IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA171/2018
[2021] NZCA 94

BETWEEN	GRACE HADEN Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 11 March 2021

Court: Brown, Clifford and Goddard JJ

Counsel: Appellant in person
P D Marshall for Respondent

Judgment: 26 March 2021 at 11.00 am

JUDGMENT OF THE COURT

A The questions of law set out at [36] are answered at [57] of this judgment.

B The appeal is allowed.

C Ms Haden's convictions are set aside.

REASONS OF THE COURT

(Given by Goddard J)

Introduction and summary

The appeal before this Court

[1] In December 2017, Ms Haden was convicted in the District Court on five charges of breaching a suppression order made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (Tribunal) under the Lawyers and Conveyancers Act 2006 (Act).[1] The prosecution was brought on the basis that a suppression order had been made under s 240(1)(c) of the Act in a written decision of the Tribunal dated 24 November 2016 (the November 2016 decision).[2] Ms Haden defended the charges on the basis that no formal order under that provision had ever been made. Judge Adeane did not accept that argument. He entered convictions on the five charges.[3] Ms Haden's appeal to the High Court was unsuccessful.[4] Ms Haden sought leave to appeal to this Court. Leave was declined.[5]

[2] A charge in relation to breach of the same suppression order was subsequently laid against Mr Vincent Siemer. In the District Court, Mr Siemer was convicted of breaching a suppression order made by the Tribunal.[6] Mr Siemer's appeal to the High Court was unsuccessful.[7] However he was then granted leave to appeal to this Court,[8] and that appeal succeeded (*Siemer* (CA)).[9] This Court held that the Tribunal's November 2016 decision did not make it sufficiently clear that an order had been made under s 240 of the Act.[10]

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1 *Police v Haden* [2017] NZDC 28419 [District Court decision].
2 *Waikato Bay of Plenty Standards Committee No. 2 v Wells* [2016] NZLCDT 34 [November 2016 decision].
3 District Court decision, above n 1, at [11].
4 *Haden v Police* [2018] NZHC 498 [High Court decision].
5 *Haden v Police* [2018] NZCA 255 [First CA leave decision].
6 *Police v Siemer* [2018] NZDC 24353. Mr Siemer was charged under s 263 of the Lawyers and Conveyancers Act 2006 with the offence of contravening an order made under s 240.
7 *Siemer v Police* [2019] NZHC 1346.
8 *Siemer v Police* [2019] NZCA 574.
9 *Siemer v Police* [2020] NZCA 178 [*Siemer* (CA)].
10 At [32].

[3] When Ms Haden became aware of the outcome in *Siemer* (CA), she applied for recall of this Court's first leave decision (First CA leave decision) and for leave to appeal to this Court. Those applications were granted.[11]

Summary

[4] We agree with the conclusion reached by this Court in *Siemer* (CA) that the Tribunal did not make an order under s 240 of the Act in the November 2016 decision. The position appears to be that a s 240 order was made orally at the penalty hearing before the Tribunal on 8 November 2016; the November 2016 decision set out the Tribunal's reasons for making that order but did not itself contain a s 240 order.

[5] There is force in the Crown's submission that although the November 2016 decision did not make a s 240 order, it evidenced the prior making of a s 240 order. The November 2016 decision did not expressly say that a s 240 order had been made orally at the hearing on 8 November 2016. But arguably it is implicit in the November 2016 decision, read in context, that such an order was already in existence. Be that as it may, Ms Haden's trial in the District Court proceeded on the basis that the relevant suppression order had been made in the November 2016 decision. There was no reference at the trial to an order being made orally on 8 November 2016. It would be a miscarriage of justice for Ms Haden's conviction to stand in circumstances where neither the date on which the order was made, nor the terms of that (oral) order, were in evidence at her trial. Ms Haden's conviction is therefore set aside.

Background

Disciplinary proceedings before the Tribunal

[6] These proceedings have their origin in disciplinary proceedings brought before the Tribunal against a lawyer, Mr Wells.[12] Mr Wells sought interim suppression of his name pending the hearing of disciplinary charges against him under s 240(1)(c) of

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11 *Haden v Police* [2020] NZCA 498 [Second CA leave decision].

