

1 **BEFORE THE PLUMBERS, GASFITTERS AND DRAINLAYERS BOARD**

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3
4 **IN THE MATTER** an inquiry pursuant to section 42 of
5 the Plumbers, Gasfitters and
6 Drainlayers Act 1976

7 **AND**

8 **IN THE MATTER of PAUL BRYNLEY GEE**

9
10
11 **Date of Hearing:** 22 February 2011

12
13 **Venue:** Plumbing, Gasfitting and Drainlaying ITO
14 Ltd, Allied Nationwide Tower, Level 8,
15 142 Lambton Quay, Wellington

16
17 **Board Members**

18
19 Mr Mark Whitehead - Chair

20 Mr Peter Jackson

21 Mr Stephen Parker

22 Mr William Irvine

23 Mr Graham Hardie

24
25 Ms Melanie Phillips - Acting Registrar

26 Mr Bruce Corkill QC - Legal Assessor

27 Mr David Laurenson appears on behalf of the Investigator

28 Mr Wallace Gordon appears on behalf of Mr Gee

29 Ms Jacqui Kennedy - Stenographer

I N D E X

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1 (10.00 am)

2 **CHAIR:** Good morning everybody, I'm Mark Whitehead the
3 Presiding Board Member. I would just like to introduce
4 those people from the Board that are here. We have
5 Mr Irvine; Mr Hardie; representing the Registrar,
6 Ms Phillips; our Legal Assessor, Mr Corkill; Mr Jackson;
7 Mr Parker; and, the stenographer, Ms Kennedy.

8 Perhaps, Mr Gordon, could you introduce yourself and
9 who is with you.

10 **MR GORDON:** Yes. My name is Wallace Gordon and this is Mr Paul
11 Gee.

12 **CHAIR:** And you, Mr Laurenson?

13 **MR LAURENSEN:** I'm David Laurenson with Tony Hammond, the
14 Investigator.

15 **CHAIR:** Thank you very much. Thank you all for appearing
16 today. I'll just pass over to Mr Corkill and he will
17 advise us on procedure for this morning's hearing.

18 **MR CORKILL:** Thanks, Mr Chairman. This is what we call a
19 pre-hearing application, a charge has been laid, an
20 application has been made for the charge essentially to be
21 stayed. It is an application brought on Mr Gee's behalf
22 with Mr Gordon acting as his advocate. Therefore, I
23 suggest the correct process will be for Mr Gordon to
24 commence by taking the Board through his submissions and
25 other materials that have been filed, then Mr Laurenson
26 will present his submissions, taking the Board through his
27 submissions and any other material that he considers
28 relevant, then finally I, as the Legal Assessor, will give
29 you a direction on the legal and procedural issues
30 relating to this matter.

31 Now, one of the issues that is raised in the application is
32 an issue which is described as impartiality of the Board, and
33 in accordance with case law that has been decided, particularly
34 in the High Court, I think the correct process, so that the

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1 parties are properly informed as to exactly what the factual
2 position is concerning the status of Board members and any
3 particular associations they may or may not have, the correct
4 process will be for the Board to, through you, Mr Chair, to
5 indicate right at the start of the hearing what the position is
6 with regard to any particular individuals who are referred to
7 in the submissions. I confirm to the parties that I have given
8 this advice to the Board earlier today and I then withdrew and
9 they prepared a statement that they are going to read out, or
10 that the Chair is going read out, which covers those factual
11 matters.

12 Just for those who have an interest in legal issues, the
13 particular case which I have in mind where it appears a process
14 of this kind was followed is a decision of Priestley J in a
15 case called *Wang v Cornwell* of 4 June 2009, where a particular
16 association arose in the course of the hearing, and it's clear
17 that the Judge tabled all the relevant information that he
18 needed to table about his association with some particular
19 parties who were relevant in that case, each side made
20 submissions, the Judge then ruled on it and that essentially is
21 the appropriate process that can be followed here.

22 So, Mr Chair, in the interests of transparency and so that
23 there is an accurate understanding of what the facts are before
24 the case commences I'm going invite you to table the
25 information that I understand you have obtained from your
26 colleagues.

27 **CHAIR:** Correct. Okay, so the Board wishes to make the
28 following statement.

29 ***

30 **OPENING STATEMENT BY MR CHAIRMAN**

31 **CHAIR:** To ensure transparency and to clarify some aspects of
32 the Board members' perceived relationships in this
33 hearing, we wish to record the following:

34 Mr Whitehead, he is currently Chair of the Board of

1 Master Plumbers, Gasfitters and Drainlayers Inc and has
2 been for the last three years. He is aware of Mr Gee as a
3 member of this organisation but has no relationship with
4 him. He does not know Mr Darnley at all.

5 Mr Parker is a member of the New Zealand Institute of
6 Gas Engineers. He has no relationship with Mr Darnley or
7 Mr Gee and is unaware of their names. Mr Parker's
8 relationship with Mr Hammond when at the Gas Association
9 up until September 2010 and at the Plumbers, Gasfitters
10 and Drainlayers Board has been only in a professional
11 capacity. Mr Hammond was a contractor from time to time
12 with the Gas Association, to add clarity to that
13 statement.

14 Mr Jackson has never been a member of the New Zealand
15 Institute of Gas Engineers. He is a member of the Master
16 Plumbers Organisation and has no association or knowledge of
17 Mr Gee or Mr Darnley.

18 Mr Hammond is engaged by the Board with regard to various
19 matters and has been required to give evidence to the Board
20 from time to time on technical and discipline issues. All
21 members have no personal relationship with Mr Hammond.

22 We, the Board, wish to clarify that you, Mr Gordon, are here
23 in your capacity as an advocate for Mr Gee and you are not here
24 representing the Plumbing, Gasfitting And Drainlaying
25 Federation?

26 **MR GORDON:** (Nods). Yes, that's right.

27 **CHAIR:** That's correct?

28 **MR GORDON:** Yes, that's correct.

29 **CHAIR:** All right. Just a couple of points of interest. If
30 you wish to use the bathroom they're opposite where you
31 come in off the lift at the far end. We will convene
32 until 12.15 and then break for lunch till 1.30, and I
33 think that's about all. If anyone has any questions, by
34 all means don't hesitate to ask. At this point I will ask

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1 Mr Gordon to make your legal submissions, please.

2 ***

3 **SUBMISSIONS IN SUPPORT OF "MOTION TO DISMISS"**

4 **BY MR GORDON ON BEHALF OF MR GEE**

5 (Mr Gordon reads submissions from tab 12 of the bundle,
6 top of page 2 as follows:)

7 "The central issue ... impartiality of the Board".

8 (End of first sentence, para 11)

9 **MR GORDON:** When we refer to "the Board" here I would like to
10 explain that most people have the perception when they say
11 "the Board" that that includes the Registrar, the Board
12 members, the Secretariat; the Board as an organisation
13 rather than the Board as a committee as they sit here.

14 So, Mr Gee contests that a definitive line does not exist
15 which places into question the impartiality of the Board.

16 (Mr Gordon continues reading from second line,
17 para 11 as follows:)

18 "In preparation ... Industry Training Organisation Board".

19 (End para 34)

20 **MR GORDON:** That is only a proposal that has gone forward.

21 (Mr Gordon continues reading from paragraph 35
22 as follows:)

23 "A conflict of interest ... dismissal of all charges".

24 (End of written submissions)

25 **MR GORDON:** We would like to add that as members of the
26 disciplinary committee you've been placed in the situation
27 where you're going to be asked to judge yourselves. This
28 is a very awkward situation and we did suggest the
29 situation be dealt with by an independent body, but we've
30 been told this must be dealt with by you. So, now the
31 onus is on you to make a fair and impartial judgment on
32 yourselves and the actions of the Board, the Secretariat
33 and the process and procedures surrounding the case and
34 Mr Gee. You'll be required to take in all relevant

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1 information and consider how so many issues affecting one
2 person could occur in one case. And there is more than
3 one issue, there are a cluster of issues which all point
4 to one direction, being the direction of unfairness and
5 bias.

