Lay Litigants' Costs: Back to the Future? McGuire v Secretary for Justice

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INTRODUCTION

The Supreme Court in *McGuire v Secretary for Justice*[1] has reversed the unwelcome surprise employers of in-house counsel received in the Court of Appeal's decision in *Joint Action Funding Ltd v Eichelbaum*.[2] In what was effectively an appeal against the Court of Appeal's holding, all five members of the Supreme Court held that case to have been wrongly decided. Returning the law to the pre-*Joint Action Funding* position, the Court upheld both the "primary rule", preventing the award of costs to unrepresented litigants, and the exceptions to that rule.[3] These exceptions allow the award of costs to lawyers appearing in person and employed lawyers. The Court of Appeal's abrogation of the latter exception in *Joint Action Funding* had threatened to affect significantly the economics of litigation using in-house counsel.[4]

In short, the departure in *Joint Action Funding* from long-standing principle was erased. Back to the future we go. However, there is no good reason to suggest this position will, or should, remain.

William Young J, writing for himself, Elias CJ, and Glazebrook and O'Regan JJ, acknowledged that the "public policy justifications for the primary rule … are distinctly contestable".[5] Writing separately, Ellen France J went so far as to call the distinction between lawyers-in-person and other lay litigants apropos costs "irrational."[6] The Court recognised a strong principled case and significant support in the profession for law reform.[7] These arguments are, I suggest, compelling. Certainly, the decision has "dashed hopes" held by access to justice advocates for reform in this area.[8] Equally compelling, however, is the Court's recognition of the desirability of conducting major policy reforms "otherwise than by the courts."[9] In any case, it appears the call for reform is being taken up elsewhere.

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1 *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.

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

3 *McGuire*, above n 1, at [55].

4 See Herman Visagie "The vexed issue of court costs for in-house counsel" (30 July 2018) ILANZ <http://ilanz.org> for an expression of these concerns.

5 *McGuire*, above n 1, at [82].

6 At [91].

7 At [77].

8 Bridgette Toy-Cronin "Dashed Hopes: *McGuire v The Secretary of Justice*" (21 November 2018) Civil Justice Watch <civiljusticewatch.blog>.

9 *McGuire*, above n 1, at [88].

II BACKGROUND

The Underlying Proceeding

The primary focus of argument before the Supreme Court in *McGuire* was the correctness of *Joint Action Funding*. William Young J recognised that, to an extent, the merits of Mr McGuire's substantial case on appeal were beside the point in addressing the issue of costs as the primary question of general and public significance before the Court. Accordingly, and somewhat ironically perhaps, no adverse costs award was made against Mr McGuire on this unsuccessful appeal.[10]

The primary interest of *McGuire* being the costs point, I will not comment on the Court's disposition of the underlying proceeding or that matter's somewhat convoluted history. It is sufficient to note briefly that Mr McGuire is a lawyer whose application for approval to provide legal aid services under the Legal Services Act 2011 was declined by the Secretary for Justice — apparently in part because of concerns based on previous adverse findings regarding Mr McGuire's professional conduct.[11]

Mr McGuire applied for judicial review of the Secretary's decision and was successful at first instance in the High Court.[12] However, the Secretary was successful in his appeal to a full court of the Court of Appeal on the basis that the Legal Services Act 2011 provides for a statutory review process that must be excluded before judicial review proceedings can be commenced.[13] The Supreme Court, agreeing with the Secretary, took the same view as the Court of Appeal.[14]

Strictly speaking, the question of Mr McGuire's entitlement to costs following his success in the High Court did not arise. Nonetheless, the correctness of *Joint Action Funding* was put squarely before the Court. The New Zealand Law Society and Bar Association were given leave to intervene, and much of the Solicitor-General's submission[15] was on the question of costs.[16]

The Pre-*Joint Action Funding* Position

The position before *Joint Action Funding* was clear. Indeed, it was supported by long-standing and consistent authorities. Whatever the merits of the law before *Joint Action Funding* and after *McGuire*, the law is well-suited to ensuring that "the determination of costs [is] predictable and expeditious."[17]

10 At [89].
11 At [6]–[28].
12 *McGuire v Secretary for Justice* [2017] NZHC 365.
13 *McGuire v Secretary for Justice* [2018] NZCA 37, [2018] 3 NZLR 71.
14 *McGuire*, above n 1, at [41]–[51].
15 Una Jagose QC appeared personally.
16 At [54].
17 High Court Rules 2016, r 14.2(1)(g).