12 Mr Wells has since died, and the grounds for suppression no longer apply to him. We do not suppress his name in connection with this judgment.

the Act, which provides that the Tribunal may make an order prohibiting the publication of the name or other details of the person charged:

> **240 Restrictions on publication**
>
> (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:
>
> …
>
> (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.

[7] On 25 July 2016, the Tribunal issued a written decision on interim name suppression (July 2016 interim decision) in which it concluded that the threshold for suppression had been reached.[13] Public interest considerations were outweighed by the factors identified by the applicant, including the fact that he had retired from practice, was in bad health, and had for some 10 years been "harassed through the courts, by a vexatious litigant".[14] The July 2016 interim decision did not contain any language expressly making an interim order under s 240 of the Act, but it was clear from that decision that the Tribunal considered that interim suppression should be ordered.

[8] On 6 September 2016, the Tribunal proceeded to hear the charges against Mr Wells. He was found guilty of one charge of negligence such as tended to bring the profession into disrepute.[15]

[9] The Tribunal then held a further hearing on 8 November 2016 to determine the penalties to be imposed in respect of that breach. At that hearing Mr Wells sought permanent suppression of his name under s 240 of the Act. At the end of the hearing the Tribunal conferred, then the Chair said:

> Alright [Mr Wells] we have been able to reach a consensus about the penalty orders that ought to be imposed. We have determined that we can stop short of suspension. And instead we will be imposing a Censure which you will

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13 *Waikato Bay of Plenty Standard Committee No. 2 v W* [2016] NZLCDT 19 at [9].
14 At [3]–[5].
15 *Waikato Bay of Plenty Standards Committee No. 2 v M* [2016] NZLCDT 24 at [1].

> receive in written form. Fine of $5,000. An order that you refund the fee of $3,648.94. We decline to reimburse by way of compensation Mr P's fees and we'll give reasons for that. We are ordering a contribution to the Standards Committee's costs in the sum of $15,000. There will be an order against the New Zealand Law Society for the s 257 Tribunal costs which will be certified in due course but probably are in the region of about $7,000. And there will be an order that [Mr Wells] fully reimburse the s 257 costs also, to the Law Society. And name suppression will be granted.

[10] On 24 November 2016 the Tribunal issued the November 2016 decision, which was headed "Reasons of the Tribunal for Decision on Penalty". We set out in full the Tribunal's discussion of name suppression:[16]

> [22] The reasons for interim name suppression are set out in our interim decision of 25 July 2016.
>
> [23] The Standards Committee submit that the public interest in openness of the disciplinary process demands that the practitioner's name be published.
>
> [24] We accept that an adverse finding means that the threshold for suppression is higher than at an interim stage.
>
> [25] Mr Davey accepted the decisions of *H* and *ABC*. Both allowed permanent suppression in cases where the practitioners had serious health concerns. In the latter case the likely detriment to the practitioner's mental health had been certified by a psychiatrist. Mr Davey submits that, in the absence of a certificate from a psychiatrist, the Tribunal ought not to be satisfied in this regard. In the *H* matter both psychological and physical health problems were involved and the serious adverse consequences which might be suffered by the practitioner were his name published, tipped the balance against publication in that matter.
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> [26] In the present case there is ample information before the Tribunal to accept that there are both psychological and physical health conditions at a serious level. In addition to that, as referred to in our interim decision, the practitioner has in the past been pursued by a litigious and irrational person who might be expected to re-engage in a campaign against the practitioner should the present matters come to that person's attention.
>
> [27] The litigation pursued by this person has been the subject of adverse judicial comment at all levels.
>
> [28] Given that there is no risk to the public posed by this practitioner in the future, *we consider that the combination of factors referred to above do, in this unusual set of circumstances, justify the permanent name suppression of the practitioner, his former client and any identifying details*.

[11] Ms Haden was the person whom the Tribunal identified at [26] of its decision as litigious, and potentially re-engaging in a campaign against Mr Wells.

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16 November 2016 decision, above n 2 (footnotes omitted and emphasis added).

[12] It appears that the Tribunal's November 2016 decision was published, with the name of the practitioner anonymised as "Mr M", on the Ministry of Justice website.

