IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-7381

IN THE MATTER OF	the Judicature Amendment Act 1972 and the Law Practitioners Act 1982 and the Lawyers & Conveyancers Act 2006
BETWEEN	JOHN EVANS DORBU Applicant
AND	THE LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL First Respondent
AND	NEW ZEALAND LAW SOCIETY Second Respondent

Hearing: 13 November 2009

Appearances: Applicant in person
H C Keyte QC and M A Treleaven for Second Respondent
First Respondent abides the decision of the Court

Judgment: 13 November 2009

ORAL JUDGMENT OF RANDERSON J
[On an application for Interim Relief]

Solicitors: New Zealand Law Society, PO Box 5041, Wellington 6145
Counsel: J Dorbu, PO Box 105 345, Auckland
H C Keyte QC, PO Box 125187, Auckland 1740

[1] The applicant for judicial review, Mr Dorbu, is facing 12 disciplinary charges in the Lawyers and Conveyancers Disciplinary Tribunal brought originally by the Complaints Committee of the Auckland District Law Society under the Law Practitioners Act 1982. In terms of the transitional provisions of the Lawyers and Conveyancers Act 2006, they are now brought by the Lawyers Standards Committee (No 3) of the New Zealand Law Society: s 356 of the 2006 Act.

[2] The hearing was set down for a period of two weeks from Monday this week, 9 November 2009. The proceedings, I am told, have been on foot for some 13 months. Although there have been some preliminary requests for information by Mr Dorbu (some of which have been met) it was not until 3 November 2009 that issues were raised with the Tribunal at a telephone conference regarding further documents being sought by Mr Dorbu. It was suggested to Mr Dorbu that he should lodge an amended application which he did on 5 November 2009 shortly before the hearing was due to commence.

[3] The application was for an order for discovery against 10 named parties, including lawyers, the Registrar of the Family Court, the Bank of New Zealand, a firm of real estate agents, and one of the complainants Mr Ivan Barge.

[4] Secondly, there was an order sought that the charge numbered 10 be dismissed summarily.

[5] The Tribunal heard the applications brought by Mr Dorbu on 9 November at the commencement of the hearing. In a brief decision given that day, the Chairperson of the Tribunal, District Court Judge D Clarkson, dismissed both applications. Plainly, the Tribunal was concerned about the last minute nature of the application and the grave inconvenience which would be caused to the members of the Tribunal and witnesses should the hearing be delayed in consequence of the application for discovery. The Tribunal noted there could be issues regarding legal professional privilege where discovery was sought from lawyers and that the material sought was in very broad and unspecified terms. The Tribunal noted that if it became apparent during the hearing that specific relevant documents were missing, the Tribunal could deal with that situation at the time.

[6] Yesterday Mr Dorbu filed an application for judicial review. The specific relief sought in the application is an order quashing the decisions made by the Tribunal on 9 November and a direction as to the future conduct of the proceeding. The application was accompanied by an interlocutory application for interim relief. The interim relief also sought the quashing of the decisions made on 9 November notwithstanding that this was the substantive relief claimed. Mr Dorbu also sought, by way of interlocutory relief, an order that he be allowed to seek discovery of documents from the parties named in his application for the purpose of preparing his defence. The Court was also asked to determine, on an interim basis, whether Mr Dorbu was bound by the findings of Priestley J in proceedings in this court: *Barge v Freeport & Ors* CIV 2002-404-1771 27 October 2005.

[7] During the course of argument Mr Keyte QC indicated the second respondent was not in a position to deal with the substantive application and has not, of course, had the opportunity of filing affidavits. Mr Dorbu indicated that the principal order sought by way of interim relief was an order stopping the Tribunal from proceeding until the substantive application was dealt with.

[8] Two matters can be promptly disposed of. The first is the question of law raised. Mr Keyte properly accepted on behalf of the second respondent that Mr Dorbu cannot be bound by the findings made by Priestley J in the named proceedings since Mr Dorbu was neither a party nor a witness to those proceedings and did not have any opportunity to defend himself against the adverse findings which Priestley J made against him. It follows that, to the extent that findings made by Priestley J in the named proceeding are relevant to the disciplinary proceedings before the Tribunal, Mr Dorbu must be at liberty to challenge those findings.

