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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0089 OF 2007S
(High Court Civil Action No. HBJ 13 of 2006S)

BETWEEN: IFTHAKAR IQBAL AHMED KHAN

Appellant

AND: FIJI LAW SOCIETY LEGAL PRACTITIONERS DISCIPLINARY COMPLAINTS COMMITTEE

First Respondent

THE FIJI LAW SOCIETY

Second Respondent

Coram: Byrne, JA
Hickie, JA
Bruce, JA

Hearing: Wednesday, 12th November 2008, Suva

Counsel: S.D. Sahu Khan for the Appellant
D. Sharma for the First and Second Respondents

Date of Judgment: Friday, 21st November 2008, Suva

JUDGMENT OF THE COURT

Introduction

1 This is an appeal against a judgment of Pathik J given on 18 August 2006 wherein he refused to order judicial review of a ruling of the Fiji Law Society Legal Practitioners Disciplinary Complaints Committee. The Appellant in this case, Ifthakar Iqbal Ahmad Khan is the subject of proceedings before that Committee.

Chronology

2 Before considering the merits of that appeal, in order to understand the issues in this appeal, it may be helpful to set out a chronology of this matter. It will be necessary to expand on the somewhat abbreviated entries in the chronology in due course. The chronology is as follows:

(a) 23 August 1999: Sheo Shankar complains to the Fiji Law Society about the conduct of Mr Khan in connection with the settlement of his claim for damages for personal injuries.

(b) 30 September 1999: Sheo Shankar makes a report to the police alleging that Mr Khan did not give him his insurance money.

(c) 18 May 2001: police interview Sheo Shankar in relation to the allegation made in a report to police.

(d) 3 April 2002: two charges were laid before the Fiji Law Society Legal Practitioners Disciplinary Complaints Committee which alleged misconduct against Mr Khan in connection with the settlement of Mr Shankar's claim for damages for personal injuries.

(e) 26 May 2005: Mr SM Shah sitting as a magistrate gave judgment in the Nadi Magistrates Court where he convicted Sheo Shankar.

(f) 9 July 2005: the Committee indicated that it would like to see the judgment of the Nadi Magistrates court in respect of certain proceedings. The proceedings concerned a conviction of Sheo Shankar before Mr SM Shah.

(g) 16 September 2005: the Committee was supplied with a copy of a judgment of Mr Shah. (The Committee had requested copies of the notes of proceedings but they were never supplied.)

(h) 25 January 2006: the Committee gave a ruling in respect of an application for an order that the disciplinary proceedings against Mr Khan be struck out on the basis of what was characterised as issue estoppel.

(i) 31 March 2006: Mr Khan gave notice of a motion for an application for leave to apply for judicial review.

(j) 3 April 2006: Pathik J granted leave to apply for judicial review and ordered that the grant of leave should operate as a stay of the proceedings before the Fiji Law Society Legal Practitioners Disciplinary Complaints Committee.

(k) 20 July 2006: the application for a judicial review was heard.

(l) 18 August 2006: Pathik J delivered judgment.

(m) 4 September 2006: Mr Khan gave notice of appeal against the decision of Pathik J.

(n) 4 September 2006: Pathik J made an order which stayed in the disciplinary proceedings before the Committee until the determination of the appeal by Mr Khan to the Court of Appeal.

Fiji Law Society Legal Practitioners Disciplinary Complaints Committee

Statutory framework

3 The Legal Practitioners Act regulates the practice of law in Fiji. It establishes the Fiji Law Society. The objects of the Society are set out in section 13 of the Act. The relevant objects of the Society in section 13 are set out below:

(a) to maintain and improve the standards of conduct and learning of the legal profession in Fiji;

(b) to promote the welfare and to preserve and maintain the integrity and status of the legal profession;

(g) to protect and assist the public and the legal profession in all matters touching, ancillary or incidental to the practice of the law;

(j) to investigate charges of professional misconduct against any practitioner and to take such action thereon as may seem proper;

(s) to do all such other things as are incidental or conducive to the attainment of the foregoing objects or any of them.

4 The Act gives the Fiji Law Society an important role in the practice of the law in Fiji. In a general context, the Society plays an important role in the admission of legal practitioners (Part IV); controls the issue of Practising Certificates (Part V); regulates the rights and liabilities of legal practitioners (Part VI); deals with the appointment of a receiver in circumstances relating to matters such as the death of a legal practitioner and where the practising certificate of a legal practitioner is in question (Part VII). In addition, the Society has an important role to play in the regulation and recovery of legal costs. Of great relevance for present proceedings, the Society has a vital role to play in the maintenance of professional standards in the legal profession of Fiji: Part IX. Indeed, section 101 of the Act empowers the Society to make rules of professional conduct. (Those rules may be published after consultation with the relevant minister.)

5 Section 81 of the Act establishes a disciplinary committee. The committee is comprised of both lawyers and lay persons. The composition of a Disciplinary Committee is done through a panel system established under section 81(2) of the Act. Section 81(8) of the Act sets out the functions of the Committee as follows:

(a) to inquire into charges referred to it of malpractice, professional misconduct, or unprofessional conduct or practice on the part of a practitioner;

(b) to inquire into charges referred to it of misconduct or default in respect of a practitioner's practice by a clerk or servant employed in relation to that practice; and

(c) to make or cause to be made such investigations as it considers necessary for the purposes of its hearings.

6 It is open to anyone to make a complaint to the Society. In this regard, section 83(1) of the Act provides that:

> Any person may make a complaint to the Society regarding any alleged malpractice, professional misconduct, or unprofessional conduct or practice by any practitioner, or any servant or agent of any practitioner. Such complaint may be made orally or in writing.

Once a complaint is received, the Society is required by section 84 of the Act to make such enquiries as it considers appropriate. One possible outcome of section 84 is that the conduct the subject of complaint may be referred to the Disciplinary Committee. In the event of a referral to the Committee, a procedure provided by the Act is then brought into operation which involves, amongst other things, provision for witnesses, testimony on oath and, in general, the full panoply of a disciplinary hearing. Plainly, the procedure must be conducted by reference to the objects of the Society including those set out above.

7 In the event that a charge or matter is considered by the Committee to have been proved, a range of disciplinary penalties from censure to striking off are open to the Committee: section 93. Hearings are required to be in the public unless the

Chairperson of the Committee in relation to a particular matter orders otherwise: section 97. Section 98 provides that "the Society may from time to time make rules in respect of the making, hearing and determination of applications and enquiries under this Part. Proceedings shall be instituted and conducted before the Committee in accordance with these rules."

