IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-1025
CIV-2013-404-1512
[2013] NZHC 1955

BETWEEN	EVGENY ORLOV Appellant
AND	THE NATIONAL STANDARDS COMMITTEE 1 AND THE AUCKLAND STANDARDS COMMITEE 1 Respondents

Hearing: 26 June 2013

Appearances: W Pyke for Applicants
E Orlov in person

Judgment: 6 August 2013

JUDGMENT OF KATZ J

This judgment was delivered by me on 6 August 2013 at 10:00 am
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Solicitors:
New Zealand Law Society, Wellington

Copy to:
WC Pyke, Hamilton
E Orlov, Auckland

Introduction

[1] Mr Evgeny Orlov is a barrister practising in Auckland. He is currently facing disciplinary proceedings brought by Standards Committees established by the New Zealand Law Society ("Law Society") under the Lawyers and Conveyancers Act 2006 ("Act"). A substantive hearing of some of the charges against him is scheduled to take place before the Lawyers and Conveyancers Disciplinary Tribunal ("Tribunal") in September 2013.

[2] Mr Orlov believes that there is insufficient evidence to justify the charges against him. He therefore applied to the Tribunal to dismiss the charges, prior to the substantive hearing. Mr Orlov's argument was broadly equivalent to a civil "no case to answer" submission or a discharge application under s 347 of the Crimes Act 1961 in criminal proceedings.[1] Mr Orlov's dismissal application was unsuccessful, for reasons I discuss further below.

[3] Mr Orlov also requested the Tribunal to either give him a "sentence indication" or to convene a settlement conference. The Tribunal declined to do so.

[4] Finally, the Tribunal also declined an application by Mr Orlov to stay the proceedings on the grounds of undue delay.

[5] Mr Orlov appeals against each of these decisions. The Standards Committees do not accept that a right of appeal exists in relation to a pre-hearing interlocutory decision not to dismiss charges.[2] Mr Orlov therefore filed judicial review proceedings in addition to his appeal. In light of this, the Standards Committees did not take any issue with the jurisdiction of this Court to address the various issues raised by Mr Orlov.

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1 *Hall v Wellington Standards Committee (No 2)* [2013] NZHC 798 per Woodhouse J.

2 Their argument was essentially that s 253(1) provides a right of appeal to the High Court only against a decision made by the Tribunal under Part 7 of the Act. The Standards Committees argue, however, that the Tribunal does not have the power under Part 7 to dismiss charges pre-hearing. Accordingly their position is that a decision not to dismiss charges pre-hearing cannot be a decision made under Part 7 of the Act. It is therefore not appealable.

[6] The outcome of this appeal/review turns on the following key issues:

(a) Does the Tribunal have either statutory jurisdiction or inherent power to strike out or otherwise dismiss charges on the basis of "insufficiency of evidence," at a pre-hearing stage?

(b) If so, did the Tribunal err in the exercise (or non-exercise) of that jurisdiction or power?

(c) Does the Tribunal have statutory jurisdiction or inherent power to give a sentence indication or to convene a settlement conference? If so, is it obliged to give a sentence indication or convene a settlement conference if requested?

(d) Did the Tribunal err in declining to grant a stay of the proceedings on the grounds of undue delay?

The Tribunal's statutory jurisdiction

[7] I will first consider the scope of the Tribunal's statutory jurisdiction, before considering the scope of any inherent powers that may be ancillary to that jurisdiction.