6 We will show that Mr Gee has been treated unfairly and
7 also, very importantly, that the average person looking
8 from the outside can be left with the impression that it
9 has been the case and there has been a prejudice towards
10 Mr Gee. We're not here to judge about the accusations
11 against Mr Gee but we're here to judge if he has been
12 treated fairly and by the principles of natural justice,
13 and if the process has been open and transparent. To do
14 that you'll need to decide if your own processes and
15 procedures are in fact fair and impartial, and are seen to
16 be fair and impartial. Would an outsider be left with the
17 perception that Mr Gee has been treated fairly and with
18 impartiality? It isn't about the Board being seen to
19 achieve the result but more about it being seen to be
20 doing the right thing.

21 The impartiality we claim is directed at the process
22 not at the individuals. If the process is right, then
23 there is very little risk to the individuals. To be fair
24 on Mr Gee you will need to remove yourselves from your
25 disciplinary role and place yourselves in his shoes, or
26 the shoes of the average person looking in. Look at the
27 motion from the perspective that it could be you or anyone
28 in the industry sitting here in the place of Mr Gee. His
29 is simply the name and his is simply the discipline case.
30 What you need to look at is the way he has been treated
31 and the conduct of the process.

32 You've been asked to look at the definitive line between the
33 actions of the Board, of the Secretariat, the Investigator and
34 his counsel, and have those lines been crossed or is there a

1 perception that they may have been crossed. You're going to be
2 asked to look into the involvement of the Board, the
3 Secretariat, and the effect of those letters that were sent
4 which were false. In most judicial proceedings here you must
5 prove, but with the discipline system with the Board, it's set
6 up in such a way that the tradesperson is guilty until they
7 prove their own innocence.

8 Now the Board is in the situation of being the accused, so
9 we ask that you approach this situation in the same manner that
10 the Board is guilty until proven innocent. We don't believe
11 the issues are going to be deal with as a "them against us"
12 situation, but more of a "right and wrong" situation. We
13 firmly believe this can be a win/win situation and are willing
14 to work and move towards that end.

15 **CHAIR:** Do you have any further submissions, Mr Gordon, or is
16 that the end of your submission?

17 **MR GORDON:** Apart from that it's really only evidence from
18 Mr Gee and myself.

19 **CHAIR:** Thank you.

20 **THE COURT:** Mr Laurenson, would you like -

21 **MR CORKILL:** Just before Mr Laurenson, the evidence is before
22 the Board and is part of your submission, so we're not
23 having oral evidence in the course of this hearing. I
24 just wanted to make that clear.

25 The other thing I should have mentioned to you,
26 Mr Gordon, is Mr Laurenson is going to address the Board
27 now. You will have a right of reply but it will be
28 strictly in reply and only in respect of matters that he's
29 raised. Do you follow that?

30 **MR GORDON:** Yes.

31 **CHAIR:** Mr Laurenson.

32
33 ***
34

1 **INVESTIGATOR'S SUBMISSIONS IN OPPOSITION TO**
2 **"MOTION TO DISMISS" BY MR LAURENSON**

3 **MR LAURENSON:** In my submissions, I just at the start there set
4 out the four grounds on which this application is made and
5 I say that, in effect, this is an application for what is
6 known in the law as a stay of this disciplinary proceeding
7 against Mr Gee, that is a stay of the charges so that's
8 the end of it.

9 So, what I propose doing first is to just take you through
10 the legal principles first relating to when stays can be
11 granted by disciplinary bodies.

12 First of all, it's accepted by the Investigator that the
13 Board does have the discretion to stay disciplinary charges
14 against the registered person in certain circumstances, and I
15 set out there the basis for that as really, as the Court has
16 held, as part of its powers to regulate its own procedures and
17 to observe the principles of natural justice. However, it's
18 important to note that this power to stay can't simply be
19 exercised on the basis that there might have been a breach of
20 one of the rules of natural justice. The Investigator submits
21 that what you've got to look at are the established principles
22 of the grounds on which stays can be granted and, really, they
23 fall into two categories.

24 One, on the basis of undue delay; secondly, on the basis of
25 abuse of process, and what can be characterised as what's known
26 as egregious conduct on the part of a prosecuting body. The
27 discretion to stay in disciplinary proceedings is very similar
28 to the discretion that has been exercised by the courts in
29 criminal proceedings. However, what the cases make clear is
30 that Courts have been more prepared to stay criminal
31 proceedings than they have to stay disciplinary proceedings,
32 and the main reason for that is because of the protective
33 nature of disciplinary proceedings. What I will just do is
34 refer to some statements of cases which have made this clear.

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1 The first one I refer to is at paragraph 5, *L v Dentists'*
2 *Disciplinary Tribunal*. I've set out a quote. Part of it says:

3 *"In particular, in deciding whether a permanent stay of a*
4 *disciplinary proceeding in the tribunal should be ordered,*
5 *consideration will necessarily be given to the protective*
6 *character of such proceedings and to the importance of*
7 *protecting the public from incompetence and professional*
8 *misconduct on the part of medical practitioners"*.

9 I submit that same statement can be applied in the context
10 of this Disciplinary Board, in the context of plumbers
11 gasfitters and drainlayers.

12 Over the page:

13 *"The issue arises because of the protective character of*
14 *disciplinary proceedings. The purpose of such proceedings is*
15 *not to determine and punish criminal wrongdoing. Rather, the*
16 *jurisdiction exists to protect the profession in question and*
17 *those members of the public who come into contact with it.*
18 *Whether or not the protective influence of disciplinary*
19 *proceedings is required to serve these purposes is, in my view,*
20 *a relevant factor to be weighed in the mix in any application*
21 *for stay"*.

22 At paragraph 8 I refer to what I've already said, and that
23 is that there are basically two grounds for granting a stay in
24 disciplinary proceedings and criminal proceedings. First one
25 is delay, which I state isn't alleged in this case. There's no
26 suggestion that there's been undue delay and there should be a
27 stay granted on that basis. The second ground is on the basis
28 of what's known as egregious conduct by prosecuting
29 authorities.

30 And egregious, you can look at dictionary definitions of
31 that. I've looked at one from the Concise Oxford Dictionary
32 which says "shocking, outstandingly bad", but at the end of the
33 day what is meant by that is very bad reprehensible conduct on
34 the part of a prosecuting body, that is the basis for a stay or

1 an abuse of process by Crown other than delay. I refer to a
2 case that talks about this alternative ground and granting a
3 stay. It says:

4 *"...or alternatively where there has been egregious conduct*
5 *by prosecuting authorities which is such as to require judicial*
6 *intervention";*

7 Further down, after referring to the first ground of delay
8 it says:

9 *"Secondly, I do not believe that this case approaches they*
10 *type of extreme situation that is required under the*
11 *established principles, and in particular those laid down in*
12 *Moevao (supra), to justify Court intervention. The delay by*
13 *the Police here was not so reprehensible or deserving of*
14 *criticism as to amount to an abuse of process".*

15 Then I refer to that case referred to, the Moevao case, and
16 there's a paragraph down there that talks about what is
17 required for this extreme step to stay on this ground:

18 (Mr Laurenson reads from bundle, tab 11, paragraph 9
19 as follows:)

20 *"The justification for ... process of the Court".*

21 (End of that paragraph)

22 Further down I refer to another statement from one of the
23 other Judges in that case, Richmond J. He said:

24 (Mr Laurenson continues reading from mid-last quote at
25 paragraph 9 as follows:)

26 *"...Therefore any exercise of ... wrongly made use of".*

27 (End of para 9)

28 I'll refer to another case there. The Fox case near the
29 bottom of the page, once again referring to these principles:

30 (Mr Laurenson continues reading from third line from bottom of
31 page 4, tab 11 as follows:)

32 *"The power to stay is ... clearest of cases".*

33 (End para 10, page 5)

34 The next case I refer to there is just a case which makes it

1 clear that these principles that are applied in criminal cases
2 to stay on this ground have also been applied in disciplinary
3 cases.

4 So, that's the starting point, and the Investigator's
5 submission: In effect, the ground for the stay in this case
6 must be on the basis that there is some form of egregious
7 conduct by the prosecuting authority, and in this case the
8 prosecuting authority is, in effect, Mr Hammond, the
9 Investigator, because it's the Investigator that lays the
10 charge. That amounts to this egregious conduct that warrants
11 this extreme step that notwithstanding the Board has this
12 responsibility for protecting the public, notwithstanding that,
13 the charges shouldn't go ahead.