8 An appeals procedure is provided for under the Act. Section 100 provides:

> (1) An appeal shall lie to the Court of Appeal from any order of the Committee at the instance of either the Attorney-General, the Society or any other party to the proceedings.
>
> (2) Such appeal shall be in the nature of a rehearing and shall be made within such time and in such form and shall be heard in such manner as shall be prescribed by the rules of procedure made under this Part.

Charges

9 In the context of that statutory framework, the following charges were laid on 3 April 2002:

> Charge 1
>
> The practitioner failed to account to Sheo Shankar ("Shankar") for the proceeds of settlement of Shankar's claim against Surendra Prasad ("Prasad") arising out of an incident in which Shankar suffered personal injury in or about July 1996, in that, having on or about 22nd March 1998 settled the said claim in the sum of A$35,000.00 (inclusive of costs) and having, on or about 8th April 1998 received payment of the sum of A$35,000.00 from Prasad's insurer, the practitioner failed to pay to Shankar the said sum of A$35,000.00 or any part thereof.
>
> Charge 2
>
> That in or about June 1998 at the office of Singh & Fatiaki in Nadi, Fiji, the practitioner falsely represented to Shankar that Shankar's claim against Prasad was capable of settlement in the sum of $11,000.00 only (including costs) and that Shankar would receive the sum of $5,000.00 only from such settlement when, in fact, as the practitioner well knew, Shankar's claim against Prasad had been settled on or about 23rd March 1998 in the sum of A$35,000.00 inclusive of costs.

Proceedings before the Disciplinary Committee

10 On 9 April 2002 a Disciplinary Committee was formed. There were some initial vicissitudes in relation to the composition of the Committee. A preliminary hearing was fixed for 18 March 2003. At that point, both the Law Society and Mr Khan appeared. The Law Society was then required to file a list of documents upon which it intended to rely. In due course, Mr Khan was also required to file a list of documents. On 7 June 2003, Mr Khan was represented by counsel and there was some suggestion that a preliminary point as to jurisdiction might be raised. However it would appear that the matter was resolved to the extent that the Committee would be hear evidence first.

11 On 19 July 2003, there was a further hearing of the matter. Evidence was called. The Law Society called Sheo Shankar who was categorised as the complainant and indeed, if the charges are true, he was the victim of the conduct alleged against Mr Khan.

12 The Law Society then closed its case and two witnesses were called by Mr Khan. At the conclusion of the evidence, there was a submission of no case to answer. In the result, on 26 October 2004, the Committee held that there was a case for Mr Khan to answer.

13 Sheo Shankar testified before the Disciplinary Committee. The essence of his evidence was that while he was visiting a friend of his in Queensland, he slipped over and fell and broke his leg. His friend arranged for a process to be undertaken whereby he got compensation through his friend's insurance. Sheo Shankar was at pains to say that his contact with Mr Khan was very limited. He was insistent that he never received the $25,000 which was, after costs were deducted by Mr Khan, the compensation he was supposed to receive. In cross-examination, one of the things that was suggested to him was that he was a party to a conspiracy with his friend in Queensland and a friend in New South Wales to defraud. Essentially the contention was that the accident actually occurred in New South Wales when he was visiting a

friend in that State. However, there was no occupiers liability insurance on the premises of his friend in New South Wales and there was in relation to the premises of his Queensland friend. Accordingly, the claim was that the accident occurred at the premises of Shankar's friend in Queensland. In a not very satisfactory way, the interview that Shankar gave to the police was put to him. He maintained the version that he had given in examination in chief. It is not necessary to recite his evidence in detail.

14 Mr Koya also testified that he passed the money to Sheo Shankar. There were some highly extraordinary components the story that was given in to the Disciplinary Committee. Mr Koya was then a solicitor's clerk in a law firm. He said that he gave $25,000 to Mr Shankar. He said that he obtained a form of release and acknowledgement from Sheo Shankar and that it had been signed by him. The file (presumably a solicitor's file) had been handed over to Mr Shankar at that time. Ordinarily a solicitor who handed over a file in this fashion would be expected to retain a copy for his records. It is somewhat extraordinary that this aspect as never been canvassed. What is extraordinary is that the evidence before the Disciplinary Committee was singularly vague as to how the $25,000 got into the hands of Mr Koya in the first place. It appears to have been handed to another person who handed it to Mr Koya. There is absolutely no documentation for this extraordinary course of conduct. These features of the case alone are very worrying. Even if it is true that in reality Mr Khan was still a Queensland legal practitioner at the time of this conduct, the almost monumental negligence which appears to have been displayed in the handing over of a significant sum of money which was the property of Mr Shankar. It might be thought that this of itself might have attracted the considerable anxiety of the Law Society of Fiji. Even if it is strictly true that Mr Khan was not acting as a solicitor in Fiji in connection with this conduct, this obvious negligence might well throw into serious question his fitness to practice in Fiji.

15 While on the topic of worrying features of the case which came out before the Disciplinary Committee it is worthy of mention that Mr Khan testified in the

proceedings before the magistrate in which it was alleged that Mr Shankar had lied to the police about whether or not he received the $25,000. The Disciplinary Committee had a copy of the reasons of the learned Magistrate. At page 3 of the Magistrate's reasons for decision, the following passage is recorded by the learned magistrate:

> PW2 [*ie* Mr Khan] had paid the money to the accused. PW2 advised the accused that he should he should tell Surend Prasad he was injured at one Anil's place in New South Wales. PW2 further stated that the accused told him that since Anil's place was not insured the accused used Surend Prasad's place as a place of accident and hence compensation claim was sent to Surend Prasad's Insurance Company for Insurance Claim. The accused further told PW2 that the proceeds of the Insurance Claim will be shared between and that is why PW2 should not tell Surend Prasad that the money was not paid to him.

If that is an accurate record of what Mr Khan told the magistrate there is one cogent construction of that passage which suggests that Mr Khan was a party to the conspiracy to defraud the insurance company. That is not the only place where this matter was related in this fashion. As is noted in *Barristers Board v Khan* [2001] QCA 92, which was Mr Khan's appeal to the Court of Appeal of Queensland against an order that he be removed from the roll of Barristers in that State, De Jersey CJ (Williams & Byrne JJ concurring) noted:

> In communications with the Law Society, he denied Mr Shankar's claim to have received none of the $35,000 insurance payout, going so far as to label Mr Shankar's claim as fraudulent in its conception. It is interesting to note, however, one might add, that if there was fraud, then even on the respondents own account, he was involved in it.

