading to that.

ELIAS CJ:

Yes.

MR McGUIRE:

Thank you. So if I may just continue. Then in 2013 I was experiencing big difficulties with that Standards Committee and there I say that there is a connection between those difficulties and an apology from the New Zealand Law Society on the 31st of August 2016, which I have noted in my submissions, and in that regard Your Honours there were two people who sat on the selection committee who were on the Manawatu Standards Committee who I say shouldn't have been there in all the circumstances because there was a conflict of interest and it also didn't help that I asked one of those selection committee members for a reference in my application but she refused because she said she didn't know me well enough, but then she must have reconsidered because she then subsequently agreed with the other

members unanimously not to recommend that my application be approved and this is a real problem, in my submission, unless the recommendation was in the first instance questioned and critiqued by the Secretary and I say that it wasn't. I did not apply to review this decision because I was busy trying to clear off some of the problems I was having with the Manawatu Standards Committee at the time, which were manifested in various legal aid provider certificates of standing, and in particular, the particularly relevant one is the certificate of standing dated the 6th of May 2015, and that's on page 319 of the case on appeal, and that was in relation to my second application for a legal aid approval, 2015, and that latter certificate, 2015 certificate, records the ongoing difficulties I was having with the Manawatu Standards Committee in and around the 11th of July 2013, which was the date the selection committee made its recommendation about the 2013 application. In view of all this my argument is that Mr Coles and Ms Woods, who were the two members of the selection committee who were also members of the Manawatu Standards Committee, shouldn't have been members of the selection committee, and whether or not I applied to review the Secretary's decision is irrelevant because the Review Authority's powers only extend to the information originally submitted in the application and assessed by the selection committee, and the Review Authority does not have powers in any jurisdiction to review the fairness and also reasonableness o the decision-making process and procedure adopted by the selection committee and the Secretary. So therefore my argument is that section 83 of the Legal Services Act 2011 can't apply.

Now if I may Your Honours I'm going to refer please to the relevant section which has been very helpfully included in the bundle of authorities from the respondent, and it's at tab 2.

ELIAS CJ:

Sorry which bundle, is it the respondent's?

MR McGUIRE:

Yes, the respondent's bundle of authorities Your Honour, and tab 2 is a selection of some of the sections of the Legal Services Act 2011. My point therefore is that section 83 of the Act can't apply if the legality and validity of a recommendation or Secretary's or both is challenged and that's clear also, in my submission, from section 82 which refers only to the Secretary and the Secretary's decisions. And I've looked further. The –

ELIAS CJ:

Can you just, I haven't looked at the, your statement of claim. It's in the, I'd just like to see how you've challenged this. Is it the one at tab 1?

MR McGUIRE:

The amended statement of claim is tab 4.

ELIAS CJ:

Thanks. Where's the challenge to the committee?

MR McGUIRE:

It's variously pleaded Your Honour.

ELIAS CJ:

Perhaps you can, we should just look at the claim for relief. I see. So it's the selection committee's decision is what's challenged?

MR McGUIRE:

Yes Your Honour.

ELIAS CJ:

Yes, I'm sorry to have interrupted you. The challenge to the 2015 decision is ongoing?

MR McGUIRE:

Yes Your Honour. There's a hearing for a judicial review on that in the Wellington High Court on the 15th of August.

ELIAS CJ:

Thank you.

GLAZEBROOK J:

Can you just explain more clearly why section 83 doesn't apply?

MR McGUIRE:

I say it doesn't apply, Your Honour, because it refers specifically to a review of a Secretary's decision only, and what I'm –

GLAZEBROOK J:

But you're challenging the Secretary's decision as well?

MR McGUIRE:

Both of them Your Honour yes.

GLAZEBROOK J:

So why doesn't it apply to the Secretary's decision?

MR McGUIRE:

Because I'm arguing, I have argued that, variously that there's a problem with the Secretary's decision as well, which I will come to, independently of the selection committee, but also another argument I have is that the Secretary's decision was, if you like, contaminated virtually by the selection committee's decision.

WILLIAM YOUNG J:

But if you can't challenge the Secretary's decision, what's the point of challenging the selection committee's decision, which is merely a preliminary to the Secretary's decision. It's not really a decision, it's a recommendation, isn't it?

MR McGUIRE:

It's a recommendation, it should have been a recommendation.

WILLIAM YOUNG J:
All right.

MR McGUIRE:
I'm actually challenging both this –

WILLIAM YOUNG J:
All right, well how do you get around section 83 in relation to the Secretary's decision? The words say you may not do it unless, until the termination of review proceedings?

MR McGUIRE:
Well I mean there is, I've got several arguments, and the first one is that section 83 is subject to the principle of legality in section 27(2) of the New Zealand Bill of Rights Act 1990.

WILLIAM YOUNG J:
But how do you read it in a way that permits you to review the proceedings in the teeth of the words may not?

MR McGUIRE:
Well one of my arguments Your Honour is that the section 83 says "may apply" and so therefore –

WILLIAM YOUNG J:
It says "may not" doesn't it?

MR McGUIRE:
It says "may not apply" and I've tried to draw a distinction between the phrase, for example, "may not apply" and "must not apply" and the differences between –

WILLIAM YOUNG J:
Isn't one just more polite than the other?

MR McGUIRE:

No Your Honour I don't agree.

WILLIAM YOUNG J:

In what circumstances may you apply in the teeth of the words may not apply. How should the section read?

MR McGUIRE:

I think that the section should have been more, I'm not a draftsperson, but it should have been far more emphatic to make it absolutely clear that the overriding constitutional rights that people have, or the applicant might have outside just section 83, which is the principled argument that I've tried to make about –

GLAZEBROOK J:

It doesn't take away judicial review though, does it, it just says you've got to do another step first?

MR McGUIRE:

Yes, but the problem is if you –

GLAZEBROOK J:

So where's the overriding constitutional right that gets taken away by that, especially as the second review is actually basically denied though.

MR McGUIRE:

Well I would argue that the second review is not de novo for one thing. One of my arguments is that there is an operations manual that has been published by the Legal Services Agency that says any review is limited with the information that's been provided to the selection committee and so therefore one of the arguments I've made is that the Review Authority doesn't have the power and authority, for example, to question, for example, the constitutional membership of a selection committee and in this case I think that's relevant because of the fact that two of those members of the selection

committee were also members of the Manawatu Standards Committee, which was –

GLAZEBROOK J:

It's not bound by the decision, is it? So it might be limited to the information but it looks at that information itself.

MR McGUIRE:

Yes but that wouldn't necessarily affect or cure an allegation or a problem with the breach of natural justice, that's an entirely different matter, which is outside the compass, if you like, of the Review Authority.

ELIAS CJ:

Even accepting that this may not, on the argument you are addressing to us, exclude judicial review at the pre-decision stage. If there is some, if the whole process goes off the rails, that this is only focused on the decision, don't you still encounter that line of authority, I haven't looked at them, but *Reid v Rowley* [1977] 2 NZLR 472 and *Calvin v Carr* [1980] AC 574 about when you do have a merits review, whether that's sufficiently curative, and whether, even if there is jurisdiction to judicially review it's appropriate because of course it's a discretionary remedy, it's a supervisory jurisdiction. Now I don't think anyone is referring us to that line of authority but I'd like to engage with it if we can.

MR McGUIRE:

I'm sorry Your Honour I can't.

ELIAS CJ:

That's all right, but I think the effect of those authorities, and I'm sure Justice France will correct me because you'll know them more intimately, is that you really do look to see whether it's curative. But if something has totally gone off the rails, the Courts are not inhibited by the fact that there is a review. Now that's leaving aside whether this clause excludes that for the moment,

but there's still a problem, even at common law, even if you didn't have a privative clause.

MR McGUIRE:

Yes, I don't, yes. I can't comment because I don't know the…

ELIAS CJ:

No, all right, that's fine, thank you.

ELLEN FRANCE J:

Just on the information point, Mr McGuire, I don't know what the operations manual says, but the regulations do allow the Review Authority to go more broadly in terms of the information, don't they?

MR McGUIRE:

They do Your Honour.

ELLEN FRANCE J:

I'm looking at the, page 13, tab 3 of the respondent's bundle, regulation 27.

MR McGUIRE:

Well with respect Your Honour I would argue that that is not necessarily what they do in practice, and the reason I would submit that Your Honour is because there's a copy of the relevant provider manual in my authorities, and I'm going to find that.

GLAZEBROOK J:

I must say I don't think it matters but perhaps you can explain why it matters.

MR McGUIRE:

I've got it in here somewhere. There are two pages that I included that refers to the operations manual.

GLAZEBROOK J:

Is that on page 34?

MR McGUIRE:

Page 34 it is, thank you Your Honour.

GLAZEBROOK J:

And I think it's actually on page 35 at the bottom.

MR McGUIRE:

At the bottom Your Honour yes. The last paragraph says, according to this practice, "The scope of any review is limited to the information originally submitted in the application and assessed by the selection committee."

ELLEN FRANCE J:

I think that's in the context perhaps of where you get totally new information. It's saying well you start again rather than deal with it by way of review. But I might be…

WILLIAM YOUNG J:

Or it may be wrong but that would be a matter of challenging it if the review wasn't conducted in accordance with the statute.

MR McGUIRE:

Well, do you want me to continue?

ELIAS CJ:

It does really seem pretty restrictive, particularly since there doesn't seem, that this subsequent sentence seems to tell you that if you want to put in new information you have to go back to square 1.

MR McGUIRE:

Yes, and –

GLAZEBROOK J:

Well of course the regulations only allow the review committee to ask for more information, they don't give a right to put further information in.

ELIAS CJ:

Yes, yes.

GLAZEBROOK J:

So in fact that might be true if people are trying to put in further information. It might be a sensible thing to start again.

MR McGUIRE:

Well there would be a reassessment –

ELIAS CJ:

Well that's a major part of the submissions by the Solicitor-General that that's the scheme, that everything has to be current.

MR McGUIRE:

Yes, that's true.

GLAZEBROOK J:

Which makes some sense because if you, for instance, had a practitioner with a complaint against them that is found to be inappropriate and that practitioner was cleared of any wrongdoing whatsoever, then of course you would wish it to be assessed again. Equally if a very serious complaint comes in that seems to have some substance then again it might be, that one would want to reassess.

MR McGUIRE:

My argument, however Your Honour, is that I wasn't really in a position for any reassessment until really the 26th of August 2016 because that was when things changed for me in terms of the written apology, and that was an acknowledgement of things that had been going on in 2013, and so I had to wait, and I'm going to come to this, but effectively I had to, it was futile to apply for a review until basically I had done something about what was being said about me in those certificates of standing –

ELIAS CJ:

But what was the impediment to making a fresh application?

MR McGUIRE:

Well, Your Honour, the problem with that was that, and it's in the case on appeal, after I was granted a certificate of standing on the 1st of September 2016, I sent that to the Ministry of Justice because the problem I had up until then was whether I was a fit and proper person because of all the contents of the legal aid provider certificates of standing which cast doubt about that, and so once I tried to clear my name from the 2015 certificate, which I effectively did in 26 August 2016, this is all in my affidavit, I actually sent that to the case manager who deals with the legal aid application and I said, will the certificate suffice, and she said no, there' still too much stuff on it that casts doubt about whether or not you're a fit and proper person so don't both applying. That's all in my affidavit. And that's where this futility argument came up in the High Court. That's the reason why Justice Cull agreed with me it was futile, that I was right that it was futile to carry on because there were still ongoing problems and I couldn't make an application so I was stuck.

ELIAS CJ:

Where do we find the 1 September –

GLAZEBROOK J:

The application for review, is that what you're talking about?

MR McGUIRE:

No, an application for legal aid, for approval. I didn't make another application for approval and I still won't because the last I'd heard from the, as I say, from the Ministry of Justice, the contact person, the file manager who deals with, you know, contracts or approvals, I was told, I've had dealings with her before, she advised me that there were still issues with the certificate.

ELIAS CJ:

Where do we find the certificate of 1 September?

MR McGUIRE:

Page 319.

ELIAS CJ:

Of the case on appeal?

MR McGUIRE:

Yes Your Honour.

ELIAS CJ:

This is the basis of the futility thing?

MR McGUIRE:

Yes.

ELIAS CJ:

Argument is it?

MR McGUIRE:

Yes it is.

ELIAS CJ:

I see, thank you.

GLAZEBROOK J:

What do you say to the argument of the Crown that up to date information is needed?

MR McGUIRE:

Well, the problem for me, Your Honour, is still going to be the problem with the certificate. It doesn't matter if it's updated information or not. I was told by the, as I say, the contact person from the Ministry of Justice -

GLAZEBROOK J:

No but you're applying for a review of a decision in 2013 and 2016 but there isn't an issue with that as I understand it, in terms of jurisdiction, but you're applying for a review of a decision in 2013.

MR McGUIRE:

Yes.

GLAZEBROOK J:

What effect is that going to have whether it was right or it was wrong in relation to the current situation?

MR McGUIRE:

Well, what I would like possibly Your Honour is, well I've thought about that and there's possibly several options. The first one is that we could start again. It could be reassessed by somebody and then – under section, regulation 27, or whatever, effectively conduct a de facto or informal review and I could provide information which would satisfy them that (a) I was a fit and proper person and secondly, in the intervening years –

GLAZEBROOK J:

But why can't you do that by just making a new application? That's sensible, isn't it?

MR McGUIRE:

But I can't Your Honour because the certificate is still not acceptable to the Ministry of Justice. They've told me.

GLAZEBROOK J:

But you don't know whether that's the case or not without making that application do you?

MR McGUIRE:

Your Honour, with respect, I've had a fair number of dealings with the contract managers for the Ministry of Justice and before that the Legal Services Agency, correspondence about –

GLAZEBROOK J:

Well what's a de facto review going to do for you if you're going to have that same problem?

MR McGUIRE:

Well I don't know, I suppose the question is whether I will or not.

ELIAS CJ:

So is your problem that if the certificate, and I still haven't actually found it, this is the Law Society –

GLAZEBROOK J:

It's tab 41.

ELIAS CJ:

Tab 41, sorry, but if the certificate wasn't sufficient then, it's not going to change the position, is that right?

MR McGUIRE:

Yes Your Honour. At the moment I –

GLAZEBROOK J:

But this is a different certificate.

MR McGUIRE:

Yes I know Your Honour.

GLAZEBROOK J:

It's a totally different certificate with totally different information in it, as I understand it.

MR McGUIRE:

Yes.

GLAZEBROOK J:

So it's not the original certificate.

ELIAS CJ:

No, no, but I'm just trying to work out what your real complaint is. Is it that you were told by the official that it didn't make any difference. It was futile?

MR McGUIRE:

Yes.

ELIAS CJ:

Is that the beef?

MR McGUIRE:

Yes Your Honour.

ELIAS CJ:

But you didn't test that?

MR McGUIRE:

There is, well, that was accepted by Justice Cull. I mean, there's emails et cetera between me, it's on the file between myself and I can't remember what her name was, and that's the reason why.

ELIAS CJ:

So can we just have a quick look at what Justice Cull said about that?

MR McGUIRE:

Yes Your Honour.

ELIAS CJ:

Because are you saying that it was futile for you to resubmit another application because you'd been told by the case officer that it wasn't sufficient?

MR McGUIRE:

Yes Your Honour.

ELIAS CJ:

Well I think we should –

ELLEN FRANCE J:

But if you made another application it would have to be considered, wouldn't it, and then you could seek a review of that?

MR McGUIRE:

With respect, Your Honour, this will be the third – I applied in 2015 for another review, for an application which was unsuccessful, and I applied to review that and that was unsuccessful, so it's not as if I haven't tried again, I have tried again, unsuccessfully, and again I, in the circumstances I find it difficult that my chances of applying a third time would be any better than the previous two in all the circumstances. That's where the futility argument comes in.

ELIAS CJ:

But the 2015 decision was for a different, to be a provider in criminal law. Presumably that, you know, there were different considerations weren't there?

MR McGUIRE:

Yes there were although they also referred to my character and whether I was a fit and proper person, which is based on the certificate that I had also included in that application.

ELIAS CJ:

And was that this certificate?

MR McGUIRE:

No, it was a –

ELIAS CJ:

No, it would have been earlier.

MR McGUIRE:

It was. It was another one. That's the 6th of May 2015.

ELIAS CJ:

But that's sort of, that, you say, is overtaken by this certificate, and yet nobody's had an opportunity to consider that, although you've been given an indication that it might not make any difference, is that it?

MR McGUIRE:

Yes Your Honour.

ELIAS CJ:

But you haven't actually put that to the test by making an application?

MR McGUIRE:

No I haven't Your Honour.

ELIAS CJ:

Yes, I see.

MR McGUIRE:

And I'm loathe to because of my previous experience and also because of what I've been told, what I was a told, legitimately told by someone who basically is a contract manager for these things in the Ministry of Justice, who I've basically relied on.

ELIAS CJ:

Can you take me briefly to where you say Justice Cull makes these findings that support this futility point?

MR McGUIRE:

Paragraph 40, Your Honour, which is on page 47 of the case on appeal, and paragraph 41.

ELIAS CJ:

Yes, thank you.

ELLEN FRANCE J:

And the Court of Appeal deals with that at paragraph 53 at tab 9 and the point made there is that Ms Davis, that if the matter ended up before the Review Authority, that would have to properly consider it. Ms Davis was not to be taken as speaking for the Review Authority.

MR McGUIRE:

Yes, although with respect the first time I received an affidavit from Ms Davis about her authority and her role and function was in these proceedings, and she – no, sorry, this was another proceeding.

ELLEN FRANCE J:

I was going to say, I don't think we have that in this one.

MR McGUIRE:

No, no, there's no evidence from her actually about what she, you know, what she did and did she have the authority, yes and no, there's nothing whatsoever. Can I continue?

ELIAS CJ:

Thank you, yes, carry on.

MR McGUIRE:

Going back to my overview of my case, Your Honours, and where I got to was I suggested or submitted that arguably any defects or issues about the propriety of a recommendation, or this particular recommendation in 2013, could have been circumvented by a fair, open-minded and objective Secretary

who critiqued and challenged some of the aspects of the recommendation rather than just necessarily accepted it carte blanche. And in that regard, Your Honours, I'd like to refer you please to page 235 on the case on appeal. This is the Secretary's decision on 7th of November 2013, and I'd like please to refer particularly to the second block paragraph on page 235, and the last sentence, and it reads, "I am concerned that a member of the committee has personal experience of dealing with Mr McGuire and has recommended that Mr McGuire's application for approval be declined." And that is Ms Woods who is the person that I asked to provide me with a legal aid contract and she said she didn't know me well enough. So my point, Your Honour, is that as far as the Secretary's decision is concerned, she was aware, obviously aware that there must have been a problem with natural justice in terms of the selection committee but didn't actually challenge it, didn't do anything about it, and just declined the application regardless. My submission is that the Review Authority doesn't have the authority and power to engage in any review of that crucially important element in this decision and as I've already suggested or argued in practice the statutory review is more limited to actual information provided by the applicant rather than, for example, questioning the membership and judgment of Ministerially appointed lawyers of selection committees and section 83, in my submission, doesn't apply in those circumstances.

