NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 37

LCDT 021/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE 2** Applicant
AND	**Mr G** Respondent

DEPUTY CHAIR

Dr J Adams

On the papers

DATE OF DECISION 23 August 2023

COUNSEL

Mr P Collins for the Standards Committee

Mr C Stevenson for the Respondent Practitioner

DECISION OF DEPUTY CHAIR
STIPULATING MANNER OF COMPLIANCE WITH WITNESS SUMMONSES

[1] In these disciplinary proceedings, the Tribunal has issued witness summonses pursuant to cl 6 of sch 4, Lawyers and Conveyancers Act 2006. The issue of those summonses gives effect to an appellate decision of the High Court in this case.[1] The summonsed witnesses are not parties to these proceedings. As permitted by cl 6(3)(c), the summonses require the witnesses to bring documents of a nominated class (or classes) to the hearing.

[2] This is a vexed case. As the High Court Judge recently observed about the nature and scope of this dispute:

> [76] However, context is everything. It is plain from reading the affidavits that the present proceedings are simply the latest iteration in a long and bitter inter-sibling dispute. It is also apparent, taking some of the documentary evidence at its face, that Z's allegations and actions relative to her brother, his family and their parents are strongly refuted by X and will require exploration at the hearing….

[3] In this case, facts are keenly at issue and feelings run high. (I am not referring to counsel whose demeanour has been professional.) It is no surprise that a fresh layer of dispute has emerged. That dispute concerns the way in which document production will occur. This tricky issue, novel, if little, surfaced during a case management conference. I have received written submissions.

[4] It is a gatekeeping issue. Mr Stevenson submits that, because the summonses were issued at the request of the practitioner, the requisite documents should be available to him first, and it should be his call whether any document is produced in evidence. He adds that the Standards Committee has already made its call on what documents it regards as relevant, and it should not be allowed to revisit that strategic call. Mr Collins submits that procedural fairness requires that both counsel should have equal opportunity to review the documents.

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[1] *X v Y Standards Committee* [2023] NZHC 1446.

[5] The issues I consider, are:

- Is the summons procedure ultra vires in this case?
- Is pragmatic modification of the summons procedure ultra vires?
- What is the nature of these proceedings?
- Is the Standards Committee estopped from inspection?
- How should the produced documents be managed?

Is the summons procedure ultra vires in this case?

[6] Mr Collins raises concern whether the procedure adopted by the Tribunal in this case trespasses into the region of third party discovery. The Tribunal is a creature of statute, it has no inherent jurisdiction. Mr Collins refers to undisputed authorities[2] for the proposition that it has no general jurisdiction to order third party discovery.

[7] None of that can diminish the statutory authority for the cl 6 procedure. If the proposition were that the Tribunal cannot exceed the cl 6 procedure, I would agree. In this case, the High Court decision expressly authorised the issue of the summonses upon the basis that the material that might be obtained would serve a fair trial where both "reliability and credibility" of the complainant may become relevant.[3] The High Court Judge observed:

> … without access to and knowledge of the source material, counsel will be hamstrung in the extent they can explore the completeness of disclosure. It is a self-evident truism that counsel cannot cross-examine on matters they are unaware of. With nothing to contradict Z they will be largely bound to accept her answers. As a consequence, there is a real risk that an effective cross-examination will be compromised. The issuing of summonses will go a considerable way to reassuring both the defence and the Tribunal that all relevant matters have been disclosed and the principle of fairness is thereby enhanced. [4]

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[2] *Re Zhao* [2016] NZLCDT 16; *Deliu v Auckland Standards Committee 1 and National Standards Committee* [2015] NZHC 2199 (esp. at [28]; *Auckland Standards Committee 1 and the National Standards Committee v Deliu* [2015] NZLCDT 21 (esp. at [50]); *Re Orlov* [2013] NZLCDT 27 at [54].
[3] See above n 1 at [54].
[4] See above n 1 at [58].

