IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-4757
[2014] NZHC 487

BETWEEN	EVGENY ORLOV Plaintiff
AND	NATIONAL STANDARDS COMMITTEE No.1 Defendant

Hearing: 13 March 2014

Counsel: F C Deliu for plaintiff
W Pyke for defendant

Judgment: 13 March 2014

ORAL JUDGMENT OF FOGARTY J

Solicitors:
F C Deliu Auckland
W Pyke, Auckland

[1] On 24 February last, I delivered a judgment in these proceedings which debarred Mr Deliu from appearing as counsel for Mr Orlov in an appeal by Mr Orlov against a decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal that he be struck off from the Roll of Barristers and Solicitors. That appeal is set down for hearing on 1 and 2 April 2014.

[2] Counsel have all agreed that Mr Orlov has a right of appeal from that decision, and that appeal has been filed in the Court of Appeal.

[3] On 4 March, I had a further case management conference which recorded that Mr Deliu appears on procedural matters with my approval and records that acceptance that Mr Orlov has that right of appeal. I intimated that unless the Court of Appeal arranges for an urgent hearing and delivers a judgment some time short of 1 April, it looks very likely that I would have to vacate the fixture set down for 1 and 2 April.

[4] There is an application by Mr Orlov for consolidation of the appeal proceedings with the judicial review proceedings which is currently being opposed.

[5] I told counsel that I favoured both the judicial review and the appeal being heard by the same Court and invited counsel to discuss steps that need to be taken to get the judicial review case ready for hearing and arranged for this fixture today to hear any outstanding issues, with an endeavour that I resolve them today. I recorded I had notice that one of those issues would include on whether or not Mr Deliu should likewise be barred from representing Mr Orlov on the judicial review, but that I appreciated that the arguments and issues would be different from those that I had resolved in the judgment.

[6] This morning I have heard oral argument. The hearing has proceeded as much by way as case management conference as it has as a hearing but I am satisfied, I think, that I have given everybody opportunities to make their points.

[7] Preceding the hearing, I had received a formal interlocutory application by the National Standards Committee No.1 for an order that Mr Deliu be debarred from

appearing as counsel for the appellant in the judicial review. That was the application I anticipated in the earlier minute.

[8] I also received two memoranda, one from the National Standards Committee in support of that and I also received a memorandum from Mr Deliu on the issues. Having read those memoranda, I came into Court impressed by Mr Pyke's argument that it will not in fact be practically possible to disentangle the merit points of the appeal from the grounds of review, so that if the appeals and review are heard together it will be (and I am quoting now from Mr Pyke's submission) "hopelessly unmanageable to confine Mr Deliu to discrete areas as the claims range widely in and out of the merits".[1]

[9] I heard Mr Deliu first as coming into Court he had the practical burden of persuading me that he should not be debarred from hearing the judicial review. He offered a solution whereby the judicial review be heard on 1 and 2 April.

[10] I heard from counsel as to the practicalities of clearing away procedural matters that need to be sorted before the judicial review can be heard. Mr Deliu needs to have a transcript of the hearing before the National Standards Committee. Apparently that is available and is an electronic file and can be provided immediately to Mr Deliu by Mr Pyke. Similarly, Mr Pyke has an index to the record of the hearing of the Standards Committee and that can be provided.

[11] After discussion with Mr Deliu, I am satisfied that he has access to Mr Orlov's files in Auckland. Mr Orlov is currently in South America. Mr Orlov is the pleader of the statement of claim in the judicial review. But, in the end, I was satisfied, and I think Mr Deliu was, that he will be able to obtain such material as he needs to from Mr Orlov's files in Auckland to enable him to argue the judicial review point.

[12] Before I heard from Mr Pyke, I was earlier of the view that Mr Deliu could be allowed to argue the judicial review proceeding had it been heard prior to and separately from the appeal, comforted by the presence of a amicus in court. The

[1] Mr Pyke's submission.

amicus has been here today, Mr Hollyman and I have invited him to participate in procedural issues to the extent he can be. I am alive to the fact that his appointment is also the subject of appeal to the Court of Appeal. But, in the meantime, he remains as amicus.