GLAZEBROOK J:

Is that the submission that's based on *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 is it?

MR McGUIRE:

That's part of it, Your Honour, yes.

GLAZEBROOK J:

Well is there any other, I mean just what does "may not apply" for judicial review mean except if there are natural justice concerns is it?

MR McGUIRE:

Yes, that's right Your Honour.

GLAZEBROOK J:

And anything else?

MR McGUIRE:

Well, in my submission, *Tannadyce* is really, I mean, is really only a manifestation, if you like, of the underlying principles of, you know, the principles of legality in section 27(2) of the Bill of Rights Act. That's just an exercise in the application of those underlying principles.

GLAZEBROOK J:

Well that doesn't really help me. What are the other aspects that take away from section 83? I've got natural justice, what else?

MR McGUIRE:

Well, it's –

GLAZEBROOK J:

Bias I suppose you're arguing are you?

MR McGUIRE:

There's bias, predetermination, which is probably the same thing, conflict of interest, probably the same thing.

GLAZEBROOK J:

What sorry?

MR McGUIRE:

Conflict of interest.

WILLIAM YOUNG J:

So as I understand your argument had you sought to challenge the selection committee's recommendation on the basis of bias or breach of natural justice,

the passage in the manual that you've taken us to would have precluded the argument.

MR McGUIRE:
Sorry Your Honour?

WILLIAM YOUNG J:
Say you'd gone to the Review Authority.

MR McGUIRE:
Yes.

WILLIAM YOUNG J:
Do you say that you would not have been able to argue in front of the Review Authority that there was natural justice breaches or that there were, there had been bias?

MR McGUIRE:
That's the way I read it Your Honour.

WILLIAM YOUNG J:
And that's based on your reading of the section of the manual that you've taken us to?

MR McGUIRE:
Yes Your Honour.

WILLIAM YOUNG J:
If that were wrong what, so just, is that what your challenge, the literal meaning of section 83, is based on?

MR McGUIRE:
Yes, Your Honour, yes. So I've got the literal, the actual literal reading, ordinary natural meaning of the words, and then the other argument I've got is, well, what about the principled argument, the wider, deeper, principled

constitutional argument. In my submission they're arguably complementary because, for example, I've cited *R v Pora* [2001] 2 NZLR 37 in my submissions and then the, what was said there was that if Parliament want to restrict someone's rights, they should have used the right language. Well I'm saying this is, at best this is ambiguous language. It's not absolutely clear whether it's absolutely entirely excluded, in which case I should be entitled essentially to the benefit of the doubt.

ELIAS CJ:

Mr McGuire, for myself, and subject to what is said by the respondent, I can see that judicial review might have been available if you'd challenged the composition of the selection committee, but once you had the decision of Ms Hill, which identifies in her reasons matters that you, that really don't have anything to do with the certificate issue, it's an absence of references about your knowledge in the area and it's about your demonstrated experience and competence in family law, and that's all set out, why doesn't that totally overtake any natural justice points, or bias points, or inappropriate composition points about the selection committee? I mean don't you have to front it in terms of saying why this conclusion was not open to Ms Hill?

MR McGUIRE:

Well I have, Your Honour, in my pleadings, I have suggested (a) it's wrong factually and secondly, the other argument, the other thing I've argued I think is that there's no, to me there's no evidence that the recommendation was other than not pretty much followed by the Secretary.

ELIAS CJ:

But if you had gone to review and you had said, the evidence doesn't support this conclusion, that would have been heard. Why isn't that exactly the sort of thing that the statute is trying to say you have to go through that process first?

MR McGUIRE:

Because I would submit, Your Honour, that the statute also would assume, for example, that assessments made about an applicant's fit and proper

person status would be, which are ultimately but not necessarily based on the legal aid provider certificate of standing, would be correct, and my argument is that –

ELIAS CJ:
But she's not really referring to that, is she?

MR McGUIRE:
Well –

ELIAS CJ:
In the reasons for her decision. It's all really on proved competency and the professional entry requirements.

MR McGUIRE:
Your Honours, if you look at pages 226 to 228, there's a subheading there, "Professional Entry Requirements," and there's numerous references to complaints, Lawyers and Conveyancers Disciplinary Tribunal, and then the conclusion on page 228 is, "Overall I am not satisfied that Mr McGuire meets the criteria for Professional Entry Requirements."

ELIAS CJ:
I see.

MR McGUIRE:
And that is about whether or not I'm a fit and proper person.

ELIAS CJ:
I see, yes, I see, thank you.

MR McGUIRE:
So just returning please to the overview of my submissions, which I've almost finished. I submit, Your Honours, that having suggested that there was a problem over the membership of the selection committee and their decision-making processes, and also an issue with the Secretary for Justice

decision, especially when she actually appears to acknowledge that there was an issue with Ms Woods about her being concerned about Ms Woods knowing about me, that's on page 235, had experience of me, had a personal experience of dealing with me and then declined my application to be declined. My, I say Your Honours that once that is combined then –

GLAZEBROOK J:
I can't quite see that. Oh I see.

MR McGUIRE:
Yes, page 235 of that paragraph. The net result must at least be a suggestion of a breach of the rules of at least aspect of natural justice, and then my thrust of my issues, of my submissions, is if and once that position is reached then the Review Authority is irrelevant because section 85 of the Act expressly provides the function of the Review Authority is to review the decisions of the Secretary. That's absolutely clear under section 85 which is –

GLAZEBROOK J:
How do you read that, are you saying that the people who are on the selection committee have to have no knowledge of you because that would be rather odd, wouldn't it, in terms of the scheme?

MR McGUIRE:
No Your Honour. What I'm suggesting is –

GLAZEBROOK J:
So you'd have to have somebody from Invercargill, for instance, who'd never seen you in court or had any dealings with you, on the selection committee.

MR McGUIRE:
No Your Honour what I'm suggesting is that that membership, the membership of that selection committee shouldn't have included the two people who were also members of the Manawatu Standards Committee at the

same time. I mean that doesn't mean that somebody else couldn't have been members of the selection committee, just not those two.

WILLIAM YOUNG J:
There is a provision in the rules about, in the regulations about conflict of interest.

MR McGUIRE:
Yes.

WILLIAM YOUNG J:
I would find it an odd reading of the regulations and the statute which prevented the Review Authority taking into account a challenge to the impartiality of members of the selection committee, in particular a complaint that the conflict of interest rule hadn't been complied with.

MR McGUIRE:
So you're saying that the Review Authority wouldn't have the –

WILLIAM YOUNG J:
No I'm saying, I just thought the Review Authority would have the right to consider whether a member of the committee had failed to stand aside as required, where there was a conflict of interest.

MR McGUIRE:
With respect Your Honour I disagree.

ELIAS CJ:
It would also have to consider the effect, wouldn't it?

MR McGUIRE:
In what way Your Honour?

ELIAS CJ

Well whether it tainted the, Ms Hills' decision, and whether it makes any difference to the Review Authority's decision.

MR McGUIRE:

I submit, Your Honour, that's where this passage that I've referred to on page 235 about the concern about Ms Woods is particularly relevant, because she knew there was a problem with Ms Woods. It's not as if she, it's absolutely clear, she said –

GLAZEBROOK J:

A conflict of interest is that you can't be on a standards committee which is looking at unsatisfactory conduct and be the member of the review committee, is that the proposition?

MR McGUIRE:

No Your Honour. My position, and it's a bit more complicated unfortunately, my position is that Ms Woods and Mr Coles should not have been members of a selection committee while being members of the Manawatu Standards Committee because if you go back, if you go, for example, refer to the apology, the written apology I got from the Law Society I got on –

GLAZEBROOK J:

All right, so it's related to the particular circumstances rather than a generic submission. All right, I understand.

MR McGUIRE:

That's right Your Honour. Absolutely.

ELLEN FRANCE J:

Sorry, why do the particular circumstances alter it?

MR McGUIRE:

Because ultimately it led to page 318 of the casebook, which is a written apology from the Law Society, the stuff that was done to me between 2012 and 2014, which was, a part of that was due to the Manawatu Standards Committee, of whom Mr Coles and Ms Woods were members at the time, in 2013.

GLAZEBROOK J:

So you say they show, the written apology shows that they were biased at the time is the submission, is that right?

MR McGUIRE:

Yes. They certainly, it wasn't appropriate for them to be on the selection committee in those circumstances.

ELLEN FRANCE J:

Well I'm not sure why it shows bias in the sense that, they might just have got it wrong, for example. So are you, is your proposition dependent on it indicating bias?

MR McGUIRE:

Yes Your Honour.

ELIAS CJ:

Perhaps we should then look at the, where's that, you don't need to take us to it, if you just give us the reference, because I haven't looked at it.

MR McGUIRE:

Of what Your Honour?

ELIAS CJ:

The apology.

MR McGUIRE:

Page 318 of the casebook.

GLAZEBROOK J:

Can I just get it straight. There's still the 2011 unsatisfactory conduct, is that right, and then there's now on 2016 a further finding of unsatisfactory conduct?

MR McGUIRE:

I've sort of lost track.

GLAZEBROOK J:

I'm just looking at page 322.

MR McGUIRE:

What page is that Your Honour?

GLAZEBROOK J:

Page 322. Having pleaded guilty to a charge of unsatisfactory conduct, and a finding of unsatisfactory conduct, is that right?

MR McGUIRE:

That's going to be subject to an application to this Court.

GLAZEBROOK J:

I understand that.

ELLEN FRANCE J:

So the 2016 one is the one for which you've made an application, that's the one the Court of Appeal dealt with recently?

MR McGUIRE:

Yes Your Honour. And the one under that, which is, about the LCRO, that was dismissed by the LCRO.

GLAZEBROOK J:

So we have the 2011 and then we have the 2016, which is under review, is that right?

MR McGUIRE:

Yes.

GLAZEBROOK J:

And that's, those are the only two relevant, thank you.

MR McGUIRE:

Yes, well, actually, well they're the only ones here and this one Your Honour. Excuse me Your Honour can I just confer…

ELIAS CJ:

Yes, of course.

MR McGUIRE:

Your Honour, there's more to it than this. This legal aid provider, which is on page 319, is not the final one. There's another one. There are actually others. Which are not here. So I'm being absolutely, you know, this is full disclosure, so this is not the final. There are other, there's been other complaints upheld about me. There's two of them which are subject to the Legal Complaints Review Office as well and there's also two open complaints, I think, two, or three, three open complaints.

ELLEN FRANCE J:

So the open ones haven't been dealt with by anyone yet?

MR McGUIRE:

No.

ELIAS CJ:

Mr McGuire, why isn't it appropriate for those to be dealt with first, before this, before your application is reconsidered or finally determined?

MR McGUIRE:

Your Honour because I, they're just disputed by me.

ELIAS CJ:

No, no, I understand that, but I'm just really thinking about from the perspective of the people who have to make these decisions about providers.

MR McGUIRE:

Yes.

ELIAS CJ:

Why wouldn't it be entirely appropriate with these statutory responsibilities for them to wait to see what the outcome of those complaints is.

MR McGUIRE:

Well the argument, the reason is, Your Honour, is that, well, the reason for that is because the clients I get tend to be …

ELIAS CJ:

Are difficult.

MR McGUIRE:

Are difficult, exactly.

ELIAS CJ:

I can understand that, yes. But still there are outstanding issues. It is a matter that has to be looked at in terms of whether you should be a legal aid provider. Don't they have to be dealt with first?

MR McGUIRE:

Well, that would be – well it probably would be true Your Honour except that I have actually tried twice. I've gone through the process twice, and that process, I have not heard anything back from the, anybody from for example, the Ministry of Justice saying well, you know, what is the explanation. What has been going on. I just accepted the certificate as saying well you're not a fit and proper person without any explanation whatsoever.

GLAZEBROOK J:

Well the certificate did comply with clause 5 of the regulations in that it provided information about complaints upheld, it went further to indicate open complaints. But one would expect that you would indicate open complaints because you would have thought it would be relevant information for anybody looking at a legal aid application, wouldn't you?

MR McGUIRE:

Well, with respect Your Honour, not really because, as I say, one of the reasons why my certificates of currency changed is because I challenged the complaints that are made about me and then, some of those are successful so therefore that's reflected in the fact that – there's a fluidity about the certificates of standing, they keep changing as I keep arguing, and so in terms of the context about whether or not it's a permanent, you know, a permanent assessment of my fit and proper person status based on the contents of the certificate, I think it's inherently unreliable because it keeps changing. So I don't, with respect, I don't agree.

GLAZEBROOK J:

Well it's not unreliable in terms of complaints upheld is it?

MR McGUIRE:

Well –

GLAZEBROOK J:

And anyway it's a requirement under the regulations that that information is provided.

MR McGUIRE:

That's right Your Honour but the –

GLAZEBROOK J:

Which assumes that it must be relevant information for unsuitability.

MR McGUIRE:

But my submission, Your Honour, is that's based on an assumption that is' correct and –

GLAZEBROOK J:

Well if it's been upheld it must be correct, mustn't it?

MR McGUIRE:

What are we referring to Your Honour sorry?

GLAZEBROOK J:

Well the charges that have been found either proved or pleaded guilty to must be correct, mustn't they?

MR McGUIRE:

Are we referring to a particular certificate?

GLAZEBROOK J:

Well it doesn't matter which certificate, does it? As a matter of principle the Law Society is required to provide information about complaints upheld.

MR McGUIRE:

That's right Your Honour. That's right.

GLAZEBROOK J:

And there's nothing unreliable about information on complaints upheld.

MR McGUIRE:

But they're not necessarily final because they're subject to a right of review to the Legal Review Office and also, as I've done several times, I've successfully had them set aside on judicial review proceedings.

GLAZEBROOK J:

So you say they shouldn't even be included until those have been completed?

MR McGUIRE:

Well not without some, not just sort of, a certificate saying there's open complaints and then there's, and I'm referring for example to page 319 which is the certificate on the 1st of September. So we've got –

GLAZEBROOK J:

We're probably getting past section 83 which is the only thing in front of us.

MR McGUIRE:

Yes. Well that as really the overview. If I may, we've probably already canvassed some of this, but I, the second part of my oral argument was really to just look at one or two aspects, in particular the Legal Services Act 2011, which we've actually done already, sorry, fairly quickly. So just reading down here, and I'm also referring again back to the bundle of authorities from the respondent, which was the relevant sections of the Legal Services Act in 2011, I'm going back to that. My argument is that, my position is that the selection committees are constituted under section 78 and they're required to advise the Secretary about the suitability of applicants under section 78, but the word "suitability" isn't defined in the Act and then what I'm, one of the things I have been suggesting, and still suggest, is that it's quite, I find it a bit challenging to understand the exact relationship between the functions of the selection committee under section 78 and the Secretary's powers which is under section 77 of this Act where the Secretary has the powers to approve or not approve, for example, applications for approval to provide legal aid services, as we know, and in that regard –

ELIAS CJ:

It's just a function to provide advice, isn't it, under section 78?

MR McGUIRE:

Yes, well it's called a recommendation.

ELIAS CJ:

Yes, well, because it's an advice as to whether – but it's simply advice, it's not determinative.

MR McGUIRE:

Yes, except one of my arguments Your Honour is that the, is the argument that the Secretary effectively, in my submission, followed the selection committee's recommendation without actually necessarily challenging any aspects of it. So for example disagreeing or independently considering the merits of my application and that also, again, sorry to be repetitive, raises that exacerbating factor that I've raised previously on page 235 where she voiced a concern about the membership of Ms Woods but, and effectively seemed to suggest that it was inappropriate but she still declined the, followed the selection committee's unanimous decision to not recommend me for a legal aid application and declined the application anyway.

ELIAS CJ:

But it also can be read as her decision coincided with their recommendation but it wasn't a rubber-stamping of it, was it? There's a decision trail that's set out there which she assumes responsibility for.

MR McGUIRE:

If that was the case, Your Honour, I'm not sure why she'd say that she was concerned.

ELIAS CJ:

Well, I would have thought, well, that indicated that she wasn't going to rubber-stamp it, but maybe that's reading too much into it.

MR McGUIRE:

Yes Your Honour.

GLAZEBROOK J:

I think she was actually saying that was a concern that someone with personal knowledge says.

ELIAS CJ:

But it's more an indication of not simply rubber-stamping the recommendation otherwise why refer to it.

MR McGUIRE:

I have already mentioned this, sorry to be repetitive, but I'm going back to the functions of the Review Authority and just repeating that the functions are provided by section 85 of the Act and they are limited to reviewing decisions of the Secretary and then as far as the statutory scheme is concerned of the regime, section 82(2) provides that and application for review is to be filed within 20 working days from the notice of the Secretary's decision but late applications are exceptionally accepted under section 82(3). And my first, the oral legal proposition in this regard, Your Honour, is that my submission section 83 is really designed to stop simultaneous duplicate reviews, which is namely a statutory review of a Secretary's decision under section 82 and a general judicial review within 20 working days of the date of notice of the Secretary's decision, which is provided under section 82(2) of the Act. And so effectively that's a temporary moratorium for a limited period where the judicial review of the Secretary decision is strictly unavailable. That's the way I read it. Thus if an application for a statutory review of the Secretary's decision is made under the section 82(2) then judicial review is unavailable and then that's okay but the problem arises is if you don't apply for a statutory review in time and then my submission is that the result of that, the consequence is that you lose that right to a statutory review and the only option is judicial review and further in that regards, Your Honour, my submission is that a statutory review is not a condition precedent of judicial review either under the correct interpretation and relationship between sections 82(2) and section 83 or in general principle. So section 82(2) is a temporary privative between working days and the date of the notice of the Secretary's decision, and after that it isn't because the time to apply for a statutory review has been exhausted. But

that's not to the detriment, however, of a general right to a legal recourse through judicial review and I say that that comes about because of the underlying impact and principles of section 27(2) and the principle of legality. And in my submission Your Honour that is an interpretation that's consistent with the principled exceptions that were formulated, for example, in *Tannadyce* and *Pora*.

Then my submission is the next issue is the relationship between section 82(3), which is the exceptional circumstances grounds for making a late application, and section 83. This is slightly different. So what section 82(3) provides is that despite section 82 you can still make a late application within three months of 20 working days of notice of whatever decision was made by the Secretary provided you can convince the Review Authority to exercise discretionary powers and convince the Review Authority that you get exceptional circumstances if the event of the application can be made in time. One of the obvious reasons for that I suggested in my written submissions was obviously ill-health. So, you know, you provide medical certificate you can justify and legitimise, legitimately justify why you weren't able to make an application in time and presumably a fair and reasonable Review Authority would accept that as an explanation and allow a late application.

