NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 24

LCDT 016/10

IN THE MATTER	Law Practitioners Act 1982
BETWEEN	**NEW ZEALAND LAW SOCIETY (NELSON SECTION 356 COMMITTEE)** Applicant
AND	**MICHAEL JOHN GILBERT** of Nelson, Lawyer

CHAIR

Mr D J Mackenzie

MEMBERS

Mr W Chapman

Ms S Sage

Mr W Smith

Ms P Walker

HEARING at WELLINGTON on 23 and 24 May 2012

APPEARANCES

Mr P Whiteside for the Applicant

Mr R Lithgow QC and Ms N Levy for the Respondent

RESERVED DECISION OF THE TRIBUNAL

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Introduction

[1] This is an Application for Stay of professional disciplinary charges made by Michael John Gilbert in respect of seven charges of misconduct brought against him by the Nelson Standards Committee ('the Committee'). The seven charges of misconduct were laid pursuant to s 112(1)(a) Law Practitioners Act 1982.[1]

[2] The Application for Stay of the charges is made on the grounds:

[1] The conduct the subject of the charges against Mr Gilbert is alleged to have occurred prior to the coming into force of the Lawyers and Conveyancers Act 2006 on 1 August 2008. As a consequence this Tribunal is to hear the charges under the transitional provisions of that Act contained in Sections 353 and 358. Effectively the Tribunal is to hear and determine the charges as if the Law Practitioners Act 1982 had not been repealed, and for that purpose has the duties and powers of the former New Zealand Law Practitioners Disciplinary Tribunal.

> "…*that it would now amount to an abuse of process to begin a rehearing of the charges.*"

[3] The application refers to a "rehearing" because of the particular circumstances of the proceedings against Mr Gilbert. Another division of this Tribunal commenced hearing the charges in September 2011. That hearing had to be abandoned during its third day, following a difficulty arising in respect of a witness the Tribunal had required be called at the time the Committee was about to close its case.

[4] Following that abandonment Mr Gilbert applied for a Stay of any further hearing of the charges, which is the matter now before this Tribunal.

[5] The division of the Tribunal involved in the abandoned hearing has recused itself from dealing with this application. The basis for that recusal was set out in a Minute dated 2 April 2012 issued by the Chair of that division, Judge D F Clarkson.

[6] This division of the Tribunal convened to hear the Application for Stay in Wellington on 23 and 24 May 2012. At the conclusion of the hearing the Tribunal reserved its decision.

The Charges

[7] The seven misconduct charges Mr Gilbert faces, which he seeks to have permanently stayed, may be summarised as follows:

> Charge 1
> A charge that Mr Gilbert incorrectly witnessed a signature on three contracts said to be signed on behalf of Corporate Capital Investment Company Limited by Mr W Goodwin on 12 January 1998. It was alleged that the contracts were not in fact executed on that date - "the false attestation charge"

Charge 2

A charge that, in August 1999, Mr Gilbert failed to ensure, in the course of proceedings, disclosure to the Court of the fact that a public statement had been issued by the Securities Commission, warning against investments with a company known as Imperial Consolidated Securities SA. This allegation arose in respect of an *ex parte* application to the High Court at Dunedin for an interim injunction against Mr D Stewart on behalf of Imperial Consolidated Group PLC and Imperial Consolidated Securities SA - "the Stewart Case non-disclosure charge"

Charge 3

A charge that Mr Gilbert knowingly omitted to list two letters he had written, on 23 December 1998, when swearing a list of documents on 20 July 2000, and, repeated that regarding one of the letters and wrongly claimed privilege in respect of the other when swearing a further list of documents on 14 November 2000. These allegations relate to proceedings brought against Mr Gilbert by Mr D Hobbs in the High Court at Nelson - "the Hobbs Case documents charge"

Charge 4

A charge that, on 12 December 2000, Mr Gilbert knowingly omitted to list a number of documents and letters when swearing that a list of documents for Court proceedings was complete and correct. This allegation relates to proceedings brought by Imperial Consolidated Group PLC and Imperial Consolidated Securities SA against Mr D Stewart in the High Court at Dunedin - "the Stewart Case documents charge"

Charge 5

A charge that, on 13 September 2001, Mr Gilbert had committed perjury, by allegedly giving false evidence in the course of re-examination during the hearing of proceedings brought against Mr D Stewart by Imperial Consolidated Group PLC and Imperial Consolidated Securities SA, in the High Court at Dunedin. The false evidence alleged related to whether a company proposed to be incorporated in February 1998 was in fact a

separate entity from a company known as Corporate Capital Investment Limited which was incorporated about that time - “the Stewart Case perjury charge”

Charge 6
A charge that, on 12 October 2001, Mr Gilbert misled the High Court at Dunedin, by causing a memorandum to be filed with that Court in respect of the availability of information relating to the date of incorporation of Corporate Capital Investment Company Limited, a company incorporated in the Bahamas. This matter arose in respect of the proceedings brought against Mr D Stewart by Imperial Consolidated Group PLC and Imperial Consolidated Securities SA - “the Stewart Case misleading memorandum charge”

Charge 7
A charge that, on 30 October 2003, Mr Gilbert committed perjury, by giving evidence alleged to be false, in the course of re-examination, regarding the date he had faxed a letter signed by him and dated 12 January 1998, and, by swearing an affidavit on 23 December 2004, in which he was alleged to have falsely stated that three agreements signed and dated 12 January 1998 had been faxed by him on that date. These matters arose during the hearing of proceedings brought against him by Mr D Hobbs in the High Court at Nelson - “the Hobbs Case perjury charge”

Basis of Application

[8] The application by Mr Gilbert was made on the ground that it would be an abuse of process to allow the charges to proceed, and listed matters under six heads claimed to support that ground:

(a) that the principal protective purpose of disciplinary proceedings cannot be achieved;

(b) that delay has caused unfairness;

(c) the inability of evidence to meet the necessary standard of proof;

(d) that fair trial is not possible on some charges because the document/personnel trail is irretrievably broken;

(e) the inappropriate intervention of the Tribunal at a previous hearing of the charges; and,

(f) a range of various ancillary matters said to be relevant.

