NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 3

LCDT 002/11, 011/10

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE AND AUCKLAND STANDARDS COMMITTEE** Applicant
AND	**EVGENY ORLOV** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr C Lucas

Ms C Rowe

Mr W Smith

Mr I Williams

HEARING at Auckland

DATE OF HEARING 25 February 2015

DATE OF INTERIM DECISION 5 March 2015

APPEARANCES

Mr M Hodge for the Standards Committees

Mr E Orlov in Person

INTERIM DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL ON APPLICATION FOR STAY OF PROCEEDINGS

[1] This is Mr Orlov's third application for a stay of proceedings. The decision is referred to as an Interim Decision for reasons which will be explained later in the decision, because there are two possible outcomes, depending on further steps taken by the parties.

[2] On 15 April 2011 the Tribunal denied a stay application but granted a lengthy adjournment to allow Mr Orlov to advance his judicial review proceedings in the High Court.

[3] A second application for permanent stay or strike out of charges was considered in December 2012 and February of 2013 and by decision of 12 February 2013 the Tribunal rejected a further application for stay, in which Mr Orlov had argued delay, abuse of process and ill health. That refusal was appealed to the High Court and a decision of Katz J of 6 August 2013,[1] upheld the Tribunal's refusal of the stay proceedings. The High Court decision has been of particular assistance in considering this most recent application which was filed by Mr Orlov on 23 January 2015.

[4] Although Mr Orlov faces 18 charges, eight further charges against him having been disposed of, with five charges established, the stay application relates to only 16 of these charges: the three remaining charges laid by the National Standards Committee in 2011, and the 13 charges laid by the Auckland Standards Committee in 2010. Mr Orlov has not sought to address the two most recent charges laid by the National Standards Committee in 2014. As an alternative to permanent stay Mr Orlov has sought to vacate the currently allocated hearing dates or to have a separate *viva voce* hearing on abuse of process.

[1] *E Orlov v The National Standards Committee 1 and the Auckland Standards Committee 1* [2013] NZHC 1955 Katz J, 6 August 2013, at [64].

Grounds

[5] Ten grounds were set out in the application. Although Mr Orlov's submissions were not filed until the evening before the hearing, it was possible to discern four main grounds from his affidavit in support. These were delay, legitimate expectation, lack of counsel combined with ill health, and bias. In the course of oral submissions Mr Orlov ranged over a number of topics which were helpfully summarised for us by Mr Hodge in his submissions in reply, as follows:

1. No public purpose is served by the charges being heard.

2. The charges do not relate to public protection.

3. The charges are "incomprehensible" and unsupported by evidence.

4. These sorts of charges are not normally brought against practitioners.

5. Delay.

6. Insufficient time to prepare.

[6] We preface our remarks about each of these grounds by noting that many of the topics are already the subject of rulings by higher courts or relate to the charges which have already been determined against Mr Orlov.

Delay

[7] As in previous applications Mr Orlov advanced the argument that the age of the events (up to six years ago) caused difficulties and prejudice arising out of dimmed memories, lack of availability of witnesses and missing documentation.

[8] We note that on previous stay applications Mr Orlov has given undertakings that he will not subsequently rely on any delays arising out of his applications for judicial review.

[9] More importantly, and binding on this Tribunal, are the remarks of the High Court and Court of Appeal respectively. In her decision of 6 August 2013 Her

Honour Katz J referred to Mr Orlov's argument that he was not bound by any undertaking given to the Tribunal, nor was he responsible for delay which had occurred in his proceedings. Her Honour referred to the earlier comments of the Court of Appeal[2] which it held at [108]:

> "…In our assessment Mr Orlov himself bears a large part of the responsibility for the delay. As he acknowledged, he was under an ethical duty to co-operate with the investigative phase of the process. However, instead of engaging in the process and answering the substance of the complaint, he chose to prevaricate and take unmeritorious procedural points. That is true of his approach to all the complaints."

And at [165] to [169]:

> "[165] These and all other charges should now be heard by the Tribunal without delay. On this point we add the following observations. We direct them particularly to Mr Orlov.
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> [166] As a legal practitioner, Mr Orlov is subject to his profession's disciplinary regime. It exists primarily for the benefit of the consumers of legal services. That is, people who include Mr Orlov's own clients. But it exists also for the benefit of all legal practitioners, not least Mr Orlov himself.
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> [167] We mentioned at the outset of this judgment, and we reiterate, that one of the central objectives of the Act is to provide for "a more responsive regulatory regime in relation to lawyers and conveyancers" [citing s 3(2)(b) of the Act].
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> [168] By raising the numerous procedural objections this judgment considers and rejects, Mr Orlov has thwarted and delayed the disciplinary process. He now complains of these largely self-inflicted delays.
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> [169] The oldest of the complaints dates back to 19 May 2008. It is imperative that the charges against Mr Orlov now be heard by the Tribunal on their merits, and without further delays."

