ORDER: (1) PROHIBITING PUBLICATION OF THE APPELLANT'S NAME FOR 20 WORKING DAYS PENDING APPEAL AND, IF APPEALED, SUPPRESSION TO CONTINUE ON AN INTERIM BASIS UNTIL DETERMINATION OF THE APPEAL – IN ACCORDANCE WITH PARA [64](a); AND (2) PERMANENTLY SUPPRESSING PUBLICATION OF THE HEALTH DIFFICULTIES OF THE APPELLANT'S DAUGHTER AND FATHER – IN ACCORDANCE WITH PARA [64](b).

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-000266
[2020] NZHC 2828

IN THE MATTER OF	an appeal pursuant to s 106(2) of the Health Practitioners Competence Assurance Act 2003
BETWEEN	NIGEL LOWRY BEER Appellant
AND	A PROFESSIONAL CONDUCT COMMITTEE Respondent

Hearing: 17 September 2020

Counsel: A H Waalkens QC and S A Beattie for Appellant
J P Coates and B J Johns for Respondent

Judgment: 30 October 2020

JUDGMENT OF EDWARDS J

This judgment was delivered by me on 30 October 2020 at 2:30 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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[1] The appellant appeals against the decision of the Health Practitioners Disciplinary Tribunal (Tribunal):[1]

(a) declining his application for name suppression;

(b) ordering him to pay costs totalling $71,134; and

(c) ordering confidentiality as to the basis of the respondent's costs, including hours spent and hourly rates.

The Tribunal's decision

[2] The appellant is a registered dentist who formerly practised in Auckland.

[3] In June 2019, the Tribunal found him guilty of three incidents of malpractice and conduct likely to bring discredit to the dental profession, which amounted to professional misconduct. The particulars of the charges established are summarised in the Tribunal's penalty decision as follows:

(a) **Particular 1** - On 17 August 2016, [B] extracted an upper molar and placed five fillings for [T], in circumstances where he had failed to obtain her agreement to the treatment plan before she was sedated and disregarded her known financial constraints and advised her after her sedation that the treatment price had increased.

(b) **Particular 2** – [B] failed to cooperate adequately with the investigatory processes of the Health and Disability Commissioner (HDC) and the Dental Council (Council) after a complaint had been laid against him by [R], and failed to provide honest responses to both the HDC and the Council in relation to his delay in responding to the complaint.

(c) **Particular 3** – On or about 17 August 2016, [B] delivered an intimidating and unprofessional letter and a tax invoice for additional services of $5,290 to [L]'s home address, following her complaint about his services, which were unprofessional and in breach of [L]'s rights as a patient and health consumer.

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[1] *Professional Conduct Committee v [B]* Health Practitioners Disciplinary Tribunal 1025/Den18/428P, 5 February 2020 (Penalty Decision).

[4] Particulars 1 and 3 were established both separately and cumulatively as sufficiently serious to warrant a finding of professional misconduct. Particular 2 was established as professional misconduct on a cumulative basis only.

[5] On 5 February 2020 the Tribunal issued its penalty decision. The appellant was censured and fined $7,500. As the appellant had undertaken to permanently retire from practice in New Zealand, it was unnecessary for the Tribunal to consider cancellation of his registration or a lengthy period of suspension. However, the Tribunal made it clear that serious consideration would have been given to both these penalties but for the decision to permanently retire.[2]

[6] The Tribunal declined the appellant's application for name suppression under s 95 of the Health Practitioners Competence Assurance Act 2003 (HPCAA). It found that the public interest was not outweighed by the private interests in this case. As to the appellant's concern for the health of his daughter and father resulting from publication, the Tribunal said:

