IN THE COURT OF APPEAL OF NEW ZEALAND

CA121/2014
[2015] NZCA 12

BETWEEN	FRANCISC CATALIN DELIU Appellant
AND	THE NEW ZEALAND LAW SOCIETY Respondent

Hearing:	13 October 2014
Court:	Wild, White and Miller JJ
Counsel:	Appellant in Person P J Morgan QC for Respondent
Judgment:	13 February 2015 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The discovery orders against the appellant confirmed by Katz J in her 13 February 2014 minute are set aside.

C The appellant is to pay the respondent's costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] These two appeals were, by consent, consolidated by order of White J on 26 March 2014.[1] Both appeals challenge decisions of Katz J in the High Court at Auckland in the course of managing and then part-hearing an application for judicial review brought by Mr Deliu.

[2] The first appeal, filed on 4 July 2013, challenged a decision by Katz J on 6 June 2013 to reduce the hearing time allowed for the judicial review application from seven to five days.

[3] The second appeal, filed on 12 March 2014, is against a decision of Katz J on 13 February 2014 to adjourn the judicial review application part-heard, pending the outcome of the disciplinary proceedings against Mr Deliu under the Lawyers and Conveyancers Act 2006 (the Act).[2]

[4] Although Mr Deliu makes the point that the first decision necessitated the second, it has effectively been overtaken by the second decision, to adjourn the proceeding part-heard. Our focus will thus be on that decision to adjourn.

[5] For the reasons we will explain, we consider the decision to adjourn was correct. The High Court ought not to have embarked on hearing and determining Mr Deliu's judicial review application until the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) had decided the disciplinary charges Mr Deliu faces. It accordingly cannot have been wrong to adjourn the hearing of a proceeding which should not have begun in the first place.

Background

[6] Three different complaints or groups of complaints had been made against Mr Deliu, who is a lawyer practising in Auckland. The first complaint, instigated by the Complaints Committee of its own volition in November 2008, alleged Mr Deliu

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1 *Deliu v The Executive Board of the New Zealand Law Society* CA718/2013, 26 March 2014. The two appeals had the CA numbers CA437/2013 and CA121/2014. White J directed that the consolidated proceeding was to use the CA number CA121/2014.

2 *Deliu v New Zealand Law Society* HC Auckland CIV-2010-404-6182, 13 February 2014 [Adjournment minute].

had acted unprofessionally in disrupting a meeting of the Auckland District Law Society's Complaints Committee No 2. The resulting charge was laid by the Auckland Standards Committee No 1 on 15 June 2010. The second complaints, made in December 2009 and July 2010, relate to allegedly unprofessional comments and behaviour directed against a Judge of the High Court. The resulting charges by the National Standards Committee were laid on 30 March 2012. The third set of complaints, made in October 2009, allege serial incompetence by Mr Deliu. No charges have been laid in respect of those complaints of incompetence.

[7] Mr Deliu filed his application for judicial review in the High Court at Auckland on 17 September 2010. His fifth amended statement of claim dated 21 December 2012 challenges, as unlawful, decisions of:

(a) the Auckland Standards Committee No 1 to investigate and lay a charge of unsatisfactory conduct in respect of his alleged disruption of the meeting. Relief, in particular the quashing of those decisions, is sought on a number of grounds, including that the decisions are unreasonable, discriminatory and otherwise in bad faith; and

(b) the National Standards Committee to lay charges against Mr Deliu in relation to his comments about the Judge and also the Chief High Court Judge, also on a number of grounds, including that the decisions abused processes, were biased, discriminatory or otherwise in bad faith and were contrary to the human right of freedom of expression and the civil right to complain about state matters.