The Act

[8] Part 7 of the Act addresses complaints and discipline. The framework set out is intended to enable complaints to "be processed and resolved expeditiously".[3]

[9] Standards Committees are required to inquire into and investigate complaints against legal practitioners. Alternatively, they may conduct "own motion" investigations.[4] When a Standards Committee receives a complaint it has three options. It can decide to inquire into the complaint, it can direct the parties to explore

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3 Lawyers and Conveyancers Act 2006, s 120(2)(b).
4 Ibid, s 130(c).

the possibility of alternative dispute resolution, or it can take no action.[5] If a Standards Committee decides to inquire into a complaint, one option available to it is to refer the matter to the Tribunal for consideration.[6] That is what happened in this case. In the event of such a referral, the Standards Committee must frame an appropriate charge and lay it before the Tribunal.[7]

[10] If the Tribunal is satisfied that a charge has been proved on the balance of probabilities, it may, if it thinks fit, make various orders. These include orders that a practitioner's name be struck off the roll, that he or she be suspended, or that he or she be prohibited from practising on his or her own account (as well as various other lesser orders).[8]

The Regulations

[11] The Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008 ("Regulations") set out various procedural rules relating to proceedings before the Tribunal. The Regulations reflect the statutory imperative that disciplinary proceedings are meant to be processed and resolved expeditiously. A response to the charges by the practitioner is to be filed within 10 working days. This is followed by an initial issues conference at which the Tribunal can make directions relating to affidavits, documents or lists of documents, schedules of admissions or denials and submissions. In addition, the chairperson may give any other directions that he or she thinks fit for the purposes of "the just, efficient, and expeditious" conduct of proceedings.

[12] The Regulations also provide for a setting down conference,[9] once the directions made at the issues conference have been complied with (or at such other time as the chairperson directs). At the setting down conference, the chairperson must fix a date for the substantive hearing and may also give any further directions that he or she considers necessary for its efficient and just conduct. The Regulations

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5 Ibid, s 137.
6 Ibid, s 152(2)(a).
7 Ibid, s 154(1)(a).
8 Ibid, s 242.
9 There is also a general power to convene any further conferences that may be required for the purposes of the just, efficient and expeditious conduct of the proceedings: reg 32.

also provide for other miscellaneous procedural matters such as adjournments, amendments to the charge, evidence, methods of service, record of proceedings and so on.

[13] Of particular significance in this case, the Tribunal also has a wide ranging power under s 252 of the Act to determine its own procedure "except as provided by this Act or by rules made under this Act".

The Tribunal's practice note

[14] There is also a separate statutory provision authorising the Tribunal to make rules "not inconsistent with this Act, in respect of the making, hearing, and determination of applications, inquiries, appeals, and other proceedings before it".[10] A Practice Note has been issued pursuant to these provisions. It sets out various additional procedural rules relating to such things as the commencement of proceedings, responses to charges, issues and setting down conferences, compliance with timetables and adjournments, conduct of the hearing and so on.

The Tribunal's inherent powers

[15] Unlike the High Court, the Tribunal has no inherent jurisdiction. Its jurisdiction is entirely derived from statute. However, all Courts and most tribunals have inherent powers. As Lord Morris observed in *Connelly v R*:[11]

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction.

[16] Inherent powers enable a court or tribunal to regulate its own procedures and prevent abuse of its processes. Such powers are ancillary to a court's statutory jurisdiction or, as one commentator has described them, are "parasitic" on that jurisdiction.[12]

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10 Lawyers and Conveyancers Act 2006, ss 227(g) and 250.

11 *Connelly v R* [1964] AC 1254 at 1301.

12 Rosara Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand, (2005)" Cant Law Rev 220.

[17] In *McMenamin v Attorney General* the Court of Appeal stated that:[13]

> An inferior Court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. This is implied as a matter of statutory construction. Such Court also has the duty to see that its process is used fairly. It is bound to prevent an abuse of that process. All this is well understood. See eg *Moevao v Department of Labour* [1980] 1 NZLR 464, *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84, and *Bryant v Collector of Customs* [1984] 1 NZLR 280. The latter case and *Bosch v Ministry of Transport* [1979] 1 NZLR 502 were both concerned with inferior Courts.

[18] The three most important categories of inherent power are:[14]

(a) the inherent power of a court to regulate its own procedure;

(b) the inherent power of a court to ensure fairness in trial and investigative procedures; and

(c) the inherent power of a court to prevent an abuse of its own processes.