[13] Shortly after the November 2016 decision was delivered, the New Zealand Law Society (NZLS) published on its website the following statement (the NZLS statement):

> Name suppression granted to censured lawyer
>
> *28 November 2016*
>
> The New Zealand Lawyers and Conveyancers Disciplinary Tribunal has found a lawyer guilty of negligence or incompetence of such a degree as to reflect on his fitness to practise or as to bring the profession into disrepute. The lawyer has been granted permanent name suppression.
>
> The lawyer, Mr M, had been friends with the complainant for over 40 years and she appointed him as her attorney under an Enduring Power of Attorney (EPA) after consulting her own lawyer. Mr M did not understand that in acting as attorney, as well as being Chair of the local branch of a charity to which the complainant would make donations, he was placing himself into a position of divided loyalties.
>
> …

Ms Haden's blog posts

[14] On 18 April 2017 Ms Haden posted a blog on her website "Transparency New Zealand". The blog reproduced the NZLS statement. Alongside the "Name suppression" banner Ms Haden identified the practitioner:

> While researching a lawyer I had cause to look at the list of lawyers who have been censured … by the Law Society. I came across one item 'Name suppression granted to censured lawyer' everything about it screams Neil Wells to me.

[15] Ms Haden posted further blogs on 9 May 2017 and 17 May 2017 identifying Mr Wells and providing links to the NZLS statement and to her original blog post on 18 April 2017.

[16] On 22 May 2017 Ms Haden was cautioned by police: any further blog posts would constitute further breaches of the suppression order. Shortly afterwards, Ms Haden again posted a blog post providing links to her previous blog posts and naming Mr Wells.

[17] On 24 May 2017, Ms Haden appeared in the Napier District Court and was remanded on bail. That day she blogged again, identifying Mr Wells and providing a link to a letter dated 4 May 2017 from the Tribunals Unit to the Office of Legal Counsel, Ministry of Justice. The purpose of the letter was to refer to the Ministry a complaint made by Mr Wells that Ms Haden had breached the Tribunal's suppression order.

The charges against Ms Haden

[18] Charges were brought against Ms Haden under s 263 of the Act:

> **263 Publication**
>
> (1) Every person commits an offence who, without lawful excuse, acts in contravention of any order made by the Disciplinary Tribunal under any of paragraphs (a) to (c) of section 240(1).
>
> (2) Every person who commits an offence against this section is liable on conviction to a fine not exceeding $25,000.

[19] The five charging documents all contained the same description of the offence charged:

> WHILE A SUPPRESSION ORDER WAS IN PLACE PUBLISHED THE NAME OF THE PERSON WHO HAD BEEN GRANTED NAME SUPPRESSION.
>
> Lawyers and Conveyancers Act 2006 section 240(1)(c) and 263(1) and (2).

[20] The summary of facts described the relevant s 240 order as follows:

> On the 24th of November 2016 Judge D F CLARKSON panel chair, made an order that the names of the practitioner and the practitioner's former client, be permanently suppressed.

[21] The summary of facts went on to identify the five blog posts that were alleged to have breached the name suppression order granted by the Tribunal.

District Court trial

[22] The District Court trial took place before Judge Adeane on 11 December 2017. The July 2016 interim decision and the November 2016 decision were produced as exhibits. The evidence before the District Court did not include a transcript of the

penalty hearing on 8 November 2016. It was not suggested by the prosecution that a suppression order had been made orally at that hearing. Rather, the trial proceeded on the basis that the prosecution alleged that a suppression order had been made in the November 2016 decision.

[23] The District Court Judge quoted from [58] of the Tribunal's November 2016 decision, and noted that there had been an earlier order on 25 July 2016.[17]

[24] The Judge did not accept Ms Haden's argument that no formal order under s 240 had ever actually been made. He considered that the appropriate interpretation of both the July 2016 interim decision and the November 2016 decision was that the power under s 240(1)(c) had been exercised to prohibit the publication of the name of a particular person charged before the Tribunal.[18]

[25] The Judge also rejected Ms Haden's argument that she was not specifically told of the provision under which the order had been made, saying:

> [8] … I am quite satisfied that that order is to be deduced from the text of the Tribunal's decision. What else could it possibly mean? Ms Haden chose to ignore it on the semantic basis that an order was something which was presumably reduced into a formal certificate and had to be served to be effective (against whom is less clear).
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> …
>
> [11] The long and short of it is that, with clear knowledge that the Lawyers & Conveyancers Tribunal had restricted the public dissemination of material which had come before it, Ms Haden defied that restriction by making matters public as she did. Those matters being established, the charges are proved to the required standard.