However, that also raises, in my submission, some other issues, for example, the wrongful exercise of discretionary power by a Review Authority in refusing an application for review on the exceptional circumstances ground would not be subject to judicial review under section 83, even if the application was made before the expiration of three months, and the reason for that, Your Honour, is because it just wouldn't qualify. And the reason it wouldn't qualify is because of an exercise of discretionary power by the Review Authority not accepting that a late application quality as exceptional circumstances. So that's got nothing to do with the legislation, it's to do with the Review Authority, and it certainly doesn't have anything whatsoever to do with section 83, those particular –

ELIAS CJ:

I'm getting a little lost I'm afraid. I'm not sure how that bears on the issues that we have to decide.

MR McGUIRE:

Well my argument, Your Honour, eventually is that it casts doubt about whether or not section 83 ousts, for example, section 27(2) and the principle of legality because if you really tease this out, for example, what this means is that, for example, you can't get judicial review if, for example, if the Review Authority decided that it wasn't going to accept a late application because the Review Authority decided there weren't exceptional circumstances. So therefore your only option must be to get judicial review, not a statutory review, it doesn't qualify, because that's a decision by the Review Authority and under section 83 refers to the Secretary's decision. So therefore surely in those circumstances the principled right, the constitutional right to judicial review just comes in and then you can apply for judicial review of a decision that's been made under the subpart. Because section 83 refers to decision under the subpart, and then section 82(3) refers to a decision made by a Review Authority, which is a decision under the subpart, to not allow a late application because that Review Authority has decided exercising discretionary powers that there aren't exceptional circumstances. Well according to the position I undertake, I understand has been taken by the respondent, that means you can't get judicial review.

ELIAS CJ:

I don't understand that to be their submission and section 83 couldn't apply in its own terms to anything other than a review of the Secretary's decision. It doesn't apply to the Review Authority.

MR McGUIRE:

But with respect Your Honour the problem with that is that section 83 says the review of any decision made under this subpart –

ELIAS CJ:

I understand that but to read the whole provision it's clearly directed only at reviews of the Secretary's decision, it's only the Secretary's decision. Anyway, I think we should move on a little. Where do you want to take us now?

MR McGUIRE:

The last point I'd like to make Your Honour is something that I referred to as exceptional exceptional circumstances, and I'll explain that. That's also in relation to the relationship between section 82(3) and section 83. I'm arguing that I arguably have exceptional circumstances in the 2013 application, but it's just that in reality I didn't know at the time that I had that, and the reason I say that, Your Honour, is again I revert back to the exceptional circumstances of consisting of two members of the selection committee are also concurrent of the Manawatu Standards Committee and my position and argument that that was a conflict of interest that ensued and so therefore I didn't, this exceptional circumstances didn't actually manifest itself until much later when I got the apology from the Law Society for things that had happened in 2013. So it crystalised, even though it was actually happening or arguably had exceptional circumstances at the time because of either actual or potential breach of the rules of natural justice relating to the recommendation and/or the Secretary, I didn't really know that fully, it didn't crystallise really until two years 10 months later when I got the written apology from the Law Society. And so, I know it's a bit circuitous, but my argument therefore is that in that case by the time the details of what could have been exceptional circumstances, which in this case my argument is that the membership of the selection committee and the potential conflict of interest, by the time that finally surfaced it was too late under section 82(3), which is well over three months, for me to do anything about it.

GLAZEBROOK J:

But hasn't that all been overtaken by the fact there has been another application and could be another application yet where all of the up-to-date circumstances could be taken into account?

MR McGUIRE:

The second application was for criminal law, this is for family law, this is for a different approval.

ELIAS CJ:

But it's still arguably – and we've heard your argument on this – overtaken by the decision of the Secretary.

MR McGUIRE:

Yes.

ELIAS CJ:

That's the issue as I see it, whether that's right.

MR McGUIRE:

Yes, that's right. But I also, I mean, my point here, I know it might be hard to follow, but my point here is that it's not a case of me not using section 82(3) in 2013 and applying for a late application within three months, I didn't know I had that, because of what I suggest was improper about the membership of the selection committee and the conflict of interest. That wasn't revealed until two years and 10 months later when I got the apology. And then working back you realise, well, that actually came, that was actually appearing at the time that I could have argued to the Review Authority, "Look what's going on, I've just got an apology from the Law Society on, say, the 10th of December 2013, I'd like to make an application for review, I think I've got exceptional circumstances," but I wasn't able to do that then because I couldn't prove it.

ELIAS CJ:

Mr McGuire, I have some sympathy that if there is vitiating error it is something the Courts would strain to be able to review, but my query is whether it is a vitiating error given that, you know, even if you're right, when the Secretary has made another determination?

MR McGUIRE:

Yes.

ELIAS CJ:

Anyway, I think we've been through that sufficiently.

MR McGUIRE:

Yes.

ELIAS CJ:

Was there any additional points you needed to make?

MR McGUIRE:

Well, no, Your Honour. I suppose the point of course is that, the fact is whether or not my case is a hopeless, I mean, ultimately might be unsuccessful, but the issue here is whether or not it should have been struck out, whether it was a hopeless case, in my submission, well, certainly, I mean it's got some merit, how much remains to be seen.

And the only other point I'd like to make, Your Honour, in terms of, quickly, about costs, very quickly in fact…

ELIAS CJ:

Was this the costs appeal?

MR McGUIRE:

Yes, Your Honour.

ELIAS CJ:

Well, shall we have that afterwards because we'll…

MR McGUIRE:

Oh, of course, yes. Yes, of course, sorry.

ELIAS CJ:

Yes, I think that's probably more sensible to keep that together.

MR McGUIRE:

Sure.

ELIAS CJ:

We'll hear from you again.

MR McGUIRE:

As Your Honour pleases.

ELIAS CJ:

I had thought from your memorandum that you wanted us to hear from the Interveners first and then you would come in after that.

MR McGUIRE:

Yes.

ELIAS CJ:

Is that what you'd prefer?

MR McGUIRE:

That's correct, Your Honour, thank you.

ELIAS CJ:

All right, then we'll hear from the Crown now, we'll hear from Mr Melvin in response and you'll be able to reply too if there's anything arising out of it of course.

Mr Melvin, we'll take the adjournment now, but perhaps you could just come to the lectern. I do have a query as to why strike-out was thought to be sensible in this case? We've effectively heard the judicial review argument. I'm not terribly familiar with strike-out and judicial review, it wasn't really

something that happened very much when I was in practice, but is it common?

MR MELVIN:

Probably not, Your Honour. We filed a strike-out application in relation to Mr McGuire's first statement of claim, and at that point there was only one issue and that was in respect of the 2013 decision.

ELIAS CJ:

Yes.

MR MELVIN:

We then, we filed the strike-out application and Mr McGuire subsequently amended his claim to introduce a second claim relating to the 2016 decision and so had the original statement of claim comprised both heads of claim in relation to both decisions then we may have made a different decision, we may not have sought strike-out.

GLAZEBROOK J:

So it was really the section 83 point?

MR MELVIN:

Yes.

GLAZEBROOK J:

So jurisdictional point.

ELIAS CJ:

But even on the section 83 point your defence still stands, so it's something that will be run…

MR MELVIN:

That's right.

ELIAS CJ:

But one would have thought that it might actually have been more efficient use of Court resources and so on to have just dealt with it straight up.

MR MELVIN:

As it turns out, that may in fact have been the case, Your Honour. At the time we took the view that it was an efficient and appropriate process to adopt.

ELIAS CJ:

Yes. But there is an element of – recourse to strike-out does deprive people of the opportunity to get off their chests their grievances, so it does tend to escalate matters perhaps. Anyway, that's just an observation.

We'll take the adjournment now.

MR MELVIN:

As the Court pleases.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.47 AM

ELIAS CJ:

Yes Mr Melvin.

MR MELVIN:

May it please the Court. Your Honours will have read the submissions on behalf of the respondent.

ELIAS CJ:

Yes.

MR MELVIN:

And I'm happy just to take questions that the Court has if that's appropriate.

WILLIAM YOUNG J:

What do you say about the practice manual Mr McGuire took us to?

MR MELVIN:

Yes.

WILLIAM YOUNG J:

Effectively we don't do anything that's not on the papers.

MR MELVIN:

I beg your pardon Sir?

WILLIAM YOUNG J:

Well the tenor of it is that the review panel is going to look at it on the basis of only what's on the papers, they're not going to conduct a broader enquiry. Now if that is the position I would have thought it's not entirely consistent with the statute and the regulations.

MR MELVIN:

Yes, it's probably not the best worded statement. It's a matter that we've raised with the Ministry of Justice in the process of preparing for this case. The instructions that we have are that applications to the Review Authority go to the Review Authority so it is for the Review Authority itself to assess whether an application made to it is properly an application that it can consider.

GLAZEBROOK J:

It is more meant to say that the person can't put any other information in rather than trying to constrain the Review Authority, do your instructions go that far?

MR MELVIN:

Yes, yes.

GLAZEBROOK J:

Because that would be fine, one can understand that to say well you can't on a review of a decision put in other information. You have to start again with a new application.

MR MELVIN:

Yes, it's to guard against an applicant effectively putting in an entirely new application that it would be, when it would be appropriate for that to go back to the selection committee and Secretary to consider, and it can't override the statute itself and the regulations and the regulations provide for the, regulation 27 of the, so that's at tab 3 of the respondent's bundle of authorities at page 13 of those regulations, and that provides that the Review Authority may request further information itself. So there's certainly scope to receive further information and of course the applicant has the ability to make any written submissions along with the application itself.

WILLIAM YOUNG J:

Does the statute say who the, if the Review Authority is independent?

MR MELVIN:

Yes it does. The Review Authority, that's dealt with Sir at regulation 19, sorry, it's clause 19 of Schedule 3 to the 2011 Act. "The Review Authority must perform his or her functions independently of the Minister." So the Review Authority is set up as an independent review body.

WILLIAM YOUNG J:

And how many members are there, just one, or there are one and a deputy?

MR MELVIN:

The authority sits as one person. There is also a deputy authority to sit when the regular Review Authority is unable to do so or in some other limited circumstances.

O'REGAN J:

So do you say the scope of the review would enable to challenge to be made to the way the recommendation was, or the process that led to the recommendation from the selection committee to the –

MR MELVIN:

That's correct Sir, yes. Our submission is that defects earlier on in the process, whether it's in the process that the selection committee undertakes, or whether it's in the process the Secretary undertakes, can be cured by the Review Authority.

ELIAS CJ:

And if the 20 day frame is missed, 20 days is it?

MR MELVIN:

20 days, yes.

ELIAS CJ:

There is no judicial review?

MR MELVIN:

Not on a, not on the plain reading of the statutory provisions, sections 22 and 83. What the applicant can do, though, is reapply. There's no barrier to reapplying. There's no cost issue. The only cost would be the $30, I understand, that is the fee for getting a certificate of understanding, but there's no application fee for applying to be a legal aid provider.

GLAZEBROOK J:

The certificate of standing, the Law Society only give them for three months or is there a three month thing in the regulation, I've just…

MR MELVIN:

My understanding it's the Law Society's practice to do so. I haven't seen any regulations that it's, or in these regulations anyway, that it's a requirement. My friend indicates –

GLAZEBROOK J:

Well one can understand because things can change over that period.

MR MELVIN:

My friend indicates that that's correct.

ELLEN FRANCE J:

Just in terms of that contrast with say the Immigration Act type provisions, in the Bill as introduced there was a time limit in the previous, in what became section 83, on the bringing of judicial review, but that was removed in the course of the legislative process. We don't know why that would have been so, why that change was made?

MR MELVIN:

No, well it's not something we've looked into Your Honour.

ELIAS CJ:

Do you have any further submissions to make on this question of whether it's a matter of jurisdiction or discretion, whether to – I mean leaving aside the terms of section 83, whether to permit review where there is a statutory process. Is there any submission you want to develop on that?

MR MELVIN:

The submission, Your Honour, is that the statutory process in sections 82 and 83 should be followed.

ELIAS CJ:

Should be interpreted as an ouster of judicial review in all circumstances?

MR MELVIN:

Except those that identified, for example, in *Tannadyce* where the majority in that case held that there were at least two situations where judicial review would be permitted. The first being if it were not practically possible to bring judicial review on the facts of the case or –

ELIAS CJ:

To use the statutory mechanism.

MR MELVIN:

To use the statutory mechanism, yes, or if the complaint is one that lies outside the statutory process. So, for example, a complaint that, in this case it would be whether the Review Authority itself was biased, for example, then that would be a matter that could be taken on judicial review.

ELIAS CJ:

Well but that could be, even on the wording of section 83, that can be a matter of judicial review.

MR MELVIN:

Yes it's, yes, it's accepted.

WILLIAM YOUNG J:

There's no limitation on a review of the Review Authority?

MR MELVIN:

No.

ELIAS CJ:

No.

MR MELVIN:

No.

ELLEN FRANCE J:

So if the complaint of bias was directed to the Secretary, just by way of example, are you saying review would be available in that circumstance or not?

MR MELVIN:

We say that in that circumstance the correct procedure is first to apply to the Review Authority. The Review Authority may well and certainly has the power to correct that error. If the applicant remains unhappy with the Review Authority's decision, he or she is able to then apply for judicial review.

ELIAS CJ:

But not if they have missed the statutory frame because they don't know about the error that would be the subject of judicial review.

GLAZEBROOK J:

That is assuming they haven't applied to the Review Authority because at that stage the error wasn't apparent.

ELIAS CJ:

Yes.

MR MELVIN:

Yes.

ELIAS CJ:

I'm just really struggling for limits to a very expansive view of, particularly given the time limits on the statutory merits review. If there was an error that really was vitiating, and which tainted what had happened, whether the jurisdiction of the Courts would be ousted, particularly as this is in an area touching employment related matters –

MR MELVIN:

Yes, and livelihoods.

ELIAS CJ:

– and the Courts have always indicated that they look fairly closely at that sort of thing. So it is a very process-minded restriction in section 83, which you can understand in cases of error and a number of the objections you make to this affecting the length of the process and things like that, one would have thought would be addressed in terms of exercise of the discretion, or in terms of the actual remedy that would be provided, but one can envisage cases where a determination would have effect, would have continuing taint on someone's life, and it might be that the Courts should intervene to correct it, even if there's no remedy in the particular application that triggered the whole thing. I mean it did strike me that the reference to the *Stininato v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1 case, which I was counsel, which I always thought was a most unfair decision and that Woodhouse was right in that, resonates a little bit, that some of these licencing decisions, the taint endures.

MR MELVIN:

So we say that the Review Authority has the ability to attend to any taint that's occurred leading up to that process.

ELIAS CJ:

No I understand that. I'm really just positing a case where that process hasn't been followed. So on your argument there is no help, even though it may be an error that wasn't discoverable at the time, and that is vitiating.

MR MELVIN:

That potentially could come into the not practically possible realm that *Tannadyce* addresses.

ELIAS CJ:

Yes.

MR MELVIN:

But it would have to be –

O'REGAN J:

It might be an exceptional circumstance justifying a late application for review.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Well it says they prevented the application from being made so it sounds more like an illness. I guess you could say well it prevented it being made because there wouldn't have been any point on the basis of the findings in making that review application and it became only evident later that there was. But you've still got a three month limit.

MR MELVIN:

Yes. the other part of the response, of course, is that the applicant can simply reapply.

ELIAS CJ:

I understand that but that doesn't, that may not entirely remove the taint that somebody has been turned down because they are not thought to be qualified. That may have implications further down the track. People have a higher hurdle on a fresh application because that's in the background.

MR MELVIN:

Mmm.

ELIAS CJ:

Anyway. Was there, sorry, I'm just having a look at my notes. Anyone have any further questions?

ELLEN FRANCE J:

It may not be apparent on what we've got but is an applicant always told who the members of the selection committee are?

MR MELVIN:

I don't have instructions on that Your Honour so I'm not sure what the answer is. In this particular case it was apparent from the Secretary's decision –

ELLEN FRANCE J:

Right.

MR MELVIN:

As to at least who made up some of the selection committee.

ELLEN FRANCE J:

Yes.

GLAZEBROOK J:

I suppose the slight difficulty is if you don't know beforehand you can't, you then have no opportunity to challenge somebody for bias or conflict of interest.

MR MELVIN:

Yes.

GLAZEBROOK J:

And conflict, performance review committee, that's different, isn't it? Selection committee is different from the performance review committee?

MR MELVIN:

Yes, they're two separate committees.

GLAZEBROOK J:

Yes.

MR MELVIN

In this case however the Secretary's decision did disclose the membership, at least in part, of the selection committee.

ELIAS CJ:

What do you mean “at least in part”?

MR MELVIN:

Well, it refers to – sorry, I thought it did. Perhaps I’m not –

GLAZEBROOK J:

Have we got the letter of 15 July 2013, there’s a committee’s recommendation was made in that?

MR MELVIN:

Where are you, Your Honour?

GLAZEBROOK J:

Sorry, I’m just looking at page 226, because he was given, 15th of July, the committee recommendation, I just wondered whether any of that correspondence said who the selection committee were, if we have any of that correspondence? There’s various correspondence referred to in the background.

MR MELVIN:

Yes. So if Your Honours go to page 210 it has the recommendation of the selection committee there, and it sets out the membership.

GLAZEBROOK J:

Yes.

MR MELVIN:

So they were disclosed.

GLAZEBROOK J:

And it may be some of that earlier correspondence actually disclosed that as well.

ELIAS CJ:

Yes, thank you, Mr Melvin.

MR MELVIN:

Yes. There's just one final point I wish to address the Court on and that's paragraph 12 of our submissions where we – it's the first paragraph of the facts section of the submissions and it's the second sentence, where in hindsight we should have been a little bit more expansive with our explanation. The sentence reads, "The Legal Services Agency revoked the appellant's approvals because he had entered into a contingency fee agreement with a legally aided client in breach of section 66 of the Legal Services Act." We just want to make it clear that for completeness that should have said, "He had entered into a contingency fee agreement with a legally aided client and sought to enforce payment of his invoice when such a payment would have been in breach of section 66," we'd just like to make that correction for the Court.

ELIAS CJ:

Well, is entering into a contingency fee arrangement not in breach of the Legal Services Act?

MR MELVIN:

It's the taking of a payment, it's when you actually take the payment that's the breach…

ELIAS CJ:

I see, yes.

MR MELVIN:

That was the breach of section 66. We just want to clarify that point.

ELIAS CJ:

Yes, thank you.

MR MELVIN:

As the Court pleases.

ELIAS CJ:

Mr McGuire, is there anything to respond to?

MR McGUIRE:

Just very briefly thank you, Your Honour. The only point I wanted to make was that, just to remind the Court that I did apply for a review of the unsuccessful 2015 application that also raises issues about the Standards Committee and the Secretary's decision, and the hearing's being heard on the 15th of August. And I was thinking while my friend was talking that I don't recall being asked by the Review Authority about the selection committee and if necessary I could – I'm fairly sure that's true – but I'd be prepared to file evidence to that effect if that's going to be helpful.