[19] I will consider first whether the Tribunal has statutory power to dismiss charges pre-hearing and then whether it has any inherent power to do so.

Does the Tribunal have *statutory* power to dismiss charges on the basis of "insufficiency of evidence" at a pre-hearing stage?

[20] A general power of dismissal pre-hearing is not expressly provided for in the Act. The Regulations enable the Tribunal to dismiss charges pre-hearing only if a party fails to appear at a hearing of the Tribunal[15] or if a party fails to comply with any direction given by the chairperson under regulation 32.[16]

[21] Any statutory power to dismiss charges pre-hearing in other circumstances must accordingly be derived from s 252 of the Act, which authorises the Tribunal to determine its own procedure "except as provided by this Act or by rules made under this Act." Reflecting this broad statutory power, regulation 32 authorises the

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13 *McMenamin v Attorney General* [1985] 2 NZLR 274(CA) at 276.
14 *Attorney General v District Court at Otahuhu* [2001] 3 NZLR 740 (CA) at [16].
15 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008, reg 27.
16 Ibid, reg 28.

chairperson to give (in addition to the directions specified in the Act) any other directions that the chairperson thinks fit for the purposes of the "just, efficient and expeditious conduct of proceedings".

[22] It was common ground, on the basis of *Hall v Wellington Standards Committee (No 1)*[17] and *Hall v Wellington Standards Committee (No 2)*[18] that the Tribunal has power to hear a "no case to answer" submission at the substantive hearing, following the close of the applicants' case. In *Hall (No 1)* Collins J summarised the position as follows:[19]

> [14] Professional disciplinary proceedings draw on procedures and principles found in both the criminal and civil jurisdictions. It is unusual for a defendant in a disciplinary proceeding to argue that there is no case for them to answer. There is, however, authority for recognising that in appropriate cases a practitioner may submit at the close of the prosecution case that there is no case to answer. An example of such a case is *Malfanti v The Legal Professional Disciplinary Tribunal*[20] in which the Court of Appeal of New South Wales said they found it difficult to understand why a submission analogous to a "no case" argument should not be entertained at the conclusion of the prosecution case where the practitioner wished to submit that there was no evidence to support any of the grounds in the charge.

[23] The Standards Committees submitted, however, that considering a "no case to answer" application during a substantive hearing is quite different to doing so at the pre-hearing stage. The Tribunal has clear jurisdiction under the Act to conduct a substantive hearing. It may therefore use its ancillary procedural powers to entertain a "no case to answer" submission during the course of such a hearing. However, the Act does not provide for dismissal applications on a "no case to answer" basis pre-hearing. Accordingly, the Standards Committees submitted that the Tribunal does not have the power under Part 7 of the Act to dismiss charges pre-hearing.

[24] This issue was before the Tribunal in *Hawke's Bay Standards Committee v M.*[21] In that case the Tribunal (which was differently constituted to the Tribunal which determined Mr Orlov's application) considered an argument advanced by the

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17 *Hall v Wellington Standards Committee* [2012] NZAR 790 (HC).
18 *Hall v Wellington Standards Committee* [2013] NZHC 798.
19 At [14].
20 *Malfanti v The Legal Professional Disciplinary Tribunal* (1993) 4 LPDR 17 (NSWCA).
21 *Hawke's Bay Standards Committee v M* [2013] NZLCDT 1

Hawke's Bay Standards Committee that it had no power to strike out or dismiss charges at a pre-hearing stage. The Tribunal rejected this argument, stating that:

> [20] We do not accept that the Tribunal has no power to strike out or dismiss without a substantive hearing in appropriate cases.[22]
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> [21] We do accept the Standards Committee's submission regarding the need for a proper resolution of evidence by hearing where there is a prima facie case, which we consider there is in this matter.