[26] The Judge imposed fines on each charge of $1,000 and awarded court costs of $130 and witness expenses of $500.[19]

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17 District Court decision, above n 1, at [3].
18 At [4].
19 At [14].

High Court appeal

[27] On appeal to the High Court Ms Haden advanced a number of arguments, including:

(a) The decision of the Tribunal on interim name suppression lacked a specific order and appeared to grant suppression to the anonymous person Mr W by some undefined means.

(b) The police had failed to produce an order made under s 240 in the name of Mr Wells. Ms Haden had been charged with contravening a "secret order" which was not in the public realm and which was silent as to the specific statutory power pursuant to which suppression was granted.

(c) The wording of the charging document was defective because it referred to suppression orders, when that was not the language of s 240 of the Act.

[28] Clark J considered that the November 2016 decision contained an order made under s 240(1)(c):[20]

> [21] The Tribunal's interim name suppression decision specifically records the fact the application for name suppression is grounded in s 240(1)(c) of the Act. The nine-paragraph decision contains the Tribunal's assessment and determination of the application for interim name suppression. The decision expressly states "the threshold for suppression has been reached". The decision is signed, dated and bears the seal of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. Manifestly, the decision is in exercise of the Tribunal's power to make an "order prohibiting the publication of the name or any particulars of the affairs of the person charged".
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> [22] Similarly, in its substantive decision the Tribunal discusses under the heading "Name Suppression" its interim decision and the circumstances ultimately justifying "permanent name suppression of the practitioner, his former client and any identifying details".

[20] High Court decision, above n 4 (footnotes omitted).

[29] Clark J considered that Ms Haden was not able to shield herself from the consequences of her breach by mounting a technical argument that the Tribunal did not make a formal "order".[21]

[30] The Judge also rejected Ms Haden's argument that the charging document was ambiguous and inadequate. The charges contained sufficient particulars to fully and fairly inform Ms Haden of the substance of the offence she allegedly committed. Each charge referred to the enactment creating the offence. The charging documents therefore met the statutory requirements.[22]

[31] Ms Haden's other arguments were also rejected, and the appeal was dismissed.

Ms Haden's first application for leave to appeal to this Court

[32] Ms Haden's application for leave to appeal to this Court in 2018 sought leave to advance arguments that:[23]

(a) The Tribunal did not make a specific order granting name suppression. The order was "being applied to an anonymous person by undefined means".

(b) The form of the charging documents was incorrect.

(c) There was no proper basis for the charges laid against her.

[33] This Court declined the application for leave to appeal, saying:

> [6] Ms Haden's arguments were rejected in the Courts below. We agree with their reasoning. The Tribunal is clearly empowered to make suppression orders which suppress the identity of those who appear before the Tribunal. Such orders do not require any specific form. Here the Tribunal's decision identifies the subject of the suppression order as well as the basis for making it.
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> [7] We agree with Clark J that the form of the charging documents gave Ms Haden adequate notice of the charges she faced. There is no question of non-compliance with the requirements of the Criminal Procedure Act.

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21 At [27].
22 At [31].
23 First CA leave decision, above n 5, at [5].

> [8] We find Ms Haden's argument there was no proper basis for laying the charges against her to be misconceived. There was sufficient evidence to support the findings of guilt reached by Judge Adeane and affirmed by Clark J. The first post referred directly to the suppression order and then suggested (correctly) who the subject practitioner might be. The subsequent posts referred back to the first post, thus compounding the first breach of the suppression order.
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> [9] In conclusion, we are satisfied none of the arguments which Ms Haden advances raises a matter of general or public importance. All the issues Ms Haden raises are case-specific. Nor do Ms Haden's arguments suggest a miscarriage of justice has occurred or may occur if the proposed appeal is not heard.
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> (Footnotes omitted.)

