NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 32

LCDT 011/10 and 002/11

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of **EVGENY ORLOV**

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr J Clarke

Ms J Gray

Ms C Rowe

HEARING on the papers

FINAL SUBMISSIONS filed 5 November 2012

DECISION ON APPLICATION FOR TRIBUNAL MEMBERS TO RECUSE THEMSELVES

Introduction

[1] The applicant, Mr Orlov, is the respondent practitioner in charges brought by the National Standards Committee, the Auckland Standards Committee No. 1 and the Auckland Section 356 Standards Committee of the New Zealand Law Society respectively.

[2] On 4 September 2012 Mr Orlov filed an application seeking various orders including the application for recusal which is the subject of this decision. The other applications have been set down for a hearing on 10 December 2012. Mr Orlov was overseas for six weeks immediately following the filing of his applications, hence the delay in filing of final submissions, and the respective hearings.

[3] The Tribunal determined that this matter, being of a more administrative nature could be more expeditiously and conveniently dealt with on the papers. Pursuant to s 231 the Chairperson has the responsibility of:

> "(1) ...
>
> (a) Making such arrangements as are practicable to ensure the orderly and expeditious discharge of the functions of the Disciplinary Tribunal;"

[4] And pursuant to s 252:

> "**S 252 Power of Disciplinary Tribunal to determine procedure** except as provided by this Act, or by rules made under this Act, the Disciplinary Tribunal may determine its own procedure."

Application

[5] The order sought by the applicant was:

> "That the members of the Tribunal who hold judicial post or who are or have been members of the New Zealand Law Society recues (sic) themselves."

[6] The applications have been opposed by Mr Pyke on behalf of the New Zealand Law Society and Standards Committees respectively (Law Society).

[7] Following a teleconference on 19 October directions were made by consent for the filing of affidavits and submissions in support of the recusal matter, which was to be dealt with on the papers. Pursuant to those directions Mr Orlov has now filed an affidavit on 23 October, and submissions on 5 November 2012.

Legislation

[8] Before considering the topic of recusal more generally, the application, as it stands, is unable to be granted because of the statutory requirements in relation to composition of a Tribunal panel.

> "**234 Constitution for proceedings**
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> (1) For the purposes of proceedings before the Disciplinary Tribunal or a division of the Disciplinary Tribunal, the Disciplinary Tribunal or division consists of—
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> (a) a chairperson, being,—
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> (i) in the case of proceedings before the Disciplinary Tribunal, the chairperson of the Disciplinary Tribunal; or
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> (ii) in the case of proceedings before a division of the Disciplinary Tribunal (being a division of which the chairperson of the Disciplinary Tribunal is a member), either the chairperson of the Disciplinary Tribunal or a member of the Disciplinary Tribunal designated by the chairperson of the Disciplinary Tribunal as the chairperson of that division; or
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> (iii) in the case of proceedings before a division of the Disciplinary Tribunal (being a division of which the deputy chairperson of the Disciplinary Tribunal, and not the chairperson of the Disciplinary Tribunal, is a member), either the deputy chairperson of the Disciplinary Tribunal or a member of the Disciplinary Tribunal designated by the chairperson of the Disciplinary Tribunal as the chairperson of that division; and
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> (b) such other members of the Disciplinary Tribunal as are selected in accordance with this section by the chairperson of the Disciplinary Tribunal.

(2) The number of members of the Disciplinary Tribunal selected under subsection (1)(b) must be an even number that is not less than 4.

(3) Half of the number of members selected under subsection (1)(b) must be lay members.

(4) Half of the number of members selected under subsection (1)(b)—

(a) must, if the proceedings relate to a lawyer or former lawyer or an incorporated law firm or former incorporated law firm or an employee or former employee of a lawyer or an incorporated law firm, be members who hold office under section 228(d); or

(b) must, if the proceedings relate to a conveyancing practitioner or former conveyancing practitioner or an incorporated conveyancing firm or former incorporated conveyancing firm or an employee or former employee of a conveyancing practitioner or incorporated conveyancing firm, be members who hold office under section 228(e).

(5) This section is subject to section 392."

[9] Thus it is impossible, in law, for the request of Mr Orlov to have a Tribunal comprised of only lay members, to be accommodated. We note that in his latest submissions dated 5 November 2012, Mr Orlov addresses the lay members of the Tribunal only.

[10] We turn to address the issue of recusal of the current Chair, Judge Clarkson. The test is set out in the submissions filed by Mr Pyke as stated by the Supreme Court in the decisions of *Siemer v Heron [Recusal]*[1] and *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2]. Both decisions confirm that there must be a factual basis for the assertion that the judicial officer in question might not bring an impartial mind to the matter.