ELIAS CJ:

But that's in relation to 2015.

MR McGUIRE:

Yes.

ELIAS CJ:

I don't think it bears on the issues that we have to look at.

MR McGUIRE:

It's just that I'm also arguing that there is breaches of natural justice about the Standards Committee decision and the Secretary's decision in those proceedings as well, and they actually reviewed that one, and I wasn't asked by the Review Authority for any information.

ELIAS CJ:

I see.

MR McGUIRE:

And I don't recall it, but I'd be prepared to file an affidavit if that would help the Court, if it's relevant.

ELIAS CJ:

I don't think it bears on – is this really in support of the indication that the Review Authority is not likely to go into those sort of matters?

MR McGUIRE:

Yes.

ELIAS CJ:

Did you raise it with them or not?

MR McGUIRE:

I can't remember exactly, I just remember I didn't think the decision was right.

ELIAS CJ:

I see.

MR McGUIRE:

And then, and I'll be honest with you, I mean, I'd have to check.

ELIAS CJ:

No. I think we don't need to get into the 2015 review.

MR McGUIRE:

Just in terms of practice though, what the Review Authority does, how extensive is the review, does it include for example allegations of impropriety and natural justice? Well, I don't recall that being raised at all by the Review Authority in 2015, but again I'd have to check.

ELIAS CJ:

Yes, thank you.

MR McGUIRE:

As Your Honour pleases.

ELIAS CJ:

Thank you, Mr McGuire. Right, well, we'll get onto the costs matter. Have you decided on an order?

MR FOOTE:

Yes, may it please, Your Honour, Mr McGuire and counsel thought that it might be best if the New Zealand Bar Association goes first because its submissions are shall we say more far-reaching, but we're in Your Honour's hands.

ELIAS CJ:

Yes, that's fine. And then Mr Collins you'll follow will you?

MR COLLINS:

Thank you.

ELIAS CJ:

And then we'll hear from Mr McGuire. We have of course read the submissions, so you can assume that in the presentation you make to us, Mr Foote.

MR FOOTE:

Thank you, I'm very grateful. May it please, Your Honours. I hope it's apparent and I'm sure it is, from the submissions filed by the New Zealand Bar Association, that the Association is asking the Court to reconsider first and foremost the "general rule", as it's called, that self-represented litigants are not entitled to costs other than out of pocket disbursements. That is, shall I say, the first question as the New Zealand Bar Association sees it, the question of principle, and then it's a matter of moving to consider whether the present costs rules, both including the discretion in rule 14.1 and the general principles in 14.2, permit awards of costs to litigants in person, I should say.

WILLIAM YOUNG J:

So far we have no one who is defending the current rule.

ELIAS CJ:

Contradicting.

WILLIAM YOUNG J:

The current, well, I would have regarded it as the current approach.

MR FOOTE:

I'm sorry, Sir, no one is –

WILLIAM YOUNG J:

Well, the current approach, leaving aside the *Joint Action Funding Limited v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70 case, is that costs are for lawyers who are, where lawyers are retained, no costs for litigants in person, an exception or a reconciliation of those two rules in relation to lawyers who are self-represented. So that's the position as it was until recently.

MR FOOTE:

Yes, Sir.

WILLIAM YOUNG J:

Okay. There's no one here to defence that status quo?

MR FOOTE:

Well that's also apparent Sir.

WILLIAM YOUNG J:

So it's not really a great place, a great occasion for us to enter into this debate, is it? It's rather a one-sided debate.

ELIAS CJ:

Particularly as there is a case that's properly constituted which is before the Court of Appeal, as I understand it, and –

GLAZEBROOK J:

On in-house counsel.

ELIAS CJ:

Yes but which will have to grapple with the wider principles, won't it?

O'REGAN J:

Well the Court of Appeal's the one who stated their view on the wider principle.

WILLIAM YOUNG J:

Well the Court of Appeal, I mean if the Court of Appeal –

O'REGAN J:

So the only question is, does it extend to in-house counsel or not.

WILLIAM YOUNG J:

No, does it waive, pull back from the invoice rule.

MR FOOTE:

Yes, on the in-house counsel point.

WILLIAM YOUNG J:

Literally the *Eichelbaum* case says you've got to have an invoice.

MR FOOTE:

The in-house counsel point, it's obviously difficult to know, impossible to know, how exactly that's going to be argued, but more importantly how it's going to be treated by the Court of Appeal.

WILLIAM YOUNG J:

But *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA) was an in-house counsel case.

MR FOOTE:

Yes.

WILLIAM YOUNG J:

So they obviously didn't go much on *Brownie Wills* and *Eichelbaum*.

MR FOOTE:

No Sir but –

WILLIAM YOUNG J:

So if they apply the *Eichelbaum* approach to *Brownie Wills* to in-house counsel then they're going to uphold Judge Matthews' decision presumably.

MR FOOTE:

That may happen. Of course my learned friends for the Crown have a different idea as to how the in-house problem, if we can call it that, might be remedied, and the Bar Association in these submissions has another idea as to how that might be remedied.

WILLIAM YOUNG J:

Well you say it doesn't matter. There's no rule from which an exception is required.

MR FOOTE:

Yes. So –

WILLIAM YOUNG J:

Just one point that troubled me. You treat it as, of no moment that giving litigants in person costs might incentivise frivolous and vexatious litigation. Why? What's the basis for that contention?

MR FOOTE:

Well, Sir the, it is of course as a matter of cause and effect possible –

WILLIAM YOUNG J:

Well people who get a psychic benefit from frivolous and vexatious litigation, might not the prospect of an award of costs actually be more of a psychic benefit and thus more of an incentive?

MR FOOTE:

Well Sir it might –

WILLIAM YOUNG J:

It was referred to in the Australian High Court case, not as a proposition emphatically but as something that warranted further consideration.

MR FOOTE:

Yes Sir and –

WILLIAM YOUNG J:

Do you say it doesn't need further consideration?

MR FOOTE:

I'm sorry?

WILLIAM YOUNG J:

Do you say it doesn't need further consideration, that issue, that we can just assume that it won't?

MR FOOTE:

Well, not exactly. I accept that as a matter of cause and effect a litigant, a hypothetical litigant, might think I've got this claim, and not only have I got this claim but if I prosecute it, and prosecute it successfully, then I may receive an award of costs as a successful litigant, and that might be one factor that a litigant might weigh in deciding whether or not to take a claim. So it's possible that it is a motivation that may encourage litigants in person, but what I say is that that possibility is not one that should carry much weight, and the reasons for that –

WILLIAM YOUNG J:

Might it not depend on how real it is?

MR FOOTE:

I'm sorry Sir?

WILLIAM YOUNG J:

Might it not depend on how real it is, how real that possibility is. If it's a just possibly might happen but it never will in practice and we can be confident about that, then you're right. Might one not want to look at what's happened in Canada and perhaps the UK to see what's happening?

MR FOOTE:

Well, Sir, I mean the decisions in Canada now span from 1995 through to 2016.

WILLIAM YOUNG J:

I wasn't thinking of the decisions. I was thinking of facts on the ground.

MR FOOTE:

I see –

GLAZEBROOK J:

Well how could you work that out?

WILLIAM YOUNG J:

Well I think you, people do work out empirical things. People work out –

GLAZEBROOK J:

But it can only be a marginal incentive because the first incentive, especially for vexatious litigants, is just the litigation isn't it? So how could you work out that marginally the possibility of costs is increased.

WILLIAM YOUNG J:

I think you might want to see what's happened on the ground. Look at the cases.

MR FOOTE:

Well I'm unaware –

WILLIAM YOUNG J:

I wouldn't dismiss it as impossible –

ELIAS CJ:

Well they are complaining in Canada about an explosion in litigants in person.

O'REGAN J:

That's because of withdrawal of legal aid.

GLAZEBROOK J:

Yes, and certainly in Britain that's the case, that it's actually because people can't get legal aid, and vexatious litigants of course couldn't anyway.

MR FOOTE:

So of course more empirical evidence might be useful, but whether and when it might appear is very difficult and impossible to know. What we do know is that, as Her Honour Justice Glazebrook just referred to, is that litigants in person, some may be there representing themselves out of choice but most of them – and the work of Dr Bridgette Toy-Cronin back this up – but most litigants in person are representing themselves because they can't afford legal representation and –

WILLIAM YOUNG J:

Or can't get legal aid.

MR FOOTE:

Or can't get legal aid, that's right, or access other ways of some kind of free legal representation. So while it is possible to conceive of a litigant who thinks

of litigation as some kind of method through which they can get recompense, my submission is that when the full impact of litigation is considered by any reasonable person that would be a foolhardy motivation.

WILLIAM YOUNG J:
We're not necessarily dealing with reasonable people though.

MR FOOTE:
Yes, Sir…

WILLIAM YOUNG J:
It's my problem.

MR FOOTE:
But I think the number one point is, whether they're reasonable or not and whatever their motivations might be to instigate litigation and to represent themselves, if they are successful that is where, obviously, costs, this question comes into play –

WILLIAM YOUNG J:
But the hope of success is also material.

MR FOOTE:
Yes. There is undoubtedly some percentage of the litigants in person out there who may be, as part of their motivation, encouraged to litigate because they think they might get costs. But is that really a reason to deny costs to litigants who are at the end of day successful in maintaining, justifying, their legal rights? So, with respect, I think looking at the motivations at the instigation of litigation, while a relevant factor is less important than considering the position of the successful litigant in person who has vindicated their rights and is not looking for some recompense for that effort, there is a wide range of litigants in person that include, may include, lawyers, obviously, other professionals, it's not all a matter of querulous and vexatious litigants. Those types of litigants, I suggest, are not best discouraged by denying costs

but by using other techniques and, in the rules, that specifically go to discourage meritless claims. Those litigants who have a meritful claim should not be disadvantaged by the fact that others might be motivated to bring meritless claims or meritless defences.

WILLIAM YOUNG J:
Do we have Dr Toy-Cronin's paper in the material? I couldn't see it.

MR FOOTE:
No, you don't. It's very lengthy. But I can have that supplied to you, Sir.

ELIAS CJ:
Well, we have it. I've got it anyway, I can give it to you.

GLAZEBROOK J:
Yes – oh, I think it is, yes.

ELIAS CJ:
Can I just sort of – because we've jumped in at the middle really here – I just wondered whether we might try and analyse where we are going here. I think you're getting from the Bench some concern about making decisions on broad policy matters which may not be best undertaken by the Courts but if they are undertaken by the Courts I think we need to approach it in a fairly structured way. Effectively what you're doing is pushing the availability of costs to a logical conclusion, in fact I think it could probably go further than you are suggesting in your submissions, because on the arguments you advance I wonder whether there's any reason to deny a represented litigant the time he or she spends in preparing for the case. So, you know, logic may take us a long way here. I'm particularly interested in three aspects of this. One is the historical legal basis for costs, and I'm very grateful to Mr McGuire for giving us Dr Goodhart's article, which I found extremely interesting on that, and in particular I'd like you to address the jurisdiction conferred originally by the Statute of Gloucester and I know that you say that it was glossed by Coke, but I'm not sure that that is a full answer to it, I think Goodhart really

acknowledges that too. I would like you to address some of the case management reasons, because I think it is quite clear that the changes in Canada in particular are driven by the central place occupied by the ability to punish people through awards of costs in observing case management requirements. It's not surprising that it all starts about '95 and I'd quite like some exploration of that. And the other matter that I'm concerned about is the whole assumption, the whole structure of legal aid payments which under our system is based on, I'm not sure that it's right to say that it's objectively assessed value. It is actually what lawyers, at the moment, are charging, that is how that was set, and if that's so is it so obvious that it translates into the position of the lawyer-litigant, if you don't have a requirement of actually some out of pocket costs. I'd like some focus on those matters and why really we should develop matters to the extent that you're talking about here, or whether we should perhaps just regard this case about arguably a blip in the law that came in 100 and whatever years ago, and whether that can legitimately be removed, leaving some of these wider questions of how far you press costs for consideration by the Rules Committee, or by Parliament, and it is very striking that if you are going to press these things to this sort of ultimately logical conclusion, perhaps you should look back at whether your premise is right and, of course, in the United States there are no costs, and if you're really looking at policy matters perhaps somebody needs to be identifying the barrier provided by the risk of adverse costs orders to access to justice.

GLAZEBROOK J:

If we're having a shopping list can you also deal with the actual requirement in the rules, the limited to actual costs as well?

ELIAS CJ:

Oh and the necessity to import contingency fees, which the rules does which rather does suggest the need to deal specifically with that, that it's out of pocket costs that are what people had in mind, and indeed I think arguably was the basis of the Statute of Gloucester, although not position in equity. Necessarily.

MR FOOTE:

Thank you for that broad, those particular categories. I think the fundamental concern about the current law relating to costs and litigants in person that the Bar Association has is that it's not fair to all participants before the courts. It identifies one category of litigants, those who represent themselves, and treats them differently to others, the represented litigants, and thereby puts them at a double disadvantage or, say, a disadvantage –

ELIAS CJ:

But can you pause there, because on the arguments you advance in which you acknowledge that there'd have to be some sifting of the quality of representation and things like that, you're never going to get total equality of treatment.

MR FOOTE:

Well, that might be so but that's not a reason, in my submission, to have a situation where one section of litigants is summarily or inviably unable to attain costs, so –

ELIAS CJ:

Well, unless costs is out-of-pocket expenses, what you pay out in the litigation.

MR FOOTE:

Yes. So in relation to the way the general rule developed as focused on indemnity, or partial indemnity as it has become, then that makes sense, that's the basis for that general rule is that indemnity, there's nothing to indemnify for litigants in person other than out-of-pocket expenses. The fundamental underpinning of the Bar Association's submissions are that modern costs rules do look to partially indemnity but that's not all they do, they play a central and significant part in the dynamics of the litigation process, and in respect of those purposes it's submitted that something needs to be done to –

ELIAS CJ:

So that's the disciplinary purpose?

MR FOOTE:

It is the disciplinary purpose and it's, yes, the efficiency and the conduct of litigation and the administration of the courts. But the Bar Association does say further that it is appropriate for time and labour to be recognised as a cost, just as that is a resource, a cost, which a lay litigant has spent to prepare and present the case, just as a –

ELIAS CJ:

But also a lay litigant who is represented will have those costs.

MR FOOTE:

Well, the distinction there, in my submission –

ELIAS CJ:

Yes.

MR FOOTE:

– is that it's only the time and labour of the lay litigant that is spent performing the steps required to prosecute the case. In shorthand I call that "preparing and presenting". So I appreciate what Your Honour says is that logically costs could conceivably go on to compensate all litigants for all their time spent on a particular matter, and that is a policy matter and the Bar Association doesn't say we should go that far. All it is saying is that the position of lay litigants as far as possible should be equated with those who are represented, so therefore the partial compensation is of the cost, whether that is financial payments to a lawyer or time and labour spent in achieving those steps set out in the schedules that are required in order to prepare and present the case in court, and so I think I've made the point that the Bar Association is looking for an equality of treatment there. Whether the costs should go further or be less, as it is in the United States, I accept is a matter of policy.

WILLIAM YOUNG J:

What about McKenzie friends? So if someone pays a McKenzie friend to help, should that be an out-of-pocket that's recoverable?

ELIAS CJ:

Can you pay a McKenzie friend now? You never used to be able to, maybe now…

WILLIAM YOUNG J:

But I mean, if they are, I want someone to help me with preparing submissions, it's probably a breach of the Legal Services Act, but hey it's still an invoice, it's still an out-of-pocket.

GLAZEBROOK J:

You say it doesn't have to be out-of-pocket in any event, it's just going to be the same payments for the same steps no matter who does them, whether it's a client in your office in terms of the barrister cases that we had or…

MR FOOTE:

That is what I'm saying Your Honour, that it is all about the objective steps that have to be taken.

WILLIAM YOUNG J:

So if a McKenzie friend does all the objective steps?

MR FOOTE:

Yes well I, yes, that's my answer to that.

WILLIAM YOUNG J:

So effectively a McKenzie friend could be paid.

MR FOOTE:

I certainly could be held to be wrong on this Sir but I, my limited experience with McKenzie friends on either side is that they do get remuneration.

WILLIAM YOUNG J:

Sorry, yes, but –

ELIAS CJ:

Really? Strange.

WILLIAM YOUNG J:

But an award of costs could cover the work that's actually done by a McKenzie friend rather than by the litigant in person.

MR FOOTE:

Yes. I think that's –

WILLIAM YOUNG J:

Have you thought about that before or not?

MR FOOTE:

No Sir.

WILLIAM YOUNG J:

So, I mean we are making this up in a sense, it's not really a criticism, we're sort of doing it on the hoof, aren't we?

MR FOOTE:

Well –

WILLIAM YOUNG J:

On the fly.

MR FOOTE:

Well, Sir, the way that the Bar Association sees it Sir is that we're asking the Court to address a general rule that was made by the Courts beginning probably at *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 –

WILLIAM YOUNG J:

Well some might say that it was really made by statute, if you go back to the Statute of Gloucester, well I suppose you'd say well it's been interpreted in a particular way –

MR FOOTE:

It's been interpreted in a particular way and that goes to my next point which is then that also that the court has to look at interpreting the extent or breadth of its discretion now, and also the particular terms of the costs rules. So when –

WILLIAM YOUNG J:

Just pause there. This is a question I wanted to come back to. If there was no right to costs other than those relating to services carried out by a lawyer, say, in the mid-19th century, is the jurisdiction to award costs something which can really be conferred by rules of court? I mean it's not my understanding the rules of court can confer a substantive right, a right to substantive relief that didn't otherwise exist.

MR FOOTE:

I suppose that's where we come back to the statute Sir which, and my understanding of the Statute of Gloucester, and all the other statutes that have followed, are that they give that jurisdiction to award costs and do not discriminate or distinguish people who represent themselves from represented litigants.

ELIAS CJ:

Depending on what costs means, which has to be looked at in its historic context, one would have thought, probably beginning with the Statute of Gloucester.

GLAZEBROOK J:

Unless you see the costs is the cost of actually obtaining the remedy that you achieve from the court –

ELIAS CJ:

That's according to Professor Goodhart, what was changed by the Statute of Gloucester because plaintiffs used to get indemnity as part of the damages before the Statute of Gloucester was enacted.

MR FOOTE:

Yes.

ELIAS CJ:

Defendants, I don't think got costs until 1606 or something, he says, so that indemnity –

GLAZEBROOK J:

Yes, but I think Justice Young's point was there wasn't jurisdiction before but you could argue there was because it was an indemnity –

WILLIAM YOUNG J:

Well it depends on what you mean by "jurisdiction".

GLAZEBROOK J:

So that was my point, at least in terms of a successful plaintiff.

WILLIAM YOUNG J:

Sorry, if you start from a proposition that surely might have been right, okay, and the hundreds of years that followed the Statute of Gloucester where costs aren't awarded to litigants in person for their time and trouble.

MR FOOTE:

Mhm.