> [65] The health concerns for the practitioner's daughter and father are no doubt legitimate. However, they do not present such an immediate or inevitable risk that they should outweigh the public interest factors in this case. In coming to this decision, the Tribunal has mostly considered the potential impact of publication on [B]'s daughter. However, we note that [B]'s daughter has a different name from her father, her health is [redacted]. These are all important matters that make risks to her health less significant. The father's health at over 90 years is inevitably at risk because of his age. We do not place any material weight on this factor.
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> [66] In the present case, the Tribunal finds the public interest factors in favour of publication are weightier. The charge of professional misconduct has been established. There are aspects of the charge that relate to patient harm caused by unprofessional behaviour that we consider weigh heavily in favour of publication of the practitioner's name. While the practitioner has undertaken not to resume dental practice, we consider it remains an important safeguard that his name is also published to inform health consumers of his identity. The other public interest factors have also played a part on our decision, now that the charge has been established.

[7] The Tribunal also made an order of costs pursuant to s 101(1)(f) of the HPCAA. In determining quantum, the Tribunal agreed that some of the Professional Conduct Committee's (PCC) investigation costs were excessive and fixed reasonable

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2 At [29] and [30].

costs at $90,000. The Tribunal ordered the practitioner to pay 50 per cent of the reasonable costs, being $45,000 payable to the PCC, and $26,134 to the Tribunal for a total sum of $71,134.

[8] Finally, the Tribunal made an order that the hours spent, and hourly rates disclosed by the PCC in relation to the proceeding could not be used by the parties for any other purpose other than the proceeding. The Tribunal recorded that the order was not intended to prevent the parties from referring to the discussion of costs set out in the decision or past or future cases in which submissions have been made in open Tribunal or court on costs.[3]

Approach on appeal

[9] An appeal against a Tribunal decision is as of right.[4] It proceeds by way of rehearing.[5] The Court may "confirm, reverse, or modify the decision or order appealed against", or make any decision or order that could have been made by the Tribunal. It may also send a decision back to the original decision-maker for reconsideration.[6]

[10] There is a difference between the parties on the approach to appeals from suppression and costs orders made by disciplinary tribunals. Mr Waalkens QC, for the appellant, submits that the decisions of the Tribunal are evaluative and accordingly the approach set out in *Austin, Nichols & Co Inc v Stichting Lodestar* should apply.[7] On that approach, the appellant bears the burden of showing that the lower court's decision was wrong, but the appellate court must reach its own view of the merits.

[11] Mr Coates, for the respondent, relies on the weight of authority which suggests that name suppression and costs decisions involve the exercise of a discretion. Accordingly, the approach set out in *May v May* should apply.[8] To succeed on appeal on this approach, the appellant must show that the Tribunal acted on a wrong principle,

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3 At [68]–[69].
4 Health Practitioners Competence Assurance Act 2003, s 106(2)(b) and (d).
5 Section 109(2); and High Court Rules 2016, r 20.18.
6 Health Practitioners Competence Assurance Act 2003, s 111.
7 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
8 *May v May* [1982] 1 NZFLR 165 (CA).

failed to take into account a relevant matter, or took into account an irrelevant matter or the decision was "plainly wrong".

[12] In *J v New Zealand Institute of Chartered Accountants Appeals Council*, Gwyn J reviewed relevant law on the approach to be taken in appeals from decisions on non-publication orders.[9] That decision concerned a judicial review of a decision of the Appeal Council of the New Zealand Institute of Chartered Accountants dismissing an appeal from the Disciplinary Tribunal which had declined to make a non-publication order. One of the grounds for review challenged the Council's adoption of the *May v May* standard to appeals from non-publication orders. The relevant rule in that case provided that the Tribunal or Appeals Council could make a non-publication order if it considered it "appropriate to do so having regard to the interests of any person or to the public interest".