[8] In short, the authority to issue these summonses has been tested on appeal. The ambit of the summonses has been prescribed by the outcome. Inferentially, the High Court has ruled that these summonses comply with cl 6. If the Standards Committee wished to test that, it should have sought to appeal the outcome. It is not proper to put that in issue in the Tribunal now.

Is pragmatic modification of the summons procedure ultra vires?

[9] But let's check. Has the Tribunal exceeded what cl 6 allows? Clause 6 of sch 4 provides:

> **Power to summon witnesses**
>
> (1) For the purposes of its proceedings, the Disciplinary Tribunal may, on its own initiative or at the request of a party, issue in writing a summons requiring any person—
>
> (a) to attend at the time and place specified in the summons and to give evidence; and
>
> (b) to produce any papers, documents, records, or things in that person's possession or under that person's control that are relevant to the proceedings.
>
> (2) The Tribunal may require a person producing any of the things listed in subclause (1)(b) to do so under oath or affirmation, by statutory declaration, or by other means.
>
> (3) The power to issue a witness summons may be exercised by the Tribunal, the chairperson, the deputy chairperson, the chairperson of a division, or any officer of the Tribunal purporting to act at the direction or with the authority of the Tribunal or any of those persons.
>
> (3A) A witness summons must be in a form approved by the chief executive of the Ministry of Justice after consulting the Tribunal.
>
> (4) The Tribunal may—
>
> (a) require a copy of anything that is produced to be provided to any person appearing at the hearing; and
>
> (b) impose any terms and conditions on the provision of copies and the use that can be made of them.
>
> (5) For the purposes of subclause (1), **writing** includes—
>
> (a) the recording of words in a permanent and legible form; and
>
> (b) the recording of words by electronic means that can be retrieved and read; and
>
> (c) the display of words by any form of electronic or other means of communication that is subsequently recorded by electronic means and that can, by any means, be retrieved and read.

[10] In the course of his appellate decision, Moore J commented: "The power to issue a summons under cl 6 is expressed in the widest of terms. There are few words guiding the exercise of the power; nor are there any express constraints."[5]

[11] Clause 6 is clear that the summons is issued by the Tribunal, even where done at the request of a party. The issue of a summons can require either or both of two spheres of action: the witness must "attend … to give evidence"[6]; and "produce"[7] certain items "under that person's control that are relevant to the proceedings."[8] Both actions are engaged here.

[12] Pursuant to cl 6(4), the Tribunal may "require a copy of anything that is produced to be provided to any person appearing at the hearing" and "impose any terms and conditions on the provision of copies and the use that can be made of them." The former means the Tribunal can require sharing; the latter protects privacy and confidentiality.

[13] I am not troubled by the fact that the summons process in this case involves fishing. What may be produced is unknown to one side or the other or both. Documents within the target class(es) could be relevant, and the High Court has expressly sanctioned the ambits. The Tribunal has no general power to order third party discovery but, where the cl 6 process is used to elicit documents that could serve fair trial purposes, the Tribunal can, in my view, regulate the process in a practical manner. It would be silly, here, to require witnesses to come to the hearing, and to then undertake a sifting and sorting process "on the hoof." Impractical.

[14] Mr Stevenson proposes that, as counsel for the party who requested the summonses, the witnesses should be required to attend on a nominal date, and that inspection would take place. This would enable tidy preparation, better informed cases, and less inconvenience to witnesses. When Mr Stevenson suggests that "the jurisdiction [in cl 6(4)] is expressed in a way which is intended to enable flexibility" I agree. However, I think the statutory purpose intends to serve the Tribunal's

[5] See above n 1 at [45].
[6] Clause 6(1)(a).
[7] Clause 6(1)(b).
[8] Clause 6(1)(b).

proceedings, not only (as Mr Stevenson continued) to avoid frustration or impediment for Mr Stevenson's client.