At least in New Zealand, doubts as to the legitimacy of the primary rule and its exceptions have been confined to dicta.

Since the Statute of Gloucester 1278,[18] an award of costs has been available to the successful party in civil litigation.[19] The promulgator of the Statute considered the victor, having been put to the trouble and expense of retaining counsel to vindicate their rights through litigation, should be entitled to some relief from those costs.[20] While this jurisdiction to award costs was an invention of statute, and retains a statutory basis, the measure of costs and the principles governing costs are a product of case law.[21] In New Zealand today, the primary responsibility for the costs regime rests with the Rules Committee continued under the Senior Courts Act 2016.[22] The Committee exercises a policy-setting and development role in respect of the rules of practice and procedure for the District Court and Senior Courts.[23]

Through that rule-making process, the measure of relief awarded now varies significantly across the common law jurisdictions. England still practises the "full costs" indemnity model.[24] This can be described as a subjective approach to costs. Since 2000,[25] New Zealand has practised an objective model of costs according to scale.[26] Under this model, parties are entitled to two thirds of what the Rules Committee deems to be reasonable for a proceeding of a given complexity and scale.[27] Except for the rule that costs recovered cannot exceed a party's actual expenditure on legal fees,[28] the New Zealand approach is not concerned with the amount actually spent.

Despite the variety of approaches now in place across the common law world, the "paradigm" underpinning the regime is that a costs award serves to compensate a successful party for expenditure on legal fees.[29] Accordingly, there is no scope in the award of costs to self-represented parties for the opportunity cost incurred in preparing and presenting their case. That is, self-represented litigants cannot, at common law, claim compensation for loss of earnings from employment or lost business opportunities (in the case of self-employed litigants) resulting from the time spent on litigating.[30] At most, self-represented litigants are entitled to claim the full amount, subject to an overriding requirement of reasonableness, of their costs of photocopying,

18 Statute of Gloucester 1278 (Eng) 6 Edw I c 1.
19 *McGuire*, above n 1, at [56].
20 Edward Coke *The Second Part of the Institutes of the Laws of England: Containing the Exposition of Many Ancient and Other Statutes* (E and R Brooke, London, 1797) at 288.
21 Senior Courts Act 2016, s 162; and High Court Rules, pt 14.
22 Sections 145–155.
23 Senior Courts Act, ss 145 and 148; and District Court Act 2016, s 228(1)(b).
24 Rachael Schmidt-McCleave "Costs" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 763 at [21.2.1].
25 High Court Amendment Rules 1999, r 2; and High Court Rules, pt 14. The High Court Amendment Rules entered into force on 1 January 2000: r 1(2).
26 *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC) at [33]–[34]. See also Schmidt-McCleave, above n 24, at [21.2.1]; and Robert Osborne and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR14.2.01].
27 Schmidt-McCleave, above n 24, at [21.2.1].
28 High Court Rules, r 14.2(1)(f).
29 *McGuire*, above n 1, at [62].
30 *Atlas Corp Pty Ltd v Kalyk* [2001] NSWCA 10 at [9].

undertaking research and obtaining legal advice in pursuing their claim. This is what was termed the "primary rule" in *McGuire*.

The majority of the High Court of Australia in *Cachia v Hanes*, upholding the "primary rule" in that jurisdiction, made similar observations.[31] To these, the majority added the justification that the presence of litigants-in-person in courts is not to be encouraged given the delays and lack of expertise their presence brings.[32] This policy concern, coupled with a recognition of the difficulties involved in quantifying the value of a costs award to a lay litigant for their opportunity costs, or even in identifying the value of their work compared to that which would have been performed by counsel, has prompted Australian courts to uphold the primary rule.[33]

There are two exceptions to this rule. The first is that a lawyer, which has been defined restrictively as meaning only those both enrolled as a solicitor and/or barrister and holding a practising certificate, is entitled to an award of costs where they represent themselves. The rationale for this distinction, as recited by William Young J in *McGuire*, is that because the work a lawyer-in-person performs would be the same as that they would perform if representing another person, it can be compensated in the same measure.[34] One might argue, however, following the English Court of Appeal's 1884 decision in *The London Scottish Benefit Society v Chorley*, that because certain aspects of a lawyer's task — such as consulting and attending the client — are unnecessary where client and counsel are the same person, the lawyer should not be entitled to a costs awards in respect of steps in litigation.[35] To this, William Young J added the justification that a lawyer-in-person, being a lawyer, will perform work of equal skill to that which would have been done by separate counsel.[36] This would ameliorate the concerns around disruption identified in *Cachia v Hanes*.