[13] Justice Gwyn referred to the Court of Appeal's decision in *Taipeti v R* regarding the features of appeals that might point towards either an evaluative or discretionary decision:

> [49] Mr Waalkens observes that no distinction is made in the Rules between appeals on penalty and appeals relating to name suppression decisions. He further submits there is no substantive reason to treat a determination on whether a disciplinary threshold is met differently to a determination regarding whether the r 13.62 threshold of name suppression being "appropriate" is met. Nothing indicates the latter decision involves the sort of discretion warranting deference from an appellate decision-maker.
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> [50] Mr Waalkens further points to the decision of the Court of Appeal in *Taipeti v R* regarding appeals against discretions:
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> > [A survey of decisions regarding the distinction between an appeal against a discretion and a general appeal] show that the classes of case which appeal courts classify as an exercise of a discretion are dwindling. Three possible indicia of the presence of discretion emerge. First, the extent to which the decision-maker can apply his or her own "personal appreciation" has been identified as a "key indication". Clearly, the greater the level of prescription in terms of what is required of the decision-making process the more likely the decision is an evaluative process, rather than the exercise of a discretion. Second, procedural decisions are more likely to be an exercise of discretion than wider issues of principle involving the application of law to the facts. Third, if only one view is legally

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9 *J v New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566.

> possible, that points away from a discretion. In other words, where there is scope for choice between multiple legally "right" outcomes, that points towards a discretion.
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> (footnote omitted)

[14] Her Honour expressed concern about treating suppression and publication issues as discretionary. She observed that whether publication is "appropriate" requires careful evaluation, and a deliberative judgment. The Judge put weight on the fact that the appeals were to be conducted by way of re-hearing in that case, observing that an appeal hearing conducted on the narrow *May v May* principles, restricts the efficacy of the requirement to conduct the appeal by way of rehearing.[10] She found that the appeal should have been approached by way of rehearing in accordance with the principles in *Austin, Nichols* rather than *May v May*.

[15] In this case, the Tribunal may make non-publication orders under s 95(2), the relevant part of which provides:

> (2) If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make any 1 or more of the following orders:
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> …
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> (d) an order prohibiting the publication of the name, or any particulars of the affairs, of any person.

[16] The desirability threshold has some similarities to the requirement that the order be "appropriate". In both cases, the relevant body is required to have regard to the interests of any person and the public interest. I consider Gwyn J's observations in *J v New Zealand Institute of Chartered Accountants Appeals Council* apply equally in this context. The statute requires the Tribunal to carefully evaluate the respective interests in deciding whether it is desirable to make the non-publication order.

[17] The appeal provisions deserve weight in this regard also. The Court seized of an appeal is vested with a wide statutory power to make any decision or order that could have been made by the Tribunal. Both the statute, and the High Court Rules,

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[10] *J v New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566 at [71].

stipulate that the appeal is to proceed by way of re-hearing. In light of the Court of Appeal's decision in *Taipeti v R*, I consider these provisions suggest that the appeal from the suppression decision should be approached in accordance with the principles set out in *Austin, Nichols*.

[18] The approach to be taken on appeals from costs awards raises separate issues. As Mr Coates submits, the costs jurisdiction has generally been considered discretionary, and accordingly, the approach in *May v May* applies.

[19] However, Mr Waalkens submits that costs decisions made under the HPCAA are decisions regarding penalties. That is because the power to award costs is found in the range of penalties a Tribunal may impose under s 101(1) of the HPCAA. Mr Waalkens submits that the Courts have been more open to adopting an *Austin, Nichols* approach where the appeal is from a penalty decision.[11]

[20] There are good reasons to say that the Tribunal's decision regarding costs involves an evaluative approach. Here too, the appeal provisions dictating that the appeal is to proceed by way of re-hearing hold weight. Although there is little in the way of statutory prescription in terms of what is required of the decision-making process, the decision nevertheless involves the careful evaluation of a number of factors. These factors were outlined by Priestly J in *Vatsyayann v Professional Conduct Committee of the New Zealand Medical Council* as follows:[12]

> (a) professional groups should not be expected to bear all the costs of the disciplinary regime;
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> (b) members who appeared on charges should make a "proper contribution" towards costs;
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> (c) costs are not punitive;
>
> (d) the practitioner's means, if known, are to be considered;
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> (e) a practitioner's defence should not be deterred by the risks of a costs order; and

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11 See, for example, *TSM v Professional Conduct Committee* [2015] NZHC 3063.