[15] I find that to require summonsed witnesses to attend on a nominal date, with the expectation that their production obligations can there and then be satisfied, is pragmatic and efficient. It better serves the interests of justice, the convenience of parties, and the dignity of the proceedings than one that results in an unpredictable flood (or trickle) of documents in the course of a hearing, already in train. Avoidance of mayhem is sound management. I rule that the nominal date process falls within the ambit of cl 6(4)(a).

What is the nature of these proceedings?

[16] It is tempting to imagine disciplinary proceedings as quasi-criminal proceedings. There is often much at stake – livelihood, reputation, for example. The Standards Committee is a class of prosecutor. The charge is referred to as a "charge." The practitioner's professional reputation is generally entitled to be considered unblemished until the prosecutor's burden of proof has been discharged.

[17] But there are salient differences. The burden of proof is lesser (balance of probabilities) than in a criminal court. The practitioner does not appear as a lay defendant but as one already privileged by admission to the profession. The practitioner has no right to silence and can be expected to assist the enquiry. The relationship between a member of the profession and their regulating body is of a different nature to that between criminal defendant and Crown. Disciplinary proceedings bridge inquisitorial and adversarial models. The Tribunal enquires into the complaint by means of the charge procedure, taking its direction from the purposes of the legislation. Those purposes involve protection of the public and the reputation of the profession. Natural justice must, of course, apply.

[18] In the present case, the practitioner is an established practitioner with an international and national reputation. Although the allegations do not relate to what are termed "regulated services," his reputation could be smirched by adverse outcome. For him, the stakes are high. Nevertheless, he is not in the position of a defendant in criminal proceedings.

[19] A helpful way to regard this is to start from the purposes of the Lawyers and Conveyancers Act. The Tribunal must conduct its business to serve those purposes. The practitioner must get a fair hearing. I repeat that natural justice must be observed. Within that frame, he is entitled to confidentiality with his own counsel. But, like a party in civil proceedings, he has a duty to provide the forum with all unprivileged relevant documentation. It gives the public confidence in Tribunal processes if we avoid any appearance that a party might be in a position to suppress relevant material.

[20] Against this background, I prefer an even-handed process of dealing with new material that, by and large, neither party is entirely cognisant of.

Is the Standards Committee estopped from inspection?

[21] Provided, of course, that the Standards Committee is permitted to advance its hand. Mr Stevenson puts the view that the Standards Committee has already played its hand and should not be allowed to finger new cards (unless he says so). Mr Collins resists. The Standards Committee wants a chance to assess potential, new material and does not cede, to Mr Stevenson, sole say about what should be introduced into evidence or not.

[22] The process of inspecting material produced by summonsed witnesses is to assess relevance to the proceedings. Each party may perceive differing opportunities in a document. Neither should have a power of veto, in disciplinary proceedings. The purposes of the proceedings are best and most reliably met by both counsel having equal opportunity to inspect. It is possible that considerations of privacy or confidentiality may arise: if so, either party may wish to obtain a ruling under cl 6(4)(b).

[23] I find that the Standards Committee is not precluded from having an equal view of potential documents. One party or the other may have slight advantages of familiarity with some documents but, across the board, these should even out, and I see no need to tune the process finer.

How should the produced documents be managed?

[24] In order to obtain an even-handed approach, I remind both counsel that the process of inspection and selection is to serve the needs of the hearing, to elicit all

relevant material, and to ensure a fair hearing – this latter being a matter always of keen interest to the practitioner.

[25] I direct that all documents provided by summonsed witnesses for the nominal date (15 September 2023) shall be listed and copied to both counsel. For the sake of convenience, I direct that Mr Stevenson shall receive the documents first, and that they shall all be made available to Mr Collins within one week.

[26] Counsel should confer within one month of the nominal date and, one week later, advise the Tribunal of the extent of their common view, and set out any items requiring pre-trial attention by the Tribunal.

DATED at AUCKLAND this 23rd day of August 2023

Dr J Adams
Deputy Chairperson