However, that was not the matter which moved the Court of Appeal of Queensland to order the removal of Mr Khan's name from the Roll of barristers in that State. It was the half-truth he told in relation to whether he was subject to disciplinary proceedings. What he told the authorities in Queensland was literally true but did not reveal all that should have been revealed in that regard. Small wonder it is that the Court of Appeal of Queensland saw fit to refuse the appeal by Mr Khan.

16 Of significance to the course of the proceedings and to this appeal, is the testimony of a police officer from Nadi who produced a record of interview apparently taken on 18 May 2001. That was about two years after the report alleging Mr Khan's failure to account for the money had been made to the police. Nevertheless, the interview revealed a number of facts which were both significant and inconsistent with the testimony of Sheo Shankar. The critical features of that interview (Record, page 3-82 and 5-15) are as follows:

(a) that the accident the subject of the claim occurred in New South Wales and not in Queensland as alleged in the claim for damages;
(b) the reason for asserting that the accident occurred in Queensland was that the premises where the alleged accident took place were subject to insurance cover for occupiers liability whereas the premises in New South Wales was not;
(c) Sheo Shankar received $25,000 from Mr Koya on 8 May 1998 and acknowledged receipt thereof

It is reasonably clear that at the time of the hearing before the Disciplinary Committee on 19 July 2003 that the trial of the charge levelled against Mr Shankar had not been heard notwithstanding the fact that the conduct the subject of the judge occurred in the 90s and that the complaint was laid before the police in 1999. The conviction, as noted above, did not occur until 2005. It is not absolutely plain from the record of proceedings before the Magistrate (Record 3-150) whether there had even been the decision to charge Mr Shankar at the time of the hearing before the Disciplinary Committee in July 2003.

Application to stay disciplinary proceedings

17 In due course, those representing Mr Khan became aware that Mr Shankar had been convicted before the magistrate. By Notice of Motion dated 7 July 2005, Mr Khan sought an order that the disciplinary proceedings before the Committee be struck out. The basis of the application was that by reason of issue estoppel the proceedings before the Disciplinary Committee could no longer continue. As the Committee noted in its statement of reasons for ruling on the Notice of Motion, "The allegations made by Sheo Shankar in his statement to the police are essentially the same as those

in his statement to the Fiji Law Society which form the basis of the charges brought by the Fiji Law Society against [Mr Khan] in these proceedings."

18 The Disciplinary Committee had available to it the reasons for judgement of the Magistrate who convicted Mr Shankar. The Committee summarised the position of Mr Khan at page 4 of its decision as follows:

> 1. The finding in the Nadi Magistrates court that the statement of Sheo Shankar made to the police on the 30th of September 1999 [Mr Khan] had not accounted to him for the sum of A$35,000 collected by [Mr Khan] on his behalf, was false.
> 2. The finding in the Nadi Magistrates Court that the statement that Sheo Shankar made to the police on the 18th of May 2001 that the statement he made to the police on third of September 1999 was false, was true;
> 3. The finding in the Nadi Magistrates Court that the Acknowledgement dated 8th of May 1998 in which Sheo Shankar acknowledge receipt of $25,000, was true;
>
> are essentially the same issues that are required to be determined in these proceedings and that it is not therefore open and would be an abuse of the process of the court for this Committee to possibly come to a different conclusion on those issues and that this Committee is estopped from doing so.

19 The Disciplinary Committee, in its ruling on 25 January 2006, noted the authorities cited by counsel for Mr Khan. They summarised the issue of whether or not issue estoppel applies to a second set of proceedings, that in the earlier proceedings:

(a) the same question has been decided;
(b) the judicial decision which is said to create the estoppel was final; and
(c) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The Committee noted that issue (b) has been established: *ie* the judicial decision was final. With an element of wry understatement, the Committee said whether the other issues (a) and (c) have been established "is not so easy to answer". Nevertheless, on the Committee held in relation to issues (a) and (c) that these were not established. The committee said:

> also in these proceedings, the Law Society is the applicant (the complainant being Sheo Shankar) and Mr Khan is the respondent. In the Nadi Magistrates Court, the State was the prosecutor (the complainant being Mr Khan) and Sheo Shankar was the accused. Therefore, although Mr Khan and Mr Sheo Shankar are involved in the proceedings, the actual parties to the two sets proceedings are different.

It is also significant that the Committee went on to note the position in relation to charge 2 which had been levelled against Mr Khan. The committee held:

> This committee is also of the view that the allegation in Charge 2 against [Mr Khan] namely that the [Mr Khan] falsely represented to Sheo Shankar and his claim was capable of settlement in the sum of $11,000 and that Shankar would receive the sum of $5,000 only from such settlement was not an issue that was before all was decided by the Nadi Magistrates Court.

20 Further, the Disciplinary Committee noted that there seemed to be a difference in terms of reference to currencies as between Australian dollars and Fijian dollars.

21 The Committee indicated that for these reasons, the motion to strike out the proceedings was dismissed. The Committee then invited Mr Khan to advise whether he wished to call any further evidence or whether he would close its case and make final submissions before the Committee concluded in its decision on the charges laid against Mr Khan.

Judicial Review

22 Following these proceedings, Mr Khan applied for and was granted leave to judicially review the decision of the Disciplinary Committee. The decision impugned by Mr Khan was the decision of the Disciplinary Committee to continue the hearing of the charges against Mr Khan despite the complainant having been convicted in the Nadi Magistrate's Court as outlined above. The application of the judicial review sought

(a) an order of Prohibition to prohibit the Disciplinary Committee from further preceding against Mr Khan

(b) an order in the nature of *certiorari* to remove the decision or ruling of the disciplinary committee relating to jurisdiction a case to answer and estoppel to the High Court;

(c) a declaration that to proceed against Mr Khan was contrary to the Constitution.

23 The application for judicial review was heard by Pathik J. it will be readily apparent from the chronology that we have outlined at the commencement of our judgment that Pathik J proceeded with great (and, with respect, admirable) expedition. He delivered judgment on 18 August 2006 refusing the application for a judicial review. The essence of His Lordship's careful decision was that the application was premature. His Lordship's judgment appears to have been based on two interlocking reasons.

24 The first reason of Pathik J was that the application fell foul of the requirement in Order 53 that there has to be an "decision" which is amenable to judicial review. In this regard, Pathik J held "unfortunately in my considered view this case does not fall under the said Rule 3 as a 'decision' which is amenable to judicial review." The learned judge added that the final decision of the Disciplinary Committee was unknown at this stage. He added having made that comment, "After that if the applicant is at all unhappy with the decision, the doors of the courts are open to him."