12 *Vatsyayann v Professional Conduct Committee of the New Zealand Medical Council* [2012] NZHC 1138.

(f) in a general way 50 per cent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

[21] In sum, I consider there to be good grounds to approach the appeals from both suppression and costs orders according to *Austin, Nichols*. But, ultimately, I do not consider the disposition of the appeal turns on this point. The result is the same whatever approach is adopted for reasons that now follow.

Suppression

[22] Suppression orders are governed by s 95 of the HPCAA, the relevant parts of which are set out above. The Tribunal may make a non-publication order if satisfied that it is desirable to do so. As the Tribunal observed, s 95(2) requires private and public interests to be weighed in the balance.

[23] The desirability threshold is lower than the criminal threshold that applies in s 200 of the Criminal Procedure Act 2011 and it is also lower than the threshold that applies in the civil context.[13]

[24] Mr Waalkens is critical of the Tribunal's failure to refer to the "desirability" threshold in its decision. He submits that had this relatively low threshold been in mind when considering the public and private interest factors, the Tribunal would have reached a different decision.

[25] The failure to refer expressly to the threshold does not mean that the Tribunal was not aware of it. Nor does it mean that it was applied incorrectly. What matters is the outcome of the balancing exercise between the private and public interests at issue, and whether that leaves the Tribunal satisfied that a non-publication order is "desirable". That balancing exercise is considered next.

Private interests

[26] The private interests in this case are taken first. There are two main risks relied on both separately and cumulatively:

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13 *Johns v Director of Proceedings* [2017] NZHC 2843 at [166].

(a) the risk to family members; and

(b) the risk of collateral harm to the appellant's practice.

[27] As to the first of these, the appellant says that there are two family members who face a real risk of irreparable harm resulting from publication. The first is the appellant's daughter. [Redacted].

[28] The other family member is the appellant's father. He is 93 years old and has a [redacted].

[29] Mr Waalkens drew a comparison to Fogarty J's decision in *ANG v Professional Conduct Committee* where the impact on the practitioner's family, who were suffering from an unrelated death of a child at the time, was one factor in the decision to reverse the Tribunal's decision declining to order name suppression.[14] He submitted that the Tribunal made no reference to this case, and underestimated the risk of harm to the family, characterising it as "inevitable embarrassment".

[30] I do not consider the case of *ANG* to be of much assistance. There is little discussion about the relative importance of the impact on the family in the overall balancing exercise. In any event, the balancing exercise is case specific, and little assistance in weighing each factor may be gained from other decisions.

[31] The suggestion that the Tribunal characterised the risk of harm as "inevitable embarrassment" misconstrues the Tribunal's decision. The reference to inevitable embarrassment was in the context of a review of relevant legal principles and the observation that this will not normally outweigh the public interest in publication once a charge of professional misconduct is proved. The health concerns for both family members in this particular case were acknowledged by the Tribunal to be legitimate. But the Tribunal considered that they did not present such an immediate or inevitable risk that they should outweigh the public interest factors in this case.

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14 *ANG v Professional Conduct Committee* [2016] NZHC 2949.

[32] I agree with the Tribunal's characterisation of the current risk to family members. The impact of publication on the appellant's daughter is a serious matter and is not to be diminished in any way. The nature of the impact, however, requires close assessment. It appears from the health practitioner's letter that the risk arises out of exposure to the media due to her father's difficulties. However, publication would not extend to the name of the appellant's daughter. Any exposure to the media would not, therefore, be direct.