[8] In a directions minute on 6 September 2012, Courtney J directed a fixture of eight days for the hearing of Mr Deliu's judicial review application and of a separate application by Mr Deliu seeking judicial review of the decision of the Legal Complaints Review Officer (LCRO) reviewing decisions of the Standards Committee (seven days for the first judicial review; one day for the LCRO

proceeding). The Judge noted: "the expectation that evidence will be taken in this case, either from subpoenaed witnesses or by cross-examination of deponents".[3]

[9] Following a two day issues conference and interlocutory hearing in April 2013, the trial Judge, Katz J, in a minute dated 3 May 2013, directed the Court to fix a seven day hearing.[4] Subsequently, after comprehensively reviewing the file in the course of determining the interlocutory applications, Katz J directed the Registry to allocate a five day fixture.

[10] Mr Deliu responded to the fixture notice issued by the Court by applying to Katz J that she recuse herself from hearing his substantive judicial review application, on the ground of actual or apparent bias. In the judgment she delivered on 26 July 2013, Katz J refused to do that.[5]

[11] It is apparent from Katz J's recusal judgment that she directed a five day fixture having dealt with applications for discovery, admission of facts, further particulars and interrogatories over two days. She recorded:[6]

> In addition to affidavits relating to specific interlocutory issues, Mr Deliu relied at the interlocutory hearing on evidence he had filed in support of his substantive claims, including his affidavit of 15 November 2012, which annexes 4961 pages of exhibits, comprising 13 volumes.

She also recorded that she considered five days "would be a more realistic estimate" of the time it would take to hear the application.[7]

[12] The hearing of the two proceedings began on 9 September 2013 but had not finished after the allocated five days, and was adjourned part-heard on 13 September.

[13] In her subsequent minute of 13 February 2014 further adjourning the

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3 *Deliu v The New Zealand Law Society* HC Auckland CIV-2012-404-6182, 6 September 2012 at [15].
4 *Deliu v The New Zealand Law Society* HC Auckland CIV-2010-404-6182, 3 May 2013 at [15].
5 *Deliu v The New Zealand Law Society* HC Auckland [2013] NZHC 1871 at [52].
6 At [7].
7 At [11].

proceedings pending outcome of the disciplinary proceedings against Mr Deliu, Katz J noted:[8]

> [6] Ultimately the substantive hearing could not be concluded in five days, primarily due to the length of Mr Deliu's submissions (179 pages), which were served on the eve of the hearing.

[14] The Judge then recorded her attempts to find a further three days to complete the hearing. Mr Morgan QC was readily available, but Mr Deliu advised the Court "that he would not be available until March 2014, at the earliest".[9]

[15] Next Katz J referred to a minute she had issued on 15 November 2013, noting that a delay of at least six months in completing the hearing was not satisfactory.[10] In that minute the Judge had also noted the Supreme Court, in the interim, had declined leave to appeal to Mr Orlov,[11] in what the Judge termed "parallel proceedings". She cited these two passages from that leave judgment:[12]

> [6] Procedural issues concerning the respondent Committees' decisions that complaints should be considered by Disciplinary Tribunal could of course have been raised before the Disciplinary Tribunal, and thereafter if necessary on an appeal to the High Court by way of rehearing and a further appeal to the Court of Appeal, with leave, on a question of law.[13] In such a case the High Court would generally consolidate any concurrent judicial review proceedings in respect to the Tribunal's decision with an appeal brought against it. The Court would not normally permit judicial review proceedings to be heard ahead of the statutory proceedings, other than in exceptional cases.[14] The Court of Appeal has also observed that, since the applicant's proceedings were issued, it has become settled that there is a right of review to the Legal Complaints Review Officer of Standards Committees' decisions made under s 152(2)(a).[15]
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> [7] In this case the High Court and Court of Appeal heard and determined the judicial review proceeding in advance of the hearing. That does not mean it is in the interests of justice that we hear a second appeal. There is no settled basis of fact on which this Court could decide whether the way the Committees proceeded, and laid charges, was lawful and fair. The statutory process would probably provide helpful factual context and

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8 Adjournment minute, above n 2, at [6].

9 At [7].

10 *Deliu v New Zealand Law Society* HC Auckland CIV-2010-404-6182, 15 November 2013.