[9] As will be seen from these heads, and the discussion that follows, Mr Gilbert was claiming that continuation of the proceedings, of itself, would be unfair and prejudicial in all the circumstances, as well as claiming that specific matters prejudiced his ability to properly defend himself.

Submissions of the Parties on the Application

Protective purposes

[10] It was submitted for Mr Gilbert, in support of his Application to Stay, that the circumstances of these charges were such that the principal protective purposes of the Law Practitioners Act 1982 could not be achieved. In support of this proposition, the historic nature of the conduct the subject of the charges was noted, together with the fact that Mr Gilbert had ceased practising in November 2009.

[11] It was also submitted for Mr Gilbert that because the principal purpose of the disciplinary jurisdiction is a protective purpose, and that purpose was "*spent*" in this case, other circumstances favouring a stay could assume more prominence.

[12] In opposing the Application for Stay, the Committee noted that because Mr Gilbert could at any time reapply for his practising certificate, the protective purposes of the Law Practitioners Act remained applicable. It also said that a practitioner confronted with disciplinary proceedings should not be able to avoid proceedings by simply handing in his or her practising certificate and declaring retirement from practice.

Delay

[13] In respect of delay, Mr Gilbert claimed that the cumulative effect of delay at all stages made it now unfair to commence a second hearing.

[14] The submission for Mr Gilbert was that relevant delay had occurred both pre and post the decision to prosecute under the disciplinary provisions. The time-lines claimed to contribute to the delay in this matter were:

> May 2005: A legal practitioner in Nelson, Mr J M Fitchett, lodged a complaint about Mr Gilbert's conduct related to investments made through "Imperial Consolidated" and in relation to various proceedings in the High Court involving Mr D Stewart and Mr D Hobbs. Most of the conduct complained of relates to conduct alleged to have occurred between January 1998 and October 2001, with one charge relating to conduct alleged to have occurred in October 2003 and December 2004.
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> May 2005 to July 2009: Investigation of Mr Fitchett's complaint was undertaken by the relevant Complaints Committee.
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> August 2009: Determination was made to lay charges.
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> September 2010: Charges laid.
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> September 2011: Prosecution case heard, but the hearing was abandoned on its third day, immediately prior to the proposed close of the prosecution case. This was as a consequence of the Tribunal requiring evidence from an additional witness for the prosecution, Mr D Hobbs, whom the Tribunal wished to introduce to the prosecution case at that point in the hearing.

[15] The effects of the cumulative delay prejudiced Mr Gilbert it was claimed, and the entire period from May 2005, including the particular circumstances of delay,

should be considered by the Tribunal when assessing whether it would be unfair to now commence a second hearing.

[16] The Committee, in noting that Mr Gilbert relied on cumulative delay through the entire disciplinary process which commenced in May 2005 with a complaint by another legal practitioner, submitted that the only delay relevant to consider in the Application for Stay was that which occurred between the determination to lay charges in August 2009 and the actual laying of charges in September 2010.

[17] In respect of that period of thirteen months, the Committee said that it was constantly engaged in a bona fide attempt to obtain affidavits to support the charges following the decision to proceed against Mr Gilbert. It also noted that some of that delay during the thirteen month period concerned could be attributed to Mr Gilbert himself. As a consequence there was no delay sufficient to justify a stay arising from that period.

[18] The Committee also submitted that any delay prior to the first hearing should not be considered by the Tribunal in assessing the effects arising from delay, as Mr Gilbert had "waived" his right to apply for a stay on the basis of that delay once the first hearing of the charges commenced before the Tribunal in September 2011. Also, the Committee said, Mr Gilbert had not made a challenge prior to that hearing regarding the effects of delay up to that point.

[19] The Committee said that by embarking on a defended hearing of the charges before the Tribunal in September 2011, without protest regarding prejudice arising from delay, Mr Gilbert could not now expect any delay prior to that hearing to support his application. The Committee also submitted that but for the intervention of the Tribunal at that first hearing, when the Tribunal required that Mr Hobbs be called to give evidence, the hearing of the charges would have been concluded and the question of stay would not have arisen. The Committee noted that it had no responsibility for the delay which had occurred since September 2011.

Inability of evidence to prove charges

[20] In respect of Mr Gilbert's claim of insufficient evidence to prove matters against him, it was submitted that there was no evidence sufficient to support some of the charges. It was claimed that the prosecution evidence on those charges had been found wanting following testing by cross-examination at the first hearing of the charges, and that because the necessary standard of proof could not be met it would be unfair to put Mr Gilbert through a second hearing.

[21] The Committee noted that disputed facts could not be resolved on an Application for Stay, and that there was clearly a case to answer at a substantive hearing. It also made the point that Mr Gilbert's defence was about to commence at the time the first hearing of the charges was abandoned, and there had been no suggestion at that point that Mr Gilbert considered he had a basis for applying for dismissal of the charges at completion of the prosecution case. He had clearly accepted that he would defend the allegations at that first hearing, indicating an acknowledgement that he had a case to answer.

Evidential availability

[22] The basis of Mr Gilbert's claim that a fair trial was no longer possible, because of an irretrievably broken evidential trail in respect of some charges, was that documents and witnesses were not readily available to him to defend his position.

[23] For Mr Gilbert it was submitted in this regard that the documentation necessary to prove the provenance and date of certain contracts the subject of charges was known to be in the Bahamas in 1998, but with the passage of time was not available to him for his defence. That was also a consequence of such material being last in the possession of a now defunct corporation previously operating from that country.

[24] Similarly, it was said, the people who could give evidence about such matters were not available given the elapse of time since the documents in question were current, in 1998.

[25] The Committee submitted that this matter could not be properly raised as an issue at this time, noting that it was not raised as an issue before the Tribunal at the first hearing in September 2011.

Intervention by the Tribunal

[26] For Mr Gilbert, it was submitted that the intervention of another division of this Tribunal at the first hearing, in requiring, at its own instigation, evidence from a person (Mr Hobbs) the Standards Committee had not proposed to call, was inappropriate, and prejudicial to Mr Gilbert.