This Court's decision in Siemer (CA)

[34] As noted above, this Court granted leave to bring a second appeal in relation to charges that Mr Siemer had breached a suppression order made in the November 2016 decision.[24]

[35] This Court allowed Mr Siemer's appeal, finding that the Tribunal had not made a suppression order with sufficient clarity to found a prosecution against Mr Siemer.[25] This Court was not persuaded that an order under s 240 of the Act had been made in the Tribunal's written reasons decision:

> [25] It is arguable that an order was made at the conclusion of the penalty hearing on 8 November, when the chairperson stated that "name suppression will be granted". An order pronounced orally by the chairperson in the presence of the Tribunal members sitting would comply with reg 34, and it would bind those with notice of it, including Mr Siemer had he been present.
>
> [26] However, the case was not argued in that way, for good reason. The Tribunal evidently intended that the orders would be made in its written reasons for decision. As noted above, the written reasons did not state that they recorded orders already made. And it is not suggested that Mr Siemer attended the hearing on 8 November. The police relied on the written reasons to establish that he had notice of the order, so establishing the mental element of the offence under s 263. We accordingly put any orders pronounced on 8 November to one side. We approach the appeal, as counsel did, on the basis that if an order was made at all, it was made in the written reasons of 24 November. This is a point of some moment in this case, as we explain below.
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> …

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24 *Siemer v Police*, above n 8, at [11].
25 *Siemer* (CA), above n 9, at [32].

> [32] In our view the Tribunal's decision did not make it sufficiently clear that an order had been made. It did not say so in as many words. The conclusion that an order was made rests on an inference founded only on its decision that grounds for an order had been made out, but a decision is logically antecedent to an order. Mr Hodge pointed to the fact that Mr Wells's name was anonymised, but that need not evidence a suppression order. Anonymisation can be an alternative to suppression, used for example to limit publication of information in which there is a legitimate privacy interest.
>
> (Footnote omitted.)

Ms Haden's second application for leave to appeal to this Court

[36] As noted above, Ms Haden then applied for recall of the First CA leave decision and for leave to appeal to this Court. The First CA leave decision was recalled, and leave was granted on the following questions:[26]

> (a) Did the High Court err in *Haden v Police* [2018] NZHC 498 in finding the Tribunal's decision was sufficient to constitute an order under s 240 of the Lawyers and Conveyancers Act in the circumstances of this case?
>
> (b) If the answer to the question in (a) is answered in favour of Ms Haden, should her convictions be quashed?

Submissions on appeal

Ms Haden's submissions on appeal

[37] Ms Haden submitted that this Court has now found that no order suppressing publication of Mr Wells' name was made under s 240 of the Act in the November 2016 decision. The Courts below had erred in failing to accept her submission that no s 240(1)(c) order existed. So her conviction should be set aside.

[38] Ms Haden also argued that in the November 2016 decision, the Tribunal referred to the reasons for making a "suppression order". But that is not the language of s 240. The Act does not provide for the making of "suppression orders" as such. The language used by the Tribunal, and in the NZLS publication, was insufficient to convey to her or to any other reasonable reader that an order had been made under s 240 of the Act. She had done some research and had concluded in good faith that the Tribunal had not exercised any power that would prevent her from drawing on

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[26] Second CA leave decision, above n 11, at [16].

information available to her from other sources to identify Mr Wells as the practitioner who was the subject of the Tribunal's decision.

Crown submissions on appeal

[39] The Crown submitted that the better view was that an order under s 240 was made orally by the Tribunal at the penalty hearing on 8 November 2016. The November 2016 decision recorded the Tribunal's reasons for making that order.

[40] Mr Marshall, who appeared for the Crown, accepted that the Tribunal's November 2016 decision did not itself make a s 240 order. However, he submitted that it evidenced the prior making of such an order. The November 2016 decision did not expressly state that a s 240 order had been made on 8 November 2016. But the making of such an order at an earlier (unidentified) date could be inferred from the language used in the November 2016 decision.

[41] Mr Marshall submitted that the charging documents were expressed in general terms that were not tied to the Tribunal's November 2016 decision. Although the oral decision from 8 November 2016 was not in evidence before the District Court, it was sufficiently evidenced by the Tribunal's November 2016 decision that the making of a suppression order had been established beyond reasonable doubt.

[42] Mr Marshall submitted in those circumstances the first question in respect of which leave had been granted should be answered "yes": the Tribunal's November 2016 decision was not sufficient to constitute an order under s 240 of the Act in the circumstances of this case. However, because the Tribunal's November 2016 decision evidenced the making of such an order, Ms Haden's convictions should not be quashed: the answer to the second question should be "no".