WILLIAM YOUNG J:

Now one option is to say well that's all wrong we'll just start again and the jurisprudence is rubbish and we'll have a brave new world.

ELIAS CJ:

Chorley are you talking about?

WILLIAM YOUNG J:

No, I'm putting that to one side. I'm just saying let's assume that the law was correctly stated in *Chorley*.

MR FOOTE:

Yes.

WILLIAM YOUNG J:

I can't really have been changed by the rules of court, can it? *Chorley* says, it proceeds on the assumption there's no jurisdiction to grant costs to a litigant in person. Okay, if that was the law in the 1890s or 1880s, it can't really have been changed by rules of court, can it ?

MR FOOTE:

As a matter of jurisdiction that must be right Sir the court can't create its own jurisdiction out of thin air but I think that the argument moves to the point the Chief Justice made just a moment ago that it depends what you mean by "costs" and essentially I see *Chorley* as saying costs are only legal costs billed to your lawyer and first of all even if that was right at the time, there is certainly scope for the meaning of "costs" to change over the years and under different regimes, you know, 130 or 40-odd years later. So that's, well that's my answer to that Sir.

GLAZEBROOK J:

Which begs the question as to whether –

WILLIAM YOUNG J:

Sorry, say *Chorley* was wrong at the time, and still wrong; (b) *Chorley* may have been right at the time but we've got to assess it anew.

MR FOOTE:

Reassess it, that's –

WILLIAM YOUNG J:

And the third one which I, neither of which I have a huge objection to philosophically, but the third one which I do have objection to, is it all changed with the High Court Rules 2016.

MR FOOTE:

No, I don't put that forward at the moment.

WILLIAM YOUNG J:

Okay.

MR FOOTE:

I don't put that forward. It's the first two arguments.

WILLIAM YOUNG J:

Right, okay.

MR FOOTE:

And when we look at what *Chorley* said about costs it must be important to say well why did it come to that conclusion, and the commentators such as Beck and Flannigan in the Canadian cases will say, well look, the only rationale put forward at that point was that quantification of labour against costs were too difficult and that was in the context where, of course, English law required full indemnity costs. So I can see how the Judges may have been concerned, that if they have a lay litigant who's spent an inordinate amount of time prosecuting their case, that that would be hard to quantify, number 1, and number 2, although they don't say this, it may then lead to a very large award of costs to a lay litigant as opposed to a legally represented one who runs the case more efficiently. So there are those reasons for *Chorley* and what the Bar Association says is that those, that the quantification reason, at least if not then certainly now, doesn't hold water,

and that the purposes for which costs awards are utilised by the court for the efficient conduct of litigation is a more recent development and should be, and makes a difference to how the concept of costs and what is recoverable by litigants, is viewed, and the English saw this as long ago as 1975, because they went ahead and changed their legislation, with support from the Lord Chancellor, from Lord Denning, directly reversing *Buckland v Watts* [1970] 1 QB 27 only five years earlier.

ELIAS CJ:

I really struggle to see how that helps you in the argument you're addressing to us because it was legislatively done. It was, you know, it was a move that was undertaken by a body that can review the whole of the policy in the area. You're asking us to accomplish the same thing.

MR FOOTE:

I am and the reasons for that are this. That of course legislation is one way of doing this, and that's what the English decided to do, we don't know why exactly, but that doesn't mean that the court is not the appropriate body to grapple with and rule on these issues, because essentially what they come down to is an appreciation of the breadth of discretion and what the costs rules mean.

WILLIAM YOUNG J:

But it's not that good for the court to do it without a contradictor.

MR FOOTE:

So, thank you, Sir, I'm glad you came back to that point because we sort of lost it along the way. Now –

WILLIAM YOUNG J:

Well, now, I suppose you have got me…

MR FOOTE:

Certainly, Sir, but – let me just gather my thoughts if you will. Cost is a difficult one, isn't it, because you don't know if it's even on the table until the lay litigant is successful. So it's difficult for interveners, for example, to say, well, we definitely must be there on that case because it looks like the lay litigant's got a good case and we'd better put our oar in there, and have the defendant – I'm sorry, I'm assuming the lay litigant is a plaintiff for a moment – and have the losing party argue that they shouldn't be entitled to have costs. The opportunity here seemed to be available to deal with the issue because the Court of Appeal dealt with it in *Joint Action Funding* of course and then in this case referring directly back to *Joint Action Funding*, and they did so, might I say, with very little, well, with no submissions on the meaning of the costs rules, Part 14. So one of the reasons that I –

ELIAS CJ:

Or the meaning of costs historically, which is what I'm principally interested because I'm slightly, slightly in Justice Young's camp in the sense that I think the jurisdiction is where we should look principally, what is the scope of the jurisdiction, and so I think we should look at the statutory provisions and trace them through. It is true that there is also, the equitable jurisdiction's probably inherent jurisdiction, but we've repackaged that in the Judicature Act 1908, and again it's just what does costs mean is the issue, which probably has to be looked at as to the understanding of what – because costs is not necessarily cost, which seems to me at the heart of the issue here.

MR FOOTE:

I agree. So just to complete my answer to Justice Young, the reason that the Bar Association filed a relatively full application to intervene and a memorandum in support of that, was to indicate that these arguments, that this might be appropriate occasion to put forward these arguments. To an extent the respondent, represented by the Crown, does engage with these arguments and says, "No, this is a matter for Parliament," number one, number 2 that anyway the costs rules should only relate to legal costs but

there needs to be a tweek in the Court of Appeal's reasoning to allow for the in-house counsel matters. So there are some –

WILLIAM YOUNG J:
So how would you tweek that?

MR FOOTE:
Well, I would tweek it…

ELIAS CJ:
But we're not going to tweek that when that's before the Court of Appeal, surely? I think it's very responsibly –

GLAZEBROOK J:
Well, we would have tweaked it presumably if we accept the Bar Association's just necessarily have tweaked it, if we accept the Bar Association's submission.

O'REGAN J:
Well, you wouldn't have needed to.

MR FOOTE:
Yes, that's right.

ELIAS CJ:
We don't need to. I mean, one of the options for us is to deal with this case quite narrowly to say was what happened a hundred and – how many years ago is it – was that an aberration which we should correct or is it an aberration we continue to live with until there is a wider review. So we only deal with the question of the litigant-solicitor.

MR FOOTE:
Of course that's open to the Court.

GLAZEBROOK J:

Because if we decide it's an aberration we've still got the Bar Association's submissions that it's an aberration that should be corrected the other way, not by taking away the ability for lay lawyers, sorry, well not lay litigant but litigant-lawyers to claim their own costs but by extending it, because one can get rid of an aberration two ways, by taking away the aberration and taking away those rights, or else giving them to the other people. So I don't think we can, if we decide it's an aberration –

ELIAS CJ:

Well it's an option but one might say it's a bigger policy issue, the other way.

GLAZEBROOK J:

Well you could certainly say that, yes.

WILLIAM YOUNG J:

It's very difficult to deal with it piecemeal. I mean there are –

ELIAS CJ:

Which is what *Chorley* did.

WILLIAM YOUNG J:

Well, no, *Chorley* is complete. I mean it's a complete judgment. It establishes a rule and an exception.

MR FOOTE:

It assumes a rule perhaps and then establishes an exception to it, but yes.

WILLIAM YOUNG J:

Right, but we can say *Chorley* is right and we'll just follow it anyway. We could say that the solicitor-litigant person exception is wrong and can it. Or we can say the rule's wrong and costs cover everything.

MR FOOTE:

That's right.

GLAZEBROOK J:
We can say it's not for us –

WILLIAM YOUNG J:
Or we can do nothing.

MR FOOTE:
Yes.

O'REGAN J:
Well we can't really do nothing.

WILLIAM YOUNG J:
We could, if the appeal is dismissed it doesn't arise.

O'REGAN J:
Yes but it leaves in place then the Court of Appeal decision in *Joint Action Funding* so that would change it, the change to *Chorley* would remain in place.

WILLIAM YOUNG J:
Yes, sorry, if we simply said we won't, we leave open questions whether *Joint Action Funding* or *Eichelbaum* is correct, the issue doesn't arise in this case. So there are four options.

GLAZEBROOK J:
Or could say well there's something that needs to be looked at but it's not for us, it should go back either to Parliament or to the Rules Committee, depending upon the view on jurisdiction. Because if jurisdiction, there was no jurisdiction there is no jurisdiction then it would have to go to Parliament i.e. either inherent jurisdiction or in the rules.

MR FOOTE:
So I agree that those are all options. The Bar Association considers that this is an appropriate to grasp this nettle, if I can use that metaphor, because –

GLAZEBROOK J:

To a degree it would be obiter, wouldn't it, if there isn't any costs or award at issue?

MR FOOTE:

It may be entirely obiter, Your Honour, I can't escape that depending on the conclusion in the substantive part of the appeal but –

ELIAS CJ:

But why can't the issue here, the solicitor-litigant, be dealt with in the case that's before the Court of Appeal. I know they have already decided it but they could, they will have to look at that in the whole mix and then if it came on appeal to us then we would have the whole ground to survey.

MR FOOTE:

Of course that's possible, Your Honour, but we just don't know, of course, how that's going to pan out, how the Court of Appeal – first of all, whether it is appealed to this Court, but secondly how the Court of Appeal will treat the in-house counsel issue and whether they will, as you say, look at the whole ground.

ELIAS CJ:

Well they'd have to really –

ELLEN FRANCE J:

They have to –

O'REGAN J:

They had a court of five decide it one way. They're not going to reverse a decision that they made a year ago.

ELIAS CJ:

No but even if they maintain it, they are going to be invited to build on it. It's quite clear that that issue, the decision of Judge Matthews, is going to be challenged.

MR FOOTE:

Yes.

ELIAS CJ:

So they will have to assume that, build on it and then one would have thought there would be probably an appeal which will wrap up the issue, the narrower issue, but in a wider context. And the Court can appoint somebody to represent the other side.

MR FOOTE:

Yes. Well...

ELIAS CJ:

Because if, I mean just speculating, but if the Solicitor-General doesn't get Crown costs able to be recovered she's certainly going to appeal, and if she does presumably you might appeal if it doesn't go further than dealing with, well, on the basis that you're arguing here, that it can't stop with lawyers, it has to extend to lay litigants.

MR FOOTE:

Well, I agree with Your Honour's first premise that the Solicitor is likely to appeal if costs are, if the Court of Appeal upholds their wording in *Joint Action Funding*, says there's no costs available for in-house counsel. But we don't know whether in fact if the Court of Appeal say, well, yes, it isn't a necessity, now that we think about it, to render a bill of costs, it's just a matter of legal costs, we'll go back to what President Cooke said in *Henderson Borough Council v Auckland Regional Council* [1984] 1 NZLR 16 (CA) and that seems to fix that particular little problem that we inadvertently created, that's the other possibly. And whether then the – remembering that this is an Inland Revenue

case where the other side is someone who, or a company that is being put into liquidation as I understand it, whether they would then appeal it –

WILLIAM YOUNG J:
Well, it wasn't put into liquidation but it would appear to be a bit stressed.

MR FOOTE:
Yes.

WILLIAM YOUNG J:
So it may not contest the appeal.

MR FOOTE:
So it may well not either contest the appeal or of course may well not appeal to this Court.

GLAZEBROOK J:
Well, it's hard to know what you'd be appealing.

ELIAS CJ:
Then we'd have to wait for a litigant in person to bring an appeal.

MR FOOTE:
But, Your Honour, that's what we have here, with respect. Yes, he's a lawyer litigant but –

ELIAS CJ:
But there's an exception at the moment established for a lawyer, or was.

MR FOOTE:
There was.

ELIAS CJ:
So we can deal simply with the lawyer litigant.

MR FOOTE:

I don't argue that the Court can deal simply with that, that's one option open to the Court. But nevertheless it is a fair proposition on the present case to deal with the wider question of lay litigants because the Bar Association, even the appellant himself, and the Law Society, and the Court of Appeal, all say and all agree that there should not be any exception for a lawyer. The question simply is, that I submit is fairly before this Court, is whether or not all litigants in person, including lawyer litigants, are able to recover costs or whether they are not. As Her Honour Justice Glazebrook puts it, is it the exception for lawyers that gives way or should it be the general rule that no litigants are eligible for costs that gives way. And that question does seem to me to be fairly raised on the present case –

ELIAS CJ:

But we could decide the case and leave that point open, we needn't foreclose it, in a case that's properly constituted to say, you know, that step needs to be widened. Anyway…

GLAZEBROOK J:

But if we say the lawyer litigant exception, uphold the Court of Appeal on that, then the only way that Mr McGuire if he was successful could get costs would be if the rule was widened, that's your point isn't it, ie, if we say there shouldn't be an exception, accept your submissions, then in this case Mr McGuire, even if successful, will not get costs?

ELIAS CJ:

Yes.

MR FOOTE:

That's right. So if Mr –

GLAZEBROOK J:

So it is at issue, you say, the more general issue as to whether lay litigants should get costs, because that's the only way he would?

MR FOOTE:

That's right. So my impression of how this case was unfolding was that the issue must be squarely before the Court and there is – no, that's all I have to say on that.

GLAZEBROOK J:

And actually probably no other case could come before us because we'd be changing our, it would have to be asking us to change our decision on that point. Because by upholding the Court of Appeal we're upholding the no costs to lay litigant rule.

MR FOOTE:

Yes…

ELIAS CJ:

I'm not sure that that would be right necessarily, I don't think it would be necessary to express it in that way. It would be simply by virtue of his being a lawyer that doesn't qualify him for costs. Anyway.

MR FOOTE:

There is no doubt that if Mr McGuire is unsuccessful in this appeal then the matter does not have to be dealt with in this Court. But if he is successful I think it has to be broached and if he is unsuccessful, coming back to that possibly, it is a matter for the Court of course as to whether or not the Court wishes to make over to comments given, and I suggest that the Court may consider doing so because this happens to be the direct appeal of – I'm sorry, this sounds very trite, I don't mean it to sound that way – but it's obviously the direct appeal from the Court of Appeal's *McGuire v The Secretary for Justice* [2018] NZCA 37 decision which added comments to its more substantive decision about this issue in *Joint Action Funding*. So it's as good as sort of a direct appeal on this issue as the Court may well get, because otherwise the Court is left waiting for a litigant in person, or a lawyer litigant, who has the tenacity and determination to bring a case all the way to the Supreme Court and be successful. The Bar Association says, look, England recognised the

principles that underpin the Bar Association's submissions in 1975, and there's that comment from Lord Elwyn Jones that New Zealand was thinking about the same thing. Canada has in a number of decisions recognised that lay litigants should get costs in cases since 1995, so that's 23 years ago now. So the Bar Association says this is as good an opportunity as any in order to deal with this issue.

ELIAS CJ:

Do you think that you need to be much longer, Mr Foote, because we've probably – I'm not trying to inhibit you but I just wondered what sort of timeframe we're looking at?

MR FOOTE:

Well, I'm really in your hands, Your Honours. First of all, I'm grateful obviously that the Court has read the submissions, and they are reasonably fulsome. I don't have – perhaps over the lunch adjournment I can see whether we've covered the additional points –

ELIAS CJ:

Yes, and we'll consider what we would like, if there's anything we'd particularly like you to develop.

MR FOOTE:

Thank you.

ELIAS CJ:

Good. All right, we'll take the adjournment now, thank you.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.18 PM

ELIAS CJ:

Yes, thank you Mr Foote.

MR FOOTE:

Thank you Your Honours. I have reviewed the shopping list that we began with and I will do my best to limit any further comments to matters raised there, or of course anything further that Your Honours wish to hear from, but two points regarding first of all regarding why it was apprehended by the Bar Association that this Court would grapple with the costs issues, and that it should do so. The first was that in the leave to appeal decision the Court expressly said that they wished to encompass all issues addressed in the Court of Appeal judgment, including both the appeal and the cross-appeal, and in the leave to intervene decision on the Bar Association's application to intervene, also the Court welcomed submissions on issues related to the costs issue, and the Bar Association gave notice that its position was that the general rule ought to be overturned. So those are simply, indicate why we're here I suppose, and my submission remains from earlier that it is an appropriate occasion to deal with the underlying general rule about lay litigant's costs.

I've read Goodhart, so this now comes into the jurisdiction topic that we were discussing before lunch. Goodhart traces how costs develop from the Statute of Gloucester through until the late 1800s and as the Chief Justice quite rightly pointed out, it wasn't the case that from the Statute of Gloucester costs were available to all litigants, that Statute dealt with the demandant, as they were called in those days, or the plaintiff. By 1670 or so that the principle of costs had been extended to include the successful defendant. By the time we get to 1875 when law and equity were fused, the discretion in the British Act and the Court Rules at the time, which I mentioned in the Bar Association's submissions, the English Supreme Court of Judicature Act 1875, that's at paragraph 12 of the Bar Association submissions, conferred a general costs discretion in all civil cases, and effectively replaced the Statute of Gloucester and Andrew Beck explains how that Act was applicable to New Zealand. So at that point there was without doubt a general costs discretion for all litigants before the courts. Now what Goodhart, Goodhart doesn't mention lay litigants, but he makes it quite clear that what the masters in those days, the taxing masters were doing, were assessing legal costs and

the adequacy and claimability of those legal costs. But Goodhart also recognises, back in 1929, that costs have more than just a purpose for indemnity. That, in fact, the courts have already begun to use costs to control the administration and efficiency of justice in their courts. So for example, and I think it's at page 862, the trial judge has a wide discretion as to costs and may by this means punish a party who is unfairly brought or defended in action. It's not infrequent that the plaintiff, although successful, has to pay the defendant's costs in whole or part and then goes on to talk about how costs are used by the courts to, as a means of discouraging unfair and unnecessary litigation.

In New Zealand now of course we have the Senior Courts Act 2016 and section 162 of that Act which says that, "If any Act confers jurisdiction on the High Court… for the purpose of any civil proceedings, or any criminal proceedings or any appeal, without expressly conferring jurisdiction to award… costs jurisdiction to award and deal with those costs and to make and enforce orders relating to costs, must be treated as also having been conferred on the court or judge."

ELIAS CJ:
That's going forward. There is new jurisdiction that is or if there's jurisdiction that's conferred by statute, but it doesn't change the pre-existing jurisdiction, does it?

MR FOOTE:
No, I don't think it does, I think it just confirms it, and I think that's the –

ELIAS CJ:
Well, it's not really dealing with the pre-existing jurisdiction, it's talking about when statutes – oh, well, all right, maybe it does.

GLAZEBROOK J:
If it's newly conferring…

ELIAS CJ:

No, not newly confers.

MR FOOTE:

Essentially it says if a statute doesn't expressly give jurisdiction to deal with costs, here it is

ELIAS CJ:

Yes.

MR FOOTE:

And then, just to make clear on what basis that jurisdiction should be exercised, section 162(2) says the costs may be awarded or otherwise dealt with at the discretion of the court or the judge. So there's a very broad discretion there. Of course the High Court Rules are included as, I suppose, subordinate legislation by reference in the Senior Courts Act, and so those rules give jurisdiction to award costs both in a general way and the discretion in rule 14.1.