25 In considering the first basis of his decision, Pathik J made the point that it is fundamental to the jurisdiction of the High Court to judicially review a decision that it is the decision-making process itself which is scrutinised and not the merits of the decision.

26 The second basis for his decision was that the finding or ruling of the Disciplinary Committee which was the subject of the application for judicial review was a finding or ruling of an interlocutory nature. He observed that the policy of the High Court is not to shut out a decision which is not final unless there are exceptional circumstances. This policy is of some longevity going back to *Practice Note No 1 of 1993* issued by the then Chief Justice. That practice note indicates that if judicial review of an interlocutory decision is sought it, will be only in exceptional

circumstances that the High Court will grant leave to judicially review such a decision. In relation to the issue of issue estoppel, Pathik J observed that "this may prove to be a strong ground and this has to be raised in the proper forum after a final decision has been reached. But the applicant will then have to get over the first hurdle and decide whether he wants to go by way of judicial review or straight to the Court of Appeal under the Legal Practitioners Act as may be advised."

Appeal

27 The Appellant put forward a multitude of grounds. There were grounds filed on 4 September 2006. The next statement of grounds of appeal appears in a document entitled "Additional Grounds of Appeal" dated 27 October 2008. Finally, incorporated in "Submissions by the Appellant" there is at page 4 of that document in paragraph 17 the grounds of appeal (as amended) set out. We have proceeded on the assumption that those grounds are in substitution for earlier grounds of appeal. While this is a somewhat convoluted way of communicating to the Court of Appeal what are the actual grounds of appeal, rather than getting bogged down in technicality, we proceed on that basis.

Grounds 1 and 2: judicial review at this stage

28 Ground 1 and 2 challenge the primary bases upon which Pathik J refused to judicially review the decision of the Disciplinary committee.

29 The first submission of the Appellant is that Order 53 (which governs the procedure in applications for judicial review) nowhere says that a decision must be a final decision before it is susceptible to judicial review. Further, picking up observations of Pathik J in his judgment where the learned judge questioned whether there was a "decision" which was susceptible to judicial review, the submissions of the Appellant referred to authority which would suggest that the word decisions has a variety of potential meanings. For this proposition, the Appellant cites ***Australian Broadcasting Tribunal v Bond & Others*** (1990) 170 CLR 321.

30 ***Australian Broadcasting Tribunal v Bond & Others*** concerned proceedings for judicial review brought under the Administrative Decisions (Judicial Review) Act 1977 (Cth) - as opposed to proceedings brought under Order 53. As Mason CJ observed (page 328) a fundamental question for consideration by the High Court of Australia were the limits of the jurisdiction of the Federal Court of Australia under that Act to review conclusions, including findings of fact which constitute elements in the chain of reasoning leading to the ultimate administrative decision or order which is the subject of the application for review. It is obvious that the High Court of Australia was called on to construe an Act of the Commonwealth Parliament which governs judicial review in certain circumstances and was not dealing with Order 53 proceedings. Nevertheless, there are some highly instructive components to the judgment of the High Court.

31 The case concerned a complex web of facts concerning whether a certain Mr Alan Bond was a fit and proper person to hold certain broadcasting licences. It is not necessary to recite those facts in detail. Under the Administrative Decisions (Judicial Review) Act, 1977 there is a definition of the phrase "decision to which this Act applies". Nevertheless, Mason CJ considered that the definition did not sufficiently elucidate the meaning of the word "decision" as it was applied in the Act. Mason CJ made the point (these passages are quoted in the skeleton argument of the Appellant) that "decision" can have a multitude of meanings. At page 336 of the judgment Mason CJ notes that the definition does not speak of "final decision". Mason CJ then noted (page 336) that by parity of reasoning with the Act, that the Court has power to grant declaratory relief in a manner which is not confined to ultimate decisions that this might suggest that the concept of a reviewable decision is not limited to a final decision disposing of the controversy between the parties. Again, this passage is carefully noted in the written submissions of the appellant. Mason CJ went on to note that there were a number of competing considerations. He concluded:

> The relevant policy considerations are competing. On the one hand, the purposes of the Administrative Decisions (Judicial Review) Act are to allow

> persons aggrieved by the administrative decision-making processes of government a convenient and effective means of redress and to enhance those processes. On the other hand, in so far as the ambit of the concept of "decision" is extended, there is a greater risk that the efficient administration of government will be impaired.

Mason CJ did not completely resolve that issue. He held:

> That answer is that a reviewable "decision" is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.

In other words, in common with the second basis upon which Pathik J refused judicial review brought under Order 53, intermediate decisions are not ordinarily susceptible to judicial review.

32 In ***Australian Broadcasting Tribunal v Bond & Others*** (above), Mason CJ reviewed a further series of considerations and concluded that the interpretation of "decision" in ***Lamb v Moss*** (1983) 76 FLR 296 was too broad. Mason CJ indicated that he favoured some observations of Ellicott J in an earlier case as follows:

> It may well be that the word 'decision' means an ultimate or operative determination not a mere expression of opinion or a statement which can of itself have no effect on a person.

Mason CJ then observed:

> However, I would not wish for myself to place emphasis on the words "of itself" in this statement. To say that a reviewable decision is an ultimate or operative determination does not mean that antecedent conclusions or findings which contribute to the ultimate or operative decision are beyond reach. Review of an ultimate or operative decision on permissible grounds will expose for consideration the reasons which are given for the making of the decision and the processes by which it is made.

33 It was nevertheless clear from Mason CJ's judgment in ***Australian Broadcasting Tribunal v Bond & Others*** that intermediate decisions were at least capable of being

susceptible to judicial review. Indeed, the reference by Mason CJ to ***Lamb v Moss*** (1983) 76 FLR 296 is pertinent in that ***Lamb v Moss*** was a case where it was held that it was appropriate to permit judicial review of a decision by a magistrate in committal proceedings to determine that there was a case to answer. The determination by a magistrate that there is a case to answer is, of course, an intermediate decision which is an important step on the way to a determination to commit an accused for trial (the ultimate or final decision). However, Mason CJ in commenting on ***Lamb v Moss*** said that while he considered that the decision that there was a case to answer was reviewable under the Act, and was a step on the way to the ultimate decision as to whether to commit and accused for trial, he noted that section 16 of the Administrative Decisions (Judicial Review) Act which provided that the grant of judicial review was a discretionary act. Mason CJ concluded: "further, I agree that only in the most exceptional circumstances would it be appropriate to grant relief in respect of the decision given by a magistrate in committal proceedings. The delays consequent upon fragmentation of the criminal process are so disadvantageous that they should be avoided unless the grant of relief by way of judicial review can clearly be seen to produce a discernible benefit".