[9] The second point relates to the application for summary dismissal of count 10. In that respect the Tribunal found there was a clear case to answer and no further argument has been advanced to this court on that point. It will be a matter for the Tribunal to determine and Mr Dorbu will have the opportunity of fully defending that matter before the Tribunal.

[10] In the time available today, I have heard argument about the relevance of the material being sought by Mr Dorbu. However, there is a preliminary question about the jurisdiction of the Tribunal to make an order for discovery against non-parties. It is clear from the transitional provisions of the 2006 Act that the Tribunal is to proceed (having regard to the fact that the charges were laid before the new Act commenced) as if the new Act had not been passed: s 353 of the 2008 Act. Section 358(1) of the 2008 Act provides that in those circumstances the duties and powers of the Tribunal are to be the same as those of the New Zealand Law Practitioners Disciplinary Tribunal under the 1982 Act as if the 2006 Act had not been repealed.

[11] Under the 1982 Act the Tribunal had power under s 126(1), by notice in writing, to require a person to attend and give evidence before it at the hearing of any proceedings under the Act and to produce relevant documents in that person's custody or control relating to the subject matter of the proceedings. That is effectively a power to summons rather than a power to order discovery.

[12] My attention has not been drawn to any provision of the 1982 Act which gives the Tribunal a power to issue an order for discovery against a non-party. Since the Tribunal is a creature of statute it follows that the only powers available to it are those given by the statute. In the absence of a power to order discovery against non-parties, the Tribunal's authority was limited to issuing a notice requiring someone to attend and product documents under s 126(1).

[13] I note that under the 2006 Act there does not appear to be any power to issue an order for discovery. Rather, in terms of clause 6 of Schedule 4 of the Act, a party to the proceedings before the Tribunal may apply to a District Court Judge for a certificate authorising the Tribunal to issue a summons under that provision. The Judge may not give a certificate unless satisfied that the evidence is material to a matter before the Tribunal and that it is necessary or desirable that the summons be issued to compel the attendance of the witness at the hearing. If a certificate is made by a Judge under this provision then the Tribunal is obliged to issue a summons in terms of subclause (3) of clause 6. In this case, the Chair of the Tribunal is a District Court Judge so she would have been in a position to give a certificate under that provision if it were applicable.

[14] In the time available I have been able to make a preliminary assessment of the relevance and significance of the material sought by Mr Dorbu from the various parties named in his application. It is possible that some of this material may be relevant but I agree with the view expressed by the Tribunal that much of it is sought in very general terms and may well be more in the nature of a fishing expedition than being truly relevant to any material issue.

[15] I made the suggestion to Mr Dorbu that an application under Rule 3.13 High Court Rules could well result in the Judge presiding at the hearing between *Barge v Freeport and Ors* allowing access to the documents produced in that hearing. Plainly, a little time would be needed for that to occur, but it is an option which Mr Dorbu could have explored much earlier if he wished.

[16] Mr Keyte has quite properly endeavoured to be pragmatic about how this issue should be approached given the exigencies of the pending hearing and the time that would be taken before this matter could be dealt with on a substantive basis in this court. Of immediate concern is the fact that a witness from the Bank of New Zealand, Ms Wu, is about to go overseas and it is desired to have her evidence taken this afternoon. It is now 2.25 pm so if that is to occur it would have to commence very soon.

[17] Mr Dorbu has sought a large number of documents from the Bank of New Zealand who were the bankers for Freeport. Of primary concern to him is his wish to examine the bank statements around the time of the disputed transactions in July 2002 which were the subject of the proceedings before Priestley J and which relate to most of the charges brought in the disciplinary proceedings.

[18] During the course of the hearing today it was ascertained that Ms Wu will be able to bring to the Tribunal this afternoon the bank statements for Freeport relating to the period 1 March 2002 to 30 August 2002. At present I am having difficulty in discerning the relevance of that material but if Mr Dorbu wishes to have it and it can be promptly arranged, it seems to me appropriate for that material to be produced by Ms Wu this afternoon when she gives her evidence. Mr Dorbu tells me there is an issue as to whether Freeport was solvent during the relevant period but it rather

seems to me that the real issue is what happened after the BNZ debt was paid and the mortgage then assigned from the Bank to another party. Mr Keyte confirmed it was not suggested there was anything improper on Mr Dorbu's part in relation to the assignment of the mortgage.

[19] Mr Keyte also made the point that charges 10, 11 and 12 could proceed without impediment next week since Mr Dorbu does not seek any documents in relation to those proceedings.