Discussion

[43] As this Court emphasised in *Siemer* (CA), the fact that an order has been made under s 240 of the Act must be clear to a reader of the decision (or, we would add, to a person present at a hearing at which such an order is made orally).[27] In this case, the

[27] *Siemer* (CA), above n 9, at [30].

language used by the Tribunal in determining the applications before it for interim and final orders under s 240 lacked the clarity that is desirable when exercising a power of that kind.

[44] No specific form is required for an order under s 240, as this Court observed in the first CA leave decision.[28] But where an order is made under s 240, it is desirable that this be done explicitly in language that conveys, in as many words, that an order is being made there and then. As the different reasoning and outcomes in the earlier decisions involving Ms Haden and this Court's decision in *Siemer* (CA) illustrate, stating that such an order is justified, or that such an order "will be" made, can (depending on context) leave room for confusion about what exactly the Tribunal is doing and whether the power is actually being exercised at that time. Hence the uncertainty in this case about whether an order had been made on 8 November 2016, or merely foreshadowed at that time, and the differing conclusions reached by the courts about the effect of the November 2016 decision.

[45] It would have been preferable for the Tribunal to expressly state, both in the body of the relevant decision and in an order band or a separate results section at the end of the decision, that it was making the relevant order. It would also have been preferable for both the interim and final s 240 orders to refer expressly to s 240 of the Act, to track more closely the language of s 240 (which refers to prohibiting publication rather than to "suppression" as such), and to set out the precise terms of the relevant prohibition (in particular, what could not be published and the duration of the prohibition).

[46] The July 2016 interim decision did not expressly state that an order was made under s 240 prohibiting publication of Mr Wells' name or other identifying particulars pending the hearing of the charges against him. But we accept that despite the absence of any explicit statement to that effect, a reasonable reader of that decision would conclude that an interim order had been made under s 240 prohibiting publication of Mr Wells' name pending the hearing of the charges against him.

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[28] First CA leave decision, above n 5, at [6], set out at [33] above.

[47] We also accept the Crown's submission that an order under s 240 was made orally on 8 November 2016. It appears that some aspects of that oral decision were intended to be operative orders with immediate effect: for example, the reference to the fine and to a contribution to the standards committee's costs. Other aspects of the Chair's oral decision are more naturally understood as looking ahead to orders to be made in a subsequent written decision. But it seems to us that taken in context, the statement that "name suppression will be granted" is best understood as an immediate order under s 240. The use of the future tense is not decisive. A reasonable person who was present at the hearing and heard the Chair's comments would understand that there was a prohibition in place on publication of Mr Wells' name, with immediate effect.

[48] In *Siemer* (CA), this Court noted that it was arguable that a suppression order had been made orally on 8 November 2016. But the appeal was not argued in that way: it proceeded on the premise that no order was made on that date. This Court identified, in obiter, three reasons for that approach:[29]

(a) The Tribunal "evidently intended that the orders would be made in its written reasons for decision".

(b) The November 2016 decision did not state that it recorded orders already made.

(c) It was not suggested that Mr Siemer had attended the hearing on 8 November 2016. The November 2016 decision was relied on by the police to establish that Mr Siemer had notice of the order.

[49] We agree that where orders have been made orally and a subsequent written decision simply records the reasons for those orders, it is good practice (and, we think, normal practice) for the written reasons to expressly record the fact that certain orders have already been made, and to record the terms of those orders. The omission to do this in the November 2016 decision contributed materially to the difficulties encountered in this case. The view we have reached about what the Tribunal must

[29] *Siemer* (CA), above n 9, at [25] and [26].

have intended to do on 8 November 2016 differs from the view expressed, in obiter, in *Siemer* (CA), which in itself illustrates the room for reasonable disagreement about that issue caused by the lack of clarity in the oral remarks made on that date, and in the subsequent written decision.

[50] If an oral order was made under s 240 on 8 November 2016, it is easier to understand the absence of any operative language making an order in the Tribunal's November 2016 decision. We agree with the view expressed by this Court in *Siemer* (CA) that the November 2016 decision does not clearly make an order under s 240. That is probably because it looks back to an order that has already been made and does no more than explain the reasons for the (prior) making of that order.