[27] This prejudice arose in two ways it was submitted. First, it caused an unjustified significant delay when the hearing had to be abandoned part heard. Second, the nature of Mr Hobbs' evidence was unknown and unexpected, and in any event, was proposed at a time when Mr Hobbs had heard some evidence that other witnesses had been excluded from hearing by order of the Tribunal made at the first hearing of these charges.

[28] This intervention by the Tribunal at the first hearing of the charges, indicated, in the submission of counsel for Mr Gilbert, that the Tribunal considered the prosecution evidence to that point (the prosecution case was about to be closed) did not meet the required evidential threshold. The intervention also resulted in counsel for Mr Gilbert being confronted by an unexpected witness, and having no knowledge of the nature of the evidence that witness would give, counsel submitted, and that itself was prejudicial.

[29] For Mr Gilbert it was noted that the Tribunal had said at the first hearing that it relied on the inherent inquisitorial nature of disciplinary proceedings and its ability to use s 126 Law Practitioners Act 1982 to require, at its own instigation, a person to give evidence. Counsel for Mr Gilbert submitted that the nature of disciplinary proceedings did not go as far as permitting the Tribunal to intervene in the way it had in attempting to enlarge the scope of the Committee's evidence at the hearing.

[30] He noted that the section relied on by the Tribunal to require Mr Hobbs to provide evidence was a machinery provision, related to a power to issue notices

requiring attendance to give evidence. It was not a power, he submitted, authorising the Tribunal to intervene at the close of the prosecution case by calling for evidence from a person whom the Committee was not intending to use as a witness prior to that point.

[31] The Committee submitted that an allegation of the Tribunal misdirecting itself regarding its powers to take that step could not properly be a basis for Stay. It said that any abuse of process which would provide grounds for a Stay had to result from some action of the Committee, not the Tribunal, and the Committee denied it had done anything that could amount to an abuse of process.

[32] In any event, it said, in the view of the Committee, a proper reading of s 126 showed the Tribunal had jurisdiction to require an additional witness to give evidence, and its inquisitorial role justified its intervention, so there was in fact no error by the Tribunal.

Ancillary matters

[33] A range of other matters was raised for Mr Gilbert as the sixth basis of support for his claimed ground of abuse of process, variously reflecting: fairness in approach to prosecution; the complainant's motives; absence of complaint by a "victim"; whether some charges arose from matters which were simply questions of individual judgment; Mr Gilbert's standard of behaviour since the alleged transgressions and absence of concern about him committing any transgression in future; and the personal toll on Mr Gilbert of the allegations and the ongoing failure to achieve a resolution of the charges.

[34] The Committee said that these matters would be more appropriately addressed as submissions on penalty by Mr Gilbert if found guilty of the misconduct charges, rather than as supporting grounds for his application.

Discussion of submissions on the Application

Protective purposes

[35] In the view of the Tribunal, the investigation of allegations against Mr Gilbert, followed by the laying of charges and the commencement of the first hearing of those charges, which hearing was not completed, could not mean that the protective purposes of the disciplinary regime have thereby been satisfied. There has been no completion of the hearing, and as a consequence, no determination concluding the charges. In that situation the professional disciplinary regulatory regime could not be said to have responded fully. The proceedings remain incomplete, and the charges unresolved.

[36] Protective purposes do not cease simply because of the historic nature of the conduct at the heart of the allegations. There may be an exercise required when historic allegations are made, to ascertain whether prosecution of alleged conduct is practicable or desirable,[2] but in our view that would involve consideration of matters such as the availability and probity of evidence and associated risk of unfairness arising from the elapse of time, and the prejudicial effect of delay on a practitioner's ability to defend charges. Absence of protective purpose would not be a factor in such a situation. That purpose will usually continue to exist in our view.

[37] If the charges against Mr Gilbert were stayed, and at some time in the future Mr Gilbert was to apply for a practising certificate, the New Zealand Law Society, having regard to its statutory obligations under the Lawyers and Conveyancers Act 2006,[3] would likely want to review the facts of the matters involved in these charges as part of its consideration of any such application. In those circumstances it is difficult to say that the protective purposes of the disciplinary regime could be considered "*spent*" so far as these charges are concerned. Even if stayed, those purposes would remain active, so the claim of spent purpose cannot provide support for the stay application itself.

[2] See for example s 138(1)(a) Lawyers and Conveyancers Act 2006 in respect of matters under that Act.
[3] In particular the exercise of its discretion under s 39(4)(b).

[38] Similarly, protective purpose requirements do not cease as a result of Mr Gilbert's intention not to practise in future. As the Committee noted with regard to this point, a disciplinary response should not be limited by a charged practitioner voluntarily stepping out of practice. We agree with the proposition submitted by the Committee, that protective purpose does not terminate with the cessation of practise.

[39] As a consequence, we do not accept that the principal protective purposes of the proceedings cannot be achieved because of the delays since the time the conduct complained of is alleged to have occurred. Nor do we consider that those purposes cannot be achieved because of the cessation of practise by Mr Gilbert.

Delay

[40] In respect of delay, we consider the cumulative passage of time which we should take into account in assessing the effects of delay comprises in excess of seven years, commencing from the time the complaint was made in May 2005 to the present. The Court of Appeal noted in *Chow v Canterbury District Law Society*[4] that s 101 Law Practitioners Act 1982 required an investigation to be carried out "as soon as practicable" and that timing was reasonably to be extended to the actual laying of charges. While the delay between the decision to lay charges and the actual laying of those charges was the issue in *Chow,* it is clear that the Court accepted the same temporal imperatives applied to the investigation preceding the laying of charges.

[41] We do not agree with the Committee that because Mr Gilbert had been prepared to go to hearing in September 2011 without raising any issue of delay prior to that date, he had thereby in some manner "waived*"* his right to raise the effect of that delay now.

[42] We think the better approach is whether the additional delay, arising from the abandonment of the first hearing, unduly prejudices Mr Gilbert when considered cumulatively with all of the earlier delays. The abandonment of the first hearing in this case is the trigger event that opens an enquiry into whether the

[4] *Chow v Canterbury District Law Society* [2006] NZAR 160, at [26].

resulting totality of delay suffered by Mr Gilbert has an undue prejudicial effect. Once the hearing was abandoned, and prejudice from delay claimed, the cumulative effect of delay, reaching right back to commencement of the disciplinary process in May 2005, has to be considered in our view.