34 Toohey & Gaudron JJ in a concurring judgment, observed:

> Generally, the exercise of or the refusal to exercise a substantive power will constitute a decision which, in the terms used in *Lamb v Moss*, has "an ultimate and operative effect". However, this will not always be so. It is not difficult to envisage situations in which the exercise of, for example, a power to make an order (as referred to in s.3(2)(a)[of the Administrative Decisions (Judicial Review) Act]) is conditioned upon an earlier declaration (as referred to in s.3(2)(e)). In that situation there would be no decision with "ultimate and operative effect" until a decision had been made with respect to the exercise of both powers. Yet, clearly enough, the making of the declaration would, by force of s.3(2)(e), constitute the making of a decision.

Brennan & Deane JJ delivered concurring judgments.

35 ***Australian Broadcasting Tribunal v Bond & Others*** (above) was cited with approval by the High Court of Australia in ***Griffith University v Tang*** (2005) 221 CLR 99

where Gummow, Callinan and Heydon JJ (the balance of the High Court concurring) observed:

> *Bond* concerned the exercise of a power vested by statute in the appellant to suspend or revoke licences under the statute. This Court decided that, to qualify as a reviewable decision, it will generally be necessary to point to a decision which is final or operative and determinative, at least in the practical sense, of an issue of fact falling for consideration; a conclusion reached as a step along the way in a course of reasoning to an ultimate decision ordinarily will not qualify as a reviewable decision. The reasoning in *Bond*, particularly that of Mason CJ, apparently responded to an apprehension of misuse of the statutory review system by challenges at intermediate stages of decision-making processes.

36 In ***Bijay v Permanent Secretary for Education, Women & Culture*** [1997] FJHC 47 the applicant was a public servant. He was interdicted from duty without pay without being given the opportunity of offering an explanation. Disciplinary charges were to follow. The applicant sought leave to apply for judicial review. It was objected by counsel on behalf of the Respondent in that case that the application was premature because interdiction was simply one step in the process. Pathik J rejected this contention. The learned judge observed:

> It is my view that the *'decision'* does not have to be *'final'* in the sense stated by [counsel for the Respondent]. Without in any way giving the semblance of deciding on the substantive matter it appears that in this case it was a decision of such a grave nature with drastic consequences to the applicant that it was incumbent on the first Respondent and the Commission not to throw overboard the principles of natural justice although the procedure to be followed when interdiction is contemplated is not spelt out in Reg. 42. [emphasis supplied]

His Lordship cited ***Birss v Secretary for Justice*** (1984) 1 NZLR 513 in support of this contention. It is plain from the balance of the judgement that the learned judge was stressing that all he was dealing with at the stage of giving the ruling cited above was consideration of an application for leave to apply to judicial review. Nevertheless, although Pathik J sought to distinguish ***Australian Broadcasting Tribunal v Bond & Others*** (above), it could be strongly argued that, in reality, His Lordship's judgment is, in truth, an application of the principles in that decision.

37 Also pertinent to the concept of "decision" is the decision of the House of Lords in ***Council of Civil Service Unions v Minister for the Civil Service & Others*** [1985] AC 374. Lord Diplock (with whom Lord Fraser, Roskill, Scarman and Brightman concurred) observed:

> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> (1) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (2) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

It will readily be seen that this approach does not divide the concept of "decision" for analytical purposes into interlocutory decisions and final decisions. On this analysis, the fact that the decision of the Disciplinary Committee could be characterised as an interlocutory or interim decision or, more pertinently, not a final decision is not in the strict sense, the critical issue is whether it alters rights or obligations enforceable at private law. Lord Diplock appears to be saying that once you have a decision which comes within this rubric, regardless of whether it is final or interlocutory, it is susceptible to judicial review. The only question to be asked, subject to the exercise of discretion to grant or refuse judicial review, a matter to which we will shortly return, would be, for example, under paragraph (a) whether the decision of the decision maker (in this case the Disciplinary Committee) altered Mr Khan's rights or obligations enforceable by him or against him in private law.

38 The decision in ***Council of Civil Service Unions v Minister for the Civil Service & Others*** has consistently been followed in England and Australia. More pertinently, it has been consistently followed in Fiji: ***Re Satish Chandra*** (1986) 32 FLR 16 (Court of Appeal, Speight, VP, Roper & O'Regan JJA); ***Seafarers Union of Fiji v Registrar of***

Trade Unions (1989) 35 FLR 134 (Jesuratnam J); ***Gopal v Attorney-General*** (1992) 38 FLR 211 (Fatiaki J); ***Dewa v University of the South Pacific*** [1996] FJHC 125(Pathik J); ***Ali v Attorney-General of Fiji*** [1996] FJHC 93 (Pathik J); ***Chand v Registrar of Trade Unions*** [2005] FJHC 418 (Jitoko J).

39 We apprehend that the passage in ***Council of Civil Service Unions v Minister for the Civil Service & Others*** cited (above) was the inspiration for the conclusion of Pathik J that there was not a decision susceptible to judicial review. The basis for that view is that nothing had been decided which altered the rights or obligations of Mr Khan. All that had been decided was that:

(a) Mr Khan had a case to answer and was free to conduct his case accordingly; and

(b) While the law of issue estoppel applies, on the facts of the case, there was nothing which required the Committee to cease consideration of Mr Shankar's testimony.

The decision of the Disciplinary Committee which determined the charges and may or may not have altered his status as a legal practitioner had yet to be made. We will have to return to the issue of issue estoppel later in this judgment. It is to be noted, however, that the Disciplinary Committee appears to have agreed with the law as propounded by counsel for Mr Khan. Where they disagreed with his submissions was in the application of the law to the facts and circumstances of the case.