[51] There is considerable force in the Crown's submission that it is implicit in the Tribunal's November 2016 decision that a s 240 order has previously been made. It would make no sense at all for the Tribunal to explain why a s 240 order should be made, then fail to go on and actually make such an order, unless such an order was already in existence. A reasonable reader would not think that the Tribunal was engaging in an abstract discussion about the desirability of a s 240 order in its November 2016 decision. Nor is there anything in that decision to suggest that the Tribunal was contemplating making such an order at some future time. A reader might wonder if the Tribunal had, by oversight, failed to make the order it had identified as justified and appropriate. But that would be a surprising conclusion that would give a reasonable reader some pause. The alternative explanation — that a s 240 order had previously been made, and all that was happening in this written decision was that the reasons for that order were being set out — is more appealing.

[52] However, this conclusion depends on a high degree of contextual and inferential reasoning about what the Tribunal must have had in mind. There is, as already noted, no express reference in the Tribunal's November 2016 decision to an earlier oral order. We do not consider that the Tribunal's November 2016 decision, without more, establishes beyond reasonable doubt that a s 240 order had previously been made. Nor, obviously, does it shed any light on when such an order was made, or on the precise terms of that order, which are not recited at any point in the Tribunal's November 2016 decision.

[53] We are not attracted by the Crown's argument that Ms Haden's conviction can be sustained on the basis that the s 240 order made on 8 November 2016 had been adequately proved before the District Court, in circumstances where:

(a) There was no reference at all during the District Court trial to the making of an oral order on 8 November 2016.

(b) The summary of facts, and the entire prosecution case, proceeded on the basis that such an order had been made in the Tribunal's written decision delivered on 24 November 2016.

[54] It follows that the prosecution failed to establish an essential element of the charges against Ms Haden at the District Court trial.

[55] We add that we are not attracted by Ms Haden's argument that the reference to "suppression orders" was insufficient to put her on notice that an order had been made under s 240. More specifically, we do not accept that use of this language by the Tribunal:

(a) Meant that an order had not been made under s 240 of the Act. We do not consider that a reference to a suppression order in the context of these Tribunal decisions can reasonably be understood as anything other than a reference to a s 240 order. If the Tribunal had said in its November 2016 decision that it granted a suppression order in relation to Mr Wells' name and identifying particulars, that would have been sufficient to constitute a s 240 order.

(b) Could provide a lawful excuse for non-compliance with the order, for the purposes of s 263. We are not attracted by Ms Haden's argument that there was room for uncertainty about whether the s 240 power had been exercised because that provision does not refer to "suppression", and that she could reasonably proceed on the basis that there was no prohibition on publication of Mr Wells' name. If she was in any doubt about the position, she should have sought legal advice before

proceeding to publish Mr Wells' name. She could also have applied to the Tribunal for an order clarifying (or modifying) the scope of the orders it had made.

[56] More generally, we note that ignorance of the existence or terms of a s 240 order will not of itself amount to a lawful excuse for the purposes of s 263. Offences of breaching suppression orders under the Criminal Justice Act 1985 have long been regarded as imposing strict liability: *Karam v Solicitor-General*.[30] The "without lawful excuse" element in the s 263 offence means that it is not a true strict liability offence. Thus, for example, a defendant will have a defence if they took all reasonable care and made all reasonable inquiries and reasonably believed that there was no s 240 order in place: that would amount to a lawful excuse. But simple ignorance of a s 240 order, without more, would not amount to a lawful excuse. Nor would a claim that a person did not understand a "suppression order" to be an order under s 240 of the Act be sufficient to found a defence under s 263.

Result

[57] We answer the questions in respect of which leave was granted as follows:

(a) Did the High Court err in *Haden v Police* [2018] NZHC 498 in finding the Tribunal's decision was sufficient to constitute an order under s 240 of the Lawyers and Conveyancers Act in the circumstances of this case?

Yes.

(b) If the answer to the question in (a) is answered in favour of Ms Haden, should her convictions be quashed?

Yes.

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[30] *Karam v Solicitor-General* HC Auckland AP 50/98, 20 August 1999 at 8; see also *Adams on Criminal Law — Criminal Procedure* (loose-leaf ed, Thompson Reuters) at [CPA211.03].

[58] The appeal is allowed.

[59] Ms Haden's convictions are set aside.

Solicitors:
Crown Law Office, Wellington for Respondent