14 Now what I will do is deal with each of the four categories
15 of conduct that Mr Gee submits justifies the stay in this case.

16 The first one is the suggestion that Mr Hammond was
17 appointed as Investigator outside the scope of the Board
18 policy. And this relies on the fact that in the Board News, I
19 think for June 2008, there was a notice that states that the
20 Board had developed the following person specifications as a
21 prerequisite for the position of Investigator, and those
22 prerequisites refer to the need to be a craftsman gasfitter or
23 plumber and to have held that position for 15 years.

24 It's correct that Mr Hammond didn't fit into that category
25 in that he was a gas inspector. However, the first point about
26 that is that there is the evidence from Mr U'ren to the effect
27 that that notice published in the Board newsletter was intended
28 to provide guidelines for those persons interested in becoming
29 an Investigator, wasn't intended to be definitive and was not
30 intended to be seen as mandatory.

31 The point I make at paragraph 15 is that regardless of what
32 any notice in the Board News says, the Board's power to appoint
33 an Investigator is provided for in the statute, in the 1976 Act
34 at section 40. Section 40 provides that the Board may appoint

1 any person not being a member of the Board who is a registered
2 person. If you go to Section 2 for the definition of
3 "registered person", that includes a gas inspector.

4 It's not in dispute that Mr Hammond was a gas inspector at
5 the time and he remained so until 1 April 2010 when the new Act
6 came into force.

7 So, before I go on to paragraph 16 there's one point I want
8 to add here, and that is this issue is, well it's been
9 suggested that notwithstanding that the statute allows the
10 Board to appoint Mr Hammond, that is contrary to the policy
11 that has been set by the Board. The point I want to make about
12 this is that it is clear in law that it would be in fact
13 unlawful for the Board to set a policy that restricted the
14 exercise of its statutory power or discretion. There's no harm
15 in a body such as the Board setting a policy as long as it's
16 not set as one that has no exceptions so that it restricts the
17 power that it has under statute, and I'll just hand you out
18 here - (document distributed). This is well-known law from
19 Taylor on Judicial Review and it makes this point. You'll see
20 there, there's a statement at paragraph 15.77 of this text
21 about five lines down:

22 "Reliance on policy is not unlawful. What is unlawful is
23 the blind following the policy. The policy cannot deny the
24 power which the law has deferred".

25 So, what I say about that is that it was quite proper what
26 Mr U'ren has said, that although it might be a guideline, that
27 is all it was. It wasn't intended to be the policy that was
28 followed with no exceptions. So, it was quite appropriate
29 given the extensive qualifications and experience that
30 Mr Hammond has in the gas industry, and given that he was a
31 person who under the statute could be appointed by the Board,
32 it was most appropriate and certainly not inappropriate for him
33 to be appointed as Investigator for this investigation.

34 There is then the issue that it is accepted that before

1 Mr Hammond actually provided his report to the Board he had
2 ceased to become a gas inspector, and that is because I think
3 his report was provided in about July 2010 but at the end of
4 March 2010 the status of gas inspector disappeared as a result
5 of consultation that took place which resulted in under the new
6 Act there being no position of gas inspector. However, the
7 position is covered by the transitional provisions of the 2006
8 Act, in particular sections 181(1) and (2). Which provide that
9 any person who was appointed in any capacity in respect of an
10 investigation or complaint that was commenced before the coming
11 into force of the new Act will continue to have the same powers
12 as if the new Act was still in force.

13 I'll just refer to Section 181:

14 181(1) All investigations, inquiries in disciplinary
15 proceedings under the former Act that may have been commenced
16 before the commencement of this section and that have not been
17 completed before that commencement are to be continued and
18 completed as if this Act had not been enacted;

19 (2) The Board and every body or person appointed constituted
20 or acting under the former Act in respect of complaints in
21 disciplinary proceedings continues to have and may exercise all
22 of its, his or her powers, functions and duties under that Act
23 for the purposes of giving effect to sub-section (1).

24 So, although after 1 April 2010 Mr Hammond ceased to be a
25 gas inspector, he was appointed as an Investigator prior to the
26 introduction or coming into force of the 2006 Act. It was in
27 respect of a complaint that was commenced and investigated
28 before then and, therefore, he has all the powers as an
29 Investigator as if the 1976 Act continued after that time. So,
30 it doesn't matter that he ceased to be a gas inspector on
31 1 April.

32 The next ground that is relied on by Mr Gee is the
33 suggestion that the Investigator is not impartial, this is
34 dealt with at paragraph 17 in my submissions. And this appears

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1 to be on two bases. The first I set out at 17(a), that he's
2 not impartial because as a result of being a strong advocate of
3 safety and standards in the gas industry, and the industry
4 organisations he belongs to, he is in a position of bias
5 regarding issues of non-compliance and faults in the system
6 which may damage the image of the industry. So, it seems to be
7 suggested that because he has all this experience and expertise
8 in the industry and has been involved in developing standards
9 in the industry, he's biased when it comes to investigating a
10 person who is alleged to have infringed some of those
11 standards.

12 The second basis is alleged to be because of his close
13 personal relationship with Mr Darnley.

14 Dealing first with the legal principles relating to this
15 allegation of bias. It's correct that one of the principles of
16 natural justice includes a rule against bias. This case, it
17 appears, involves allegations of what is known as "apparent
18 bias" as opposed to "actual bias". It's not alleged, I don't
19 think anyway, that Mr Hammond was actually biased in the way he
20 carried out his investigation, it's more apparent bias on the
21 basis of his experience and his associations in the industry.
22 The test for "apparent bias" is set and referred to in a
23 Supreme Court case. The test for apparent bias is that a
24 decision maker is disqualified if:

25 *"...a fair-minded lay observer might reasonably apprehend*
26 *that the [decision maker] might not bring an impartial mind to*
27 *the resolution of the question the [decision maker] is required*
28 *to decide".*

29 The first point I'd make here is that, of course, the
30 decision that is really in issue here is the decision of the
31 Board in respect of the charges that Mr Gee faces. Now, of
32 course, Mr Hammond as the investigator is not the decision
33 maker and, of course, the Board has not even made that decision
34 yet. So, it's submitted that really this issue of bias and

1 whether or not a decision maker is biased for the purposes of
2 the rules of natural justice doesn't even apply here and
3 doesn't apply to Mr Hammond.

4 I'll come soon to the submission, if you find that it does
5 apply to him, for instance, one of the things he did do was to
6 reach a conclusion as to whether or not the complaint had
7 substance, and I'll make a submission on what the
8 Investigator's position is in respect of that. But what I do
9 say is that, really, the only basis, because it's not delay
10 here, the only basis that there could be a stay granted in this
11 case in respect of Mr Hammond's position or his conduct is on
12 the second ground of egregious conduct on the part of
13 Mr Hammond, and what the Investigator says here is that there's
14 absolutely no suggestion and indeed no basis for there being
15 any conduct on the part of Mr Hammond that could possibly
16 satisfy this ground that would warrant that extreme step being
17 taken. If there's any conduct on the part of Mr Hammond that
18 could be seen as egregious conduct giving rise to abuse of
19 process, that would justify a charge as being stayed.

20 I explain why I say that first of all in (a) over on page 7.
21 It can't be an abuse of process for an Investigator to have
22 extensive experience in the gas industry that Mr Hammond has.
23 The fact that he has this extensive experience in the gas
24 industry and the fact that he has been involved in developing
25 various standards in the gas industry in my submission simply
26 enhances his suitability to be Investigator.

27 The second alleged basis of this lack of impartiality of
28 Mr Hammond is alleged to be this close personal relationship
29 with Mr Darnley.