The other exception — the employed lawyer exception — allows the award of costs to a party, such as a company, that nominally appears in person but is represented in court by a lawyer in their employment. Practically speaking, this exception has become increasingly important because of the increasing use of in-house counsel in litigation.[37] While the employer has not "incurred" expenditure on legal fees in relation to the case, insofar as in-house counsel was employed, the courts have recognised that the use of employee time on a particular matter at the expense of other work represents an

31 *Cachia v Hanes* (1994) 179 CLR 403 at 410.

32 At 415.

33 *Kelly v Noumenon Pty Ltd* (1988) 47 SASR 182 (SC) at 184–185; and *Cachia v Hanes* (1991) 23 NSWLR 304 (CA) at 317. See also *Von Reisner v Commonwealth (No 2)* [2009] FCAFC 172, (2009) 262 ALR 430; GE Dal Pont *Law of Costs* (4th ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at [7.27]–[7.29]; and *Anne v Ask Funding Ltd (No 2)* [2015] FCA 1351 at [7]–[9].

34 *McGuire*, above n 1, at [82]–[84].

35 *The London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (CA) at 875. See also *Buckland v Watts* [1970] 1 QB 27 (CA) at 36; *Hanna v Ranger* (1912) 31 NZLR 159 (SC) at 160; and *Brownie Willis v Shrimpton* [1998] 2 NZLR 320 (CA) at 327.

36 *McGuire*, above n 1, at [83].

37 See Geoff Adlam "Spotlight on New Zealand in-house lawyers" (15 May 2017) New Zealand Law Society <www.lawsociety.org.nz>.

ascertainable cost.[38] Accordingly, the exception does not infringe the principle that a party should not profit from litigating.

The Decision in *Joint Action Funding*

Again, the primary interest of *Joint Action Funding* being the costs issue, the disposition and facts of the underlying proceeding are somewhat beside the point. In brief, Mr Eichelbaum, a practising barrister, succeeded in the High Court in obtaining an order for rectification of Joint Action Funding Ltd's share register under the Companies Act 1993.[39] Appearing as a lawyer-in-person, Mr Eichelbaum obtained an award of costs and disbursements as if he had third-party representation, subject to a number of *Chorley*-type deductions. Seizing on the doubts as to the principled correctness of the "lawyer-litigant exception" voiced by the minority in *Cachia v Hanes*, Joint Action Funding successfully invited the Court of Appeal to revisit the exception.[40]

Writing for himself and Simon France and Joseph Williams JJ, Brown J surveyed the position as it stood in England[41] and Australia[42] before deciding that the question was not a matter of principle but rather one of construction of the costs regime under the High Court Rules 2016 (the Rules).[43] Brown J conducted this construction according to the conventional purposive approach to interpretation,[44] having regard to both the text of the Rules and the "travaux préparatoires"[45] in the form of the Rules Committee's records relating to the costs rules.

Brown J noted that the principle underpinning the current costs regime is that the function of a costs award is partial indemnity so as to allow reasonable recovery only.[46] Accordingly, a costs award cannot exceed, except in the special and now exceptional cases of increased and indemnity costs awards,[47] the scale of reasonableness established by the costs schedules to the Rules[48] or the actual costs incurred by the party.[49]

This limitation having been clearly established, the question for Brown J was what the word "costs" means for the purposes of pt 14 of the Rules. In accordance with the conventional approach to interpretation, the word would take its meaning from its linguistic context within the Rules. Crucially, his Honour noted that the word "costs" — which is not expressly defined in the Rules — is used in conjunction with the word "incurred" in