[10] Upholding the Tribunal's 2013 decision to refuse to stay the proceedings on the basis of delay Katz J had this to say[3]:

> "[67] Cases in which courts or tribunals have exercised their inherent powers to stay proceedings on the grounds of abuse of process due to delay are rare. In this case I can see no basis for interfering with the Tribunal's conclusion that the delays were not such as to amount to abuse of process, particularly given the underlying reasons for the delays. The Tribunal is the body best placed to assess those reasons. It concluded that Mr Orlov himself bears a large part of the responsibility. This view is consistent with that reached by the Court of Appeal in *Orlov*.

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[2] *E Orlov v New Zealand Law Society & Ors* [2013] NZCA 230.
[3] See footnote 1 at [67]-[69].

> [68] In relation to prejudice, the Tribunal was not satisfied with that a fair hearing would no longer be possible, due to the passage of time. The Tribunal noted the extent of Mr Orlov's response in support of his interlocutory applications, noting that he had "detailed recall and indeed delivered his position in his standpoint to the Tribunal with significant vigour". As counsel for the Standards Committee observed, this observation was made by an experienced judge, who chaired the Tribunal and signed the decision.
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> [69] In my view the Tribunal's findings on the issue of delay were open to it. Accordingly this aspect of Mr Orlov's appeal/review also fails."

[11] Having regard to these findings, although the Tribunal must look at the overall period, it will be most useful to focus on the events since the August 2013 High Court decision, to ascertain whether this further delay would alter the previous views.

[12] Following the rejection of the second stay application in February 2013, Mr Orlov proposed that the eight charges relating to his comments about His Honour Harrison J be separated out and heard first. It was Mr Orlov's contention (erroneous as it transpired) that if he were found guilty on these charges, which he saw as the most serious, he would be struck off and there would be no purpose served by considering the remaining charges.

[13] Mr Pyke, who was then representing the Standards Committee, agreed that this was a sensible approach and the matter was set down for five days in early September 2013. These charges were duly determined and five findings of misconduct or unsatisfactory conduct made against Mr Orlov. A penalty hearing occurred in November 2013, the outcome of which was that Mr Orlov was struck off the Roll.

[14] Mr Orlov appealed against the findings and against penalty. In their decision of August 2014[4] a full Bench of The High Court overturned the penalty of strike off, however upheld the Tribunal's decision on liability.

[15] Pending the outcome of that appeal and indeed subsequent to the decision and pending any further appeal by Mr Orlov, pre-trial conferences were held in which the hearing of the remaining charges was discussed. For the Standards Committee Mr Pyke reserved his position as to the further charges pending the outcome of the appeal, in particular whether the strike off would be maintained, because of the

[4] *E Orlov v National Standards Committee & Ors* [2014] NZHC 1987, Simon France and Ronald Young JJ.

possible wasted expenditure and public interest in hearing the remaining charges in relation to a practitioner who was already struck off.

[16] For his part Mr Orlov was concerned to put his time and energy into the appeal itself. Thus the remaining charges were held until shortly after the August 2014 decision. Then in October, the Standards Committee filed two fresh charges.

[17] At this time Mr Orlov instructed Mr Deliu to represent him and it was Mr Deliu who attended on Mr Orlov's behalf a pre-trial and setting down conference in December 2014 at which hearing dates were allocated for the charges. The two earlier sets were set down separately, for a week each in March 2015 and the more recent charges were later set down for July 2015 in order to give Mr Orlov and his counsel more time to prepare.

[18] It is these events which underlie Mr Orlov's further claim to "legitimate expectation". Mr Orlov contends that a stay of the charges was granted and that he relied on that. The specifics of that reliance are not clear.

[19] The Tribunal is very clear that no stay of these charges was ever granted. Indeed it would not have been granted by a Chair sitting alone, without a formal hearing or, at the very least, a written consent memorandum. Even if the latter, it would have been considered by the Tribunal as a whole. This did not occur.

[20] There is no basis for the suggestion of legitimate expectation by Mr Orlov who has simply misconstrued the situation. The delay which has ensued since August 2013 has, once again been primarily of Mr Orlov's making. We are not necessarily critical of this; it is simply what has occurred. Firstly the severance of the charges, which was a perfectly sensible suggestion on his part, and subsequently the exercise of Mr Orlov's rights of appeal.