[43] Without the additional delay caused by the abandoned hearing, the delay of five years and four months from complaint to the laying of charges would have been bad enough, but when coupled with the abandoned hearing, that delay is compounded to an extreme level in the context of disciplinary proceedings. It is the totality of delay which affects the degree of prejudice Mr Gilbert suffers, not any one part of that delay. The cumulative delay does give support to Mr Gilbert's application.

Inability of evidence to prove charges

[44] With regard to Mr Gilbert's claim that the evidence does not meet the necessary standard of proof, the normal position in an Application for Stay is that the pleaded facts are assumed to be true[5] and it is not an abuse of process to proceed with a matter simply because of a view that a defendant has a complete defence.[6]

[45] In principle we agree that the issues to be proven in respect of the charges are for proof in the course of the substantive proceedings, rather than in a preliminary application of this nature. The context of an Application for Stay does not readily lend itself to the proof of the substantive matters to be dealt with if the Stay is not granted.

[46] There is of course a difference in this case which we must consider. The whole of the prosecution case (apart from evidence from Mr Hobbs which was required by the Tribunal at the last moment as the prosecution was about to close its case and which resulted in the abandonment of the first hearing) had been lodged with the Tribunal, and those witnesses cross-examined at the first hearing. As a consequence, Mr Lithgow QC, for Mr Gilbert, invited this Tribunal to read the

[5] *A-G v Prince* [1998] 1 NZLR 262 (CA); *Couch v A-G* [2008] NZSC 45 at [33].
[6] *Geotherm Energy Limited v Electricorp Ltd* (1991) 4 PRNZ 231 (CA).

affidavit evidence and consider the transcript of the first hearing. He said that would show that the evidence would not meet the required standard,[7] and supported his client's Application for Stay.

[47] While we agree that proposition may have some force on a charge involving a narrow scope, we do not see how this Tribunal could properly dispose of a charge without full trial where matters were more complex, particularly where defence witnesses had not been cross-examined and where we were required to form a view on credibility. That cannot be adequately done based simply on affidavits, and a transcript of the first hearing covering only examination of prosecution witnesses.

[48] In respect of this matter, the Tribunal considers that while some of the narrow scope charges could possibly be shown at this preliminary stage to be at risk of not being proven, other, more complex charges, can only be properly resolved at trial, not in the course of this preliminary application. We do not consider that Mr Gilbert's application for a stay of all charges is supported by this claim of inability to prove charges.

Evidential availability

[49] So far as Mr Gilbert's claim that a fair trial is not possible, as the documents and personnel trail is irretrievably broken, there was not sufficient evidence before us that would justify this as supporting the application.

[50] We accept the submission of the Committee on this point that the defence case had been prepared (including expert evidence from a document examiner) and finalised in preparation for the first scheduled hearing without this issue being raised. We do not consider anything has changed regarding availability of evidence since the first hearing (which is the relevant period for this particular matter, given that the parties had commenced that hearing with all the evidence they proposed to rely on) which justifies Mr Gilbert now raising this matter as a matter supporting his application.

[7] On the balance of probabilities, but flexibly applied having regard to the seriousness of allegations and the tendency to require stronger evidence in such cases – *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

Intervention of the Tribunal

[51] The intervention of the Tribunal, which is the basis of part of Mr Gilbert's case for a Stay, is a further part of delay. The intervention was the direct cause of the first hearing having to be abandoned part heard on its third day, as the Committee's case was about to be closed. The abandonment arose because of the difficulty it caused Mr Gilbert's counsel, Mr R Lithgow QC. Mr Lithgow considered he would be unable to cross-examine because of knowledge he had of the witness proposed by the Tribunal (Mr Hobbs). That was accepted by the Tribunal, which offered an adjournment to assist, but eventually accepted that abandonment was required. Another approach might have been to withdraw the request to have Mr Hobbs give evidence, but that was not proposed, presumably because the Tribunal considered that it was necessary for it to hear from Mr Hobbs.

[52] Mr Hobbs was obviously an unanticipated witness, both by counsel for the Committee and by counsel for Mr Gilbert, with no indication of what evidence Mr Hobbs might have to offer known to either of them at that point. The Tribunal had made an order excluding witnesses, but Mr Hobbs was present in the public gallery during at least part of the time Mr Goodwin gave evidence. As a consequence the order had no value in respect of that evidence, which itself raises an issue of potential prejudice.

[53] The Tribunal stated at the time that in seeking to have Mr Hobbs called it was doing so in reliance on s 126 Law Practitioners Act 1982 and in recognition of the inquisitorial nature of disciplinary proceedings, particularly when regard is had to the protective purposes of such proceedings. For Mr Gilbert, it was claimed that the Tribunal's intervention was prejudicial, and inappropriate as the Tribunal had no power to intervene and require a person to give evidence at the hearing in the way that occurred.

[54] We accept that submission may have some force, especially when s 126 is read closely, and its reference to the requirement for the Tribunal to issue a "*notice in writing*" for a person to attend is considered. That may indicate that a preferred interpretation is that the section facilitates the summonsing of witnesses to give evidence and produce required matters. We also note that the Tribunal has not

been given specific statutory inquisitorial powers of the nature of true inquisitors, such as a Coroner or the Employment Relations Authority.[8]

[55] The abandonment of the first hearing is a significant matter contributing to the position Mr Gilbert finds himself in. That abandonment opened up the need to review all cumulative delay occurring from the time the complaint was made, more than seven years ago, and accordingly this factor claimed by Mr Gilbert does support his application in our view.

Ancillary matters

[56] Mr Gilbert claimed a range of other matters also supported his Application for Stay on the grounds that to proceed with the charges against him would amount to an abuse of process. Under this omnibus list he included:

(a) That Mr Stewart, a person involved with matters arising under a number of the charges, had made similar allegations to the Law Society against Mr Gilbert. Those allegations had been investigated and no charges arising from that complaint were commenced.