38 *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA) at 23.
39 *E v J* [2016] NZHC 419.
40 *Joint Action Funding*, above n 2, at [3].
41 At [16]–[19].
42 At [10]–[15].
43 At [8].
44 At [23].
45 At [20].
46 At [27].
47 See r 14.6 of the High Court Rules and the commentary thereon in Osborne and others, above n 26, at [HR14.6.01]–[HR14.6.03].
48 Schedules 2–3.
49 *Joint Action Funding*, above n 2, at [24]–[27] and [46]–[49].

three instances in rr 14.2 and 14.6.[50] These provisions relate to the principles applying to the determination of costs, and increased costs and indemnity costs, respectively. On two of those occasions, those words are used together with the word "actual[ly]". The first is in r 14.2(1)(e), which reinforces the objective nature of the costs regime in providing that what is a reasonable amount of costs is not to be determined by reference to the skill level or experience of, or time actually spent on a matter by, the counsel involved. The second is in r 14.6(1)(b), which provides for the award of indemnity (actual) costs in some cases.

However, the word "actual[ly]" does not appear in r 14.2(1)(f), which simply provides that "an award of costs should not exceed the costs incurred by the party claiming costs". Despite this distinction, his Honour did not consider that a different meaning should be assigned to the word "costs" in r 14.2(1)(f) compared to the phrases used in rr 14.2(1)(e) and 14.6(1)(b).[51] Taking the view that "actual[ly]" imports a meaning of "in fact or in reality", based on the word's use in rr 14.2(1)(e) and 14.6(1)(b), the Court of Appeal considered that r 14.2(1)(f) precludes an award of costs exceeding the amount for which a party was actually invoiced.[52] Critically, in terms of the position of in-house lawyers, the Court did not see this definition of "costs" as "includ[ing] a period of time spent in connection with litigation upon which some notional numerical value is placed but which is not the subject of a bill of costs."[53]

As noted above, the employed lawyer exception is based on the view that there is some cost to the employer of in-house counsel in having its staff occupied by litigation that the law would recognise, the absence of an "actual" costs invoice aside. As the "costs" (on this definition) of a party represented by their employee are, like those of a lawyer-in-person, zero, no costs award can be made.[54]

For Brown J, this linguistic reasoning cohered with the intention behind the 2000 costs regime reforms of establishing an objective approach to the determination of costs. His Honour attached weight to the fact that, in accordance with the observations made in *Chorley*, the High Court had needed to make deductions from Mr Eichelbaum's costs award to reflect the fact that he had not needed to consult or take instructions from himself as his own client.[55] The need for the court to undertake the exercise of making such deductions where the lawyer-in-person exception applies is, for Brown J, inconsistent with the objective costs regime's goal of rendering the award of costs a mechanical exercise according to scale.[56] Accordingly, his Honour adopted what William Young J in *McGuire* termed an "invoice required approach"[57] to costs. In saying this, as noted by Associate Judge Matthews in

50 At [31].
51 At [33].
52 At [40]–[41].
53 At [41].
54 At [44]–[45].
55 At [51] and [56] citing *Chorley*, above n 35, at 875–876 and *E v J*, above n 39, at [26]–[30].
56 *Joint Action Funding*, above n 2, at [57].
57 *McGuire*, above n 1, at [87].

Commissioner of Inland Revenue v New Orleans Hotel (2011) Ltd, Brown J failed to recognise that for in-house counsel, "attendances" and "consultation" in the form of intra-office meetings and information gathering will still be necessary in a way not true of lawyers representing themselves.[58]

The Consequences of *Joint Action Funding*

Nonetheless, the Court of Appeal's decision in *Joint Action Funding* was binding on the High Court in *New Orleans Hotel*, with the effect that Associate Judge Matthews felt obliged to deny the Commissioner of Inland Revenue an award of costs in a proceeding where she had been represented by counsel employed by her office.[59] This was despite the Associate Judge's misgivings as to the outcome. Associate Judge Matthews referred at length to the Court of Appeal's longstanding contrary decision in *Henderson Borough Council v Auckland Regional Authority*[60] and the subsequent practice of the High Court[61] based on that decision.[62] As William Young J noted in his decision in *McGuire*, the Court of Appeal in *Joint Action Funding* did not engage with this line of authority.[63]