[21] We do not consider that the further 18 months delay, even when viewed with the previous delay, can amount to an abuse of process in this matter or so seriously prejudice Mr Orlov that it ought to form the basis for a stay of these proceedings. It was certainly not due to any default on the part of the Standards Committees.

Prejudice, Particulars, Lack of Time

[22] As to prejudice generally, we note in his affidavit and submissions Mr Orlov raises numerous matters of insufficient particularisation, lack of discovery and "incomprehensible" charges.

[23] These very matters have also been the subject of clear rulings by the Court of Appeal, for example,[5] the Court refers to Mr Orlov's contention that the *L* complaint lacked particulars and that this constituted a breach of natural justice. The Court held:

> "[66]We do not accept that contention. The *L* letter runs to six pages with four appendices. It is comprehensive. The various allegations are detailed …
>
> [67] In our view, it would be difficult to conceive of a more thoroughly particularised complaint and it is untenable for Mr Orlov to suggest otherwise."

[24] It is also clear, and noted by higher courts that Mr Orlov has had full discovery.

[25] It is appropriate at this point to also comment on a further plank of Mr Orlov's application; that he has had insufficient time to prepare. He has been facing these charges for five to six years and has not been in legal practice for the past 16 months. He has had three months notice of the upcoming hearings. It is untenable to suggest he has insufficient time to prepare.

Lack of counsel and ill health

[26] Mr Orlov variously contends that his counsel is unable to represent him because of the cost and his other commitments, or cannot appear because of the bias of the Tribunal. Mr Orlov contends he has had no time to apply for legal aid and cannot afford to retain counsel and that he has approached numerous legal aid counsel who have refused to take his case. He did not provide any supporting evidence in relation to such approaches.

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[5] See footnote 2 at [66].

[27] Furthermore Mr Orlov places his ill health before the Tribunal as a matter which ought to be weighed in the stay application. Initially, he provided a very brief doctor's certificate which referred to an unspecified liver disease. When the Tribunal pointed out to him the certificate did not appear to comply with the Medical Council's own guidelines as to the detail required, he provided a further certificate from his doctor. This was challenged by the Standards Committee and Mr Orlov himself accepted that it was insufficiently specific as to the nature of duties that he could perform. Mr Orlov says he will present himself to any liver specialist nominated by the Standards Committee.

[28] The Standards Committee take the view that if Mr Orlov wishes to rely on his health as a reason for adjourning or halting the proceedings, that he ought to be the person to provide that evidence. That submission has considerable merit. We do consider the onus is on Mr Orlov to provide the Tribunal with detailed medical evidence as to the nature of his illness since he contends it prevents him from returning to legal practice, this may well be a significant issue in the overall assessment of this matter, but without proper evidence the Tribunal can take it no further.

Bias

[29] Mr Orlov raised allegation of bias, against the Chair in particular, relating to her having chaired the previous Tribunal which made findings against Mr Orlov and imposed a penalty which he continues to refer to as "unlawful".

[30] The Standards Committee referred the Tribunal to the decision of *Saxmere*[6] submitting that a previous adverse finding by a judicial officer does not of itself disqualify that officer from considering subsequent matters. The test posed is whether "… a fair minded, impartial, and properly informed observer could reasonably have thought that the Judge might have been unconsciously biased …"[7]

[31] Mr Orlov did not adduce any evidence which could lead to that question being answered in the affirmative. We also note that on previous occasions he has alleged variously, bias and bad faith against other Tribunal members, and the New Zealand

[6] *Saxmere Company Limited v The Wool Board Disestablishment Company Limited (No 1)* [2010] 1 NZLR 35).
[7] See footnote 6 at [37].

Law Society and its officers respectively but has, on appeal, abandoned these allegations.

[32] In relation to similar bias allegations made on appeal to the Full Court of the High Court, that Court was taken through numerous examples of exchanges between the Tribunal members and Mr Orlov during the previous substantive hearing. They did not uphold his allegations of bias and concluded:[8]

> "The passages in the transcript to which he refers do not, we consider, disclose bias but do show that members of the Disciplinary Tribunal at times were frustrated and probably annoyed by Mr Orlov's conduct."

Threshold arguments

[33] Mr Orlov also argued that a number of the charges or particulars related to matters that would not lead to charges against other practitioners, or were minor. As to the latter, the issue of a threshold for the laying of charges has been finally disposed of by the Court of Appeal on Mr Orlov's appeal on the decision of Heath J in the High Court. At paragraphs [54] to [55] of its decision the Court of Appeal firmly disposed of the "threshold argument" for the nine reasons there set out.