We do not consider that supports Mr Gilbert's application because it was a separate process which reached a conclusion not to proceed based on a specific investigation carried out at the time. The charges Mr Gilbert now faces arose from a new complaint, separately investigated, and which resulted in a decision to prosecute. Its efficacy is not affected by an earlier, separate, complaint that went through its own process, particularly where the detail of the earlier complaint, its basis, and the detail of the investigation undertaken together with reasons for the relevant determination were not before us.

[8] See the special statutory powers in s 120 Coroners Act 2006 and s 160 Employment Relations Act 2000. Note also s 101(3)(b) and (e) Law Practitioners Act 1982 which allowed a complaints committee to demand an explanation and the provision of information by the person the subject of an investigation. Similarly s 141(b) and (c) Lawyers and Conveyancers Act 2006 to the same effect. These professional disciplinary provisions may support a view that any inquisitorial role is to be undertaken by the professional body charged with disciplinary responsibilities, to facilitate the investigation necessary and to assist with the formulation of charges, rather than being something the Tribunal itself should undertake in the course of hearing the charges which result from that investigation.

(b) That the various charges arose from matters involving questions of individual judgement, which had been indicated by different views being expressed by different judicial officers in the course of the issues being dealt with in the course of the Stewart Case and the Hobbs Case. This matter was also raised in another way for Mr Gilbert, with a suggestion that some charges arose out of acts which were based on what could be fairly classified as reasonable subjective judgments.

We do not consider matters under this head assist Mr Gilbert with his application. The consideration of related matters in other judicial forums was not undertaken with a view to considering matters of professional disciplinary misconduct by Mr Gilbert. To the extent that such matters were raised, as an adjunct to the main purpose of those proceedings, separate consideration in the disciplinary jurisdiction remains appropriate. The claimed subjectivity aspect is also not a matter to be dealt with in the course of considering this application, being something to be resolved on the evidence at the substantive hearing, if a Stay is not granted.

(c) That in respect of some charges Mr Gilbert faces (relating to disclosure and discovery[9]), because Mr Gilbert had relied on advice from his counsel, Mr J Upton QC, Mr Upton must thereby be equally culpable, but had not been charged. That was an essential unfairness to Mr Gilbert it was claimed.

We do not consider that this assists Mr Gilbert's application. Mr Upton QC has not been the subject of a complaint. It is not for this Tribunal to speculate on whether Mr Upton should have faced any charges, and we add that we have seen nothing that suggests he should. Mr Upton's sworn evidence filed for the first hearing of the charges, and available to us as part of our review of all such material (albeit his

[9] The Stewart Case non-disclosure charge, the Hobbs Case documents charge, the Stewart Case documents charge, and the Stewart Case misleading memorandum charge.

affidavit was untested by cross-examination), records that in respect of the disclosure and discovery related charges against Mr Gilbert, Mr Upton, as counsel, advised Mr Gilbert. Mr Upton deposed that he remained of the view that his advice represented a proper professional judgment that he was entitled to make. This of course would be important evidence if the substantive charges were to proceed to a further hearing, but for present purposes we have considered it only in the context of Mr Gilbert's claim of essential unfairness as a ground in support of his application for a Stay.

(d) That Mr Fitchett, the practitioner who complained about Mr Gilbert, based his complaint on a misconception about whether, in the Hobbs proceedings, he was wrong to put some allegations to Mr Gilbert.

We do not consider this assists Mr Gilbert's application. It may well be a matter that provides indirect commentary on motive for the complaint, but that does not necessarily affect the validity of the complaint. It has been investigated, and as a consequence it has been determined that charges should proceed and they have been laid and served. The issue at the current time is whether it would be an abuse of process to proceed, and at this stage of proceedings, and with the charges already having been part heard at the first hearing of those charges, matters are well past the point where the validity of the rationale for the complainant making his complaint in May 2005 should be part of our consideration in this application.

(e) That there is no person who is a "victim" pursuing this matter.

We do not consider that this assists Mr Gilbert because the principal purpose of the disciplinary regime is protection of the public interest. That a person affected by conduct alleged to constitute misconduct may not wish to actively pursue disciplinary proceedings does not change whether or not there has been misconduct. Matters have

always been able to commence by own motion.[10] The matter has been raised, investigated, and charges have been laid to be heard. The disciplinary process is unaffected by whether or not a person who may be a "victim" wishes to be involved. The issue is public protection.

(f) That Mr Gilbert has practised for a lengthy period following the alleged conduct without any other transgressions being found against him, that he has learned his lesson where he accepts he could have done better, that he has suffered personal cost as a result of an extended series of proceedings related to matters in which the alleged misconduct has arisen and the unresolved status of the disciplinary proceedings, and that there should be a lack of concern about any future transgressions.

Apart from the effects of the unresolved status of the disciplinary proceedings, which we take into account as part of the prejudice arising from delay, we do not consider the other matters noted in this part assist Mr Gilbert's application. We agree with the submission of the Standards Committee that these other matters are more properly matters of submission on penalty if a rehearing proceeded and charges were proven.

Conclusions

[57] We consider that the cumulative delay suffered by Mr Gilbert since commencement of the disciplinary proceedings against him does provide support for his claim of abuse of process as a ground for his Application for Stay. The intervention by the Tribunal and consequent requirement to abandon the first hearing on its third day has compounded matters, opening up the question of total delay, and also effectively adding at least a further year to the then pre-existing delay if we do not grant the Stay. While no direct prejudice has been shown to arise from the further delay arising from the abandonment of the first hearing in terms of matters such as evidential availability, we do consider that it adds

[10] Section 99 Law Practitioners Act 1982, and now s 130(c) Lawyers and Conveyancers Act 2006.

additional weight to the effects of the pre-existing delays. It forms part of the overall assessment of the affect of cumulative delay, particularly having regard to whether in all the circumstances it would be unfair and oppressive to continue to press ahead with hearing the charges a second time.