30 It's quite clear from the evidence that Mr Hammond does not
31 have any close personal relationship with Mr Darnley. The
32 affidavit of Mr Hammond states that when he was appointed as
33 Investigator he didn't even recognise the name "Mr Darnley".
34 It wasn't until he actually first interviewed him in relation

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1 to this complaint that he recognised the name because
2 Mr Darnley actually said to him that he might remember on a
3 previous occasion back in 1998 he conducted an oral assessment
4 of Mr Darnley with another person, Mr McIvor, for the purposes
5 of the craftsman status. He also later during the
6 investigation realised that he had spoken to Mr Darnley twice
7 before on the telephone in relation to a 2008 complaint. That
8 certainly doesn't give rise to any close association between
9 Mr Darnley and Mr Hammond, he didn't even recognise the name to
10 start with.

11 In terms of his associations, Mr Hammond, it appears, and
12 Mr Darnley have both been members of the New Zealand Institute
13 of Gas Engineers but Mr Hammond doesn't recall ever having met
14 with Mr Darnley at any of the gatherings of that institution,
15 and, in fact, didn't even know that he was a member of the
16 New Zealand Institute of Gas Engineers until he read the
17 Application for "Motion To Dismiss". So, it's clear there's no
18 close association between Mr Darnley and Mr Hammond.

19 What I deal with at paragraph 21 is even if the rule of
20 bias, the rule against bias did apply to Mr Hammond, and, as I
21 say, for example in relation to the assessment or the
22 conclusion that he had to make in respect of the complaint as
23 to whether or not it had substance, then there can be no basis
24 for finding of apparent bias against Mr Hammond. Applying the
25 test that I've referred to set down by the Supreme Court
26 there's no basis for finding, based on either his experience in
27 the gas industry or his previous dealings with Mr Darnley, that
28 a fair-minded lay observer might reasonably apprehend that
29 Mr Hammond might not bring an impartial mind to the
30 investigation. I submit that no fair-minded neutral observer
31 could possibly think because Mr Hammond has this experience and
32 expertise in the industry, or because on one occasion he had
33 met him previously back in 1998, on two occasions had
34 interviewed him in relation to another complaint, that he might

1 not bring an open mind to the investigation. I submit that the
2 test cannot even become close to being satisfied.

3 The next ground advanced by Mr Gee is that the Board is not
4 impartial. This is advanced on two bases. The first is that
5 Mr Darnley, as well as some Board members, I think it's alleged
6 Mr Parker, Mr Salisbury and possibly Mr Jackson, are members of
7 the New Zealand Institute of Gas Engineers; and, secondly,
8 because Mr Gee and Board members, Mr Whitehead, Mr Simmiss and
9 Mr Jackson, had been members of the Masters Plumbers,
10 Gasfitters and Drainlayers New Zealand Inc.

11 We've now got the statement from the Board as to what the
12 correct position is, and what it appears is that although there
13 are some common memberships there's basically no association
14 between any of the Board members and Mr Darnley or Mr Gee,
15 other than perhaps knowing that Mr Gee might be a member of one
16 of them. So, that's the factual position, the starting point
17 as to whether or not there's any lack of impartiality or any
18 apparent bias on the part of the Board because of their
19 association with either Mr Darnley or Mr Gee.

20 The other thing here, of course, is that in relation to the
21 allegations against Mr Gee and the charges against Mr Gee that
22 are sought to be dismissed, the Board hasn't made its decision
23 yet. So, what I submit is that the most that this application
24 could result in, if it is found, for instance, that any of the
25 Board members do have some sort of disqualifying association,
26 is that any particular member that does have too close an
27 association cannot sit on the hearing of the charges of Mr Gee.
28 And it's not accepted, as I've already said, that there is any
29 such disqualifying association. But if there was one, that's
30 the most that could result because the decision hasn't been
31 made yet.

32 It appears, though, that Mr Gee is attacking the process and
33 the impartiality of the Board on the basis that some of the
34 Board members who it is alleged have these associations with

1 Mr Gee, or Mr Darnley, have already been involved in making two
2 resolutions involved in the discipline process to date; the
3 first one was the resolution to appoint Mr Hammond as the
4 Investigator under the Act; and, the second one it is alleged
5 was their resolution to convene a due inquiry under the Act in
6 respect of the complaint against Mr Gee. However, what the
7 Investigator says about that is that even if there was some
8 sort of disqualifying association, too close an association,
9 it's submitted that none of those associations could possibly
10 have prevented any of the Board members from being part of
11 either of those two resolutions because of the nature of those
12 resolutions and the subject matter that was being dealt with at
13 the time. And certainly, the fact that any of the Board
14 members who may have some sort of association because of the
15 organisations they sit on, none of that could possibly amount
16 to egregious conduct or any type of conduct that could possibly
17 justify a stay on the grounds of abuse of process, and I
18 explain why I say that from paragraphs 25 on.

19 Dealing first with the resolution to appoint Mr Hammond as
20 the Investigator. This occurs under section 41 of the Act, and
21 I'll just take you to that because it's clear that once a
22 complaint has been referred to the Board, the Board only has
23 two options as to what it can do. It can either immediately
24 convene a due inquiry and hear the charges in accordance with
25 section 43 of the Act of process, or it can appoint an
26 Investigator before doing so.

27 So, if we go to section 41. Section 41(4): If the
28 Registrar is satisfied after considering a complaint and any
29 statutory declarations relating to the complaint that he may
30 have required that a complaint relates to a matter that is
31 within the Board's jurisdiction under section 42 of this Act,
32 he shall confer the complaint to the Board. 41(4A) talks about
33 what happens then: Before considering any complaint in
34 accordance with the succeeding provisions with this part of the

1 Act the Board may, if it thinks fit, refer the complaint to an
2 Investigator. So, what that suggests, of course, it can either
3 consider the complaint in accordance with the succeeding
4 provisions of the Act, which is really sections 42 and 43 on,
5 or it can refer the complaint to an Investigator and under
6 41(5): If after examining the complaint the Investigator
7 considers it has substance, he shall refer it to the Board for
8 consideration by the Board in accordance with procedural
9 provisions of this part of the Act.

10 So, what this makes clear is the Board can either without
11 appointing an Investigator immediately convene a due inquiry
12 et cetera in accordance with section 43, the charge, process
13 et cetera, or it can appoint an Investigator, and it's only if
14 the Investigator finds that there is substance that the Board
15 can then consider the complaint in accordance with the Act.

16 So, in fact, what happened in this case was that the Board
17 resolved to appoint an Investigator. That, in fact, was the
18 option open to the Board most favourable to Mr Gee. The other
19 option was just immediately to convene a due inquiry. The
20 reason it's most favourable to Mr Gee was because if the
21 Investigator had investigated and found there to be no
22 substance, then it wouldn't have gone any further. And if we
23 look at what actually happened, this is at Mr U'ren's
24 affidavit, the information that the Board had before it,
25 Annexure A. Mr U'ren says this is the only information,
26 Annexure A to his affidavit, that was placed before the Board
27 before the Board made the resolution to appoint Mr Hammond.
28 You'll see there it's got, "The Registrar recommends as
29 follows". Then there's just a recommendation that it appoint
30 Mr Hammond as the investigator to investigate the complaint
31 against Mr Gee and Mr Darnley.

32 So, it's not even as if it can be suggested that the Board's
33 choosing the Investigator or anything like that, there could be
34 no possibility of any lack of impartiality or any impact of it

1 given that the result was the option most favourable to Mr Gee
2 in any event.

3 The second resolution really, I submit, wasn't even required
4 because, I mean I'm not criticising the fact that it happened,
5 it's perfectly appropriate, but all the second resolution
6 resolved to do was what the Board was bound to do under
7 section 43(1) anyway once the Investigator found the complaint
8 had substance. Once an Investigator is appointed and the
9 Investigator finds that there's substance of a complaint, a due
10 inquiry has to take place in relation to that complaint in
11 accordance with the process set out under section 43. So, the
12 Board had no option to do anything anyway, anything other than
13 that. So, once again there can be no suggestion that there was
14 any inappropriate conduct on the part of the Board or that any
15 association of any Board Member could in any way have affected
16 the process to the disadvantage of Mr Gee.

17 In any event, paragraph 28, what I go on to consider is that
18 in any event none of the associations, as I've already said,
19 could possibly justify any of the Board members being
20 disqualified from hearing the charges against Mr Gee or from
21 being part of those resolutions.