ELIAS CJ:

Well, don't the rules just channel the way the jurisdiction is exercised, that's the function of rules, and indeed practices of the court?

MR FOOTE:

Well, yes, I think that rule 14.1, if, it might not be entirely necessary, but it confirms the general jurisdiction on all matters relating to costs of and incidental to a proceeding, and that that is the overriding rule. Then, I agree with Your Honour, that the rules after that, 14.2 and thereon, are guidelines that channel the exercise of that discretion in most cases. But the discretion is –

ELIAS CJ:

Well, I'm just flagging really the point that was put to you by Justice Young that rules can't confer jurisdiction.

MR FOOTE:

No.

ELIAS CJ:

There may be inherent jurisdiction or there may be statutory jurisdiction, but the rules simply organise how jurisdiction will be exercised.

MR FOOTE:

Yes. Well, I suppose there's a hybrid case here because the rules are part of a statute now, so they could be statutory jurisdiction. But it's probably a moot point because the jurisdiction exists in a statutory sense through section 162 in any event. I suppose my point is that –

ELIAS CJ:

Well, I think it probably pre-exists that.

MR FOOTE:

Pre-exists that, all right. Well, we're perhaps agreed on that issue that the court has discretion, in a very broad sense –

ELIAS CJ:

Sorry, where do I find the rules?

MR FOOTE:

I'm sorry?

ELIAS CJ:

Where do I find the rules? They're in the respondent's bundle are they?

MR FOOTE:

They are.

GLAZEBROOK J:

I'm just trying to find them as well, I just keep losing them.

ELIAS CJ:

Yes, thank you.

MR FOOTE:

Yes, so I think we're agreed that the court has a jurisdiction on costs and that it's a broad one. The question is, I suppose, given the historical practice of awarding costs only for legal costs incurred, whether that constricts or fetters the discretion to order costs or whether the court can accept that its discretion toward costs is broad enough to countenance the idea that lay litigants ought to get costs more than out-of-pocket fees. And that's where, I suppose, the Canadian decisions say, "Absolutely," and having just mentioned a Canadian decision though, can I refer to an Australian decision of President Kirby, and this is in the New South Wales Court of Appeal in the *Cachia v Hanes* (1991) 23 NSWLR 304 case…

ELIAS CJ:

Where's that?

MR FOOTE:

It is at tab 11 of the Bar Association's bundle. What President Kirby essentially says is that when we look back at the historical practice of not giving costs to lay litigants or only giving costs for legal fees, that we need to do so critically and that in His Honour's words, "The principle that a lay litigant in person is not entitled to costs beyond out-of-pocket expense is borne more of a curious course of judicial presumption rather than a long line of authority," that's at page 311. But the reason that President Kirby reaches that point is set out from page 308 onwards and the first observation is that the Australian Supreme Court Rules at the time, just like the Statute of Gloucester, makes no distinction between categories or classes of litigants. He goes on to say, "Unlike the Courts which thereafter interpreted that statute, this Court should not superimpose a gloss upon the current rule thereby creating artificial distinctions." And the situation is the same in New Zealand also, that there is nothing in the general discretion about costs nor in the specific rules about

costs that expressly prohibit the awards of the costs or the ability of lay litigants to recover costs.

ELIAS CJ:

But, I mean, it's all the way you express it really. It's a prohibition on recovering anything except out-of-pocket costs.

MR FOOTE:

Yes…

ELIAS CJ:

So it's not a rule against lay litigants, it's just that lay litigants are not incurring out-of-pocket legal costs.

MR FOOTE:

Yes, but my point I think goes before that, and that is that costs shouldn't be limited to legal costs in the first place.

ELIAS CJ:

Well, out-of-pocket costs, because it may not just be legal costs. The principles, well, *Cachia v Isaacs* (1985) 3 NSWLR 366, that's out-of-pocket expenses. The Statute of Gloucester, "The costs of his writ purchased," and it sounds pretty much like out-of-pocket.

MR FOOTE:

Well…

ELIAS CJ:

And that's the way it's been applied. So, you know, it's sort of a little bit emotive to turn it around and say it's a rule that discriminates against litigants in person if nobody is able to recover anything except out-of-pocket costs.

MR FOOTE:

Yes, I don't intend to be emotive about it, it just may be the way that –

ELIAS CJ:

Well, that's probably a bad choice of language on my part, so.

MR FOOTE:

No. What President Kirby is pointing out here, what the Canadian decisions tend to say –

ELIAS CJ:

Well, Kirby is dissenting.

MR FOOTE:

He is, yes, I agree with that. And what the academics Flannigan and Andrew Beck in New Zealand say is that their view is that there's nothing in the Statute of Gloucester or other statutes that follow it that limit recovery to legal costs, as if that is a less emotive way to put it.

ELIAS CJ:

Well, let's say out-of-pocket costs…

MR FOOTE:

Or that limit recovery to out-of-pocket costs.

ELIAS CJ:

Well, that's the way it's been treated and that's arguably the way the Statute of Gloucester is expressed, "purchased".

MR FOOTE:

Yes, I suppose that – if I can just for a moment, I've got a note of it right here. Yes, "May recover against the tenant the costs of his writ purchased." Well, I admit that I haven't looked into how the word "purchased" would necessarily have been defined in 1275, but nevertheless by the time we get to 1875 and by the time we deal with New Zealand's rules, they don't use language that talks about legal costs or writ purchased or out-of-pocket costs.

ELIAS CJ:

Or out-of-pocket costs. But that may be because of the assumption of what costs mean, that costs are, in this context, out of pocket. And that, I thought – I didn't go back when you were looking at it – but that's what I thought Goodhart said is the way it has been consistently interpreted. And then question is whether, or the blip of lawyers coming up with notional costs I suppose, rather than out-of-pockets costs.

MR FOOTE:

Yes. I think Goodhart goes through the different types of costs that are taxed by the master and all those costs are out-of-pocket legal, pay out-of-pocket costs, including legal costs, yes, that's right, but there's no reference to "opportunity cost', as one would say.

So what the Bar Association is saying is that either, as Kirby puts it, this general rule is really an assumption that should be re-looked at or it should be looked at again, and that it doesn't actually reflect the statutes from 1275, or that, as Justice Young proposed is one option, while it might have been appropriate only to have out-of-pocket costs awarded in 1884, matters have changed because of the developing purposes to which cost rules are put by the Court, and that point I've developed very fully in the submissions and unless there are questions from the Bench I won't go into that any further, but I wanted to make the thrust of the submissions clear.

The way in which it is put in *Cabana v Newfoundland and Labrador* 401 DLR (4th) 113, which is at tab 16 of the Bar Association's submissions at paragraph 35, was that, "The fairness and efficacy of the no indemnity rule is undermined by the recognition that costs awards serve other purposes and that a rigid insistence on denying costs to self-represented litigants may have the effect of upsetting litigation dynamics, thereby potentially creating unfairness in the process. Such a creation of unfairness discourages access to justice," and then it refers to the other Canadian decisions that have reached the same conclusion.

So the only other issue that was discussed before the break was whether it was appropriate for the Court to be dealing with this issue or whether it was Parliament, but I think we traversed that issue in sufficient detail before the break.

GLAZEBROOK J:
Or, alternatively, Rules Committee, did you…

MR FOOTE:
Yes.

GLAZEBROOK J:
Do you just put them all in together do you?

MR FOOTE:
Well, I'm sorry, I don't really mean to do that. But I looked into whether there was anything in the statutes about the breadth of the Rule Committee's powers, for lack of a better word, and there was really very little that I could find. There is in the Senior Courts Act, I think –

GLAZEBROOK J:
Well, it's really just one case which may not even, depending on the outcome of the appeal, even raise the issue of costs directly, the right vehicle, rather than something like the Rules Committee either as an advisory to Parliament or in itself, that can look at all of the issues related to this matter. And Justice Young in the break brought up solicitors suing for their fees, for instance, who probably don't in fact brief them out to somebody but sue for them themselves.

MR FOOTE:
Yes. I can't see why they would be treated any differently than any other lay litigant if you like.

GLAZEBROOK J:

Well, no, but that might be an argument for keeping the current rule in terms of the exception for solicitors for instance.

MR FOOTE:

Well…

GLAZEBROOK J:

It might not be as well, but…

MR FOOTE:

Yes. The Bar Association position is that there shouldn't be a difference and I don't see that that's just another contract really for services, and the solicitor who's suing on that he can instruct someone if he wishes.

WILLIAM YOUNG J:

Except that there will be thousands and thousands of cases in which solicitors have recovered costs in those sort of proceedings as a matter of absolute routine, so there is "a" practice in this regard, perhaps more extensive than the Court of Appeal recognised.

MR FOOTE:

Yes.

ELIAS CJ:

Well, I'm just not sure whether recovery of debt, any debtor can recover the costs of recovery can't they?

WILLIAM YOUNG J:

Not for drafting statements of claim, et cetera, not costs according to scale.

ELIAS CJ:

Oh, no, but would costs according to –

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

Okay, all right.

WILLIAM YOUNG J:

I'm pretty sure, I don't think there'd be many firms of solicitor plaintiffs that wouldn't seek judgment for the outstanding debt plus costs.

MR FOOTE:

Plus costs. I suspect that's right. And –

WILLIAM YOUNG J:

And I probably wouldn't go to them myself if they were not in that habit.

MR FOOTE:

Yes. Well, the Bar Association simply says that the way to deal with these issues is really quite straightforward. The various policy issues have been debated by academics, they've been debated in the Canadian cases, they've been debated in the House of Lords in its legislative context in England, and the reason for the old rule really was an issue of quantification, that, the Bar Association says, is not one that carries much weight these days, I think Justice Thorp in the *Jagwar Holdings Limited v Julian* (1992) 6 PRNZ 496 decision said that that sounded an odd rationale to the modern ear, and that was back in 1995, but –

WILLIAM YOUNG J:

That point, it's sort of true, but the scale – so the way that the High Court Rules work, for what it's worth, does rather presuppose that lawyers are involved.

MR FOOTE:

Yes, it does…

WILLIAM YOUNG J:

I mean, the paradigm that they're addressing is a case where lawyers are instructed and perhaps counsel are instructed as well.

MR FOOTE:

So, and that is my learned friend's point for the Crown, is that realistically the rules and the schedules and what have you are set up on that basis. So there are possibly two ways of dealing with this that end up at the same point. One is to say, yes, that's absolutely right, and the scales are, and the rules in 14.2, are primarily directed at legal, or entirely directed at legally represented litigants, and the issue of lay litigants falls outside that to be dealt with pursuant to the discretion. How should that discretion be exercise? It should be exercised as closely as possible to the position of represented litigants, which brings us back to the scale. The other way of dealing with it is to say that the rules in 14.2 can accommodate an interpretation that they do apply to lay litigants, and the only one that causes any particular difficulty in my submission is the 14.2(1)(f), which is the compensation rule, the cap rule, and in that regard the discretion is simply used, the general discretion that is, to disregard the cap rule in relation to a successful lay litigant. And the Bar Association says that for the policy reasons outlined in the submissions that that is a good reason to use the discretion, because it presents a level playing field to all litigants before the Court.

ELLEN FRANCE J:

Could I just ask, Mr Foote, what is your response to the point the Chief Justice made earlier on about the recognition of contingency fees in the Rules?

MR FOOTE:

My response is that I think that they do – how shall I put this? – they are obviously confined to legal fees on a contingency basis and they do support the interpretation of the rules in 14.2 to be rules that are primarily, if not entirely, aimed at legally represented litigants. I don't think there's any way of escaping that, I'm not trying to escape it, I think that's right. So that may suggest that the better way to approach the lay litigant issue, if the Court is

willing to do so, is to say, those rules, the schedules 14.2 and 14.3, which deal with contingency fees, are aimed at legal costs and represented lawyers, rules to lay litigants sit outside that and need to be dealt with by the discretion. How does the discretion get operated? As close as possible to the rules for represented litigants. The only rule that needs to be ameliorated is 14.2(1)(f).

ELLEN FRANCE J:

And you would say that the approach in *Henderson* is inadequate because it makes that a more exceptional, that parity a more exceptional situation, is that right? But it does recognise a discretion doesn't it?

MR FOOTE:

I think it does, and thank you, Your Honour, for raising that point, because I think the problem, with respect, with my learned friend's arguments for the respondent about *Henderson* and the in-house counsel matter, is that there's no real getting away from the fact that what President Cooke was sanctioning in *Henderson* is that it's okay to have an opportunity cost taken into account, it's a legal opportunity cost but it's an opportunity cost nevertheless. And so if you're going to do that then it gets very close to a special exception for a special, for lawyers who are employed. And I think that that brings us back in problematic areas where you've got a special – you're only for legal costs incurred, except if you happen to employ somebody, that's an okay opportunity cost. And the argument would be, well, why is that opportunity cost all right and not the opportunity costs of lay litigants? The better way to deal with it is to go back and say all lay litigants may, under discretion, be entitled to costs. We have to look at each case individually rather than making an inviolable rule across a whole category of litigants. So for example, some lay litigants will be the in-house counsel situation, they can be expected to do a completely professional and proper job and there would be no reason to think why the costs should depart from scale other than the usual ones.

ELIAS CJ:

Well, why do you say that? Because if it's right, as I understand it to be, that the scale has been set by reference to what law firms are currently changing, that's how it was arrived at –

MR FOOTE:

Yes.

ELIAS CJ:

– why wouldn't there be some modification?

MR FOOTE:

Well, there would be some modification if there is any work where, for example, the counsel was essentially instructing him or herself, but otherwise my understanding, and I stand to be corrected by my learned friend following, that essentially the, particularly an in-house counsel for Government department cases, that –

ELIAS CJ:

They use the scale.

MR FOOTE:

They use the scale, the practice is the order for liquidation is done to be costs, or whatever the particular category is.

ELIAS CJ:

Well, all of this may suit the legal profession but who's looking at the wider social interest here?

MR FOOTE:

Well, with respect, this is not a position from the Bar Association point of view that suits its purposes.

ELIAS CJ:

No, but there is an appearance actually that the scale is jacked up, you know, that it's not set according to any measure except the fees that lawyers habitually charge.

MR FOOTE:

Yes.

ELIAS CJ:

And whether that, you know, if we really are looking at the bigger picture, which I'm trying to resist here, but if you're looking at the bigger picture wouldn't someone looking at this legislatively, whether it's Rules Committee or Parliament –

MR FOOTE:

Yes.

ELIAS CJ:

– want to know whether there are access to justice issues entailed in allowing recovery of costs at that rate.

GLAZEBROOK J:

That was looked at by the Rules Committee –

ELIAS CJ:

No, it was not.

GLAZEBROOK J:

Well I think it was in the sense that they decided partial recovery was –

ELIAS CJ:

Ah well, but it's always been partial.

GLAZEBROOK J:

And I think the Law Commission has looked at those issues as well and in fact Britain sent people down to look at our regime because they didn't like their regime in terms of full recoveries, and prefer that half way, which was explicitly decided to be between America and Britain and would, the right balance. Whether they did set the right balance might be another matter.

ELIAS CJ:

Well that's all I'm querying really, whether –

GLAZEBROOK J:

But it was thought about in quite, whether it was thought about in a – but certainly they made the, the British did send people down because they did think our regime was better. I don't think it had any effect on them.

MR FOOTE:

Mmm.

WILLIAM YOUNG J:

Lysnar v National Bank of New Zealand (No 2) [1935] NZLR 557 (CA) is an authority that is considered authority directly on point, isn't it?

MR FOOTE:

It is directly on point. It doesn't go any further than really to cite *Chorley* for the same reasons.

WILLIAM YOUNG J:

Lysnar was, in fact, a solicitor but he didn't have a practice certificate so he was denied what you might call counsel's fees components of the scale.

MR FOOTE:

Yes.

WILLIAM YOUNG J:

When his appeal later succeeded in the Privy Council. But it's not as though there's a sort of a void in the authorities.

MR FOOTE:

Oh no I didn't mean to suggest that.

WILLIAM YOUNG J:

Was *Lysnar* referred to by the –

MR FOOTE:

I've said that the authorities –

WILLIAM YOUNG J:

Was *Lysnar*, oh, well I suppose *Lysnar* really is primarily concerned with the rule rather than the exception.

MR FOOTE:

Yes, and I – all I was saying was that since *Chorley*, to the extent that it's been followed, the merits of the underlying general rule have not been closely examined. The only Court that I think has done that to some extent is the High Court of Australia in *Cachia v Hanes* (1994) 179 CLR 403 and as set out in the submissions they say they approve *Chorley* and that the quantification is a problem, they say, and they also say we don't want to give the impression that lay litigants can get a, can profit from litigation and indeed they should be discouraged because they put additional burdens on other litigants and the Courts. So I've dealt with those rationales in some detail in the submissions for the Bar Association.

ELIAS CJ:

Does that conclude…

MR FOOTE:

It does, unless Your Honours have any further questions.

ELIAS CJ:

Thank you Mr Foote. Mr Collins, you've heard the exchanges so I'm just conscious of the fact that we're running out of time rather so if you can pick up on what you've heard and develop anything that you think needs developing, that would be fine.

MR COLLINS:

Thank you Your Honour. I can be rather more abbreviated I think because the New Zealand Law Society came to this Court, as it did to the Court of Appeal, on the issue of the lawyer-litigant exception and as the regulator of the country's legal profession, the Law Society is sensitive about not embarking unrestrainedly on advocacy for the abolition of the general rule for which it has no mandate. So the issue then was the shifting ground that has occurred in the context of this appeal where the appellant is understood to have abandoned his argument in favour of a lawyer-litigant in reasonably colourful terms, describing it as a Victorian era piece of elitism worthy of abolition. So the Law Society has not, except to point out that rule 14.2 is capable of interpretation to allow costs to unrepresented parties. The Law Society is not here to advocate the seismic shift of the abolition of the general rule. It supports the abolition of the lawyer-litigant exception as occurred in *Joint Action Funding*, but it's submitted because of perhaps what might be described as the untidiness of the issue where there are a range of approaches in different jurisdictions, it would prefer to see that analysis undertaken on a principled ground in addition to a strict interpretation of rule 14.2, but its position is, or was in the Court of Appeal and remains here, that the lawyer-litigant exception became the law of this country received in 1912 in *Hanna v Ranger* (1912) 31 NZLR 159 from *Chorley* in the UK and proceeded for a century until 2017 without close analysis as to its principled justification and when one looks at the principled justification said to support it in a modern setting, it is submitted that it is lacking in justification and was rightfully identified as such in *Joint Action Funding*.

WILLIAM YOUNG J:

What do you say to solicitors suing for their own costs. Do you say they shouldn't be able to recover costs on top of the debt?

MR COLLINS:

I understand the issue and –

WILLIAM YOUNG J:

Did the Law Society understand the issue?