[58] The important effect of delay which we identify in this case is the question of whether the total delay, involving proceedings in train for over seven years from the date of complaint to the present and also involving an abandoned hearing, means that there now exists a "*situation in which any continuation of the proceedings would, of itself, be so unfairly and unjustifiably oppressive that it would constitute an abuse of the court's process".*[11]

[59] For the Committee it was submitted in respect of the charges against Mr Gilbert that "*an abuse of process can only arise as the result of some action on the part of [the Committee],*"[12] and it denied that anything it had done in the course of prosecuting the charges would justify a finding that a rehearing of the charges constituted an abuse of process.

[60] If that submission was intended to define the scope of our consideration of what may constitute abuse of process, we think it unduly narrows our enquiry into what Mr Gilbert is claiming constitutes an abuse of process. It may be that submission was made having regard to comments regarding the exercise of prosecutorial discretion in *Moevao v Department of Labour,*[13] which discussed claims of abuse of process arising in that situation.

[61] While *Moevao* dealt with an application for stay for abuse of process based on conduct by a litigant, it does not preclude a basis for abuse of process arising other than via a party's conduct. In *Moevao* the focus was on the Court's ability and willingness to intervene on matters of policy, regarding whether proceedings should have been initiated. It noted the very limited basis on which the Court should intervene in such a situation. In Mr Gilbert's case, the issue is not a policy based question of due exercise of prosecutorial discretion to commence

[11] Per Deane J in *Jago v District Court of New South Wales* (1989) 168 CLR 23, at 58.
[12] Synopsis of Submissions for Standards Committee dated 18 May 2012 at paragraph 2.4.
[13] [1980] 1 NZLR 464.

proceedings, but an analysis of the prejudice inherent in the delays associated with proceedings commenced.

[62] In Mr Gilbert's situation, it is not a question of whether the Committee may be responsible for the prejudice claimed to have arisen, but whether, considering all the circumstances, there is a prejudicial effect arising from the proceedings themselves being continued having regard to the facts and circumstances of the cumulative delays that have occurred.

[63] To quote Justice Deane in *Jago v District Court of New South Wales*[14] more fully:

> "*The power of the court to stay proceedings in a case of unreasonable delay is not confined to the case where the effect of the delay is that any subsequent trial must necessarily be an unfair one. Circumstances can arise in which such delay produces a situation in which any continuation of the proceedings would, of itself, be so unfairly and unjustifiably oppressive that it would constitute an abuse of the court's process.*"

[64] There has been a number of cases where what may constitute an abuse of process has been discussed. Fairness and the avoidance of any suggestion of injustice are key elements in ensuring no prejudice exists.

[65] In *Walton v Gardiner,*[15] the High Court of Australia, dealing with a stay application in a medical professional disciplinary matter, noted that allowing disciplinary proceedings to continue, where to do so would be unfairly and unjustifiably oppressive in the circumstances, would constitute an abuse of process.

[66] The public interest in ensuring that the continuation of proceedings does not involve unacceptable unfairness or injustice was also noted by Richardson J in the

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[14] Above, n 11.
[15] *Walton v Gardiner* (1993) 177 CLR 378, at 392.

course of his judgment in *Moevao,*[16] where His Honour said, in reference to an aspect of the public interest, the maintenance of confidence in the administration of justice;

> "*It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."*

[67] We accept that this comment was made in reference to prosecutorial discretion in that case, but the principle embraced by that comment applies to all circumstances that may be an abuse of process, and is not restricted by the particular issue in *Moevao.*

[68] When considering the issue of delay we note that if the stay is not granted, an hearing before the Tribunal would not occur until more than seven years had expired since the complaint. That is because:

(a) The investigation of the original complaint, made on 26 May 2005 by a practitioner, Mr J Fitchett, took four years and two months to complete.

(b) Once that investigation was completed, the Committee resolved to lay charges under s 101 Law Practitioners Act 1982. That decision was notified to Mr Gilbert by letter dated 24 August 2009. Charges were laid, on or about 17 September 2010, some five years and four months after the original complaint.

(c) A year later, in September 2011, the hearing of the charges commenced before another division of this Tribunal, but the hearing had to be abandoned through no fault of Mr Gilbert's.

(d) This division of the Tribunal was to rehear the charges against Mr Gilbert, but Mr Gilbert has now applied for a Stay of proceedings, on

[16] *Supra,* at 481.

> the basis that in all the circumstances to continue with another hearing would be an abuse of process. If the Stay is not granted, a rehearing is unlikely to occur until later this year, over seven years since the complaint was made, and relating to conduct alleged to have occurred up to fourteen years ago, in the late 1990s.

[69] In *Chow*[17] the Court of Appeal considered an application for stay in a professional disciplinary matter based on a delay of sixteen months. The delay related to the interval between a determination to proceed with charges (after the Complaints Committee had completed its inquiry into the conduct complained of, which took approximately eight months and about which no complaint was made), and the actual laying of the charge.

[70] The key time line points were;

(a) A complaint had been made regarding Mr Chow in September 2001, alleging misconduct from mid 1999 to the end of 2000.

(b) The investigation which followed commenced in October 2001.

(c) The investigation process took some eight months, and on 18 June 2002 the Complaints Committee determined that charges should be laid.

(d) On 3 July 2002 the Complaints Committee advised that it had concluded that the charges should be heard by the national tribunal, and that charges would be prepared and laid on that basis.

(e) Charges were laid and served in October 2003, some sixteen months after the decision to lay charges had been made in mid-June 2002.

[71] Mr Chow challenged the validity of the charges on the basis of this sixteen month delay. He applied for a stay or dismissal from the national tribunal on the

[17] *Chow v Canterbury District Law Society* [2006] NZAR 160.

basis of the delay between the decision to lay charges and the actual service of the charges on him, the sixteen month period noted above.

[72] The national tribunal declined to deal with Mr Chow's stay or dismissal application, saying that as a creature of statute it had no inherent jurisdiction allowing it to make such a determination. Mr Chow applied for a judicial review of that decision of the tribunal. When his application was dismissed by the High Court, Mr Chow appealed to the Court of Appeal.

[73] Commentary by the Court of Appeal confirmed that the national tribunal was not correct in assuming it had no power to deal with the Application for Stay or dismissal. The Court of Appeal noted that the tribunal had an implied power to see that its process was used fairly, including a power to stay or dismiss charges in an appropriate case. *McMenamin v Attorney-General*[18] was cited as an example of recognition previously given to that position by the Court of Appeal.