40 As we have already noted, Mason CJ in ***Australian Broadcasting Tribunal v Bond & Others*** (above) disagreed with the concept of "decision" in ***Lamb v Moss*** (1983) 76 FLR 296. However, he agreed with the outcome of that case and given that the decision in ***Lamb v Moss*** was a decision to judicially review a holding by a magistrate in criminal committal proceedings that it was a case to answer, it is necessary to examine the impact of the case on the concept of "decision" in the present case. It is to be recalled that one of the decisions of the Disciplinary Committee was to hold that Mr Khan had a case to answer. However, it is also right to recall one of the primary points made by Mason CJ in ***Australian Broadcasting Tribunal v Bond &***

Others was that the concept of "decision" can vary according to context and circumstances. Plainly, where a Magistrate is determining whether or not to commit an accused person for trial, the decision that the accused had a case to answer could hardly be said to be an intermediate decision. It is for all practical purposes in the context of almost all committal proceedings, a final decision. (There are, of course, theoretical possibilities that an accused might call evidence in an attempt to dissuade a Magistrate from holding that there is a case to answer. However, those cases are sufficiently rare to be ignored for present purposes.) Contrast this with the decision to hold that there is a case to answer in a criminal trial before an inferior tribunal such as a magistrate. (We mention "inferior tribunal" because by the very nature of judicial review, the decision of a High Court judge to hold that in criminal proceedings before him that there was a case to answer is not susceptible to judicial review.) Where there is a trial before a magistrate the decision at the end of the prosecution case creates no rights or other liabilities. While it is an essential step in the process of any criminal trial, it does not even begin to have the status of a determination that there is a case to answer in committal proceedings before a magistrate. So too, in our opinion, is the holding before the Disciplinary Committee an essential step in the process towards a determination of the rights, obligations or liabilities of Mr Khan. However, it could not be said to be in any sense a determination of the kind contemplated Lord Diplock in ***Council of Civil Service Unions v Minister for the Civil Service & Others*** (above) or the High Court of Australia in ***Australian Broadcasting Tribunal v Bond & Others*** (above). Even if we were wrong about that, as Mason CJ pointed out in ***Australian Broadcasting Tribunal v Bond & Others***, it would only be a very exceptional case which would justify an intervention in the criminal process by way of judicial review. It is to be recalled that one of the concerns of Pathik J in the instant case was the proposition that judicial review in respect of an intermediate decision should not be permitted, presumably by reference to the discretionary component of any decision to allow or refuse judicial review. Accordingly, in the result, the decision of the Federal Court in ***Lamb v Moss*** does not assist the Appellant.

41 The ruling by the Disciplinary Committee as to whether on the facts and circumstances as they existed before the Committee as to whether in the circumstances the principles of issue estoppel prevented the Committee from proceeding where the determination as to whether the insurance money had been paid to Mr Shankar was intermediate issue that they had to determine. Again, it appears clear to us that this could not be characterised as a decision susceptible to judicial review as understood in either ***Council of Civil Service Unions v Minister for the Civil Service & Others*** (above) or ***Australian Broadcasting Tribunal v Bond & Others*** (above). In short, we are of the view that the first basis for the ruling by Pathik J refusing the judicial review was correct.

42 The second basis upon which Pathik J refused the application for judicial review was that he held that the judicial review of intermediate decisions should not be allowed unless there were exceptional circumstances. Underlying this alternative basis for refusing to judicially review the decision of the Disciplinary Committee is an assumption that such a decision is susceptible to judicial review, but that as a matter of judicial policy, the discretion to judicially review such a decision should not be exercised in favour of the party seeking judicial review unless there are exceptional circumstances. The rationale behind the policy underlying such an approach is both easy to understand and, on the authorities, well-established. The rationale is that for the efficient conduct of public business, a hearing such as the present one should be allowed to run its course to a final decision on which committee or tribunal determines the rights, obligations or liabilities of the parties rather than having a judicial review imposed whenever there is an intermediate or interlocutory decision made along the way to the final decision and one of the parties disagrees with that intermediate or interlocutory decision. It is plain beyond argument that it would be open to the High Court when dealing with a final determination of rights, obligations or liabilities to examine the intermediate decisions which led to the final decision by reference to the fundamental rules which govern the scope of judicial review. If any authority was needed for the proposition that when reviewing a final determination of

the rights, obligations or liabilities of a party that the High Court is able to examine the intermediate fact-finding and decisions leading to the ultimate decisions, that authority is to be found in ***Australian Broadcasting Tribunal v Bond & Others*** (above).

43 The position in relation to summary proceedings before a Magistrate (committal proceedings are not summary proceedings), may be that there is no jurisdiction at all to judicially review an intermediate decision of a magistrate exercising summary jurisdiction. That appears to be the position in England. In ***Hoar-Stevens v Richmond Magistrates' Court***, [2003] EWHC 2660 (Admin), the English Divisional Court considered an application for judicial review in respect of a decision by a magistrate exercising summary jurisdiction in relation to the discovery or disclosure of certain material required by the defence in the course of the trial. In relation to this, Kennedy LJ observed:

> Normally this court will not entertain an application for a quashing order in relation to a decision made in a magistrate's court where the proceedings in that court are not complete. In ***R v Rochford Justices ex parte Buck*** (1978) 68 Cr App R 114 it was said that there is no jurisdiction to do so, and a distinction was drawn between an order to direct a magistrate to hear and determine a matter, which can be obtained if he refuses to do so, and an order, as Cockburn CJ put it in ***R v Carden*** (1879) 5 QBD 1 at 5, "to control the magistrate in the conduct of the case or to prescribe to him the evidence which he shall receive or reject". Such control, it was said, could only be exercised when the case was at an end. In Buck the prosecution had sought to introduce certain evidence which the justices ruled inadmissible. The matter was then adjourned to enable the prosecution to test the ruling in the Divisional Court. When giving judgment in this court Lord Widgery CJ said that the decision to adjourn was wrong. The prosecution were asking this court to do what Cockburn CJ had said could not be done, that is to say to exercise a measure of control over the way the magistrates try the case. At page 118 he said:
>
> > The obligation of this Court to keep out of the way until the magistrate has finished his determination seems to me to be a principle properly to be applied both to summary trial and to committal proceedings.
>
> Accordingly, I would be prepared to dispose of this matter on the first argued point, namely, that there was no jurisdiction in this Court to interfere with the justices' decision, that not having been reached by termination of the proceedings below.

As Kennedy LJ later observed:

> It is one thing for this court to direct a magistrate to proceed or not to proceed. It is quite another for it to examine what, during a trial, has happened, that is to say the way in which the magistrate has in fact proceeded.

In the result, the Divisional Court held that ***R v Rochford Justices ex p Buck*** remained good law in England. It is, perhaps, instructive to note what Kennedy LJ said at the conclusion of his judgment in which he held that judicial review was not appropriate:

> Moreover even today it seems to me that there are powerful reasons for accepting the guidance offered by ***Buck***. It is of the utmost importance that the course of a criminal trial in the Magistrates' Court should not be punctuated by applications for an adjournment to test a ruling in this court, especially when in reality if the case proceeds the ruling may turn out to be of little or no importance.