[25] The Standards Committees submitted that *Hawke's Bay Standards Committee v M* was wrongly decided. Rather, it was submitted, the Tribunal's pre-hearing jurisdiction was analagous to that of the District Court in its summary jurisdiction. The Standards Committees relied in particular on *Attorney General v Otahuhu District Court.*[23] The key issue before Court of Appeal in that case was whether the District Court, in summary proceedings, has the power to rule, pre-trial, on access by the defence to information held by an agency or person other than the prosecution. The Court observed that:[24]

> Unlike the Crimes Act 1961, s 344A, the Summary Proceedings Act 1957 contains no provisions expressly recognising or allowing for pretrial rulings and there is nothing in the scheme and structure of the relevant provisions of the 1957 statute to provide any support for a separate pretrial ruling regime in summary proceedings. On the contrary, the essential focus of Part II of the Act, applying to all proceedings where the defendant is proceeded against summarily (s 11), is on the hearing of the charge.

[26] That, the Standards Committees submitted, is akin to the legislative regime under the Act.

[27] I am not persuaded that the analogy is entirely apt. Parliament has given the Tribunal expansive powers to determine its own procedure and to make such directions as it thinks fit, although of course they must be consistent with its statutory functions. The touchstone must be the "just, efficient and expeditious conduct of proceedings". The District Court procedures discussed in *Otahuhu* were fairly prescriptive in nature and there was no "fallback" statutory provision

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22 For example see the Court of Appeal in *McMenamin v Attorney General* [1985] 2 NZLR 274; and *Chow v Canterbury District Law Society* [2006] NZAR 160 at [15]; and the Tribunal's power under s 252 Lawyers and Conveyancers Act 2006.

23 *Attorney General v Otahuhu District Court* [2001] 3 NZLR 740 (CA).

24 At [11].

equivalent to s 252 of the Act. That provision provides the Tribunal with considerable flexibility.

[28] On the Law Society's analysis, even in a clear cut case, where there is no evidence at all to support of a charge, the Tribunal would have no power to bring the proceedings to an early conclusion. Of course, one would hope that in such a case the relevant Standards Committee would itself seek to withdraw the charges. But if, for some reason, it did not, then the "just, efficient and expeditious conduct of the proceedings" must allow for the Tribunal to take the appropriate action.

[29] Parliament has provided that the Tribunal is free to set its own procedure. Obviously it must do so in a way that is consistent with the discharge of its statutory functions and does not cut across any express statutory or regulatory provisions. Subject to those constraints, the Tribunal has been given a high degree of procedural flexibility in the exercise of its important statutory functions.

[30] As one Australian commentator has noted, this flexible procedure for a disciplinary tribunal means it is *sui generis.* It is neither strictly adversarial nor inquisitorial in nature, reflecting that disciplinary proceedings are aimed at protection of the public as well as discipline of the practitioner.[25] As the New South Wales Court of Appeal observed in *Malfanti v The Legal Profession Disciplinary Tribunal & Anor*:[26]

> It is impossible in my view to lay down a rigid rule. The Tribunal is bound to mould its procedures to enable it efficiently and effectively to carry out its functions in an expeditious manner....

[31] Against this background, the fact that the Tribunal has the *power* to consider a dismissal application pre-hearing doesn't mean that it is *required* to do so. 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. The Tribunal is entitled to set its own procedure and is not required to replicate the complexities of High Court

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[25] Ysaiah Ross *Ethics in law: Lawyers' Responsibility and Accountability in Australia* (5th ed, LexisNexis, Australia, 2010) at 7.89.

[26] *Malfanti v the Legal Profession Disciplinary Tribunal & Anor* [1993] NSWCA 171 at 5.

interlocutory procedures. Indeed doing so would likely cut across the legislative scheme.

[32] I accept the Standards Committees' submission that dealing with such applications at the pre-hearing stage has the potential to fragment the disciplinary process, build in another layer of potential delay, enable a lawyer to seek to avoid responsibly engaging with the disciplinary process, and undermine the intention of the Act to have matters determined expeditiously.