The Court of Appeal's decision had radical implications for the over 3,000 in-house lawyers employed in New Zealand and their employers. The In-House Lawyers Association took the view that the decision "created an unreasonable, and potentially untenable, situation for organisations who employ in-house counsel for litigation" by depriving them of an ability to recover costs, and "diminishe[d] the value of in-house counsel in comparison to external counsel based only on their employment status."[64] Absent a compelling justification for the distinction, the Association said the decision prejudiced both the position of its members and their employers' freedom in structuring their business affairs.[65]

58 *Commissioner of Inland Revenue v New Orleans Hotel (2011) Ltd* [2018] NZHC 971, (2018) 28 NZTC 23-058 at [16].
59 At [26].
60 *Henderson Borough Council*, above n 38.
61 See *Commissioner of Inland Revenue v Harbour City Tow and Salvage (2003) Ltd* HC Wellington CIV-2006-485-2002, 12 February 2007; *Grant v Pandey* [2013] NZHC 3323, (2013) 21 PRNZ 676; *Bright v Auckland Council* [2016] NZHC 2117; and *Re Commissioner of Inland Revenue, ex parte Mills* [2016] NZHC 1189.
62 *New Orleans Hotel*, above n 58, at [19]–[25].
63 *McGuire*, above n 1, at [73].
64 Visagie, above n 4.
65 Visagie, above n 4.

III THE DECISION IN *MCGUIRE*

The Majority: Elias CJ and William Young, Glazebrook and O'Regan JJ

Noting the Court of Appeal's failure to engage with the decision in *Henderson* in its reasoning, and its apparent disregard for the Rules Committee's express decision "not to abrogate or vary" the primary rule and lawyer-in-person exception in the 2000 reforms,[66] William Young J, writing for the majority, took the view that the Court of Appeal's reasoning in *Joint Action Funding* was without "sound basis".[67] His Honour noted that the word "actual[ly]" appears in rr 14.2(1)(e) and 14.6(1)(b) because the subject matter of those provisions necessarily invites reference to the actual expenditure of the party. But this does not provide a basis for inferring that r 14.2(1)(f) also refers to "actual" costs, or for a purposive interpretation of that provision based on the costs regime's objective underpinnings.

Having disposed of the decision in *Joint Action Funding* and restored the law as it stood before that case, his Honour turned to the question of whether that was a desirable state of affairs. His Honour noted that "[n]one of the parties who appeared in this Court sought to uphold the totality of the law" as it had been.[68] While noting the "invidious" nature of the primary rule, particularly in conjunction with the lawyer-in-person exception, the majority refused to accept that the lawyer-in-person exception was irrational.[69] This view was based in part on the majority's view that there was no principled basis for maintaining the employed lawyer exception — the validity of which was not disputed by any party to the proceeding — in the absence of the lawyer-in-person exception.[70] Not having been persuaded that the primary rule was perversely irrational, the majority preferred to leave reform to either the Rules Committee or Parliament.[71] As the judiciary has noted on prior occasions, the courts' processes and the adversarial system are ill-suited to deciding how proactively to address matters of public policy giving rise to polycentric considerations.[72]

The Minority: Ellen France J

In her brief separate reasons, Ellen France J departed from the majority on the rationality of the law pre-*Joint Action Funding*. Her Honour took the view that

66 *McGuire*, above n 1, at [73].
67 At [72].
68 At [77].
69 At [84].
70 At [87].
71 At [88].
72 See *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [372], n 318; and *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] NZCA 64, [2010] 3 NZLR 486 at [211]. See also Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353.

it is "irrational" to distinguish between lawyers and other litigants-in-person "[i]f opportunity costs are seen to be the rationale", as the opportunity costs incurred by lawyers-in-person are the same as those incurred by lay litigants.[73] Accordingly, for her Honour — who agreed that law reform should ideally "be effected otherwise than by the courts"[74] — the question was whether all unrepresented litigants should be able to receive an award of costs or the lawyer-in-person exception should be abrogated.[75]

IV COMMENT

Respectfully, the Supreme Court was undoubtedly correct that *Joint Action Funding* was wrongly decided. The "travaux préparatoires"[76] in the form of the Rules Committee's papers from 2001–2002 are clear that the Committee was firmly of the view that changes to the availability of costs for lay litigants were properly within the province of Parliament.[77] It would therefore be remarkable for a purposive reading of the Rules to require the abrogation of the primary rule or its exceptions. The better reading, following the Supreme Court's decision in *McGuire*, is that the Rules are silent on the primary rule and its exceptions, which exist as a matter of practice.[78]