22 The first point is that much is made of alleged associations
23 between Board members and Mr Darnley, and it's submitted,
24 stated in the Motion To Dismiss, that Mr Darnley and Mr Gee are
25 co-respondents. Well, that's not correct. It is correct that
26 when the complaint was made and when it was first investigated
27 they were both subject of the complaint, but now there are two
28 completely separate processes going on. Since the Investigator
29 has come back there have been charges laid against Mr Gee which
30 are completely separate from charges that have been laid
31 against Mr Darnley. Mr Hammond in his affidavit just explains
32 the distinction between the two sets of charges against Mr Gee
33 and Mr Darnley.

34 In respect of Mr Gee, he faces charges in respect of

1 seven installations. Six of them have absolutely nothing to do
2 with Mr Darnley as far as the Investigator's concerned. In
3 fact, Mr Darnley wasn't even interviewed in respect of six of
4 those installations. There is one installation, that is the
5 Milton Street Fish and Chip shop, where both Mr Darnley and
6 Mr Gee were interviewed, but, at the end of the day, the
7 particular in the charge against Mr Gee relating to that
8 installation is purely on the basis that Mr Gee certified that
9 installation. There's no allegation that he carried out the
10 work that is the subject of the allegation, it's that he
11 certified it.

12 As against Mr Darnley, he faces charges against
13 four completely separate installations in respect of which
14 Mr Gee wasn't even interviewed by Mr Hammond. Mr Hammond makes
15 it clear in his affidavit that at the hearing of the charges
16 against Mr Gee, if it goes ahead Mr Darnley won't be called as
17 a witness, and at the hearing of the charges against
18 Mr Darnley, Mr Gee won't be called as a witness. So, this
19 isn't a situation where you will have the Board hearing a case
20 where both Mr Gee and Mr Darnley are giving evidence and there
21 might be issues of credibility where the Board might have to
22 prefer the evidence of one over the other, because they both
23 won't be at the hearing.

24 So, it's on that basis, first of all, that the Investigator
25 simply says that any association between the Board and
26 Mr Darnley is completely irrelevant to the charges against
27 Mr Gee.

28 Paragraph 30, I refer to the fact that, in any event, any of
29 the alleged associations go no further than common memberships
30 of two industry organisations which cases, and one in
31 particular that I refer to, make it quite clear are not
32 sufficient to satisfy the test of apparent bias. Simply being
33 members of the same organisation, particularly if they're of
34 the same industry, is not enough to satisfy the test for

1 apparent bias. And I refer to that case of the *NZI Financial*
2 *Corporation* where it was a case that involved an application
3 for a kiwifruit export licence. The statement there is:

4 (Mr Laurenson reads quote at the bottom of page 9 as follows:)

5 "So far as ... objectively and conscientiously".

6 (End of quote, page 10)

7 So, that is a similar sort of case. There is absolutely no
8 evidence other than some common memberships of industry
9 organisations and, in fact, the statement from Mr Chairman
10 today makes it quite clear there is absolutely nothing even
11 approaching a close association either between Mr Gee and the
12 Board, or Mr Darnley and the Board.

13 The point I make at paragraph 31 is that even if it could be
14 considered that these associations might be close enough to
15 give rise to some sort of apparent bias, and I don't for one
16 moment accept it gets anywhere close to that, there are cases
17 that have considered the statute under which a Board or a body
18 is appointed and found that because of what is clearly the
19 statutory intention, certain aspects of, for instance, the rule
20 against bias, have been excluded because it's clear that the
21 statute doesn't require that.

22 Now, what I'm saying is that we don't even get to that
23 situation but if you look at the statute appointing the Board
24 in this case, you have a similar sort of situation because the
25 statutory constitution of the Board, which is set out in
26 Section 6, I submit is such that Parliament must have intended
27 that there could be situations where Board members and
28 registered persons facing disciplinary charges under the Act
29 could hold common memberships of certain industry
30 organisations. The Board is a specialist tribunal, there's no
31 doubt about that. The Act provides that there are ten members
32 and that those ten members must include at least six members
33 from the three trades, two from each, so you've got the
34 majority of the Board being made up of members of the three

1 trades. So, what I suggest is that Parliament must have
2 envisaged that there would be circumstances in which you have
3 members of the Board who are also members of an industry
4 organisation that a registered person facing charges might also
5 be a member of, and it must have been intended, I submit, by
6 Parliament that when the Board hears a charge against a
7 registered person it will have at least some members on the
8 Board who are members of the trade from which the registered
9 person comes from. It makes sense, obviously, that if there is
10 a gasfitter being charged and facing disciplinary action you
11 will have some gasfitters, people from the gasfitting trade on
12 the Board. It cannot possibly have been intended by Parliament
13 that if it turns out that, say, the two members who are
14 gasfitters are simply members of the same industry organisation
15 that the registered gasfitter facing the charges are from, that
16 those Board members wouldn't be able to sit.

17 So, I submit that even if you got to a situation of apparent
18 bias, then the Parliamentary intention of the regulation
19 appointing the Board is such that it wouldn't have been
20 intended that those Board members could not sit simply because
21 of an association of sitting on the same sort of industry
22 organisation.

23 One other aspect of this association argument on the part of
24 Mr Gee is that there are rules of the Master Plumbers,
25 Gasfitters and Drainlayers New Zealand Inc that would be
26 breached if Board members who are members of that organisation
27 sat on the Board that determined the charges against Mr Gee.

28 Now, whether or not that's the case, I submit, is not a
29 matter for this Board. It's not a matter for this Board as to
30 whether or not any of your members might be in breach of
31 another organisation's rules in sitting on this. That's a
32 matter for that organisation. It has no relevance at all to
33 this Board's determination of whether those members should hear
34 the charges against Mr Gee. The only other thing I'd note

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1 about that is that there's one suggestion, one reference in
2 Mr Gordon's statement to a proposed rule change that would
3 prevent, I think, the Chairman or the President of the Master
4 Plumbers, Gasfitters and Drainlayers New Zealand Inc, Board of
5 Directors sitting on either the Board or the ITO Board. The
6 point I make about that is all that is, is a proposed rule
7 change which isn't even going to be discussed until 24 March.
8 So, it's not even the case of it being a rule yet. But, in any
9 event, I would say it's completely irrelevant as to this
10 Board's decision as to whether or not any of its members should
11 sit on this matter.

12 The final ground for the application to stay the charges is
13 based on Mr U'ren at the time he was Acting Registrar sending
14 out these letters to six of the customers of Mr Gee, and these
15 were in respect of six of the installations that Mr Gee now
16 faces charges in respect of, and it's suggested that these
17 letters were defamatory and that they, in fact, state that
18 Mr Gee is dishonest and therefore affect the chance of those
19 customers giving fair and impartial evidence at the hearing.

20 Now, Mr U'ren explains the background to those letters being
21 sent out. It's accepted that in hindsight those letters could
22 have been drafted more accurately, applying more specifically
23 to the area in which the customers were in, but what these
24 were, although these letters came about initially as a result
25 of the complaint being laid against Mr Gee and Mr Darnley, they
26 were not actually sent out at all as part of the disciplinary
27 or investigative process in respect of those complaints. What
28 happened was it became clear that there was a problem with the
29 standards of gasfitting being carried out in various areas and
30 so there was an audit process started, they were sent out as
31 part of a process of auditing approximately 500 gas
32 installations throughout New Zealand with the purpose of
33 ensuring public health and safety was not placed at risk. So,
34 that is why they were sent out, those letters, to ensure public

1 health and safety of New Zealand. They weren't part of the
2 investigative or disciplinary process. So, when you come to
3 consider whether or not the sending out of those letters could
4 give rise to the situation that would justify a stay on the
5 ground of an abuse of process on the basis that there was some
6 egregious conduct on behalf of the prosecuting authority, then
7 the Investigator's submission is that that could not possibly
8 be the case. This is a situation where the sending of the
9 letters was not part of the disciplinary or prosecuting
10 process. There was no egregious conduct. What happened was
11 they were - any inaccuracy in the letter was simply as a result
12 of an oversight which occurred when the audit process conducted
13 for the purpose of ensuring public safety was extended from the
14 North Island into South Island areas. So, there's absolutely
15 no basis for there being any finding of abuse of process or
16 egregious conduct on the part of anyone.