[33] One of the central objectives of the Act is to provide for "a more responsive regulatory regime in relation to lawyers and conveyancers."[27] The *sui generis* nature of the disciplinary process, the 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. The legislative scheme does not favour formality, or complex and technical interlocutory processes that are likely to delay the substantive determination of charges. As the Court of Appeal observed in *Orlov v New Zealand Law Society*[28] there is a strong legislative imperative that complaints are to be dealt with promptly. This observation applies equally to the determination of charges before the Tribunal.

[34] Each case will turn on its own facts, but it is likely that in most cases, if the Tribunal is willing to consider a "no case to answer" application, it will be most efficiently dealt with at the substantive hearing itself. Further, if the application is declined, the most efficient course may be for any reasons to be given contemporaneously with the reasons for the substantive decision (given the inevitable overlap). Ultimately, however, the appropriate course will be a matter for the Tribunal in each case.

[35] I note that in both *Hall* and the present case, the view of the relevant practitioners appears to have been that the disciplinary process is analagous to criminal proceedings, in which a defendant is entitled to refrain from disclosing their

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27 Lawyers and Conveyancers Act 2006, s 3(2)(b).

28 *Orlov v New Zealand Law Society* [2013] NZCA 230, at [50].

defence until the 11th hour, only electing whether or not to give evidence after the close of the prosecution case.

[36] That is not, however, how the Act is structured. Reflecting the strong public interest element, the Act envisages that the practitioner will fully co-operate in the disciplinary process and provide all relevant information to the Tribunal. A practitioner cannot "keep his powder dry". A response to the charges must be filed within 10 working days. The Tribunal is able to order that schedules of admissions or denials be filed. The legislative regime envisages a default position of evidence by affidavits, to be filed pre-hearing. In this context, I endorse the observation of Woodhouse J in *Hall (No 2)* that the cases relied on by the appellant in that case did not even go so far as to support a proposition that a disciplinary tribunal would be bound to consider the merits of a charge without requiring all of the evidence *for the practitioner* to be put before the Tribunal.[29]

[37] In summary, the Tribunal does have the necessary statutory power to consider an application for dismissal of charges on a "no case to answer" basis pre-hearing. However, it is not required to do so. There are many reasons why it may not be appropriate to hear a dismissal application prior to the substantive hearing in any given case.

Does the Tribunal have an inherent power to dismiss on the ground that continuation of the proceeding would be an abuse of the process of the Court?

[38] Given my conclusion that the Tribunal has statutory power to consider a dismissal application pre-hearing, it is not strictly necessary to consider whether it has *inherent* power to dismiss the disciplinary charges against Mr Orlov on "insufficiency of evidence" grounds.

[39] For completeness, however, I note that my view is that Mr Orlov's "insufficiency of evidence" argument would not fall within the abuse of process

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[29] At [35].

category as outlined in cases such as *Moevao v Department of Labour*[30] and *Fox v Attorney General*.[31] As Richmond P observed in *Moevao*:[32]

> However it cannot be too much emphasised that the inherent power to stay a prosecution stems from the need of the Court to prevent its own process from being abused. Therefore any exercise of the power must be approached with caution. It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the Court is itself being wrongly made use of.

[40] The following passage from the judgment of Richardson J in *Moevao* elaborates further on the scope of the ability to dismiss or stay a prosecution on abuse of process grounds:[33]

> The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. 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…..
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> While the Court must be the master and have the last word, it is only where to countenance the continuation of the prosecution would be contrary to the recognised purposes of the administration of criminal justice that a Court would ever be justified in intervening.