Less persuasive is the majority's statement that there is a plausible, if contestable, rationale for the lawyer-in-person exception while the primary rule remains. As Ellen France J appeared implicitly to recognise, it is not necessary to preserve the lawyer-in-person exception to uphold the employed lawyer exception. Once it is accepted that the economic cost to an employer of having its in-house counsel's time occupied with a case is a "cost" recognised by the costs regime, no special exception for lawyers is needed to maintain the employed lawyer exception.[79] Instead, the employed lawyer "exception" is merely an application of the ordinary costs principles. Any concerns about the difficulties of applying the *Chorley* principle to lawyers who are their own client do not arise in this context. More broadly, there is force in the In-House Lawyers Association's argument that the costs regime should not produce horizontal inequality between in-house lawyers and lawyers practising in firms or at the bar apropos costs, absent a policy justification for such a distinction.

Furthermore, the idea that lawyers representing themselves are likely to contribute value to proceedings not offered by lay litigants is more contestable than the majority appreciated. As Cooke J recognised in

73 At [91].
74 At [88] and [90].
75 At [92] citing *Cachia v Hanes*, above n 31, at 412.
76 *Joint Action Funding*, above n 2, at [20].
77 See The Rules Committee *Minutes of the Meeting held on Monday 8 April 2002* (Minutes/3/02, Wellington, 9 April 2002) at [15]; and *McGuire*, above n 1, at [73].
78 Compare *Joint Action Funding*, above n 2, at [8].
79 The majority appeared to accept this in not challenging the authority of *Henderson Borough Council*: *McGuire*, above n 1, at [73].

Henderson, part of the value that independent counsel contribute to proceedings is their sense of professional detachment and objectivity.[80] That counsel's ability to advise the court effectively is imperilled where they lose objectivity and independence, when acting for a client, is recognised in the policy underpinning the Conduct and Client Care Rules' strict requirements that lawyers maintain independence in litigation.[81] It is inconsistent with these statements about the requirements of effective advocacy to suggest that a lawyer-in-person will necessarily make submissions to the court more deserving of a costs award than a lay litigant. Additionally, as Bridgette Toy-Cronin has observed, not all lawyers are litigators, and it cannot be assumed that any person holding a law degree and practising certificate is equally capable of effectively running litigation, or that they would prove superior to non-lawyers in doing so.[82] It may well be argued that lawyers, having undergone inculturation into the practice and culture of the law through education,[83] are less likely to be disruptive to proceedings — either deliberately or through ignorance of procedure — than lay litigants. Equally, however, as Toy-Cronin notes, lawyers are far from immune from the risks of losing detachment in litigation: both New Zealand's and England's first recipients of vexatious litigant orders were lawyers.[84]

The surge in the number of lay litigants appearing in the courts in recent years has proven disruptive to both the judiciary and opposing counsel and parties.[85] There is a public policy justification in not encouraging, absent other options, self-representation. However, that argument is invidious where, as at present, access to civil legal aid has become increasingly restricted.[86] Discouraging, and discriminating against, litigants-in-person who represent themselves out of financial necessity is inimical to those litigants' fundamental rights to self-representation[87] and, in turn, access to justice.[88] Indeed, as the issue of costs for litigants-in-person arises only once a litigant has proved successful, it should not be forgotten that these are not querulants but persons whose rights have been breached and who are entitled to vindication.

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80 *Henderson Borough Council*, above n 38, at 23.

81 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 13.5.1–13.5.4.

82 Toy-Cronin, above n 8.

83 See Duncan Kennedy "Legal Education and the Reproduction of Hierarchy" (1982) 32 J Leg Ed 591.

84 Michael Taggart "Vexing the Establishment: Jack Wiseman of Murrays Bay" [2007] NZ L Rev 271 as cited in Toy-Cronin, above n 8; and Michael Taggart "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896" (2004) 63 CLJ 656.

85 Adrian Zuckerman "No Justice Without Lawyers — The Myth of an Inquisitorial Solution" (2014) CJQ 355 at 355. See also Stephen Kós "Civil Justice: Haves, Have-Nots, and What to Do About Them" (address to the Arbitrators' and Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016) at [14]–[24]; and Helen Winkelmann "Access to Justice — Who Needs Lawyers?" (2014) 13 Otago L Rev 229 at 235.