[33] The fact that the appellant lives and works in a small community, and so could easily be identified, is not overlooked. As Mr Waalkens submits, that may mean that those who know the appellant's daughter will be able to identify her father, and vice versa. But that type of identification is more limited in nature. In *Anderson v Professional Conduct Committee of the Medical Council of New Zealand*, Gendall J said that the association of a family to a named transgressor will arise in the minds of those who know him/her and the family, and it does not usually arise from the publication of the practitioner's name in the collective mind of the general public.[15] Those observations were endorsed by Courtney J in *Clark v Director of Proceedings*, and they apply in this context also.[16]

[34] Those observations provide a partial answer to another of the appellant's arguments. Mr Waalkens submits that the Tribunal's order suppressing publication of the names of the appellant's daughter and father provides illusory protection in the event that the appellant's name is published or identified. Reliance is placed on *X v DP* in support of this proposition.[17] But publication of the appellant's name will not automatically lead to the identification of family members and so the orders suppressing their personal details will continue to provide some protection for them.

[35] A further protective factor in this case is that the daughter does not have an identical name to the appellant. Mr Waalkens was critical of the Tribunal's reference to this fact in its decision, but I consider it is relevant to the assessment of the overall

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15 *Anderson v Professional Conduct Committee of the Medical Council of New Zealand* HC Wellington CIV-2008-485-1646, 14 November 2008.

16 *Clark v Director of Proceedings* HC Auckland CIV-2009-404-6167, 22 February 2010 at [15].

17 *X v Director of Proceedings* [2014] NZHC 1798.

impact of publication on family members, and the Tribunal was right to take it into account.

[36] The final submission made under this head is that it was unreasonable for the Tribunal to disregard the risks to the appellant's father as a result of his age. However, the report from the father's general practitioner makes it clear that he is already aware that his son is facing a disciplinary case. It is not clear from this report what the further impact of publication will have on the father's health if the appellant is named. In fact, the report states that the appellant's father is [redacted]. I consider the Tribunal was right not to put too much weight on this report in assessing the risk to the appellant's father.

[37] The second private interest relied on by the appellant is the risk of harm to his practice. Although the appellant is not practising himself, he still owns the practice. Mr Waalkens submits that any stigma attached to the appellant will have an adverse impact on his practice and all that work there. The risk, he submits, is of irreparable financial harm. But there is little in the way to substantiate that risk. It is not at all clear that the ownership structure of the practice is transparent such that publication will result in an automatic link. And, the adverse impact arising from any such link is no doubt mitigated by the fact of the appellant's retirement. This factor deserves little weight in the overall balancing exercise.

Public interests

[38] The public interests at stake in name suppression cases were identified in *A v Professional Conduct Committee* as follows:[18]

(a) public protection;

(b) maintenance of professional standards; and

(c) transparency and accountability of the disciplinary process.

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[18] *A v Professional Conduct Committee* HC Wellington CIV-2018-485-81, 22 August 2018 at [36].

[39] The appellant submits that there is little public interest in the appellant's name being published. He says that the principle of public protection is not engaged in this case as the appellant has retired and he has undertaken to not recommence his practice. Accordingly, the public is not in any danger.

[40] I accept that the appellant's retirement mitigates the need for public protection to some degree. But that is just one of the relevant public interest principles, and the others are still engaged. The transparency and accountability of the disciplinary process is of key importance, particularly since the charge of professional misconduct was made out.[19] That principle serves more than just a public protection purpose. It protects the integrity of the disciplinary process, and as Moore J said in *Johns*, openness tends to advance the objectives of the Tribunal.[20]

[41] Mr Waalkens submits that this public interest can be met without naming the appellant, as the proceeding took place in an open forum, and the decision will be readily available to read online. He says the public do not need to know the identity of the person to understand that justice has been done.

[42] I do not agree. Openness means openness in its full sense. Transparency and accountability walk hand in hand. Those found guilty of misconduct must be held to account for their actions and part of that process includes being identified as the person who conducted themselves in that way.