MR COLLINS:

Yes.

WILLIAM YOUNG J:

Did they address this consideration? This is probably the most common one where solicitors –

MR COLLINS:

Sir I cannot say that that particular item was put under the microscope.

WILLIAM YOUNG J:

But of 1000 applications for costs by solicitors acting for themselves, 999 would be in this situation.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

So it's a rather, was there no consultation on that?

MR COLLINS:

It is true that if *Joint Action Funding* is applied and there's no fee invoice rendered by an independent, independently instructed lawyer, then the firm would be ineligible. That is a consequence –

WILLIAM YOUNG J:

Virtually all of these cases will be debt collecting cases, not *Joint Action Funding* and *Eichelbaum*-type cases, or in a sense I suppose that might have been debt collecting.

MR COLLINS:

Well there are a lot of cases of which this is an example where the lawyer runs a substantive case, more than just debt collection, for themselves and the, I suppose the question is whether that justifies the rule and –

WILLIAM YOUNG J:

I wonder whether we should be abolishing it, as I suggested to someone else, just on the fly without really having a good handle on the context.

MR COLLINS:

Well it's conceivable Sir that the exception enshrined in the District Court Rules, which specifically identifies and provides for a lawyer-litigant exception, is directed at that very situation, where the debt recovery –

ELIAS CJ:

Yes, it could well be.

WILLIAM YOUNG J:

But there's a similar rule, isn't there, in the Family Court Rules?

MR COLLINS:

Yes there is, which is anomalous or illustrates the anomaly –

WILLIAM YOUNG J:

It's either anomalous if you're right or it's part of a consistent pattern, regulatory pattern if you're wrong.

MR COLLINS:

Yes.

ELIAS CJ:

Family Court Rules were, of course, adopted by regulation of the Ministry. They weren't, they didn't go through rules –

WILLIAM YOUNG J:

Were they recommended, were the not considered by the Rules Committee?

ELIAS CJ:

No, they didn't go through the Rules Committee. I'm just really wondering about some of the, I don't know, but some of the dynamics of funding in the Family Court may have influenced that choice.

MR COLLINS:

Yes, and then you've got multitudes of many other domestic tribunals and statutory tribunals, and in my area the New Zealand Lawyers and Conveyancers Disciplinary Tribunal has section 249, the jurisdiction to order such costs as it thinks fit, and that situation will apply in a wide variety of jurisdictions.

ELLEN FRANCE J:

Just following on from that, the examples that you give at footnote 11 in your submissions, so they are more like a *Joint Action Funding*-type case are they? So are more substantive, if that's the right way of putting it?

MR COLLINS:

Yes.

ELIAS CJ:

Sorry, I don't understanding that question.

ELLEN FRANCE J:

Well, I was just…

WILLIAM YOUNG J:

It's a real contest.

ELLEN FRANCE J:

Yes, it's in contrast to the cases that Justice Young's talking about.

ELIAS CJ:

Oh, yes.

WILLIAM YOUNG J:

Yes, some cases as opposed to default judgments or summary judgments for costs.

MR COLLINS:

Yes, that's right, they were cases involving a contested legal cause.

ELIAS CJ:

Sorry, I'm just looking to see that, because one of you had helpfully set out in a footnote – oh, yes. That footnote, was that a search of all contested costs, or was it just a few examples?

MR COLLINS:

No, it was just some examples of – well, two of them are relatively recent and the RSL liquidation was a bit older, but that does not purport –

ELIAS CJ:

So we don't have any feel for how often these costs actually have been awarded in cases?

MR COLLINS:

No.

ELIAS CJ:

No, that's fine. It just seemed such a small group of cases there, I thought it might be an indication that it doesn't arise very often. But we can't take that from it?

MR COLLINS:

No. And then we get to the issue of the in-house counsel and that has caused, I'd say, some dismay, and I see from the respondent's submissions that there's sort of over a hundred cases already backed up where that has yet to be determined. But that's under appeal and appears to have been an unintended consequence, although the *Henderson* case was of course discussed in the *Joint Action Funding* judgment.

WILLIAM YOUNG J:

And *Brownie Wills* was discussed too wasn't it?

MR COLLINS:

Pardon me, Sir?

WILLIAM YOUNG J:

Was *Brownie Wills* discussed?

MR COLLINS:

Yes.

WILLIAM YOUNG J:

So that's another employed solicitor case?

MR COLLINS:

Yes. Well, it was –

WILLIAM YOUNG J:

An associate in the firm appeared at trial and in the Court of Appeal.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

So, I mean, could that really be different from the *Henderson* case?

MR COLLINS:

Where an employed solicitor is…

WILLIAM YOUNG J:

Say the solicitors were incorporated and they were a company, could you complain, take a point about a solicitor appearing rather than as compared to the situation where the Inland Revenue Department is appearing via an in-house solicitor?

MR COLLINS:

Sorry, Sir…

WILLIAM YOUNG J:

Well, I myself can't see a difference between *Brownie Wills* and the *Commissioner of Inland Revenue v New Orleans Hotel (2011) Limited* [2018] NZHC 971 case.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

Because in both cases there's an employed solicitor.

MR COLLINS:

That's right. And the justification in *New Orleans* was the person was paid a salary therefore there's a cost…1

WILLIAM YOUNG J:

But *Brownie Wills* was referred to by *Joint Action Funding*.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

And they plainly thought it was wrong.

MR COLLINS:

Yes, that's right, and, well, was the example of the case wherein the Court, well, they said they would have a look at the issue on another occasion when it arose, and *Joint Action Funding* was that occasion.

WILLIAM YOUNG J:

Sorry, where did they say they'd have a look at it?

MR COLLINS:

Well, in *Brownie Wills*, where the issue was recognised but was not addressed by the Court on that occasion.

WILLIAM YOUNG J:

And what did they say in *Joint Action Funding* about *Henderson*?

MR COLLINS:

That came out in the context of whether there was any distinction between barristers sole and their ability to recover fees, recover costs in their own course.

WILLIAM YOUNG J:

They must have thought that *Henderson* was wrongly decided too? Well presumably.

MR COLLINS:

That's at paragraph 65 of *Joint Action Funding* Sir, reference to, it's in the discussion about whether the exception applies to a self-represented barrister sole. The Court indicated, "We do not consider that there is a sound rationale in New Zealand in the context of self-representation for distinguishing a practitioner who is both a barrister and solicitor from one who is a barrister sole." Then referred to *Henderson* –

WILLIAM YOUNG J:

They really dealing there on a collateral point.

MR COLLINS:

Yes, yes –

WILLIAM YOUNG J:

But the ratio of their case is inconsistent with *Henderson*. No invoice.

MR COLLINS:

It wasn't considered in the context of the entitlement of in-house, of parties represented by in-house counsel to recover costs. So unless there are any other questions the Law Society was, is not in the position of advocating for the abolition of the general rule and has no mandate to do so.

ELIAS CJ:

Thank you. I just want to check –

WILLIAM YOUNG J:

So you say the in-house counsel shouldn't recover costs?

MR COLLINS:

No, no we –

ELIAS CJ:

Not ready to argue that yet.

MR COLLINS:

We, the Law Society considers that the established practice from *Henderson* until now was working well and uncontroversial and it's the interruption of it –

WILLIAM YOUNG J:

How do you distinguish in-house counsel from *Chorley* because presumably the work in the *Chorley* case was carried out by the clerk not by the partners.

MR COLLINS:

It must be seen as a function of its times and how the legal profession is structured –

WILLIAM YOUNG J:

No, but you obviously think *Chorley* was, the position is that's *Chorley*'s wrong?

MR COLLINS:

Yes.

WILLIAM YOUNG J:

But the work there was, as I understand it from the case, carried out by an employee.

MR COLLINS:

Yes but –

WILLIAM YOUNG J:

But why isn't that the same as in-house counsel?

MR COLLINS:

Well the statistic is that on about 13,000 practicing certificates in this country there are, I think, 22% of lawyers are employed as in-house counsel. It's an issue of the way that the legal profession is structured in the modern era.

WILLIAM YOUNG J:

Sorry, but how many are employed as employees?

MR COLLINS:

Of in-house counsel?

WILLIAM YOUNG J:

No, just generally, as employees.

MR COLLINS:

Well many. The vast majority.

WILLIAM YOUNG J:

Sorry, what I'm coming back to, as I understand your case you say *Chorley* is wrong, or shouldn't be followed.

MR COLLINS:

Unsupported by principle.

WILLIAM YOUNG J:

Okay, but why do you distinguish *Chorley* from an in-house counsel case, because as I understand *Chorley*, I may be wrong, but I think the work was carried out by a clerk.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

So why isn't the clerk the equivalent of in-house counsel in the IRD? Or the equivalent of Mr Hair in the *Brownie Wills* case?

MR COLLINS:

I can only say that that's because of the way the profession is structured in permitting in-house counsel as a mode of practice to work for an employer and to conduct litigation.

WILLIAM YOUNG J:

That was Mr Hair's position in *Brownie Wills*.

MR COLLINS:

I accept that.

ELIAS CJ:

If the matter was being looked at in the round, more as a policy development question, it would be necessary to look at the changes to the way in which law can be practiced under the Law Practitioners Act 1982, wouldn't it?

MR COLLINS:

Yes, and that would include the, well, the significant extent to which lawyers practice by in-house counsel who are employed and who are entitled to appear in courts.

ELIAS CJ:

Thank you, Mr Collins. Yes, Madam Solicitor, you're not taking –

GLAZEBROOK J:

Shall we ask Mr McGuire if he wants to –

ELIAS CJ:

No, because Madam Solicitor is actually not taking a – you're not opposing are you, in this argument? I had thought we'd go to Mr McGuire for –

SOLICITOR-GENERAL:

I beg your pardon, Your Honour, you're quite right.

ELIAS CJ:

But I'm not sure that you are really, are you?

SOLICITOR-GENERAL:

As a party I take a position on the costs question.

ELIAS CJ:

As a party you are, all right. Then I'll ask Mr McGuire first, thank you. Is there anything you want to say in response to that, Mr McGuire?

MR McGUIRE:

I just wanted to say something about, just the one thing please.

ELIAS CJ:

Yes, you'll have to go to the lectern so it can be recorded. Actually I'm not sure that this is right, this order, is it? Because nobody's opposing on the argument. Madam Solicitor is opposing on the costs.

GLAZEBROOK J:

He can get a reply but…

ELIAS CJ:

And he needs a reply to her. So maybe we should hear from –

GLAZEBROOK J:

But he hasn't made his appeal out on the costs, he hasn't been given an opportunity.

ELIAS CJ:

Ah…

WILLIAM YOUNG J:

Yes, we haven't heard from Mr McGuire on the costs.

ELIAS CJ:

All right, okay. No, fair enough. Yes, Madam Solicitor.

SOLICITOR-GENERAL:

You'd like to hear from me on –

ELIAS CJ:

Yes, you.

SOLICITOR-GENERAL:

Yes, thank you, sorry.

WILLIAM YOUNG J:

I didn't think it was actually –

ELIAS CJ:

No, no, it wouldn't be McGuire, Mr McGuire.

WILLIAM YOUNG J:

We haven't heard from Mr McGuire on costs.

GLAZEBROOK J:

He was going to address us on costs but we said we were going to –

ELIAS CJ:

That's right, I'm so sorry, yes. Mr McGuire.

MR McGUIRE:

Thank you Your Honours. I don't have much to say at all except for this, which is not legal whatsoever but it's based on my personal experience because I'm here obviously in a capacity I'm a lawyer obviously and I've represented clients on legal aid in a private capacity now as a lawyer-litigant and just speaking form a personal perspective, and from direct personal experience, and I'm sure this is probably self-evident but the way, my submission is there's no reason for a distinction whatsoever. It's been discussed at length, at some length today, based on my own experience because what I've done today I would have tried to do exactly the same if I'd been representing somebody else, either on legal aid or as a private retainer, and in my submission, Your Honour, the distinction between a lawyer-litigant, or an unrepresented litigant and a represented litigant is, doesn't have any credibility based on my personal experience and what I've actually tried to achieve in this appeal and representing myself. In my submission also on principle these efforts, if they are successful, should be rewarded in costs because our legal system for better or worse is a winner take all, presumptively, and who wins depends on the merit not the status of the individual who's doing the arguing. May it please the Court.

ELIAS CJ:

Thank you Mr McGuire. Yes Madam Solicitor thank you.

SOLICITOR-GENERAL:

Your Honours, in light of exchanges between the Bench and my friends for the interveners I might not detain you long either. Obviously my submissions, you've read them, but the point that, of course, as the respondent the Secretary for Justice takes, is that this case only gives rise to the question of costs if Mr McGuire is successful in his appeal, and in my submission he should not be successful and the issue of costs doesn't arise. So I'm echoing something that Justice Young said earlier, that it's a rather unusual way for this matter to have come up before the Court, but we are all here. You've heard extensive submissions on the question –

WILLIAM YOUNG J:

The one person who's not here is someone who likes the status quo.

SOLICITOR-GENERAL:

Well except that, the issue that's before Your Honours can be dealt with even without that, in my submission, without the revolution that's been encouraged on me by the Bar Association of, with respect, driving a very big truck through the costs regime as we have understood since at least 1242, to which point Your Honour the Chief Justice with your reference to the costs incurred, the out-of-pocket expenses, the cost of his writ so purchased all echo down into our High Court Rules that all matters of costs, sorry, all matters are at the discretion of the Court if they relate to costs of a proceeding, of somebody coming to the court for the exercise of the civil jurisdiction. They have always spoken of costs as if they are the out-of-pocket expenses. In the event that in this matter Your Honours address the costs question, in the Crown submission it could be dealt with by saying that costs, the costs regime and the starting point from the common law, and as we've been through the history somewhat of the Statute of Gloucester, the fusing of equity and common law, the adoption into New Zealand law of the laws of the United Kingdom as they were, anyway I won't go back through all that because you've been addressed on it. We've always said that costs were the out-of-pocket expenses suffered by a party. To that extent *Joint Action Funding* was right. The Crown takes issue with *Joint Action Funding* where it

can to the extent that it says that that requires an invoice to be passed, because there are other ways of showing the costs incurred of coming to the Court in exercise of the civil jurisdiction.

GLAZEBROOK J:
Like what if it's an employed solicitor in a Government department, what are these other ways of showing what the costs are?

SOLICITOR-GENERAL:
The costs that is incurred by the party, whether it's the corporation of the department in the Crown's case can be determined what that cost is. –

GLAZEBROOK J:
But how –

SOLICITOR-GENERAL:
Sorry, either through reference in the breakdown of how an agency spends its annual appropriation. If they have a set of lawyers who are especially employed for the purpose of litigation, that might be a sum that the appropriation or that the agency's annual –

GLAZEBROOK J:
But even if that is the case, those lawyers will be giving advice to people in terms of whether the, if they carried on et cetera, which would not normally be encompassed in court costs.

SOLICITOR-GENERAL:
That's right, and it wouldn't be to recover those complete costs. It would be to recover the scale costs as the reasonable costs of the step that has been taken by that lawyer.

WILLIAM YOUNG J:
It isn't, I mean it's not really saying specific costs are simply fixed according to scale which precedes, in this case on the wrong or fictitious basis that the

solicitor is, or counsel is a private contractor. But it's an easy enough, and it quotes the costs referable to the service of an in-house counsel with the costs that are allowed to –

GLAZEBROOK J:
I just don't see why in-house counsel are any different from just saying the solicitor rule continues.

SOLICITOR-GENERAL:
Well the distinction in my submission that needs to be drawn is who the party is, because in the example that Your Honour Justice Glazebrook just gave, the party is the solicitor's employer, and the other party is the solicitor, and that is the critical difference to be drawn.

GLAZEBROOK J:
But wasn't that the case with the clerk?

WILLIAM YOUNG J:
See that's why I think, I don't see *Chorley* as very different from your obvious concern with the *New Orleans* case because –

SOLICITOR-GENERAL:
Well in *Chorley*, Your Honour, if we bring up *Chorley* which is in the Law Society's authorities, begins –

WILLIAM YOUNG J:
I couldn't find them actually.

SOLICITOR-GENERAL:
It begins at page 875 with the Master of the Roll saying, "An action was brought against solicitors, who defended in person... They claimed to have their costs taxed as if they had been acting for a client, that is, a different person." They are indeed acting for themselves.

WILLIAM YOUNG J:

Sorry, I know, but the person who did the work was an employee.

SOLICITOR-GENERAL:

Some of the steps that were taken were taken by an employee.

WILLIAM YOUNG J:

So in *Brownie Wills* the work was done by in fact an extremely competent litigation lawyer, but he happened to be an employee of that firm.

SOLICITOR-GENERAL:

Yes.

WILLIAM YOUNG J:

What's the difference between that and in-house counsel for the Inland Revenue Department turning up on a bankruptcy petition?

SOLICITOR-GENERAL:

Well the difference between *Chorley* and the in-house counsel is that in *Chorley* they were suing, they were bringing a proceeding and a lawyer was the party. The Inland Revenue –

WILLIAM YOUNG J:

But, no they're not, but they're bringing – sorry. The person who did the work was an employee, and the Inland Revenue Department case the person who does the work is the employee. The people who are seeking to recover the costs are in each case the employer in the *Chorley* case, the firm in the IRD case the IRD.

SOLICITOR-GENERAL:

Your Honour I don't understand *Chorley* to have reached that.

WILLIAM YOUNG J:

Well in *Chorley* – so I understand you're not to be that keen on the general lawyer-litigant exception?

SOLICITOR-GENERAL:

That is so.

WILLIAM YOUNG J:

So you would be, it is a bit of a pile-on in terms of *Chorley* because no one thinks it's right, but what I can't see is why *Chorley* is different from *New Orleans*. I don't think it matters that the employer in *Chorley* just happened to be a solicitor. Say they'd been a mortgage broker but they had an employed solicitor clerk.

SOLICITOR-GENERAL:

Well in *Chorley* the Court was saying if the solicitor does by his clerk, which could be done by another solicitor, there really is a loss of money. It is a loss of money not just a loss of time, but it's quite different and the costs must be taxed differently from those of an ordinary litigant appearing by a solicitor. So to my understanding of *Chorley*, which might well be wrong, is that they were making the very distinction that I'm trying to make here, is where there has been actual out-of-pocket loss in litigation.

WILLIAM YOUNG J:

But they're not requiring it to be quantified in that way, they're just effectively – didn't they effectively, there was a, I think the divisional court decision may discuss the costs in a bit more detail, but pretty much they're treating it as an orthodox taxation except that internal consultations weren't allowed I think.

SOLICITOR-GENERAL:

It is true that the outcome of *Chorley* was to uphold the – they did come to the point of saying, when a solicitor is engaged in these he has the professional skill that we pay for in a sum of costs.

WILLIAM YOUNG J:

But say, it may, it's not, I mean it may not be a – but I can't see, for myself I can't see the difference between *Chorley* and *New Orleans*.