[11] In the *Siemer*[3] decision the Court had this to say:

> "[11] It is well established that apparent bias arises only if a fair minded and informed lay observer might reasonably apprehend that there is a real and not remote possibility that the Judge might not bring an impartial mind to the resolution of the question of the Judge is required to decide. The observer will not adopt the perspective of a party seeking recusal unless objectively it is a justified one. It is necessary for those making decisions on whether there is apparent bias in a particular situation first to identify what is said that might lead a Judge to decide a case other than on its merits and, secondly, to evaluate the connection between that matter and the feared deviation."

[1] *Siemer v Heron* [2012] 1 NZLR 293.
[2] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35.
[3] *Siemer v Heron, a*bove n 1 at 11.

[12] A number of the assertions contained in both Mr Orlov's affidavit and in submissions are either factually inaccurate or comprise his assumptions. For example in paragraph 9 of his affidavit he alleges:

> "it was Judge Clarkson who made the decision to give (Mr Hesketh) back his practising certificate ...".

[13] Mr Orlov then annexes a copy of the decision in which it can plainly be seen that the Tribunal was chaired by Mrs A Hinton and Judge Clarkson's name does not appear as a member of it. At another point, and arguably of little or no relevance in any event, there is an assertion that Mr Nigel Hampton has been a member of this Tribunal. Mr Hampton has never been a member of the current Tribunal constituted under the LCA.

[14] Perhaps more relevant is Mr Orlov's assertion that because the charges involve allegations of how he has behaved towards members of the Judiciary that another Judge would not be able to impartially consider such an issue. Mr Orlov also goes on to assert that as a Family Court Judge, Judge Clarkson:

> "... would most likely be extremely offended by my imputed political views and opinions about the Family Court."

[15] Mr Orlov will be aware that judicial officers must take an oath to administer the law "without fear or favour, affection or ill will", on appointment. Thus he will also be aware that it is common place for judicial officers to have to put aside any personal views in order to properly perform his or her role.

[16] Mr Pyke submits:

> "The fair minded lay observer is presumed to be intelligent and to view matters objectively, to be reasonably informed as to the workings of the judicial system."

[17] As such the fair minded lay observer would be aware of the Judge's duty to act impartially and to declare any potential conflict of interest.

[18] All members, lay and practitioners, take a similar oath before a High Court Judge on appointment to the Tribunal.

[19] Apart from his vague, speculative and inaccurate assertions Mr Orlov has failed to establish any basis on which it could be considered that his view is objectively justified.[4] Indeed Mr Orlov has not even referred the Tribunal to the leading authorities which provide the relevant test. We do not consider that he has raised any objections that can be objectively sustained.

[20] We note Mr Orlov has spent some time addressing the recusal of Ms Scholtens QC. We have not addressed this specifically, since while we do not consider his objections to have any objective substance, the Chair has already indicated that Ms Scholtens will not be a member of the Tribunal considering his charges.

[21] For the sake of completeness, we are unaware of any Interim Rulings which could be said to be adverse to Mr Orlov; but in any event rely on the decision of the Court of Appeal in *Muir v Commissioner of Inland Revenue*[5] at [98] to [100]:

> "[98] It has to be accepted that there are occasions when a Judge's prior rulings might lead a reasonable person to question whether he would remain impartial in any subsequent proceedings. That said, this could be relevant to the question of judicial bias only in the rarest of circumstances.
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> [99] The reasons for this are straightforward. It is common sense that people generally hate to lose, and their perception of a Judge's perceived tendency to rule against him or her is inevitably suspect. As Kenneth Davis has said, "Almost any intelligent person will initially assert that he wants objectivity, but by that he means biases that coincide with his own biases" (*Administrative Law Treatise* (2nd ed, vol 3, 1978), p 378). Every judicial ruling on an arguable point necessarily disfavours someone – Judges upset at least half of the people all of the time – and every ruling issued during a proceeding may thus give rise to an appearance of partiality in a broad sense to whoever is disfavoured by the ruling. But it is elementary that the Judge's fundamental task is to judge. Indeed, the very essence of the judicial process is that the evidence *will* instil a judicial "bias" in favour of one party and against the other – that is how a Court commonly expresses itself as having been persuaded.
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> [100] The general approach that judicial disqualification is not warranted on the basis of adverse rulings or decisions is also justified by appropriate concerns about proper judicial administration. There is huge potential for abuse if recusal applications were permitted to be predicated on a party's subjective perceptions regarding a Judge's ruling."

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[4] *Siemer v Heron,* above n 1.
[5] *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495.

[22] The application cannot succeed on this basis either.

[23] Many of the matters asserted by Mr Orlov in his submissions and affidavit go to the merits of the prosecution itself. For that reason Mr Pyke has elected not to respond specifically to the final submissions filed by Mr Orlov.

Decision

[24] For the above reasons the application for recusal is declined.

DATED at AUCKLAND this 21st day of November 2012

Judge D F Clarkson
Chair