11 Mr Orlov is a lawyer who was also facing disciplinary proceedings. He brought similar judicial review proceedings.

12 At [4] citing *Orlov v New Zealand Law Society* [2013] NZSC 94.

13 Lawyers and Conveyancers Act 2006, ss 253 and 254.

14 See *Tannadyce Investments v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [5]–[6].

15 This is a reference to *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562.

> facilitate the Court's determination of the issue. Importantly, in our view, there is no prejudice to the applicant in requiring him to go through the disciplinary hearing process before seeking to raise his objections to the respondents' process on an application for leave to appeal in this Court. It is a straightforward application of the statutory procedure.

[16] Katz J recorded the responses from the parties to her invitation to file memoranda as to the appropriate course in the light of those observations by the Supreme Court and the difficulty in finding a date to complete the hearing. Mr Deliu had opposed adjournment of the proceeding; Mr Morgan for the Law Society submitted it was the correct course.

[17] After reviewing relevant authorities, the Judge directed:[16]

> [The two proceedings] are adjourned pending the outcome of the disciplinary proceedings against Mr Deliu under [the Act].

Mr Deliu's submissions

[18] Mr Deliu submitted Katz J had erred in giving the direction set out in [17]. At the heart of this submission is Mr Deliu's belief that the Law Society is discriminating against him because he is not a "Kiwi" – not a "native" New Zealander born in this country. He argues he would not be facing the disciplinary charges he does face if he were a "Kiwi" lawyer.

[19] Mr Deliu explained he had, in consequence, applied for judicial review to prevent the Law Society proceeding with the disciplinary charges, and to prevent the Tribunal ever hearing them. An additional reason for applying was his instruction to counsel, Mr Tony Ellis, to take his complaint of discrimination by the Law Society to the United Nations. He needs to exhaust his domestic remedies before the United Nations will hear his claim.

[20] The two decisions by Katz J under appeal halted Mr Deliu's application for judicial review, pending the outcome of the disciplinary proceeding against him. That thwarted his attempt to avoid ever having to face a hearing of the disciplinary charges.

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[16] Adjournment minute, above n 2, at [37].

[21] Mr Deliu complained those two decisions had also, indirectly, stayed his civil claims for monetary compensation and declaratory relief which had been separated by Peters J from his application for judicial review. In a decision she gave on 4 November 2011, Peters J directed that the judicial review application be heard separately, and first.[17]

Decision

[22] These are the principles we consider determine this appeal:

(a) *Consumer protection legislation*: Legislation governing the discipline of lawyers in New Zealand has consumer protection as one of its principal objects.[18] For example, s 3 of the Act provides:

> **3 Purposes**
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> (1) The purposes of this Act are—
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> (a) to maintain public confidence in the provision of legal services and conveyancing services:
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> (b) to protect the consumers of legal services and conveyancing services:
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> …
>
> (2) To achieve those purposes, this Act, among other things,—
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> …
>
> (b) provides for a more responsive regulatory regime in relation to lawyers and conveyancers:

The primary aim of the professional disciplinary provisions in the legislation is to ensure that professionals are fit and proper persons to

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17 *Deliu v The New Zealand Law Society* HC Auckland CIV-2010-404-6182, 4 November 2011 at [32]–[33].

18 Referred to by this Court in *Orlov v New Zealand Law Society*, above n 15, at [10], where it pointed out that the current Act "has a greater focus on consumer protection" than the previous Act".

be practising their profession. Similarly the purpose of a disciplinary proceeding:[19]

> … is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

(b) *Expedition:* To achieve those aims, complaints against professionals must be dealt with expeditiously.[20]

(c) *Judicial review only after disciplinary process complete:* To ensure complaints against professionals are dealt with expeditiously, the High Court should not entertain an application for judicial review before the disciplinary process is complete, unless the complaint cannot be cured by the Disciplinary Tribunal.