[41] Finally, the New Zealand Court of Appeal in *Fox v Attorney General* stated that:[34]

> [37] These principles set a threshold test in relation to the nature of a prosecutor's conduct which warrants a decision to end a prosecution, prior to trial, as an abuse of process. Conduct amounting to abuse of process is not confined to that which will preclude a fair trial. Outside of that category it will, however, be of a kind that is so inconsistent with the purposes of

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30 *Moevao v Department of Labour* [1980] 1 NZLR 464.
31 *Fox v Attorney General* [2002] 3 NZLR 62 (CA) at [37].
32 At 470-471.
33 At 482.
34 *Fox v Attorney General* [2002] 3 NZLR 62 (CA) at [37].

> criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety. The power of stay is not available for disciplinary purposes nor to reflect a Court's view that a prosecution should not have been brought. The hallmarks of official conduct that warrant a stay will often be bad faith or some improper motive for initiating or continuing to bring a prosecution but may also be simply a change of course by the prosecution having a prejudicial impact on an accused. Finally, to stay a prosecution, and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.

[42] There is a very high threshold to meet before a statutory body or tribunal can dismiss charges on abuse of process grounds. The insufficiency of evidence ground relied upon by Mr Orlov falls well short of this threshold.

Did the Tribunal err in the exercise of its statutory power to dismiss proceedings pre-hearing?

[43] As set out above, I have concluded that the Tribunal has statutory power to consider an application for dismissal of charges on a "no case to answer" basis, pre-hearing. However it is not required to do so. Each case will depend on its own particular facts. Ultimately it is up to the Tribunal to determine its own procedure in relation to such issues, against the benchmark of what will best advance the just, expeditious and efficient conduct of the proceedings.

[44] Following a hearing which lasted more than a day, the Tribunal concluded, in relation to Mr Orlov's dismissal application, that:[35]

> We accept Mr Pyke's submissions that as a statutory creature this Tribunal has no inherent jurisdiction and that strike out power is not prescribed in the legislation or regulations. It is conceded that the power to regulate tribunal process provides us with the ability to prevent abuse of our process and we consider we should consider those grounds. We do not consider we ought at this preliminary stage to be weighing the evidence in the manner suggested by Orlov. We consider the charges and particulars are of sufficient detail and clarity to fairly inform the practitioner of what he is accused. Those are supported already by voluminous documentation.

[45] The parties seemed to interpret this passage as meaning that the Tribunal considered that it lacked jurisdiction or power to consider Mr Orlov's dismissal

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35 *Auckland and National Standards Committees v Orlov* [2013] NZLCDT 3 at [12].

application at a pre-hearing stage. I am not sure that that is the correct interpretation of the Tribunal's decision.

[46] The Tribunal noted in its decision that the charges filed by the National Standards Committee comprised 31 pages containing 11 charges and associated particulars. The charges filed by the Auckland Standards Committee comprised 18 pages containing 13 charges and associated particulars. In addition to those documents the Standards Committees had filed 3 volumes of evidence comprising 1,039 pages. Taking into account the volume of material before it, the Tribunal concluded that:

> We consider the charges and particulars are of sufficient detail and clarity to fairly inform the practitioner of what he is accused. Those are supported already by voluminous documentation.

[47] This is consistent with observations recently made by the Court of Appeal in the related *Orlov* proceedings (in which Mr Orlov challenged various procedural decisions made by the Standards Committees prior to the laying of charges in the Tribunal). For example, in relation to one of the complaints that now underpins the charges in the Tribunal, the Court stated that:[36]

> 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.

[48] The Tribunal did not feel, however, that it "ought" to engage in the highly detailed evidential analysis sought by Mr Orlov at a pre-hearing stage. In my view it is implicit from the Tribunal's decision, when considered as a whole, that this was not because the Tribunal considered that it lacked the necessary power to do so. Rather, the Tribunal considered that it was not appropriate (or possibly not necessary) on the facts of this particular case to engage in a detailed evidential analysis at a pre-hearing stage. For all of the reasons I have outlined above, that was a course that was entirely open to the Tribunal in the circumstances.