17 They are my submissions unless you have any questions.

18 **MR CORKILL:** Mr Laurenson, just before you conclude can you
19 have look at paragraph 13 of Mr Gordon's submission which
20 raises an issue about what is described as the inclusion
21 of the Investigator's counsel as inappropriate, as I
22 understand the submission in this hearing, and you might
23 just for the sake of completeness wish to address that and
24 in doing so the Board might be assisted by being taken to
25 section 43(8).

26 **MR LAURENSEN:** Well, the point about that of course is that it
27 cannot possibly be inappropriate. I mean I think - I
28 presume the section that's being referred to is the fact
29 that an Investigator has the right to be represented by
30 counsel at any hearing. It is the Investigator who is
31 bringing these charges and prosecuting the charges. I
32 have been instructed by the Investigator to represent him.
33 So, when you have an application that seeks to dismiss the
34 charges that the Investigator has laid, it is entirely

1 appropriate that his legal representative be present. So,
2 and I'll just - was it 43(8)? Yes. And that just
3 confirms that, my right to be here as the representative
4 of the prosecuting Investigator at this case.

5 **MR CORKILL:** Yes, thank you.

6 **CHAIR:** So, Mr Gordon, do you have any submissions in reply to
7 Mr Laurenson's submissions?

8 **MR GORDON:** Only a couple of minor points in that
9 Mr Laurenson's made a very good job of breaking down the
10 submission into relevant sections but we still submit that
11 it is a cluster of incidences or actions that has caused
12 the problem rather than just the individual process as
13 he's described them.

14 Now, he did mention about outstanding bad behaviour or
15 egregious conduct. I do see the influence of witnesses
16 falling into that category and also the lies that were
17 told to the witnesses about Mr Gee, this is particularly
18 in respect of the letters, and he did confirm that the
19 letters weren't sent out as part of the investigation and
20 that's part of what we contested earlier on was that the
21 investigation and the processes by the Board have crossed
22 the definitive line, has been crossed where the
23 Acting Registrar at the time has been involved in the
24 investigation as well as his role as the Registrar, and he
25 did mention with regard to the appointment of the
26 Investigator.

27 Just one thing that we would still like to contest is
28 what the industry was in fact told and what the Board
29 actually does are two different things in this situation,
30 where we were told by the newsletter what the requirements
31 were for investigation but the Board has still done what
32 they felt fit, so for the average person we don't feel
33 that that would sit quite right. That's all, thank you.

34 **CHAIR:** So, at this point we'll adjourn this hearing until

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1 1.30 - (Mr Chairman and Mr Corkill confer). So, we'll
2 adjourn for five minutes. The Board may have some
3 questions they wish to ask of either of the two parties,
4 and then we can take some information from our
5 Legal Assessor as well. So, we'll adjourn and we'll
6 reconvene at half past.

7 (Hearing adjourned from 11.22 am till 11.37 am)

8 **MR CORKILL:** Mr Chairman, and I confirm you have had a brief
9 discussion with the Board to see if there was anything
10 more in terms of issues arising out of what Mr Gordon has
11 said and Mr Laurenson has said, that the Board itself
12 needs to ask to ensure they properly understand the two
13 sets of submissions, and as I understand you have no
14 further questions so that the process from this point
15 onwards will simply be I will, as Legal Assessor, give my
16 legal direction to you, and at that stage I would be
17 recommending that you reserve your decision and issue your
18 decision in writing. And so at that point, once I have
19 given the Legal Assessor's direction, that will conclude
20 the hearing today as far as the parties are concerned.
21 So, with your leave I will now give my direction to the
22 Board, and Madam Registrar, I've got some documents here
23 if you wouldn't mind handing them around. (Documents
24 distributed).

25 ***

26 **DIRECTIONS BY THE LEGAL ASSESSOR**

27 **MR CORKILL:** What you're being handed around is a set of
28 submissions which I am going to take you through quite
29 closely. The thick bundle is simply some case law that is
30 referred to in my submission. If per chance you wanted to
31 look at the detail of case law I'm simply giving it to you
32 so that it's available, but I don't put it any higher than
33 that.

34 So, turning to paragraph 1 of my directions.

1 It is my responsibility to provide legal and procedural
2 advice to you. In doing so you should note that the final
3 determinations of all issues, both factual and legal, are for
4 you with regard to the facts. You should not interpret
5 anything I say as an indication that they should be determined
6 one way or the other, and the reason I say that is because the
7 facts are squarely within your province, not mine.

8 The matter which is before the Board is described as a
9 "motion to dismiss charges with prejudice" and it raises the
10 four issues that you've heard about: The process of
11 appointment of the Investigator, impartiality of an
12 Investigator, impartiality of a Board and defamatory statement
13 by Acting Registrar.

14 The essence of the application is that the above issues, and
15 I interpolate there, either separately or cumulatively, because
16 Mr Gordon made a point to you just now which was that, the way
17 he put it was that there is a cluster of concerns here and so
18 he is saying that from Mr Gee's point of view you need to
19 consider all the issues raised in the round and determine
20 whether there is such prejudice that the charge should not be
21 allowed to proceed because Mr Gee would not have a fair and
22 impartial hearing. In essence, what is sought is a stay of the
23 disciplinary proceeding brought against Mr Gee.

24 Now, I deal firstly with jurisdiction and what I mean by the
25 word "jurisdiction" is does this Board have the ability to
26 grant the order sought, and what I'm going to say to you in a
27 moment boils down to this, there is no real controversy about
28 this, you do have the jurisdiction but I think it's important
29 that I outline it out to you so you can be clear about what the
30 scope of that jurisdiction is.

31 Paragraph 4 I say that when dealing with disciplinary
32 matters the Board is required to observe the principles of
33 natural justice, that's in your Act and it's in the schedule to
34 your Act and may otherwise regulate its own procedure, and that

1 is in the schedule to the 1976 Act. It is well established
2 that a disciplinary body may stay disciplinary proceedings as
3 an aspect of both those principles, as an aspect of the
4 principles of natural justice and as an aspect of the ability
5 of a Board to regulate its own procedure. So, in short, yes,
6 you have the jurisdiction but what are the applicable
7 principles. And I've tried to present these in my paragraph 6
8 in a reasonably user-friendly way so that you can understand
9 the broad principles that a quasi judicial body such as
10 yourself has to bear in mind when you are dealing with an
11 application like this, and there have been many cases which
12 have considered applications of stay by disciplinary bodies and
13 these principles have emerged.

14 First, in deciding whether a permanent stay of a
15 disciplinary proceedings should be ordered, consideration will
16 necessarily be given to what is described as the protective
17 character of such proceedings and to the importance of
18 protecting the public from incompetence and from professional
19 misconduct.

20 Secondly, the disciplinary body is required to undertake a
21 weighing process similar to the kind of weighing process that
22 is appropriate in the case of criminal proceedings but adapted
23 to take account of the differences of those two kinds of
24 proceedings. The purpose of disciplinary proceedings is not to
25 determine and punish criminal wrongdoing, which is the purpose
26 of course of criminal proceedings, but to protect the
27 profession in question and those members of the public who come
28 into contact with it, and this is a relevant factor to be
29 weighed in the mix in any application for stay.

30 But against that there is a public interest in ensuring that
31 those charged with disciplinary offences not be subject to the
32 jeopardy of trial or adverse results if they are prejudiced in
33 defence of the allegations to such an extent that a fair
34 hearing cannot be obtained. And it is this factor that has to

1 be weighed against the matter referred to in paragraph (c), and
2 so that's why I have talked about it as a weighing of relevant
3 principles.

4 The power to stay should be exercised only in cases where
5 there have been, for example, wholly unacceptable delays which
6 render a fair trial impossible and, of course, that's not
7 alleged here, or alternatively where there has been egregious,
8 and I agree with Mr Laurenson that the dictionary says that
9 means outstandingly bad or shocking, egregious conduct by the
10 prosecutor authorities which is such as to require judicial
11 intervention.

12 In (f) I set out some principles that have emerged in
13 criminal proceedings and as I will say in a moment, these
14 points also have application in the disciplinary arena.