[74] In considering the merits of the application by Mr Chow, the Court of Appeal said that the Law Practitioners Act 1982 did impose an obligation to lay charges as soon as practicable, on two bases.

[75] First, the particular provision to inquire as soon "as practicable"[19], while relating to the investigation process, was said to also include the preparatory work necessary to finalise affidavits where further investigation was necessary to obtain and settle affidavit evidence to accompany the charges. That is, the completion of the Complaints Committee investigation and determination to lay charges is not the end of the investigation process which is required to be undertaken as soon as practicable by the section.

[76] Second, it was implicit that the requirement to lay charges was something to be done as soon as practicable in any event, once a determination to take such a course has been made.

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[18] *McMenamin v Attorney-General* [1985] 2 NZLR 274.
[19] Section 101 Law Practitioners Act 1982.

[77] What time is reasonably necessary to allow that matters have been completed as soon as practicable will depend on what is reasonable in the circumstances of each case.

[78] It was accepted by the Court in *Chow* that simple non-compliance with a statutory obligation to proceed "as soon as practicable" did not of itself mean that a stay or dismissal was justified. Rather there was to be an assessment of the effects of that non compliance, and context (in this case professional disciplinary proceedings) was a factor to be weighed.[20]

[79] The alleged conduct forming the basis of charges against Mr Gilbert, requiring an investigation period of over four years does not sit well with the requirements of s 101 Law Practitioners Act 1982, which obliged the Complaints Committee (as it was then constituted under that Act) to inquire into the complaint as soon as practicable and then to proceed (if its opinion after investigation was that it should do so) to lay charges. The charges themselves also have to be laid as soon as practicable,[21] but acknowledging that reasonable time should be allowed to draft the charges and settle supporting affidavits.

[80] While there has been a failure to comply with the requirement of s 101 in respect of the proceedings involving Mr Gilbert, at least in so far as the investigation which took over four years to complete, that does not necessarily result in a finding that there is some invalidity in the charges. As was said in *Chow*[22]

> "*Rather, a judicial assessment of all relevant factors is required. The extent of, and effects caused by, the non-compliance and the disciplinary context itself, are all highly relevant considerations, as is the nature and seriousness of the charges."*

[20] Ibid, at [37].
[21] Above, paragraph [40].
[22] Above n 20.

[81] That was also the approach taken in Australia, as noted in *Walton v Gardiner*[23] and in *R v Davis*[24] where both the High Court of Australia and the Federal Court concluded that a weighing process was required in considering whether to grant a stay, with account being taken of the protective nature of the disciplinary jurisdiction.

[82] The Tribunal has indicated earlier in this decision that it considers that the issue of delay, and its circumstances, does provide support for Mr Gilbert's application. Before deciding whether to grant a stay as a consequence we have to balance the effects of that delay against the fact that he faces seven misconduct charges in the legal professional disciplinary environment.

[83] Our approach in considering the application has been to consider each of the matters raised in support by Mr Gilbert, to enable us to form a view as to whether it provides support for his application. After deciding whether there are matters which do support Mr Gilbert's claim that to continue would be an abuse of process, we then weigh up all competing matters in deciding whether a stay is thereby justified. That includes the fact and circumstances of the delay, its effects, the seriousness of the charges, and the need for such disciplinary matters to be heard in the disciplinary context, with its public protection focus.

[84] These charges have taken a very long time to bring to a conclusion, remaining unheard some seven years and three months after the commencement of proceedings by complaint. There have been delays at all points, and disruption to the normal process arising from the abandonment of the first hearing on its third day. In our view any reasonable person would likely consider a continuation of proceedings now, by requiring Mr Gilbert to go through a second hearing after such delays, to be unduly oppressive in all the particular circumstances of this case.

[85] The power to stay in a case of unreasonable delay is not confined to a case where a specific effect of delay is such that any subsequent trial is able to be shown as being unfair. The fact of delay, of itself, can reach a point where

[23] *Walton v Gardiner* (1993) 177 CLR 378.
[24] *R v Davis* (1995) 57 FCR 512.

continuation would be so unfairly and unjustifiably oppressive as to warrant consideration of a stay to avoid an abuse of process.

[86] Having reached the point that we are satisfied that delay in this case has been unacceptably long, exacerbated as it has been by the forced abandonment of the first hearing, we have to undertake a balancing of relevant factors before deciding whether a stay is the appropriate relief for Mr Gilbert's Application for Stay. Matters such as fairness to Mr Gilbert, the legitimate interest of the public in seeing allegations of wrongful conduct tested in court, the need to maintain public confidence in the administration of justice which should not be seen as unduly overbearing and oppressive, and the need to ensure protection of the public from incompetence and misconduct in the professional disciplinary environment are all matters to be weighed.

[87] Clearly, the seriousness of the conduct alleged will also be a factor to be considered as part of that weighing process. The Committee submitted that the charges were serious, involving questions of perjury and document fraud, matters which mandated determination in the disciplinary process having regard to the purposes of the disciplinary regime in protecting the public and maintaining public confidence in the profession.

[88] In assessing seriousness, we consider that the headline charges are not themselves the matters to be taken into the weighing exercise, but the actual conduct alleged and its context. As part of the balancing exercise to be undertaken here, it is the actual conduct and its context which is important in assessing seriousness of conduct.

[89] In this case we are able to examine the facts and circumstances of the conduct, rather than just taking a headline view from reading the charges and supporting particulars, because the prosecution case was presented at the first hearing. We have the prosecution case in affidavit evidence and the transcript of cross-examination on those affidavits available to us. We also have the defence affidavits from the first hearing, and while not subjected to cross examination because of the abandonment, we consider that the overall picture of the conduct

and its context is sufficient from all that material to assist us with assessing seriousness.