[13] In his oral address, Mr Pyke argued that the pleadings in the judicial review could be divided into two parts – those which complained of breaches of natural justice prior to the hearing and those which argued that matters that ought to be taken into account were not taken into account during the hearing. He argued in respect of the latter issues, that it would be difficult if not impossible to separate out consideration of those arguments from the appeal task of rehearing the case and considering what weight should or should not be placed on various factors. I was impressed by that argument.

[14] Mr Deliu requested that the argument be made more concrete by an example and I invited Mr Pyke to address me again with a concrete example. And he did so by reference to the statement of claim between pages 15 and 18. He relied particularly on pleadings in respect of a case called Ley in respect of which Mr Deliu had filed an affidavit in the proceedings.

[15] Mr Pyke took me to the pleadings on page 18 in the judicial review proceedings contending that the Tribunal had failed to mention and, so I assume, take into account serious flaws in Harrison J's reasoning and that that was a topic covered in an affidavit of Mr Deliu. As Mr Pyke put it, Mr Deliu was right in the middle of that litigation, some aspects of which went to the Court of Appeal on the question of costs. He referred to para 24 of the current statement of claim which complained that the Tribunal did not look at the defendant's evidence which included that of Mr Deliu.

[16] I then heard again from Mr Deliu indicating to him that though I had been with him on the first proposition of keeping 1 and 2 April and allowing him to argue the procedural points of the judicial review, that once I had appreciated that the judicial review also tracked onto Wednesbury reasonableness, the failure to take into account relevant considerations, that I was moved back into the position that I had

come into Court on having considered the written argument of Mr Pyke which I have referred to earlier in this judgment on the unmanageability of keeping argument as to the merits of the appeal separate from arguments as to taking into account relevant considerations or not.

[17] For these reasons, I have become persuaded that it would be unmanageable for a Court to hear Mr Deliu, as counsel on judicial review. I have considered and rejected the notion that there should be two counsel on judicial review – one dealing with the pre-hearing issues of procedure and one dealing with the deliberations of the Tribunal which overlap with the rehearing of the evidence by the appeal court.

[18] That has led me to the conclusion that Mr Deliu has to be debarred from appearing as counsel for Mr Orlov in the judicial review proceedings and I have decided to make this decision today and by way of a judgment in order to ensure that Mr Deliu can appeal this judgment immediately, in anticipation that the Court of Appeal will hear appeals on both of my decisions as to Mr Deliu's ability to act for Mr Orlov.

[19] In the course of argument, I have stated more than once and now record that I consider that because Mr Orlov has a right of appeal from these debarring decisions and because of the traditional importance that the common law judges give to the rights of parties to litigation to counsel of their choice, that it is important for the appeal to be resolved before even the judicial review or the appeal against the National Standards be heard.

[20] I have not been prepared to consider seriously continuing the appeal or the judicial review proceeding, notwithstanding my judgment debarring Mr Deliu from appearing as counsel to Mr Orlov. Mr Pyke has pointed out that there are decisions which say that cases can continue, notwithstanding the filing of an interlocutory appeal. I am aware of that. But normally if they are on evidential matters, an interlocutory appeal can be filed. The substantive hearing can continue and all matters can be dealt justly at the end of the day if there is an appeal against the final decision. I do not see this solution applying in the context where a litigant has been deprived of counsel of its choice by a decision of the Court.

[21] Enquiry from the Registrar disclosed that the Court has available three days, 24, 25 and 26 June, upon which this matter could be heard. Those dates were offered after it became clear that although the appeal has been lodged promptly to the Court of Appeal against my earlier decision, the process of requesting the Court of Appeal for an urgent fixture has not yet been engaged. I have received assurances from Mr Deliu that that will be engaged now but I can readily appreciate there is now insufficient time before 1 April for the Court of Appeal to hear the appeals against my previous judgments and today's judgment, and make a decision and – depending on the outcome – Mr Orlov have time to find other counsel if the appeals are dismissed, because Mr Orlov, of course, has a right to have counsel alongside the continued presence of an amicus.