[20] The overall concern here is to ensure that Mr Dorbu receives a fair hearing and is not disadvantaged by the absence of documents which are relevant to the disciplinary charges being brought against him, which I accept are serious. However, the Tribunal also has to consider carefully the issue of relevance and other issues relating to the overall fairness of the hearing including fairness to the body bringing the disciplinary charges and all others involved in the proceeding.

[21] In order to obtain interim relief under s 8 Judicature Amendment Act 1972 the applicant for relief must be in a position to establish that the order is necessary in order to preserve his position. The leading authority is the decision of *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423.

[22] I am not persuaded it is necessary in order to preserve Mr Dorbu's position at this time that the hearing should be prohibited from proceeding until the substantive matter is heard. I am of the view that Mr Dorbu's position can be protected to a degree by the steps which I propose to outline. First, I see no need for any order to be made preventing the hearing proceeding this afternoon in relation to the evidence of Ms Wu and another BNZ witness, Miss Bolton (if she is able to give evidence this afternoon) on the footing that the material which I have identified in the form of bank statements is produced this afternoon and on the basis that any earlier statements going back to the year 2001 (if available) can be produced by another BNZ witness in due course.

[23] Nor do I see any impediment to the Tribunal proceeding to hear the charges 10, 11 and 12 in the time available next week if it chooses to do so, since no documents are sought in relation to those charges.

[24] The Tribunal has made it clear in its decision that it will review the position regarding specific documents as the hearing proceeds. I apprehend that Mr Dorbu will make an application to Priestley J to obtain access to the documents on the file. Having obtained those documents, which he should be able to obtain promptly, he can then make further application to the Tribunal if he seeks some specific documents not currently available from that file. It will be a matter for the Tribunal to decide whether, in the light of any specific requests, further documents should be directed using the summons power available to the Tribunal under s 126 of the 1982 Act.

[25] The Tribunal will also have to decide whether it wishes to proceed with charges 1-9 as I understand it is now very unlikely they could be dealt with in the remaining one week available. It is a matter for the Tribunal but the Tribunal may consider it would be better not to proceed with charges 1-9 until a date can be found that would enable the hearing of those charges to be completed in one hearing rather than having to adjourn part-heard.

[26] Apart from the documents sought in relation to the Freeport transaction, Mr Dorbu also seeks documents from a number of people in relation to a complaint made by Mr Andrew Gilchrist, Barrister of Auckland. Essentially the charge against Mr Dorbu in respect of Mr Gilchrist's complaint is that he made improper allegations against Mr Gilchrist which challenged his integrity in relation to the settlement of a court proceeding between a Mr and Mrs Robb and a company named Whatawhata Properties Limited (now in liquidation).

[27] Mr Dorbu sought from a variety of sources a substantial body of documents in relation to the agreement for sale and purchase, which lay at the heart of the dispute in those proceedings. I am not at all persuaded that any of the documents he sought are relevant. The real issue is what happened between Mr Gilchrist and a director of Whatawhata Properties, a Mr Swetman. The documents sought do not

have any bearing on that issue or the allegations made in the disciplinary proceedings. This includes Mr Dorbu's insistence that a copy of the agreement for sale and purchase between the parties was relevant. If he is able to persuade the Tribunal during the course of the hearing that is somehow relevant then I would not have thought there would be much difficulty in producing that agreement.

[28] The final category relates to documents sought from the Registrar of the Family Court at Auckland in relation to a case heard in 1999. Mr Keyte has confirmed there is no allegation that Mr Dorbu was acting without an instructing solicitor in a way that should attract disciplinary action. The material from the Family Court relates solely to that issue and it is irrelevant accordingly.

[29] I should add for the sake of completeness that Mr Dorbu has spent some time trying to persuade me that bills of cost rendered to Mr Barge by his solicitors at the time (Castle Brown) were relevant to the charges. Again I record that I have not been persuaded there is any relevance in any such bills of cost but, if the Tribunal is persuaded during the hearing that there may be some relevance in those documents, then no doubt it can be revisited.

[30] It may be necessary for the substantive proceeding to be heard in due course. Mr Dorbu is to file a memorandum within 14 days from today if he wishes to take the present application to the substantive stage and if so what directions he seeks in relation to preparation for the substantive hearing.

[31] The costs of today's application will be reserved.

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A P Randerson J
Chief High Court Judge