[43] There is a related interest too – the risk of unfairly impugning other practitioners. I accept that this risk is somewhat mitigated by the fact that the appellant has retired, but that does not eliminate it entirely. Retired practitioners may also be unfairly impugned. And, the appellant's ongoing involvement with his practice (in whatever form that may take) also suggests that there may still be a risk of other practitioners being associated with this conduct, despite the appellant's retirement.

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19 As the Tribunal noted, publication tends to be given more weight when a charge of misconduct is made out.

20 *Johns v Director of Proceedings*, above n 13, at [178].

Balancing the competing interests

[44] As noted by the Tribunal, where a charge of professional misconduct has been proven the weight falls more heavily in favour of publication. The public interest principles outlined above are engaged directly. That is the case here.

[45] The potential harm to the appellant's daughter gives reason to be cautious in permitting publication of the practitioner's name, but the risks to the appellant's father and to the appellant's former practice add little substance to that risk. Those risks need to be considered cumulatively, but they also need to be weighed realistically and in context, and in light of the nature and gravity of the offending.

[46] On the basis of the information before the Court, I am not satisfied that the risks outweigh the public interest in the transparency and accountability of the disciplinary process. It follows that the Tribunal's decision to decline suppression was not in error. Looked at afresh, I have reached the same decision as the Tribunal, and this appeal ground must be dismissed.

Costs

[47] Under s 101 of the HPCAA, the Tribunal may order a health practitioner to pay part or all of the costs and expenses of and incidental to the PCC's inquiry in relation to a charge, including the investigation, prosecution and hearing of that charge. As the Tribunal noted in its decision, the rule of thumb for the Tribunal is to take 50 per cent of the total reasonable costs as its starting point and then increase or decrease that percentage depending on the individual case.[21]

[48] The first step in determining costs is to fix reasonable costs. In this case, the PCC's actual costs were $136,274 but the Tribunal considered reasonable costs to be $90,000. Mr Waalkens submits that a reasonable figure should have been no more than $70,000 drawing on four Tribunal cases for comparison purposes.

[49] The Tribunal considered these four cases and concluded that the PCC prosecution costs were more than for other recent four-day defended hearings of a

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[21] *Penalty Decision*, above n 1, at [35] and [36].

similar nature. It also accepted that some of the costs would have been incurred in relation to particulars of the charge that were not established, although it did not consider that a discount of any more than 10 per cent could be justified for that factor. The Tribunal said that the sum of $90,000:[22]

> … provides for appropriate consistency with costs in other cases of a similar nature, while acknowledging there may have been some additional features for the PCC in this case.

[50] Although the "additional features for the PCC" are not expressly referred to in the decision, it may be safely inferred that they included the additional costs incurred by the PCC due to the appellant's repeated requests for extensions and delays, and a prosecution which was not entirely straightforward.[23]

[51] The appellant says that his costs relating to the penalty decision were increased due to the PCC's failure to adequately particularise the costs sought, and the Tribunal failed to take this into account. It is clear from the decision, however, that the Tribunal was alive and sympathetic to this issue. The Tribunal endorsed comments made by a full bench of the High Court in *Kaye v Auckland District Law Society* to the effect that detailed and particularised accounts fully informing a practitioner of the work actually done, by whom, and at what rate, should be provided.[24]

[52] It is correct that the Tribunal did not make an express adjustment for this factor in its decision. Mr Waalkens is critical of the Tribunal's observation that it is not its role to make a detailed analysis of costs claimed.[25] However, the Tribunal went on to identify its role as involving a "broad assessment of what are fair and reasonable costs to be ordered against a practitioner" and identified a key consideration as follows:[26]

> The Tribunal considers it is important that we balance the need to ensure that costs in a disciplinary jurisdiction do not become so prohibitive that health practitioners become weary of defending themselves while still acknowledging that if practitioners opt to do so and are unsuccessful they must expect to meet the consequences of this decision.