His Lordship added:

> If [the Magistrate's] ruling were to favour the claimant the prosecution would fail. That may or may not be a realistic possibility, but I am satisfied that even when, as here, there is an important substantive point which arises during a trial this court should not and indeed cannot intervene. The proper course is to proceed to the end of the trial in the lower court and then to test the matter, almost certainly by way of case stated.

Whether or not ***R v Rochford Justices ex parte Buck*** is good law in Fiji in relation to the issue of whether an intermediate decision of a Magistrate exercising summary jurisdiction is susceptible to judicial review, the observations of Kennedy LJ in ***Hoar-Stevens v Richmond Magistrates' Court*** are highly apposite.

44 The position in relation to disciplinary proceedings is very clear. In ***R v Chief Constable of Merseyside ex p Merrill*** [1989] 1 WLR 1077, the English Court of Appeal considered police disciplinary hearings, and the need to give separate consideration to a preliminary objection based on Regulation 7 of the Police (Discipline) Regulations 1985. The Chief Constable had given such consideration, and the applicant had then sought judicial review before the hearing went any further. Lord Donaldson MR said (page 1088):

> There can be cases in which the evidence is so substantial that it would be sensible to give separate consideration to a preliminary objection based upon

> regulation 7, but these must be very rare and I do not think that this was such a case. It must be even rarer to have a situation in which judicial review should even be considered before a Chief Constable has reached a final decision on the complaint, if indeed one can be imagined. Normally the time for judicial review would not arise, if at all, before the appeal tribunal had given its decision.

45 Further, in ***Stokes v The Law Society*** [2001] EWHC Admin 1101, the English Divisional Court (Kennedy LJ, Harrison & Keith JJ) had to considered circumstances which have a substantial resonance with the facts of the case on the subject of appeal. In that case, a solicitor was before the disciplinary committee of the English Law Society. Certain rulings had been made against him and he wished to appeal against those rulings employing section 49 of the Solicitors Act. The appeal provisions in section 49 are broadly the same terms as section 100 of the Legal Practitioners Act. The Queen's Bench Division held that it did not have jurisdiction to hear an appeal under section 49 of the Solicitors Act because the ruling the subject of the appeal concerned an intermediate ruling of the relevant disciplinary committee. The Court then considered whether the intermediate ruling was susceptible to judicial review. It was held that it was. However at the conclusion of the judgment, Kennedy LJ, giving the judgment of the Court observed:

> Returning to the point I made at the very beginning of this judgment, whilst I do not go so far as to say that judicial review can never be available to challenge an interlocutory decision of a Solicitors Disciplinary Tribunal, such a decision being unnecessary for the purposes of the present case, I envisage that if relief can be given it will only be given in exceptional circumstances and never where, as here, the error relied upon has been rectified.

46 This, it seems to us, provides not only cogent support for the proposition that it is only in exceptional circumstances should judicial review be granted in relation to intermediate decisions, but also that this is so in the context of disciplinary proceedings such as the ones the subject of the present appeal.

47 Charge 2 against Mr Khan does not concern the subject matter of the claim in relation to issue estoppel. This is an additional reason why the proceedings should not have been punctuated in the manner they have been.

48 In our opinion, the policy underlying the authorities to which we have made reference appears sound. The idea that proceedings of bodies such as the Disciplinary Committee of the Law Society should be interrupted while points which have been taken in proceedings before that Committee are ventilated by way of judicial review is a highly unattractive course. This is particularly so when one recalls that the clear object of the existence of the Law Society is the maintenance of proper professional standards and the protection of the public. That is not to say that a practitioner who is the subject of a complaint by a member of the public and against whom the Law Society proceeds should not receive a careful, considered and full hearing and be given the opportunity, consistent with fundamental principles of justice, to present his or her side of the story. It appears to us that the imperative in cases such as this should be the maintenance of the standing of the profession and the protection of the public. The public, for example, are entitled to know that members of the legal profession of Fiji are people in whom they can place implicit trust. If a practitioner remains under at a cloud of accusation it is not fair to the practitioner and it is not fair to the public who are entitled to know whether underneath that cloud, if we might be permitted to mix metaphors, lies a thoroughly rotten apple or otherwise. In our opinion, Pathik J had in mind the relevant principles as to whether, as a matter of discretion, he should judicially review its challenge to the Disciplinary Committee. He clearly appreciated all the relevant facts and circumstances and applied to those facts and circumstances to the principles. We think that the exercise of the discretion to not judicially review the Disciplinary Committee was in the circumstances of this case entirely correct.

Other issues raised on the judicial review

49 In the light of the observations in respect of the discretion to judicially review interim rulings in disciplinary proceedings it might be thought that any commentary on issue estoppel, delay and other matters raised in the judicial review is otiose. However, in

deference to the issues involved we consider that it is appropriate to add a few observations.

Issue estoppel

50 In ***Kuligowski v Metrobus*** (2004) 220 CLR 363, the High Court of Australia held that the law in relation to issue estoppel is essentially uncontroversial. In that case, the Court observed:

> In his speech in ***Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*** [1967] 1 AC 853 at 935, Lord Guest, after noting that the doctrine of issue estoppel had been accepted by Australian courts for a number of years, indicated that, for the doctrine to apply in the second set of proceedings, the requirements were:
>
> > (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

51 ***Kuligowski v Metrobus*** (above) was a worker's compensation case. It was only concerned with issues of whether the same question had been decided and whether the judicial decision which was said to create the estoppel was final. Accordingly, it is helpful to return to the ***Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*** (above) to note the principles with respect to the issue of similar parties. The speech of Lord Guest is particularly helpful in this regard. What is plain from His Lordship's observations is that there needs to be a degree of precision in this field for issue estoppel to operate. The fact that some of the parties are the same in both proceedings is not sufficient to found the estoppel. (See page 936) Further, in referring to the parties or their privies, Lord Guest observed that privies in this context meant that those who are privy to the party in estate or interest. He observed: "Before a person can be privy to a party there must be a community or privity of interest between them." (Page 936)

52 We have already noted in his judgment that the Disciplinary Committee accepted the law of issue estoppel as contended for by counsel for Mr Khan. It coincides entirely

with the law which we have briefly recited above. The Committee recognised that the decision of the Magistrate could be regarded as final. They were not persuaded that the other elements of issue estoppel had been established. The committee held:

> An unusual aspect of this case is that some evidence has already been given in the disciplinary proceedings. As this Committee has not had the benefit of seeing a transcript of the evidence taken in the Nadi Magistrates Court, it is not possible to say whether the evidence of the witnesses in those proceedings is materially different from the evidence those same witnesses gave in the Nadi Magistrates Court. Neither was counsel was able to refer to any case where a similar situation had arisen.
>
> Also in these proceedings, the Law Society is the applicant (the complainant being Sheo Shankar) and Mr Khan is the respondent. In the Nadi Magistrates Court, the State was the prosecutor (the complainant being Mr Khan) and Sheo Shankar was the accused. Therefore although Mr Khan and Mr Sheo Shankar are involved in both proceedings, the actual parties to the two sets of proceedings are different.