15 So, some of the principles that I refer to here are, the
16 concern is with conduct on the one hand on the part of the
17 litigant in relation to the case which if unchecked would
18 strike at public confidence in the Court's process and so
19 diminish the Court's ability to fulfil its functions as a Court
20 of law. Staying a prosecution is an extreme step in order to
21 protect processes from abuse. Any exercise of the power must
22 be approached with caution and outside of the category of
23 delay. The conduct must be of a kind that is so inconsistent
24 with the purposes of criminal justice that for a Court to
25 proceed with the prosecution on its merits would tarnish the
26 Court's own integrity or offend the Court's sense of justice
27 and propriety.

28 To stay a prosecution and thereby preclude the determination
29 of a charge on its merits, is an extreme step which is to be
30 taken only in the clearest of cases.

31 The principles just described relating to criminal
32 proceedings are applicable in the disciplinary context, that
33 is, and I'm summarising, where persons the subject of the
34 proceedings cannot have the matters in dispute determined in

1 accordance with accepted standards of justice and in addition
2 and specifically where the behaviour of the initiating
3 authority is for some reason unacceptable, then intervention
4 may be justified.

5 So, in summary, a high threshold must be established, a stay
6 should be granted only in the clearest of cases, namely where
7 in the opinion of the Board its processes would be abused were
8 the charge permitted to proceed.

9 Reference is made in the submission filed for Mr Gee to
10 certain statements of the Office of the Auditor-General in its
11 report inquiry into the Plumbers, Gasfitters and Drainlayers
12 Board, and reference is also made to a statement contained in
13 the report which relates to a comment which the Auditor-General
14 made when discussing historic organisational issues. Now, the
15 comments referred to do not relate to the way in which the
16 Board's decision-making occurred when it has carried out its
17 disciplinary functions. For what it is worth, any issues
18 relating to the Board's disciplinary role in whether the Board
19 had acted correctly or not would be a matter for consideration
20 by the High Court on appeal, and the point I'm making is that
21 the Auditor-General wasn't attempting to substitute itself for
22 the High Court in terms of making statements about outcomes on
23 disciplinary cases by the Board. But that all said, there can
24 be no disagreement with the proposition that the Board must use
25 its disciplinary powers in a proper and reasonable manner,
26 having regard to the legal principles developed with regard to
27 stay applications as outlined above.

28 Now, the first ground, and I emphasise again the point that
29 Mr Gordon has made, that he is submitting that all these
30 grounds need to be looked at cumulatively in the end, but he
31 has in his submission gone through them individually, as has
32 Mr Laurenson, and so have I, and that must be the starting
33 point. You must look at the individual factors that are raised
34 individually as a starting point. The first ground, as you

1 know, is to do with the appointment of the Investigator.

2 Now, in the originating document of 25 January this ground
3 is summarised by way of alleging that the Board appointed an
4 Investigator outside the scope of its own policy, and I've just
5 given you the paragraph references at my para 12 as to where
6 you find the competing arguments that have been put up, and I'm
7 not going to go through all those, those are matters for you,
8 I'm just going to concentrate on the legal issues. The
9 starting point must be section 40 of the Act which states:

10 *"For the purposes of this Act, the Board may from time to*
11 *time appoint any person, not being a member of the Board, who*
12 *is a registered person, or who is employed by a local*
13 *authority..."* which is not relevant here, *"to be an*
14 *Investigator, and may at any time revoke the appointment"*.

15 The primary question, therefore, is whether the Investigator
16 has been appointed within those criteria of section 40. This
17 issue is addressed at paras 15 and 16 of the Investigator's
18 submissions and it's a matter for you. It is also a matter for
19 you to determine what weight, if any, is to be given to the
20 guidelines published in the, I think the correct description is
21 Board News, since the statute does not refer to those criteria.

22 The second issue relates to the impartiality of the
23 Investigator, and again I've just given you the correct
24 paragraph numbers there.

25 First point, it is to be noted that it is not the
26 Investigator who would determine the charge if it proceeds. It
27 will be for the Board to determine the charge. Consequently
28 the obligation to comply with the rules of natural justice is
29 not one that falls on the Investigator but on the Board, and I
30 give you the statutory references. My point about this is that
31 the statute has been very clear about whom carries the
32 obligation in relation to rules about natural justice and it is
33 the Board that carries that obligation. So, therefore, the key
34 question based on the stay principles that I have already

1 identified is whether there has been such egregious or shocking
2 or outstandingly bad behaviour on the part of the prosecuting
3 authority that amounts to an abuse of process; that's the test.

4 The Investigator has disclosed details of his experience and
5 qualifications and it is for the Board to determine whether
6 there is indeed any conduct of the kind I have just described,
7 egregious.

8 Please note that if the Investigator gives evidence at the
9 substantive hearing, which would be the usual practice, he will
10 be able to be cross-examined by Mr Gee's representative. His
11 opinion evidence can be evaluated by the Board as to whether it
12 withstands logical scrutiny. While expert evidence may guide
13 the Board, the view of experts do not necessarily determine the
14 ultimate outcome, although the evidence of acceptable practice
15 will normally be highly relevant. The evidence of expert
16 witnesses has to be carefully evaluated and the soundness of
17 opinion carefully scrutinised by the Board, just as is the case
18 in connection with any witness.

19 Accordingly, the Investigator can be questioned about any
20 issues of concern with regard to the process by which he
21 obtained information, and as to the soundness of his views.
22 That can all happen and routinely does happen at a substantive
23 hearing.

24 Third issue, impartiality of the Board, and again I give the
25 references. It is first necessary to identify the correct
26 legal principles. Mr Gee's submission refers to statements of
27 the Auditor-General regarding conflicts of interest. However,
28 in the quasi judicial field it is decided cases of the Court
29 which must be referred to for relevant principles since the
30 Courts have over the years considered this issue on very many
31 occasions, including with regard to disciplinary bodies such as
32 the Board. The Board must apply those legal principles, and I
33 have attempted to summarise them in my para 24.

34 Starting point is that there are two types of what is called

1 "bias". There is presumptive and apparent bias. Presumptive
2 bias arises where a decision maker has a direct pecuniary or
3 personal interest in the outcome of the case. Apparent bias is
4 where the decision maker has some personal or professional
5 relationship to a party or a witness or a prejudice against or
6 a preference towards a particular result or predisposition
7 leading to a predetermination of the issues.

8 The content of the bias rule is flexible, varying with the
9 factual and legal circumstances. It is at its most demanding
10 when applied to the judiciary and it is at its least demanding
11 when applied to informal low-level administrative tribunals.
12 The tests for bias reflects the standards and expectations of
13 the reasonable person or observer.

14 In respect of apparent bias, and I interpolate that it seems
15 to be that's the assertion that's being raised in the present
16 case, the decision maker is disqualified, and I'm using the
17 words here of the Supreme Court in the recent *Saxmere* decision,
18 the decision maker is disqualified "*if a fair-minded lay*
19 *observer may reasonably apprehend that the decision maker may*
20 *not bring an impartial mind to the resolution of the question*
21 *which the decision maker is required to decide...*".

22 This rule, however, is subject to necessity. For example,
23 where the legislation itself requires persons who will have a
24 particular association to determine the issue, and I'm going to
25 speak a bit more about that in a moment, it is to be noted that
26 the fair-minded lay observer is neither unduly sensitive or
27 suspicious, nor complacent about what might influence the
28 decision. The assessment is to be tempered with realism. The
29 above principles apply to disciplinary bodies dealing with
30 occupational matters where context will be recognised and in
31 particular that members of the decision making body will
32 include members of the profession or trade.

33 In summary, then, the question will be whether having regard
34 to the particular statutory provisions within which the Board

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1 is required to operate, a fair-minded lay observer might
2 reasonably apprehend that the Board might not bring an
3 impartial mind to the resolution of the question it must
4 decide. So, you've got to start with the Act and so I'm now
5 taking you to the relevant provisions of the Act.

6 Section 6, it provides that the members of the Board must
7 include two registered persons from each of the three trades.
8 Like most occupational disciplinary bodies the specialist
9 expertise of persons who are involved in the relevant
10 occupation is ensured by having representatives from those
11 trades and professions.