[49] In any event, it appears to be implicit that, at a high level at least, the Tribunal was satisfied that there was a prima facie case against Mr Orlov. In addition, it was

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[36] At [67].

common ground that the Law Society will be seeking to put further documents (obtained from a search of Court files subsequent to the laying of charges) into evidence. Mr Orlov has indicated he will strenuously oppose the admission of any further evidence. However, until that issue is resolved, final resolution of any dismissal application based on insufficiency of evidence would seem to be premature.

Does the Tribunal have power to give a sentence indication or to convene a settlement conference? If so, is it obliged to do so if requested?

[50] The next issue raised by Mr Orlov's appeal/review is whether the Tribunal has power to give a sentence indication or to convene a settlement conference and, if it does, whether the Tribunal is obliged to do so if requested.

[51] The Act expressly envisages the possibility of alternative dispute resolution between a practitioner and a complainant during the Standards Committee's investigation phase. However there is no provision in the Act for any form of alternative dispute resolution following the laying of charges before the Tribunal. Nor does the legislation make any provision for sentence indications.

[52] There is considerable force in the Standards Committees' submission that the aim of the Act is not "tailoring a sentence to suit the needs of the lawyer charged". Rather, it is about making findings about the conduct of the lawyer charged and only then evaluating whether those findings requires certain orders to be made, in the public interest.[37] Any indication of likely penalty could potentially give rise to allegations of predetermination in the event it was not accepted. Convening a fresh Tribunal could give rise to obvious administrative difficulties and inefficiencies.

[53] The concept of a "settlement conference" in disciplinary proceedings also raises a number of issues. The Standards Committees and Mr Orlov are not parties to a civil dispute which may be the subject of negotiations.

[54] In the present case there appears to be little or no common ground between the parties and no agreed statement of facts on which a sentencing indication could

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[37] Section 3(1) of the Act; and see *Orlov v NZLS* [2013] NZCA 230.

be based. Indeed Mr Orlov's position is that the evidence is so deficient that the charges should be struck out in their entirety.

[55] Despite the obvious difficulties, I cannot exclude the possibility that that there could be a case in which it might be appropriate for the Tribunal to involve itself in some form of "settlement" process, pursuant to its s 252 powers. However, the Tribunal could never be obliged to engage in such a process. In my view it was entirely appropriate for the Tribunal not to endeavour to engage in any form of "settlement" process on the facts of this case.

Did the Tribunal err in declining to grant a stay of the proceedings on the grounds of undue delay?

[56] On appeal it was not in dispute that the Tribunal has inherent power to grant a stay on the grounds of delay, as recognised in *Chow v Canterbury District Law Society.*[38] The sole issue was whether that power had been exercised correctly.

[57] The matters a Court will take into account in relation to delay include:[39]

(a) the length of delay;

(b) waiver;

(c) the reasons for the delay; and

(d) prejudice to the accused.

[58] Mr Orlov argued before the Tribunal that the charges against him should have been struck out or stayed on the grounds of delay. He filed an affidavit in support of his stay application which raised the following key grounds of prejudice:

(a) loss of witnesses' memory and availability issues;

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38 *Chow v Canterbury District Law Society* [2006] NZAR 160 (CA).
39 *Martin v District Court at Tauranga* [1995] 2 NZLR 419 (CA).

(b) the events no longer being fresh and the requirement of trawling through and locating documents;

(c) Mr Orlov's loss of memory;

(d) Mr Orlov's health deterioration due to anxiety caused by delay;

(e) the sheer number of unparticularised allegations;

(f) the passage of time itself causing a presumption of prejudice.

[59] The Tribunal gave the following reasons for declining the stay application:

> We do not consider that delay can be said to have prejudiced Mr Orlov to the extent that he will not be able to have a fair hearing in respect of each of the charges that are to proceed. As I have indicated, he has filed lengthy affidavits himself and lengthy submissions and synopsis of arguments and his perspective of the various proceedings in which he has been involved and out of which these charges arise. He has detailed recall and indeed delivers his position and his stand point with considerable vigour.