SOLICITOR-GENERAL:

I think it is easy to explain so I'll try that again. In *Chorley* the Court said, yes this individual lay litigant, self-represented litigant, can have the costs that a lawyer can get, because they're a lawyer.

WILLIAM YOUNG J:

Yes.

SOLICITOR-GENERAL:

In *New Orleans* –

WILLIAM YOUNG J:

Well I suppose I would say they're entitled to it because the work that's been done is lawyers' work and they're lawyers, yes.

SOLICITOR-GENERAL:

That's right, and the Court goes on to say, we can measure it. We don't need to be nervous. We don't need, sorry, we don't have to take account of how nervous a party might be, there's not a lawyer because we know that we can rely on their professional skill. In *New Orleans* the party is the Commissioner of Inland Revenue. She is represented by lawyers who she employs and who she signs a cost, out-of-pocket cost for employing for her litigation.

WILLIAM YOUNG J:

But so does *Chorley*. They have to pay the clerk.

GLAZEBROOK J:

Which is what it says. It's work done by a person who's paid for doing it. The Master of the Roll says –

SOLICITOR-GENERAL:

And in *Chorley* they get to the same point.

WILLIAM YOUNG J:

But I don't know why you're not going, so *Chorley*'s great, it's stood the test of time and it's –

SOLICITOR-GENERAL:

Well *Chorley* is taken from a proposition that a lay litigant representing themselves, but simply being a lawyer, not having to engage a lawyer that they have to pay, simply being a lawyer is entitled to costs and we say that is an anachronistic distinction.

WILLIAM YOUNG J:

Well you may say that but I think that that, well I mean it's obvious what I think about it actually so I'll shut up.

ELIAS CJ:

There are slightly invidious distinctions that have to be drawn anyway, aren't there, because while you may have firmly in mind Government departments and different cost centres and all of that sort of thing, a firm of two or three partners is not so very different from a sole practitioner, so where do you draw those lines except at *Chorley*?

GLAZEBROOK J:

Well *Chorley* actually does say you can't have things for consulting yourself or instructing yourself or attending upon yourself, so in fact it probably is, in fact, looking at having work done by somebody in your office who's paid for doing so.

SOLICITOR-GENERAL:

To address the Chief Justice point, well actually to address Your Honour's point that you made earlier, I mean the costs regime is aimed at being something like two-thirds of market rate, of what's considered to be a reasonable time allocation, as Your Honour knows, a reasonable time allocation for that step. So where the line should be drawn is in that principle 14.2(1)(f), that an award of costs can't exceed the costs being claimed. In all

other respects what's actually being spent isn't relevant and so to come to Justice Glazebrook's point to me earlier, how does the department show what is costs, in my submission it doesn't need to. It's engaging lawyers. It is out-of-pocket for the expense of engaging lawyers in litigation and provided that the award of costs doesn't exceed the costs that they've incurred, the scale approach, or the principles for the determination of costs should apply.

GLAZEBROOK J:

Well it probably does exceed the costs incurred if you've got an in-house solicitor in the Auckland City Council doing a whole pile of rates stuff, thousands and thousands of them, it probably quite clearly exceeds the costs involved, their salary might be, I don't know, $50,000 or something, and they're churned through hundreds of these.

ELIAS CJ:

And they're charging out at the rate of, I don't know what the rates are at the moment, but it would $500 an hour or $500 an hour, wouldn't they, or if they're that wonderful quote that Goodhart has, you're getting a Rolls Royce system and your opposing side shouldn't have to pay for that.

SOLICITOR-GENERAL:

Well that's one of the very principles that underlines part 14, that you might be engaging in a Rolls Royce style of –

ELIAS CJ:

Although we do have some sort of sense of cases that are worth more.

SOLICITOR-GENERAL:

So straightforward nature can be done by a junior, or average complexity, someone of average skill, so it doesn't again it doesn't matter what the person actually spends in the pursuit of their litigation to get to where we have now in the Rules.

ELIAS CJ:

I am a little troubled by the fact that everything is nailed to market rates and it's a different market but, you know, may be the two-thirds recovery answers that if it ensures you don't get more than you are spending, but I'm not sure whether that's right, and I would have thought it's something to be looked at.

SOLICITOR-GENERAL:

Well two points to that Your Honour. Justice Fisher in his note, which is in the Crown's bundle, about the new, as it was, High Courts regime, makes that point that there's something of a middle road between a no costs and a full costs deliberately trying to get somewhere in the middle, that two-thirds approach.

WILLIAM YOUNG J:

Can I just, sorry, you carry on?

SOLICITOR-GENERAL:

No, I said I had two points and I've only made the first one and forgotten the second I'm afraid.

WILLIAM YOUNG J:

Say I'm a solicitor and I assign my book of debts to a debt collector, or financier of some sort, who uses an in-house solicitor to recover them. On your theory the plaintiff, who is my assignee, isn't a lawyer and therefore can recover the costs of the in-house lawyer.

SOLICITOR-GENERAL:

So the debt recovery company recovers the debt and then sues –

WILLIAM YOUNG J:

So I assign all my dodgy debts to Bad Debts Limited. They pay me out, give me 50 cents on the dollar, and then they sue on the original debts. They have an in-house lawyer who issues the proceedings and deals with them. On your

theory that's fine for costs because the plaintiff isn't a lawyer, in-house counsel is.

SOLICITOR-GENERAL:
Quite so, yes.

WILLIAM YOUNG J:
Whereas if I don't like the rate I'm being offered for the assignment of my debts, instruct my solicitor clerk to do it, I can't get costs.

SOLICITOR-GENERAL:
It might be that there's a disbursement that you can challenge to the court.

WILLIAM YOUNG J:
No, of course I can recover disbursements, I can recover filing fees, but can't I recover anything for the preparation of the statement of claim? You'd say no because – the only employer of an employed solicitor who does work that can't recover costs is a solicitor, as I understand your argument.

ELIAS CJ:
Preparation of statement of claim may be just a step that you can get.

WILLIAM YOUNG J:
But you can only get it if –

ELIAS CJ:
Or you pay the –

WILLIAM YOUNG J:
If the rule is right, an unrepresented litigant can't claim costs for preparing a statement of claim.

SOLICITOR-GENERAL:
But with respect Sir in your example an employed – that person had employed a lawyer to do it.

WILLIAM YOUNG J:

Sorry, so say I'm a litigant in person and I draft my statement of claim and I win, I don't get costs for the preparation of the statement of claim on the current rule?

SOLICITOR-GENERAL:

Mmm.

WILLIAM YOUNG J:

Right, so that's the rule. Now I'm a solicitor, my solicitor clerk drafts a statement of claim, on the exception at the moment, on *Chorley*, I can recover costs associated with the preparation of the statement of claim. You say I can't because I'm a solicitor.

SOLICITOR-GENERAL:

Well if that person kind of just gives a hand and you represent yourself I would say that is the case. In fact if that person is solicitor on the record, when they file a statement of claim on your behalf I'd say you're entitled to costs for that step.

WILLIAM YOUNG J:

But say –

SOLICITOR-GENERAL:

If he's giving you a hand perhaps.

WILLIAM YOUNG J:

The statement of claim is filed by Joe Bloggs. It's address for service of the plaintiff is at the offices of William Young. The solicitor for the plaintiff is… now would it be able to recover costs?

SOLICITOR-GENERAL:

I think not.

WILLIAM YOUNG J:

As I understand your argument, no.

SOLICITOR-GENERAL:
Yes.

WILLIAM YOUNG J:
And yet if I sign the debt, exactly the same process, the debt collector can recover costs.

SOLICITOR-GENERAL:
Of engage, yes. Of engaging a lawyer.

WILLIAM YOUNG J:
Why should the solicitor be the only person who can't recover costs for an employed solicitor?

SOLICITOR-GENERAL:
Well, and Your Honour's on one of the many policy issues that this whole matter bristles with, about how do we deal with it –

WILLIAM YOUNG J:
But is there a rationale for saying that the only employer of in-house counsel who can't recover costs is a lawyer?

SOLICITOR-GENERAL:
Well, my distinction Sir is that, the distinction is that that lawyer is the party.

WILLIAM YOUNG J:
But the other employers are the party. Anyway, sorry, we're probably going around in circles.

O'REGAN J:
I think you're using the term in-house counsel for people working in law firms whereas I think the people are talking about in-house counsel in a non-law firm.

WILLIAM YOUNG J:

I'm talking about an employed solicitor.

GLAZEBROOK J:

No, it's just what's the distinction in principle.

WILLIAM YOUNG J:

Okay, I mean an employed solicitor. So, and I'm treating, covering your in-house counsel for the Inland Revenue Department, my in-house, my solicitor clerk who I employ, and I just, I mean for the moment I can't see a rationale why a non-lawyer can recover costs associated with the work of an employed solicitor but I, as a lawyer, can't.

O'REGAN J:

But you would say if you do it yourself you can't, but if you get a –

WILLIAM YOUNG J:

No, I wouldn't say that, I'd say if I do it myself as a lawyer I would say I could recover the costs on the basis of *Chorley*.

GLAZEBROOK J:

That's isn't quite what *Chorley* says actually.

O'REGAN J:

Well *Chorley* was a clerk though wasn't it?

WILLIAM YOUNG J:

I know *Chorley* is a clerk.

GLAZEBROOK J:

But the cases were developed from them.

ELIAS CJ:

It sounds as if where we started off.

SOLICITOR-GENERAL:
And I'm sorry Your Honour to ask you again, because I can't quite get with the distinction you're drawing, in the distinction you're asking me to draw between the Commissioner of Inland Revenue, who has –

WILLIAM YOUNG J:
An employed solicitor.

SOLICITOR-GENERAL:
So she employs a solicitor who represents her, the Commissioner, in litigation. The solicitor isn't transferrable to the solicitor in your example where you are the party, the solicitor.

WILLIAM YOUNG J:
Yes but the Commissioner is the party.

SOLICITOR-GENERAL:
Mmm.

WILLIAM YOUNG J:
So in both cases, I mean I suppose, I mean it may be we just get to –

GLAZEBROOK J:
There is something really anodyne. The commissioner is owed a debt and the law firm is owed a debt, so it's a 50 partner law firm owed a debt, and you've got the Commissioner owed a debt. I think the example that's being put to you is what's the difference between the employed solicitor employed by the commissioner of Inland Revenue chasing the Commissioner's debt, and the employed solicitor chasing the debt of the firm of solicitors.

SOLICITOR-GENERAL:
If the employed solicitor is representing the firm of solicitors in the Court, if that's even – sorry, I was just thinking about that, if that's even possible – if

the employed solicitor is acting as the solicitor they are entitled to costs in the same way –

GLAZEBROOK J:
So you say there's no difference?

WILLIAM YOUNG J:
So you say *Chorley* is right?

GLAZEBROOK J:
At least in so far as *Chorley* was talking the employed solicitor, a person paid for doing it.

SOLICITOR-GENERAL:
Yes, where *Chorley* says, "There is a true loss of money when a solicitor does something through his clerk".

WILLIAM YOUNG J:
So that's the rationale, but the actual rule is costs can be awarded for what the employed solicitor does, or in that case the clerk, solicitor clerk, the solicitor's clerk I should say.

SOLICITOR-GENERAL:
The actual rule in *Chorley* was to say we will give that party their costs because we can measure the cost of their time and effort.

WILLIAM YOUNG J:
But you can do that in any of the cases we're talking about. You can do it in the case I'm hypothesising of the solicitor who employs a solicitor clerk.

SOLICITOR-GENERAL:
And if that employed solicitor clerk is to represent them that that's the equivalent of *Commissioner's* case.

WILLIAM YOUNG J:

Yes, but that's *Chorley's* case too, that's *Chorley.*

SOLICITOR-GENERAL:

No, *Chorley* was…

O'REGAN J:

I think we're just going round and round in circles.

WILLIAM YOUNG J:

Yes, I know, sorry. Okay.

ELIAS CJ:

There may however be a difference between employed solicitors, because that's largely a question of how the legal profession is not able to operate, and it may be that the in-house counsel in Government circles has to catch up with *Chorley*. There may be a difference between an employed solicitor and still a difference between a litigant in person who is a lawyer. Anyway…

SOLICITOR-GENERAL:

Yes. I mean the problem of course for this Court is that what actually arises in front of – we don't – you've already addressed it with my friends.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

What this case brings to the Court is whether the appellant here, a lawyer representing himself, if successful should get costs.

WILLIAM YOUNG J:

And you say no?

SOLICITOR-GENERAL:

We say no.

WILLIAM YOUNG J:

You say no?

SOLICITOR-GENERAL:

Mhm. And, further, we will say that *Joint Action Funding* was wrongly reasoned to say that it requires an invoice to be passed. *Joint Action Funding* wasn't thinking, in my submission, about the sorts of scenarios that we have been talking about, it was thinking about a self-represented litigant who is a lawyer, with none of the complexities that the in-house, whether departmental or corporate or within a firm, raises.

WILLIAM YOUNG J:

Except I think they were because they cite *Brownie Wills.*

SOLICITOR-GENERAL:

Well, I was observing Your Honour's exchange with my friend about that before. That was in particular saying if we're wrong about doing away with the exception is there a difference for barrister soles, that's the context in which they thought about *Brownie Wills.*

WILLIAM YOUNG J:

Or wasn't that *Henderson?* Or do they talk about *Brownie Wills* in that context too?

ELIAS CJ:

Sorry, where do we find this?

SOLICITOR-GENERAL:

It's in the Law Society's bundle, it's the first case.

GLAZEBROOK J:

It's more what the Court of Appeal was doing.

SOLICITOR-GENERAL:

It's at page 87.

WILLIAM YOUNG J:

Yes, for instance page 79 of the report, "Have the rules governing costs changed since *Brownie Wills*?" I think they're pretty conscious of *Brownie Wills.*

SOLICITOR-GENERAL:

Yes, but if you look at the reasoning that they go through in paragraphs 33 through to 43 interpreting the rules, where they're referring to costs actually incurred and costs incurred, they say, "It's our conclusion that you require an invoice, a bill of costs, by the lawyer –

WILLIAM YOUNG J:

And you say that's wrong?

SOLICITOR-GENERAL:

Wrongly reasoned, yes. Because if – and the reason I say that – it's paragraph 41 at the top of page 84 – "We don't think the phrase 'costs incurred' is apt to include a period of time spent in connection with litigation on which some notional numerical value is place but which is not the subject of a bill of costs." Those aren't the only two options in my submission, a notional numerical value, the in-house employed lawyer can –

WILLIAM YOUNG J:

Well, on that aspect I agree with you.

SOLICITOR-GENERAL:

So the options before the Court I think have already been canvassed as well as to whether this Court, either granting Mr McGuire's appeal or not, doubts where the full Court of the Court of Appeal got to in its observations about *Joint Action Funding*. It is quite some sort of distance and hoops for this Court to plainly grapple with the question about should costs be, as we know it, be abandoned all together and come to the view pressed by the Bar Association. It is open to the Court of course to say that whether or not the appeals are successful that the full Court of Appeal in its costs supporting, or speaking in

favour of *Joint Action Funding* was right or wrong, so Your Honours can get into it that way. For my part I would invite Your Honours to doubt that the *Joint Action Funding* requirement that costs incurred requires an invoice can be right, but that must be for another day, and as Your Honours have already heard, that day is coming, at least in relation to the matter coming to the Court of Appeal in the Commissioner's case.

ELLEN FRANCE J:
Is there a date set for that?

SOLICITOR-GENERAL:
Not as I understand it. There is no date set. Yes, well, by way of submission, rather than a complaint, I observe that there are some 116 High Court decisions on costs now reserved awaiting the *New Orleans* Court of Appeal decision probably.

WILLIAM YOUNG J:
So are they Commissioner of Inland Revenue cases or other cases as well?

SOLICITOR-GENERAL:
They are mostly, the ones I'm aware one are mostly the Commissioner's cases but there is also in fact a non-Governmental case where the Court of Appeal, *Bhana v Grant* [2018] NZCA 223, has just reserved its cost decision awaiting this matter being addressed again.

WILLIAM YOUNG J:
Is that a commercial case?

SOLICITOR-GENERAL:
Yes. I'm sorry to say…

WILLIAM YOUNG J:
Don't worry about it.

SOLICITOR-GENERAL:

I do have it here. The liquidation, it is a commercial case, yes it's a liquidation case. *Bhana v Grant*. So I only refer to that because not all Commissioner of Inland Revenue cases that are being…

ELIAS CJ:

So what's that a liquidator's in-house counsel is it?

SOLICITOR-GENERAL:

Yes.

WILLIAM YOUNG J:

Is that the appeal from one, because there's a judgment in our, we've been, I don't know if we've been taken to it but we've been told about it where liquidator's costs were recovered effectively as a disbursement.

SOLICITOR-GENERAL:

Well actually just, I don't have it to hand up, although it's a June 2018 judgment of Justice Palmer in the Auckland High Court that noting *New Orleans*, and noting *Joint Action Funding*, does give scale costs to an in-house liquidator on the basis that the invoice from the liquidator to the company was the proper basis on which costs could be –

WILLIAM YOUNG J:

Although it's slightly odd, unless the company was the plaintiff. If the liquidator was the plaintiff it's not, it wouldn't be a very cogent line of reasoning. If the company is, perhaps it is.

GLAZEBROOK J:

I think maybe the company was the litigant from the capital letter report I have to say rather than I'm not, that might be totally wrong.

O'REGAN J:

What about cases where Crown Law does invoice Government departments for its work, so there is an invoice in those cases?

SOLICITOR-GENERAL:

Invariably, well, there is more often than not an invoice in those cases but there are cases where the Attorney or the Solicitor appears in the law officer function and that there is no invoice, that that is more equivalent to the in-house cost.

GLAZEBROOK J:

Well it's slightly odd in any event to split the Crown in that way.

WILLIAM YOUNG J:

Well if the Attorney-General sued and probably the Crown Law Office appears, you would say the Attorney-General is entitled to costs –

SOLICITOR-GENERAL:

Yes.

WILLIAM YOUNG J:

– if successful even though represented by some who was in effect an employee of the Attorney-General?

SOLICITOR-GENERAL:

Yes. Because that is a true cost that is being incurred through, most likely, the time of the Crown Law Office counsel.

WILLIAM YOUNG J:

Well, I suppose analogies become tiresome, but it's a bit like the solicitor being sued.

SOLICITOR-GENERAL:

Your Honours, I'm content to rest on our written submissions, unless there's anything further you have.

ELIAS CJ:

No. Thank you, Madam Solicitor.

SOLICITOR-GENERAL:

If it pleases Your Honours.

ELIAS CJ:

Yes, Mr McGuire, do you want to be heard?

MR McGUIRE:

I don't have any response, thank you, Your Honours.

ELIAS CJ:

Nothing to add, thank you very much.

Well, thank you, Mr McGuire, thank you counsel for your help in this matter, we will reserve our decision. But in view of the queue we'll hope it won't take too long.

COURT ADJOURNS: 3.46 PM