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22 At [57].
23 At [46](a) and (c).
24 At [49] to [51]. Quoting from *Kaye v Auckland District Law Society* [1998] 1 NZLR 151 (HC).
25 At [58].
26 At [58].

[53] I endorse those observations. Although an express reference to increased costs caused by the PCC's failure to provide a breakdown at the outset was not made by the Tribunal, this factor was just one of the many taken into account in the broad-brushed assessment of costs.

[54] This passage also answers Mr Waalkens' submission that the Tribunal erred in failing to take into account that the appellant was entitled to defend the charge; other practitioners should not be deterred from doing so; and that costs should not be at a level that they end up being in the nature of a penalty or to punish. I am satisfied that all these factors were taken into account by the Tribunal in fixing the sum of $90,000 as a reasonable figure, and applying a standard 50 per cent by way of contribution.

[55] Finally, Mr Waalkens says that the Tribunal found that the appellant was entitled to a 10 per cent reduction for successfully defending particulars of the charge, but failed to take that into account. Read in its entirety, I consider the Tribunal took this factor into account in fixing the reasonable costs of $90,000. That is, the reasonable sum fixed only relates to those particulars of the charge established by the PCC. To apply a further discount to this sum would result in the same factor being accounted for twice.

[56] To sum up, the Tribunal clearly took into account all relevant considerations and balanced them appropriately. There is no error in the Tribunal's approach and no reason to suggest that the $90,000 figure adopted was excessive, or that the 50 per cent contribution should have been less. This appeal ground must also be dismissed.

Confidentiality of costs information

[57] The final ground of appeal relates to the Tribunal's confidentiality order relating to the hours spent and rates disclosed by the PCC in relation to the proceeding.

[58] The Tribunal rejected a challenge to its jurisdiction to make this order and ruled that the order was appropriate, but:[27]

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[27] At [69].

> … it is not intended to prevent the parties from referring to the discussion of costs set out in this decision or past or future cases in which submissions have been made in open Tribunal or court on costs.

[59] Ms Beattie, who addressed this part of the submissions, did not take issue with the Tribunal's jurisdiction to make this order. Rather, she submitted that the decision was wrong, because publication of this type of information is important to the development of the Tribunal's jurisprudence regarding costs orders. Further, she submitted, that publication will ensure consistency in the costs orders made by the Tribunal which will enhance transparency too.

[60] The respondent challenges the basis of appeal from such an order, pointing out that it does not appear to be an order made by the Tribunal under s101(2)(b) of the Act.

[61] Whether there is jurisdiction to challenge this order or not, I am satisfied that it was properly made. I am not persuaded that making the specific costs information in this case more widely available will contribute to the development of the Tribunal's costs jurisprudence. Each case is highly fact specific so that factors such as the costs incurred, personnel used, and charge-out rates will differ from case to case.

[62] In any event, if it appears that this information is likely to provide some form of assistance in another case, then an application for disclosure of that information may be made at that time. That is a better process by which to ensure consistency in the Tribunal's costs awards. I am not persuaded that the Tribunal was wrong to limit access to the information in the way that it did.

Result

[63] The appeal is dismissed.

[64] I order:

(a) that the appellant's name be suppressed for the 20 working days in which he has to appeal this decision. If he does appeal, I order that

name suppression continue on an interim basis until determination of the appeal.

(b) that details of the health difficulties of the appellant's daughter and father be permanently suppressed.

[65] If the parties cannot agree on costs, then a memorandum in support of costs may be filed and served 15 working days after release of this judgment, with a memorandum in response filed and served 10 working days thereafter. Memoranda should not exceed 5 pages in length. Costs shall be determined on the papers unless otherwise ordered.

Edwards J

Counsel: Mr A H Waalkens QC and Ms S A Beattie, Barristers, Auckland

Solicitors: Vallant Hooker and Partners, Auckland
Mr J Coates and Ms B J Johns, Claro, Wellington