[34] As to the comparison of his case with the case of other practitioners, Mr Orlov spent much of his oral submissions on this topic, citing a number of examples to the Tribunal. Mr Orlov argued "selective prosecution" because other practitioners had not been charged with criticism of judges. The charges relating to Mr Orlov's behaviour towards His Honour Harrison J have already been determined and upheld on appeal and cannot have any relevance to his argument about the current charges.

[35] The charges to be faced are of serial negligence or incompetence in relation to a number of proceedings in which Mr Orlov was counsel. These are certainly not unusual or insignificant types of charges for the Tribunal to consider and we reject his submission that they found a claim for abuse of process. It is not unusual for the Tribunal to find charges proved to different levels (other than misconduct or negligence). That is a merits issue for the substantive hearing.

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[8] See footnote 4 at [182].

General principles

[36] Before considering Mr Orlov's final submissions as to public protection and public interest we refer to the general principles applicable to stay applications.

[37] The Tribunal's powers to regulate its own process and determine such pre-hearing applications is discussed at length in the decision of Her Honour Katz J.[9] Having discussed the legislation and in particular the purposes of the legislation to protect the public and provide a flexible and responsive regime whereby there is a *"… focus on efficiency and expedition in disciplinary proceedings, and the fact that the legislative regime is predicated on the expectation that a practitioner will fully co-operate with the investigation, are all factors that weigh against hearing dismissal applications pre-hearing",* Her Honour considered that while the Tribunal had the power to consider such applications pre-hearing it was not required to do so:[10]

> "[31] The Act does not envisage wide ranging interlocutory hearings prior to the substantive hearing of disciplinary charges. Rather, the focus is on getting disciplinary proceedings to a hearing quickly and efficiently."

[38] Mr Hodge referred us to the leading authorities in relation to stay, *Fox v The Attorney General*[11] and *Chow v Canterbury District Law Society.*[12]

[39] We refer to and adopt Mr Hodge's submissions that the Court of Appeal in that case found the following factors of importance:

(a) That the delay caused prejudice in terms of a fair hearing;

(b) Mr Chow was advised promptly when the complaints were made – he had the opportunity to draw on records, people and memory available to them then;

(c) The allegations were serious;

(d) The protective nature of the jurisdiction was "highly significant";

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[9] See footnote 1.
[10] At [31].
[11] [2002] 3 NZLR 62.
[12] [2006] NZAR 160 (CA).

(e) Disciplinary charges are not criminal prosecutions.

[40] In upholding the Tribunal's second stay decision, Her Honour Katz J emphasised that the power to stay on the grounds of abuse of process was rarely exercised. Reference[13] was made to the *Fox*[14] case, which held:

> "Finally to stay a prosecution, and thereby preclude the termination of the charge on its merits is an extreme step to be taken only in the clearest of cases."

[41] Her Honour also referred to the *Moevao*[15] decision:

> "… But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court ..."

[42] The Tribunal reminds itself that the important element of public protection means that we must be particularly cautious about taking steps that prevent disciplinary charges being heard and concluded.

[43] We note that, as in the *Chow* case, Mr Orlov has been aware of the allegations from the outset, and could have adduced evidence over the past few years to address the substance of the charges, rather than becoming bogged down in procedural arguments.

[44] Again, as in *Chow,* these charges are serious.

Public purpose in determination of charges

[45] Mr Orlov submitted that no purpose was served by determining the charges because he had recently[16] been found by the Practise Approval Committee ("PAC") as "not fit to practice" and had therefore been refused a practising certificate. Although Mr Orlov has the right to appeal against such refusal he has not done so.

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[13] At [41].
[14] See footnote 11 at [37].
[15] *Moevao v Department of Labour* [1980] 1 NZLR 464.
[16] November 2014.

[46] Mr Orlov states repeatedly that he does not wish to practise in New Zealand because he had been “struck off for telling the truth” and “persecuted for political purposes”.

[47] Mr Orlov was concerned about the risk of incurring further costs orders against him which he asserted would be unnecessarily punitive. He currently faces outstanding orders of the Tribunal and various Courts of approximately $150,000. The last Tribunal hearing of one week’s duration resulted in an order made against him for the Standards Committee and Tribunal costs in the sum of $96,000. He points out that with three further week-long hearings, if he is unsuccessful, that stands to be multiplied. He says he has no money and, if he had, he would not pay any costs orders in any event. Ultimately therefore the cost may fall to the profession.