[23] Principle (a) is plain upon the face of the Act. Principle (b) is implicit, and principle (c) explicit, in the two passages in the Supreme Court's judgment in *Orlov* set out in [15] above. As to principle (b), in [22](a) above we make the point that the focus in professional disciplinary proceedings is on the practitioner's fitness to be practising. The public interest is not served if a practitioner who is unfit to practise

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19 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [128].

20 This point has been emphasised in at least four decisions of this Court. The first was indirect. In *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 the Court, when dealing with judicial review during a professional disciplinary process, commented at 539 on the wide powers a Judge has in dealing with "the possibility of delaying tactics". Implicit if not explicit in that comment is that such tactics are not to be tolerated. Second, in *Deliu v National Standards Committee (No 1)* [2013] NZCA 76 at [14] the Court said: "It is in the public interest that all aspects of the conduct of [disciplinary] proceedings be dealt with promptly." Next, in *New Zealand Law Society v B* [2013] NZCA 156, [2013] NZAR 970 at [31] there is this statement: "[The Act] … envisages a framework that results in the expeditious resolution of complaints and the prompt hearing and determination of disciplinary charges." Most recently, in *Orlov*, above n 15, the point is made several times. First, at [23], the Court referred to the need for a review by the Legal Complaints Review Officer to be conducted with "as much expedition as is consistent with the requirements of the Act, proper consideration of the review and the rules of natural justice". Then, at [50], the Court noted the "strong legislative imperative that complaints are to be dealt with promptly". Lastly, at [165]–[171] the Court observed that Mr Orlov, by raising numerous procedural objections, had thwarted and delayed the disciplinary process. It stated at [168]: "it is imperative that the charges against Mr Orlov now be heard by the Tribunal on their merits and without still further delays". There is the same emphasis in *Castles v Standards Committee No 3* [2013] NZHC 2289 where Woolford J stated at [25]: "Of fundamental importance is that both the Standards Committee and the Tribunal must act expeditiously. It [the statutory disciplinary framework] is a summary process".

is able to continue to do so. This underlines the imperative that disciplinary proceedings be dealt with expeditiously, without delays.

[24] Turning to principle (c), in *Duncan v Medical Practitioners Disciplinary Committee*, this Court acknowledged there may be cases where an application for judicial review is best dealt with before the disciplinary proceeding continues:[21]

> In some cases the ultimate right of appeal may tell against the exercise of the discretion to grant earlier relief concerning the preliminary proceedings (*Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378) but when there is a serious issue as to whether a charge is in order it may obviously be convenient to have that issue determined before embarking on a hearing of the charge.

[25] In *Orlov* at [50], this Court gave two further examples of situations where judicial review may be appropriate before a disciplinary proceeding is determined. One was non-compliance with the statutory prerequisites for the making of the decision, such as failing to conduct the hearing required by s 152(1). The other was bad faith. Bad faith may exist where a decision is made in the course of the disciplinary process without a reasonable belief that a ground exists for making that decision. All three examples are open to abuse by a practitioner seeking to delay. We think it will be a rare and exceptional case where a practitioner can properly seek judicial review of a decision made in the course of the disciplinary process before that process is complete. In the passage cited in [15] above from the Supreme Court's judgment in *Orlov*, the Supreme Court at [7] records it could see no prejudice to Mr Orlov in requiring him to go through the disciplinary hearing process before seeking to raise his objections to that process. Judges will accordingly need to be satisfied that prejudice to the applicant would result if review of the impugned decision awaited completion of the disciplinary process.

[26] Application of these principles compels us to the conclusion that this appeal is misconceived and must be dismissed.

[27] There is not, in Mr Deliu's submissions, any recognition that the Act has as one of its principal objects consumer protection.[22] Mr Deliu's focus is exclusively

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21 *Duncan v Medical Practitioners Disciplinary Committee* at [539].

22 Lawyers and Conveyancers Act, s 3(1)(a) and (b).

upon his rights as a practitioner, in particular to be free from what he alleges are discriminatory disciplinary charges.