53 Before us, counsel for Mr Khan sought to argue that the parties in the proceedings before the Disciplinary Committee were the privies of the parties before the Nadi Magistrates Court proceedings. Applying the test propounded by Lord Guest (above) this is plainly not the case.

54 In short, the Disciplinary Committee made no error of law. The only issue is whether the application of the facts and circumstances to the law by the Committee was erroneous. As presently advised, we do not think that it was.

55 Counsel for Mr Khan seeks to answer the objection as to the issue in relation to identity of parties by reference to ***Hunter v Chief Constable of West Midlands*** [1982] AC 529. That is a decision of the House of Lords and is authority for the proposition that the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision adverse to the intending plaintiff reached by a court of competent jurisdiction in previous proceedings in which the plaintiff had a full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of the court. The fact that the collateral attack was by means of a civil action raising an identical issue decided against the plaintiff in a competent court of

criminal jurisdiction was immaterial, since if the issue had been proved against the plaintiff beyond reasonable doubt in a criminal court it would be wholly inconsistent if it were not decided against him on the balance of probabilities in a civil action. This decision has been followed in courts of common law ever since. See for example: ***Saffron v Federal Commissioner of Taxation*** (1991) 30 FCR 578; ***Walton v Gardiner*** (1993) 177 CLR 378; ***South Australian Housing Trust v State Government Insurance Commission*** (1989) 51 SASR 1; ***Stergiou v McGrail*** [1994] FCA 1041; ***Michaels v Commonwealth*** (2002) 124 FCR 473. The decision has been consistently followed in Fiji: ***Singh v Commissioner of Police*** (1990) 36 FLR 45; ***Prasad v Lata*** [2005] FJCA 39; ***Shahim v Chand*** [2007] FJCA 10.

56 On no account can it be said that the Law Society of Fiji was bringing a suit, the avowed and central aim of the Society was to a finding that a criminal conviction was wrongly imposed. If it had been Mr Shankar who had done this then ***Hunter's*** case would be entirely apposite. That decision, and the line of authority which follows it, is not concerned with the calling of evidence which may have the effect of calling into question the correctness of a conviction if it is not the plaintiff or the initiator of the action determined to do this. If the Disciplinary Committee were to believe Mr Shankar and to disbelieve Mr Khan that might have the effect of calling into question the correctness of the magistrate's finding. However, that is merely incidental to the duty of the Disciplinary Committee and it could not be said to be the avowed aim of the initiator of the proceedings, that is, the Law Society.

57 It seems to us that what Mr Khan is seeking to do here is to elevate a potentially good forensic point *ie* "how could a right-thinking Disciplinary Committee believe Mr Shankar after the adverse findings by the magistrate?" into a matter of public law which called for judicial review. Assuming for the moment, first, findings adverse to Mr Khan and, second, that appeal was not the more appropriate remedy, while it might be open to argue matters concerning issue estoppel in any judicial review initiated at the conclusion of the hearings of the Disciplinary Committee, it is certainly not appropriate at the moment. Even if we had not found against Mr Khan

on the preliminary matters set out above, we would not have found for him on the issue of issue estoppel on the facts and circumstances presently known to us. It is also unlikely on the facts and circumstances presently known that we would have imposed a stay based on the reasoning in ***Hunter***.

Delay

58 Mr Khan complains that the decision of the Disciplinary Committee should have been stayed in the judicial review on the basis of delay. Many of the events the subject of the proceedings before the Disciplinary Committee occurred something like 10 years ago. It is a matter of intense regret that proceedings before the Disciplinary Committee were not instituted well before they were. Before it would be open to us to make any valid criticism of the Law Society in this regard, we would have to know about the demands on the panel who are the source disciplinary committees enquiring into complaints against legal practitioners. There may be many other cases. There may be cases of higher priority. We are not aware of the circumstances surrounding the delays experienced in dealing with complaints against legal practitioners. With appropriate restraint, we venture the observation that given the objects of the Law Society and its paramountcy as a source of standards for legal practitioners, the public are entitled to be assured that these matters are attended to with all appropriate vigour. There is no evidence of the impact of the delay, such as it is, on Mr Khan.

59 However, merely noting the date on which events occurred does not begin to start justifying intervention by way of a stay on the basis of undue delay. The elevation of the issue to a matter of constitutional concern (see section 29 of the Constitution) does not add any substantive weight to the debate. With or without section 29, if undue delay is properly established according to relevant and settled criteria that would be a possible basis for a stay of proceedings. There is nothing in the record that we can say which addresses these matters. Small wonder it is that Pathik J declined to grant a judicial review on this basis. This claim is entirely without merit.

Bias

60 In the judicial review proceedings, there was an allegation of bias against the Chairman of the Committee. (See Notice of Motion for judicial review, Record, page 3-2) In the affidavit of Mr Khan, paragraph 35, this allegation morphs slightly in that he alleged that the Disciplinary Committee was biased. (Record 3-14) The bias is not particularised. It goes without saying that this Court treats any allegation of bias with the utmost seriousness. Remarkably, given the seriousness of such an allegation, there is nothing in the papers which even begins to support that conclusion. Bias is not a make-weight allegation. Pathik J was right to dismiss it in a sentence in his judgment.

Conclusion

61 It will be apparent from what we have said that we are firmly of the view that these judicial review proceedings were misconceived. Unless there are exceptional circumstances, disciplinary tribunals and committees like the one constituted in the present proceedings should be permitted to commence their proceedings and take their natural course without interruption of the supervisory jurisdiction of the High Court. Clearly, there were no exceptional circumstances which would have justified such a course in the present proceedings. Indeed, we venture the observation that if ever there were proceedings which cried out to be run from start to finish, these are those proceedings. For the foregoing reasons we order:

(1) appeal dismissed;

(2) temporary stay pending appeal is dissolved;

(3) the 2nd Respondent to have the costs of and incidental to the appeal including the costs of and incidental to the application for a stay of proceedings pending appeal.

Byrne, JA

Hickie, JA

Bruce, JA

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