12 I just interpolate there and say that there are very many
13 occupational disciplinary bodies who have specialist expertise
14 by way of representation from the profession for trade;
15 lawyers, health, accountants, the list goes on and on. There
16 are some 30 of these bodies in the country and most of them
17 will have some specialist expertise of that kind on them.

18 Reliance is placed for Mr Gee on the power of section 41(4A)
19 for the Board to refer a complaint to the Investigator.
20 Obviously the statute itself envisages that where a complaint
21 is referred to an Investigator, the Board has to do that, being
22 the Board which would subsequently convene a hearing and to
23 determine any charge. However, safeguards to protect the
24 integrity of the ultimate hearing have been introduced and have
25 been recognised, and I'm referring there to that document that
26 Mr Laurenson took you to, and it's for you in the end to
27 evaluate that process, but clearly you've got to take the
28 statutory context into account which requires the Board to
29 appoint the Investigator.

30 Section 43(1) provides that where a complaint made or
31 referred to the Board, the Board shall, no choice about it,
32 before acting under section 42, cause a notice to be served.
33 The same comment applies here, the Board is required to cause
34 to be served on the registered person a notice of the intended

1 charge. That is an entirely standard procedure for
2 disciplinary bodies and again safeguards have been introduced.

3 Against the background of those principles and legislative
4 provisions there are three broad questions the Board must
5 consider. Does the fact that Board members have had to make
6 relevant determinations in the pre-hearing process give rise to
7 an appearance of bias?

8 Reference has already been made to statements in such cases
9 as *Jeffs* and *NZI Financial Corporation* where Courts have held
10 that the legislative intention was to include the rule against
11 bias to a certain extent, in respect of the statutory decision
12 making body in question.

13 And I'm now going to take you, members of the Board, to
14 several examples of this rule in play so you can see how this
15 principle is illustrated.

16 In the professional disciplinary field the dicta of
17 Clifford J in *Knight* assists. This is a veterinarian case. It
18 is to do with the prosecution of a veterinarian in a discipline
19 context, and the issue was whether a conflict of interest
20 between a veterinarian who chaired a first Complaints
21 Committee, Dr Twyford - they have a screening committee called
22 a Complaints Committee - and a person who chaired a second
23 Complaints Committee, a Dr Gibson, in connection with the
24 laying of charges against Dr Knight, and where the chairperson
25 of the first Complaints Committee had communicated at the
26 commencement of the process with the chairperson of the second
27 Complaints Committee, and I don't need to go into the reason
28 why there were two of these Complaints Committee but for
29 procedural reasons the second one had to be set up to do some
30 of the work. After analysing the facts, the Judge said:

31 (Mr Corkill reads quote under para 28(a), page 7 of his
32 directions as follows:)

33 "[77] In summary, therefore ... charges Dr Knight faced".

34 Now, I've read that out, not because I want you to get

1 deeply into the way in which the veterinarians operate but
2 simply there's the Judge setting out the facts as he has been
3 led to believe them to be and then he's gone, which you must
4 do, first step; second step, you then go on and apply the
5 principles, and this is what the Judge did when he came to the
6 second step:

7 *"I am not, however, persuaded that, in these circumstances,*
8 *a fair minded lay observer might reasonably apprehend..."*

9 So there's the test that I've already referred to:

10 (Mr Corkill reads from quote [78], para 28(a) of his
11 directions as follows:)

12 *"[78] I am not ... concerns about partiality".*

13 (End of quote [79], page 8)

14 The Judge was looking at the statutory context and saying,
15 well, Parliament has set it up that way so it's hard therefore,
16 it would be difficult for a fair minded person to conclude that
17 there was a partiality problem.

18 Thus, the Board must exercise its powers as required by the
19 statute. It is required to consider referral to the
20 Investigator and must then set up the hearing if a
21 recommendation to that effect is made. This aspect of the
22 matter then falls to be considered against those cases which
23 have held that the legislative intention excludes the rule of
24 bias and/or the principle of necessity that requires the Board
25 to take the decisions it has.

26 The second broad issue that the Board must consider is
27 whether, given the network of associations that exist in
28 New Zealand, there are any particular links with Board members
29 which would persuade a fair minded lay observer there was a
30 possibility the Board would not be impartial. As to this
31 issue, and I've already read out one of these passages, para 78
32 from the *Knight* decision.

33 Another example is the *Man O'War* case where the
34 Privy Council rejected a claim that because a Judge of the

1 Court of Appeal sitting in the case had a personal relationship
2 with a witness, the witness in question was the son of a man
3 who had been the Judge's former employer, long-term partner and
4 mentor for some years and brother of another partner of the
5 Judge for some 11 years, and this is the key bit, the
6 Privy Council approved a statement that "*to take any other view*
7 *would be unrealistic in the New Zealand situation*".

8 Another case, *Wang v Cornwell*, concerned an agreement for
9 sale and purchase of land. It emerged in the evidence that a
10 good friend of Mrs Wang's husband was also a friend of the
11 Judge. The Judge declined to recuse himself, holding that even
12 though the witness' credibility was in issue, a friendship that
13 was more recently on a two monthly or so interval between
14 get togethers, and where the Judge was unaware of the
15 connection, was too remote. A factor was New Zealand in
16 general, and Auckland in particular, was a small society.

17 To give you an example of a case that's gone the other way,
18 a case called *Sutherland*, the personal and professional
19 relationship that existed over four years between a Coroner,
20 who had also identified the body and knew the deceased was
21 taking medicine for manic depression, and the deceased resulted
22 in the Coroner's decision being set aside. That was too close.

23 So, these are matters of fact and degree but you have to
24 take into account the statutory context and you have to take
25 into account factors such as the particular industry and
26 profession in which you operate, and the reality that there
27 will be people who are co-members of a particular association,
28 or who may even be aware of each other.

29 The final issue raised is with regard to associations with a
30 Mr Darnley. The Investigator, through counsel, states that
31 Mr Darnley will not be called, and that his circumstances are
32 not relevant to the claim against Mr Gee. It is for the Board
33 to determine whether this factor could have any impact on the
34 Board's partiality.

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1 Finally, reference is made to a rule yet to be passed of the
2 Master Plumbers, Gasfitters and Drainlayers. That is an issue
3 for that organisation and could not bind the Board, it is the
4 statutory requirements of the Board which must regulate the
5 current procedure informed by the official cases on the topic.

6 The final issue is alleged defamatory letters. The issue
7 which must be focused on here is whether the sending of that
8 letter in some way impacts on the possibility of a fair hearing
9 of the charge to the extent that conduct by the prosecuting
10 authority, the Investigator, could thereby be said to
11 constitute an abuse of the Board's processes. The letter
12 appears to have been sent by a person other than the
13 Investigator, Mr U'ren, not Mr Hammond, and although it is a
14 matter for the Board, the Board might well conclude the letter
15 has no relevance to the issues which are set out in the charge
16 and which the Board will have to determine.

17 Now, I want to make an additional point to you about this
18 because I think it came out a little bit from what Mr Gordon
19 was saying earlier, and that related to a concern that the
20 letter might have influenced potential or possible witnesses.
21 There is no evidence before this Board at the moment to the
22 effect that it has influenced potential witnesses but that's
23 the point. It would be a matter of evidence, and if a witness
24 came along, a consumer came along to a hypothetical Board
25 hearing and had received a letter of this nature the witness
26 can be asked questions about the role of the letter and whether
27 the letter has influenced them. That's all part of the usual
28 process of evaluating the reliability of witnesses who come
29 along and give evidence in a disciplinary hearing. So, it's
30 for you, however, to weigh up this allegation and decide
31 whether this is a serious problem such as to warrant
32 intervention or not, given those kind of mechanisms that would
33 be available at a hearing.

34 Unless I can assist you further, those are my directions.

1 **CHAIR:** We thank you for those directions, Mr Corkill. Does
2 any Board member have a question relating to those
3 directions? (No questions). If there be no further
4 questions the Board will adjourn and we will reserve our
5 decision and deliver it in writing to the concerned
6 parties. Thank you for attending.

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(Hearing concluded at 12.08 pm)

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