[28] As noted in [6] above, the complaints in respect of which Mr Deliu faces charges were made in 2008, 2009 and 2010. Over six years has elapsed since the first complaint, over four years since the last, yet a hearing of the charges by the Tribunal has not yet been scheduled. That situation seems to us to be the antithesis of "the more responsive regulatory regime" which is the aim of the Act.[23]

[29] Had the High Court declined to entertain Mr Deliu's application for judicial review, and had the focus been on completing the disciplinary process as rapidly as practicable, we believe the charges against Mr Deliu would have been determined some time ago. Consistent with the purposes of the professional disciplinary provisions in the Act, it is in the public interest that all the charges against Mr Deliu be heard together as soon as possible in order that the Tribunal may determine whether he is fit to practise.[24]

[30] If the decisions to charge Mr Deliu were discriminatory and malicious, as Mr Deliu alleges, the decision of the Tribunal will cure that. The Tribunal will not find Mr Deliu guilty on charges which it considers should not have been laid against him.

[31] Mr Deliu complains this means a decision of a Standards Committee to lay a disciplinary charge is not amenable to the supervisory jurisdiction of the High Court. That is not correct. The decision of a Standards Committee is, of course, subject to independent review by the LCRO. So an immediate, independent review is available and Mr Deliu took advantage of that. Judicial review of a decision of a Standards Committee to lay charges, and also of the LCRO's decision on review, is available, but only in respect of any reviewable defect not cured by the decision of the Tribunal. In practical terms, if Mr Deliu wishes to apply for judicial review after the Tribunal has given its decision, he should make a fresh application, or at the very least amend his present application limiting it to any reviewable defects he considers

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[23] Section 3(2)(b).

[24] *Duncan v Medical Practitioners Disciplinary Tribunal*, above n 20 at 545–546.

remain uncured. As the Supreme Court pointed out in *Orlov*, any such judicial review application would normally be consolidated with any appeal Mr Deliu brought against the Tribunal's decision.[25]

[32] Mr Deliu also complains this means he cannot avoid a hearing before and decision of the Tribunal. Consequently, if the Tribunal orders that he be struck off the roll, he may not be able to practice unless and until any appeal he brings against the striking off is successful. That is correct. But the reason is the consumer protection focus of the Act. The situation of a practitioner being debarred from practice for a period, until reinstated, is preferable to the situation where a practitioner continues practising, potentially for a lengthy period, while hearing and determination by the High Court of one or more judicial review applications holds up the disciplinary process.

[33] Lastly, Mr Morgan submitted there is now nothing to stop Mr Deliu proceeding with the civil claims which Peters J directed be separated from the judicial review application which was to be heard first. We agree that is now the position.

Discovery

[34] In her minute of 13 February 2014,[26] Katz J directed Mr Deliu to comply, by 28 February 2014, with the discovery orders she had made on 13 September 2013.[27] She clarified that what was required was discovery of any recordings Mr Deliu had made of his meetings with Mr Pyke[28] on or about 5 October 2011 and 22 March 2012. As we are upholding Katz J's direction set out in [17] above, the hearing of the two proceedings is unlikely to be completed. Given that circumstance, Mr Morgan readily accepted the discovery orders were inappropriate. We set them aside.

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25 *Orlov v New Zealand Law Society*, above n 12, at [6], set out in [15] above.
26 Adjournment minute, above n 2, at [37].
27 *Deliu v The New Zealand Law Society* [2013] NZHC 2398.
28 Mr Pyke is counsel acting for the Law Society in the disciplinary proceeding.

Result

[35] The High Court's decision of 13 February 2014 to adjourn the judicial review proceeding part-heard pending completion of the disciplinary charges against Mr Deliu is upheld.

[36] The appeal is dismissed.

[37] Although Mr Deliu had not appealed against the discovery orders confirmed by Katz J in her 13 February 2014 minute, those orders are now inappropriate and are set aside.

[38] The Tribunal should hear and determine the disciplinary charges against Mr Deliu as soon as is practicable.

Costs

[39] Mr Deliu is to pay the respondent Society's costs as for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Glaister Ennor, Auckland for Respondent