86 "Legal aid: the problems and issues" *LawTalk* (online ed, Wellington, November 2018). See also Bridgette Toy-Cronin "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (PhD Thesis, University of Otago, 2015) at 87.

87 *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA) at 312.

88 See Winkelmann, above n 85, at 231.

It does not follow, however, that it is necessary to adopt an approach allowing compensation for opportunity costs — the possibility with which Ellen France J engaged in her brief dissent. As her Honour identified, if that is the approach adopted, it would be difficult to distinguish between lawyers-in-person and other self-represented litigants.

That is the approach that, following statutory intervention, is now in place in England and Wales. Successful litigants-in-person there can claim compensation for lost income for a reasonable number of hours spent preparing and delivering their case, based on either their actual income or a default rate.[89] Canada adopts an approach more analogous to New Zealand's objective approach whereby the registrar determines the quality of the work produced, the complexity of the matter and whether self-representation caused avoidable delays.[90] While this requires a case-by-case assessment of costs, which New Zealand's expeditious scale approach seeks to avoid, this approach avoids the difficulties of attempting to identify a universally appropriate rule by instead "balancing the various policy objectives of costs" in each case.[91]

While New Zealand's adoption of an approach similar to that in Canada would fundamentally depart from the objectives of the costs regime currently in place, the use of provisions calling for these sorts of case-by-case evaluations is already commonplace in New Zealand's legislative and regulatory landscape.[92] It would arguably allow for a "factoring in" of the concerns around the quality of advocacy by less-than-independent counsel, producing an incentive for lawyers to obtain representation rather than imperil their professional standing by becoming improperly partisan. It would also avoid discrimination against lay litigants.

V CONCLUSION

Whatever approach is adopted, any reform would likely represent a radical change to the costs regime in New Zealand. The above cursory survey of relevant principled considerations and alternative models reflects the wide-ranging questions of policy that prompted the Court in *McGuire* unanimously to accept that law reform should be carried out in a forum that allows appropriate consultation, such as the Rules Committee or Parliament.

While the Supreme Court's judgment indeed "dashed hopes"[93] held by access to justice advocates such as Toy-Cronin of an immediate end to the pernicious consequences of the costs regime for those unable to access

89 Litigants in Person (Costs and Expenses) Act 1975 (UK), s 1(1); and Civil Procedure Rules (UK), r 46.5. See *Halsbury's Laws of England* (5th ed, 2015) vol 12A Costs at [1743] and following for further discussion of the English position.

90 *Sherman v Minister of National Revenue* 2003 FCA 202, [2003] 4 FC 865 at [46]; *Fong v Chan* (1999) 46 OR (3d) 330 (CA); and *Dechant v Law Society of Alberta* 2001 ABCA 81 at [21].

91 *Dechant*, above n 90, at [18].

92 Graham Virgo "Judicial Discretion in Private Law" (2016) 14 Otago LR 257.

93 Toy-Cronin, above n 8.

representation, at worst this decision should be viewed as a necessary evil. The courts' adversarial process is well recognised to be a forum ill-suited to public policymaking. In my view, it was appropriate, if not attractive, for the Court to return us to the pre-*Joint Action Funding* position until fuller consultation can occur.

Significantly, at its meeting of 17 June 2019, the Rules Committee agreed to take "a first step" towards "addressing costs for litigants-in-person"[94] as part of considering "whether to abrogate the primary rule and/or the exceptions to that rule."[95] On 4 September 2019, the High Court of Australia unanimously held that the *Chorley* exception should not be recognised as part of the common law of Australia on the basis that it is "anomalous"[96] and "an affront to the fundamental value of equality of all persons before the law."[97] Given this apparent momentum, we may not be back in the pre-*Joint Action Funding* future indefinitely.

94 The Rules Committee *Minutes of Meeting of 17 June 2019* (Minutes 02/18, Wellington, 21 June 2019) at [2].

95 The Rules Committee *Minutes of meeting held on 18 March 2019* (Minutes 01/18, Wellington, 11 April 2019) at 6.

96 *Bell Lawyers Pty Ltd v Janet Pentelow* [2019] HCA 29 at [3] quoting *Cachia v Hanes*, above n 31, at 411.

97 At [3].