[60] Mr Orlov submitted that this passage indicated that the Tribunal had taken into account irrelevant considerations and failed to take into account various relevant considerations. For example, he submitted that there was no evidence before the Tribunal as to his recall of events. Further the Tribunal had not taken into account the prejudice outlined in his affidavit. Mr Orlov also noted that he had not filed any substantive affidavits in answer to the charges. It was always his stand that he was not in a position to address the charges due to, amongst other matters, delay. Accordingly any affidavits related to interlocutory issues only.

[61] Mr Orlov also took issue with a statement by the Tribunal that in February 2011 he had given an undertaking that he would not seek to rely on delay. Mr Orlov said that such an undertaking was only given on the basis that he be granted a stay of all the processes pending judicial review. However, no such formal stay was given, only an informal adjournment. Accordingly Mr Orlov did not believe himself to be bound by any undertaking.

[62] Mr Orlov argued that he was not responsible for the delay. In particular he denied that the multiplicity of proceedings he had filed in the High Court challenging aspects of the disciplinary process had caused delay in resolution of the charges before the Tribunal. The Standards Committees, on the other hand, submitted that Mr Orlov's desire to have the Tribunal proceedings stayed or adjourned pending the outcome of his High Court application for judicial review caused the lion's share of the delays.

[63] The Standards Committees further observed that filing pre-hearing applications in the Tribunal to strike out or to summarily dismiss charges also inevitably invites further delay, including further appeals and reviews (as has occurred in this case). A lawyer pursuing such an approach cannot then be heard to complain about delays.

[64] The Standards Committees noted that the Court of Appeal had already addressed a number of Mr Orlov's delay arguments in *Orlov.* The Court of Appeal held that delay of the kind that has occurred in the earlier phases of the investigation which culminated in the charges against Mr Orlov was "totally unsatisfactory and contrary to the statutory policy that complaints are to be dealt with expeditiously".[40] The Court also noted that "delay can obviously prejudice fair hearing rights and cause staleness. Delay can amount to an abuse of process". Importantly, the Court concluded on the delay issue that:[41]

> 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 investigatory phase of the process. However instead of engaging in the process in answering the substance of the complaint, he chose to prevaricate and take unmeritorious procedural points. That is true of his approach to all of the complaints.

[65] Further, under the heading of "outcome" the Court of Appeal, in noting that Mr Orlov had sought to take every conceivable point (none of which had any merit), emphasised the following:

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40 At [107].
41 At [108].

> [165] These and all other charges should now be heard by the Tribunal without delay. On this point we have the following observations. We direct them particularly to Mr Orlov.
>
> [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.
>
> [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].
>
> [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.
>
> [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.

[66] The *Orlov* case concerned procedural challenges to various decisions of Standards Committees that pre-date the Tribunal decisions at issue in this appeal. Nevertheless, the Standards Committees submitted that the Court of Appeal's findings on the issue of delay at an earlier stage of Mr Orlov's disciplinary process are consistent with the subsequent history of this matter before the Tribunal.

[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.*

[68] In relation to prejudice, the Tribunal was not satisfied 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 Committees

observed, this observation was made by an experienced judge, who chaired the Tribunal and signed the decision.

[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.

Recusal

[70] A separate ground of appeal raised by Mr Orlov in his Notice of Appeal was that the chairperson of the Tribunal ought to have recused himself from presiding. The Standards Committees addressed this issue in their written submissions but Mr Orlov withdrew this ground of appeal at the hearing. It is accordingly dismissed.

Result

[71] Mr Orlov's appeal and his application for judicial review are dismissed.

[72] My preliminary view is that costs should be awarded to the Standards Committees on a category 2B basis, along with disbursements to be fixed by the Registrar. If the parties cannot agree costs based on this indication, then the Law Society is to file its memorandum within 20 working days of this decision, with any memorandum from Mr Orlov in response to be filed within 10 working days thereafter. A decision will then be made on the papers.

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Katz J