[90] Accordingly, we have an enhanced opportunity, compared to the normal situation in a pre hearing application of this type, to assess what matters may weigh for and against a stay. This situation arises from the fact of the evidential material available from the first hearing, and our consequent ability to examine the actual nature of the conduct and its context, rather than just the charge and its particular allegations. While this may not assist us in our ability to decide whether or not charges are likely to be proven, it does provide some additional insight when assessing seriousness.[25] That assists the weighting we apply in the assessment of whether there is a charge arising from Mr Gilbert's conduct which is sufficiently egregious that notwithstanding the counter-balancing issues we have noted, a further hearing is demanded.

[91] In assessing the seriousness of each of the charges, which we accept has a degree of subjectivity for anyone who embarks on that task, and the purposes of the professional disciplinary scheme as part of the weighing up we have to undertake in considering the Stay, we have reached the view that no charge, either on its own or together with others, involves conduct that weighs so heavily as to be decisive in mandating that a further hearing must occur in the applicable circumstances. In the view of the Tribunal, while the charges, if proven, do involve matters which would be rightly classified as misconduct, their seriousness, and taking into account the protective nature of the disciplinary regime, does not outweigh the factors the Tribunal has outlined as supporting a stay in this particular case. [26]

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[25] For example, the fact that in respect of disclosure and discovery matters, Mr Gilbert was advised by senior counsel, the fact that non contradicted evidence showed that the Securities Commission warning referred to, while not highlighted, had in fact been placed on the court file, and other matters that we were able to weigh up when looking at the nature and context of the alleged misconduct.

[26] All members of the Tribunal are unanimous in their approach to this application, and their consideration of the law and legal principles applicable. In respect of the relief sought, one member has recorded that in their view the seriousness of the charges and the purposes of the professional disciplinary environment, outweigh the effects of the significant cumulative delay and process disruption, and considers that, on balance, a stay is not justified. All other members of the Tribunal have come to the conclusion, after balancing the competing factors and interests, that a stay is justified having regard to all the circumstances.

Determination

[92] As indicated earlier in this decision, and for the reasons noted, the Tribunal does not consider Mr Gilbert is able to properly support his claim of abuse of process arising from a continuation of proceedings on the basis that the principal protective purposes of the proceedings cannot be achieved. Neither does it consider that it can safely take a view, certainly on the more complex matters, on the ability of the evidence to meet the necessary standard of proof.

[93] Similarly, and for the reasons noted, we do not consider that Mr Gilbert's claim that fair trial is not possible on some charges, because the document/personnel trail has been irretrievably broken, supports his application. So far as the various other matters are concerned, we have noted earlier, in respect of each of those other matters raised in support of Mr Gilbert's application, that they provide little support, apart from the effect of the ongoing unresolved status of the charges.

[94] The matters which we have signalled we do consider provide support for Mr Gilbert's claim of abuse of process if the charges were to proceed, are the cumulative effects of delay since the time of the complaint, including the delay resulting and circumstances of the abandonment of the first hearing of these charges.

[95] There was no compelling evidence of delay prejudicing Mr Gilbert's ability to properly conduct his defence. Certainly, witness memory of events back as far as 1998 could be considered as having the potential to create some difficulties, but here the evidence has been prepared and filed.

[96] As to the availability of witnesses and documents being affected by delay, Mr Gilbert had prepared his defence and commenced a defended hearing last year, with no concern raised about such matters. In fact, Mr Gilbert's view of his position, as evidenced by his submissions on his Application for Stay, was that he had been able to successfully show that the charges were not supportable.

[97] The important issue we identify is the question of unfairness and oppression arising from the lengthy, continuing, and unusual delays. An investigation that takes over four years to reach a conclusion is not acceptable. Given that the investigation took over four years, presumably representing a careful analysis of all issues, we consider that a further period of just over one year to prepare and lay charges is also too long, particularly when having regard to commentary in *Chow* that associates the investigation with final completion of charges.[27] We accept that iteration with counsel for Mr Gilbert may have had some small effect during that period, but it still represents an inordinately long time in the circumstances.

[98] On their own, these matters of delay are not necessarily decisive, especially when one has regard to the protective purposes of the professional disciplinary regime and the allegations involved. However, when added to that delay is the further delay resulting from the fact that the hearing of the charges commenced last year had to be abandoned part heard on its third day, for the reasons traversed earlier in this decision, we consider the combined weight of all the delay, including its circumstances, favours a Stay being granted.

[99] The unfairness and prejudice of the cumulative delay, occurring in the way it has, means that to require Mr Gilbert to face a second hearing could be rightly seen as giving rise to an abuse of process. To require a further hearing, to resolve a matter commenced by complaint more than seven years ago, involving circumstances of excessive delay in completing the investigation, laying charges, and an hearing required to be abandoned part heard through no fault of Mr Gilbert's, would be so unjustifiably oppressive in our view as to constitute an abuse of process.

[100] In reaching that view we have considered all the factors noted, including fairness to Mr Gilbert, and the public interest from the perspective of the protective purposes of the disciplinary regime and from the perspective of the maintenance of public confidence in the administration of justice.

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[27] *Chow v Canterbury District Law Society*, supra at [26].

Orders

[101] The seven misconduct charges against Mr Gilbert are hereby permanently stayed.

[102] The parties shall each bear their own costs. The complaint originally made raised issues of Mr Gilbert's conduct that should have been the subject of examination, so the process was appropriate. While the execution of the disciplinary process that followed has not been acceptable, we consider that Mr Gilbert should accept the burden of his own costs, as should the Committee bear its own costs in the circumstances, so no order is made under s 129 Law Practitioners Act 1982.

[103] There is no amount to be fixed under s 257 Lawyers and Conveyancers Act 2006, as the charges were brought under the Law Practitioners Act 1982. That requires the charges to be dealt with by this Tribunal as if that Act was still in force, and as if this Tribunal was the New Zealand Law Practitioners Disciplinary Tribunal established under that Act.[28]

DATED at AUCKLAND this 28th day of August 2012

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D J Mackenzie
Chair

[28] Sections 353 and 358 Lawyers and Conveyancers Act 2006. No order is made under s 112(g) Law Practitioners Act 1982 for "Tribunal" costs as that relates to orders to pay the New Zealand Law Society those amounts, and the Law Society does not incur any costs of operating its own Tribunal in this transitional situation.