[22] For these reasons, I have decided that it is simply not practicable to maintain the fixture on 1 and 2 April. But, rather, the case should be moved to 24 to 26 June in the hope that there will be decisions by the Court of Appeal adequately before the June dates which would enable fresh counsel to be instructed, if that is the case and if that is the consequence of the Court of Appeal's decision.

[23] I remain of the view that I signalled in minutes before this hearing that, if at all possible, the judicial review hearing should be heard at the same time as the appeal. I am not consolidating the two hearings in the fullest sense because, as I have previously indicated, I am persuaded that there is a legitimate procedural reason for keeping the judicial review separate from the appeal and that reasons is that judicial review judgments of the High Court and Court of Appeal can go to the Supreme Court by leave but appeals to the High Court from decisions of the Lawyers and Conveyancers Disciplinary Tribunal may have an appellate right of appeal which stops in the Court of Appeal and cannot go any further.

[24] What I have decided to do is to require the application for judicial review to be heard by the same judge or judges who hear the appeal from the Tribunal. I will not be one of those judges unless, possibly, the Court of Appeal directs me to be one, as I have recused myself. That matter is under appeal. Once the judges are identified, they will be seized of the procedure of the matter but the hope of counsel is that the hearing on 24 to 26 June will be a hearing of both matters at the same time

– the judicial review and the appeal. I have already referred to the provision of the transcript and the index of the record and referred to the ability of Mr Deliu to get access to Mr Orlov's files which I would assume would also apply to any other counsel that Mr Orlov may instruct. Mr Pyke has asked me to add that he has been also saying that the composition of the Court cannot be decided administratively referring to the decision of *Fay Richwhite v Davison*.[2] Mr Pyke is content that the judicial officer who is examining the composition of the Court for the hearing of 24 to 26 June should have regard to that case and, if need be, and it is a decision for that judicial officer, there may need to be a more formal process before the composition of the Court is decided upon. By composition, the concern of Mr Pyke is the question of the number of judges, not who the judges would be. It is whether or not more than one judge should sit.

[25] After hearing from counsel, the following timetable orders are made together with some qualifications which I will set out at the end:

(a) Mr Orlov has until Monday, 31 March 2014 to file any further affidavits in support of the judicial review proceedings and a bundle of documents, leaving being reserved on the part of the National Standards Committee to object to any content in the bundle of documents.

(b) The National Standards Committee has 14 days to file any evidence in reply which is 14 April.

(c) Mr Orlov, as applicant on the judicial review and appellant in the appeal, has 15 working days (working back before 20 June, which is Tuesday, 3 June) to file his submissions and authorities which expires on 24 June.

(d) The National Standards Committee's submissions are to be filed by 10 June and the amicus submissions by 17 June.

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2 *Fay Richwhite v Davison (Full Court)* [1997] 11 PRNZ 190.

[26] There has been some discussion as to the composition of the Court. Mr Orlov has requested a court of either three foreign judges or three retired judges. Implicit in that, in any event, he wants more than one judge. The law, I have been told by Mr Pyke, now enables only a court of one judge to hear appeals from the Lawyers and Conveyancers Disciplinary Tribunal striking off a practitioner.

[27] I have explained to counsel that I have no authority to resolve that issue. The position of the National Standards Committee is that they oppose foreign judges or retired judges sitting with the qualification, in respect of retired judges, that is not opposition to judges who have retired but have been appointed on a temporary warrant sitting.

[28] Mr Deliu has to reservations to the above. Firstly, and as counsel for Mr Orlov, he still presses for the full Bench as requested by Mr Orlov and, in any event, if that is not granted, more than one judge of the High Court sitting. Mr Deliu expresses reservations about the adequacy of time and suggested 27 June, the Friday, also be allocated. That is simply not possible based on the information available to the court taker in this Court at the present time and Mr Deliu wants recorded that he does not consent or agree to the proposition that both appeals can be heard within three days.

[29] I will continue to deal with case management issues in this litigation until the composition of the Court is settled. There is leave to apply to all counsel in Court for any case management issues that arise and they will be referred to me.

[30] Leave is granted for the first respondent not to be represented any further, the Court having given notice that the Tribunal will abide.