Public protection

[48] Because he has no practising certificate and because he does not intend to practise again in New Zealand Mr Orlov states that there is no public protective purpose in continuing the proceedings against him. He also, more forcefully contends that the charges do not involve risk to the public because he entirely denies having been negligent or incompetent or having breached any of the rules referred to in the charges.

[49] Clearly the last matter is for assessment at the substantive hearing. However the other points raised by Mr Orlov require careful consideration. He had, at earlier hearings, offered to surrender his practising certificate and leave New Zealand if the charges against him were withdrawn. The Standards Committee had indicated in the past that a practitioner could resile from such an arrangement, and they considered they had a statutory obligation to the profession and the public to continue to have the charges determined.

[50] However, in reply submissions, Mr Orlov told the Tribunal that he would go further than he had earlier offered and would agree to being removed from the Roll of Barristers and Solicitors. He would give an undertaking never to apply for a practising certificate again even though he does not consider himself guilty of the charges. Mr Orlov was asked to confirm this position and invited to seek

independent legal advice. He confirmed his offer to be removed from the Roll and did not wish to have independent legal advice.

[51] It is the Tribunal's view that this offer changes the picture entirely.

[52] In summary we do not consider that any of the other submissions in relation to any of the other matters advanced by him are sufficient to warrant a stay of proceedings on the basis of abuse of process. In the absence of Mr Orlov's offer, his applications would fail.

[53] However we consider that were he to be removed from the Roll of Barristers and Solicitors, continuing the proceedings against him might well constitute an abuse of process. This would be particularly so if it involved an outcome whereby Mr Orlov was unnecessarily at risk for further costs orders in the region of $300,000 (by extension from the previous proceedings).

[54] The Tribunal cannot make orders to remove Mr Orlov from the Roll, except on the finding of charges under s 242. However Mr Orlov's proposal could be put in place by a voluntary application to the High Court by him, pursuant to s 60 of the Lawyers and Conveyancers Act ("LCA"). Alternatively the New Zealand Law Society could make an application to the High Court to have Mr Orlov removed, with his consent, under its inherent jurisdiction.

Procedure

[55] Following this offer by Mr Orlov the Tribunal requested Mr Hodge to seek instructions from the New Zealand Law Society and their proposal. In a memorandum of 27 February Mr Hodge indicated that it was considered s 60 might not be well suited to the disposal of a disciplinary case. Mr Hodge was concerned about the New Zealand Law Society's responsibility to regulatory bodies in other countries, however had not been able to obtain full instructions from the Council of the Law Society within the timeframe requested.

[56] A telephone conference convened for Monday 2 March was unable to progress this matter because Mr Orlov did not appear and was said to be out of New Zealand until 4 March. Accordingly the Tribunal has determined to issue this decision as an

interim decision indicating that it would entertain a stay and thereby vacate the upcoming hearing on very strict conditions as follows:

[57] In order to meet the New Zealand Law Society's concerns about Mr Orlov's future actions in applying for reinstatement should he be removed from the Roll voluntarily, we consider that the Law Society's consent to both removal and reinstatement ought to be upon clear conditions:

1. That prior to any reinstatement application Mr Orlov paid all outstanding Court-ordered or Tribunal-ordered costs awards against him.

2. That the remaining 18 charges could be considered as part of any assessment of fitness to practice undertaken by the Law Society or any Tribunal or Court on appeal from that assessment before reinstatement was granted. We understand a similar arrangement was entered into by consent in the matter of *Christopher Harder*.[17]

[58] If the parties are able to promptly reach a consensus and file the relevant papers in the High Court for consent orders to be made prior to the hearing of the next charges then that hearing date could be vacated.

[59] In all other circumstances, the hearing date will be maintained. The parties have until Wednesday 11 March to reach that stage.

Decision

1. Should the above conditions be met, that is that Mr Orlov and the New Zealand Law Society reach agreement in terms of the above conditions set out by the Tribunal and seek endorsement of that agreement by the High Court either in its inherent jurisdiction or pursuant to the voluntary removal provisions of s 60, by 5.00pm Wednesday 11 March, the proceedings under LCDT 011/10 and LCDT 002/11 are stayed pending further order of the Tribunal. Counsel are to advise further as to the position of the 2014 charges.

[17] *Auckland Standards Committee v Christopher Harder.*

2. If these conditions are not met the application for stay and for adjournment of the hearing is refused.

DATED at AUCKLAND this 5th day of March 2015

Judge D F Clarkson
Chair