MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 328/02/95C

IN THE MATTER of the Medical Practitioners Act 1995

- AND -

IN THE MATTER of a charge laid by a Complaints Assessment Committee against **DR C** a medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL:

Miss S.M. Moran (Chair)

Dr R Fenwicke, Professor R Jones, Ms J Robson and Dr J Virtue (Members)

Ms K L Davies (Legal Officer)

Ms H Hoffman (Stenographer)

Hearing held at Wellington on 30 October 2008

APPEARANCES: Mr C J Lange for Complaints Assessment Committee

Mr A H Waalkens QC for Dr C.

Introduction

1. On 10 October 2002 the Complaints Assessment Committee (the CAC) laid a charge with the Medical Practitioners Disciplinary Tribunal (the Tribunal) against Dr C alleging disgraceful conduct under the Medical Practitioners Act 1995 (the MP Act). The CAC alleged that Dr C had had sexual intercourse with the complainant in or about March 1985 when she was aged 16 years at a time when she was or had recently been his patient; and that on occasions in or about March/April 1985 supplied to the complainant marijuana, cocaine and nitrous oxide (laughing gas) for which there was no medical reason or justification.

2. This matter has had a lengthy history. A chronology of events, the content of which has been agreed by the parties, is attached as Schedule One.

3. The Supreme Court in a judgment given on 29 June 2006 (*C v Complaints Assessment Committee* [2006] NZSC 48) referred back to this Tribunal for decision, the application by Dr C for access to the medical records of the complainant relating to:

   (a) Psychiatric/psychological status both past and present.
   (b) Medical/counselling records referring to her complaint against the doctor.
   (c) The complainant's current GP records.

4. The Tribunal accordingly convened a hearing and, on 15 March 2007, issued its decision. For ease of reference, the Tribunal's directions, set out at paragraphs 94 and 95 of its decision are set out below:

"94. The Tribunal, pursuant to clauses 7(1)(b) and 7(3) of the First Schedule to the Medical Practitoners Act 1995:

(a) Requires the CAC to produce to the Tribunal the documents which are in the possession of the CAC and which the Tribunal has inspected and examined as set out below.

(b) Requires the CAC to furnish copies of those documents to Dr C and his counsel.

(c) Limits the use of those documents for the purpose of the hearing of the charge against Dr C.

95. Requires the complainant to produce for inspection and examination by the Tribunal the following documents which are in the possession of the complainant or under the complainant's control and to allow copies of those documents to be made:

(a) The complainant's complete file and/or records held by xx Hospital (now xx Hospital) commencing in 1988.

(b) The complainant's file and/or records held at xx Hospital in 1986.

(c) The complainant's file and/or records held at the xx (now xx) in July 1986.

(d) The complainant's current GP records only to the extent that they may have attached to them the complainant's earlier records covering the period 1985 to 1989."

5. The CAC appealed the Tribunal's decision to the District Court. On 6 and 9 November 2007 the District Court heard the appeal and on 4 February 2008 issued its reserved judgment. The District Court Judge dismissed the appeal on the ground that the District Court had no jurisdiction to hear the appeal; but made obiter comment to the effect that he did not agree with the Tribunal's decision. On 17 July 2008 the District Court released its decision on issues as to costs making an award in favour of Dr C.

The Present Applications

6. On 5 September 2008 the CAC made application to the Tribunal:

(a) For the Tribunal to recall, amend, or reconsider its decision of 15 March 2007

relating to the disclosure of the complainant's medical records;

(b) Alternatively, to exercise its powers pursuant to clause 7 of the First Schedule to the MP Act to direct a third party to obtain the complainant's medical records.

7. On 29 September 2008 Dr C made application to the Tribunal for an order striking out and/or staying the disciplinary charge against him dated 10 October 2002 on the grounds of (a) complainant and CAC and overall delay; (b) general and specific prejudice arising from delay; (c) failure by the complainant to comply with the Tribunal's directions of 15 March 2007; (d) the existence of a "settlement agreement".

8. Matters which were not before the Tribunal at the earlier hearing were before it by consent at the present hearing.

9. Both counsel agreed that the Tribunal could have regard to all the affidavit evidence previously filed in support of earlier interlocutory applications as well as statements filed by either party (whether signed or not) in addition to any affidavits filed in relation to the present applications.

10. Both parties also addressed the District Court's decision of 4 February 2008 regarding the CAC's appeal against the Tribunal's decision of 15 March 2007. In his decision, the District Court Judge dismissed the CAC's appeal on the ground that the Court had no jurisdiction to entertain the appeal. However, the Judge commented at paragraph 18 of his judgment that if he had had jurisdiction he would have allowed the appeal:

> *"[18] It follows that if the Court had jurisdiction to hear this appeal, it would have succeeded on its merits in that the Tribunal's direction that the complainant produce the specified documents was plainly wrong in law as those documents are the subject of her medical privilege and she has not consented to their production or use in the proceedings before the Tribunal. Furthermore, the production to the Tribunal by the CAC of any documents the subject of the complainant's medical privilege and the use of any such documents by the Tribunal is precluded."*

11. Both parties made submission on the Evidence Act 2006 which came into force on 1 August 2007. This Act repealed the Evidence Act 1908 and the Evidence Amendment Act (No. 2) 1980 which had been central to the decisions of the Court

of Appeal and the Supreme Court in this matter relating to the issue of disclosure of medical records as well as earlier decisions of the Tribunal (including its 15 March 2007 decision) regarding this matter.

12. The Evidence Act 2006 at s.69 enacted a change providing the courts (or Tribunal) with an overriding discretion as to confidential information. The passing of the Evidence Act 2006 has a bearing on the present proceedings to which reference is made later.

13. Both parties also addressed a "settlement agreement" made between the complainant and Dr C, and made submission about it.

14. In addition to the complainant's complaint resulting in the charge before the Tribunal, the complainant on 11 November 2003 had also issued proceedings against Dr C in the District Court regarding the same matter which is the subject of her complaint. In those proceedings, the complainant alleged breach of fiduciary duty for which she sought exemplary damages of $120,000 and as a further or alternative cause of action alleged breach of duty of care for which she sought exemplary damages of $75,000. It was agreed between the complainant and Dr C that the District Court proceedings could await the outcome of the hearing of the charge before the Tribunal.

15. In the meantime, however, the complainant and her husband and Dr C and his wife signed an agreement (the settlement agreement) dated 18 February 2004 whereby Dr C would pay to the complainant the sum of $50,000 in settlement of the complaint and of the District Court proceedings as well as any other complaint, claim or action which the complainant would have at the time of signing the agreement or in the future, however it might arise. The moneys would be paid within seven days of written confirmation that this Tribunal had discontinued the complaint.

16. On 17 February 2004, just prior to signing the agreement, the complainant sent an email to Mr Lange (Counsel for the CAC) which stated she had decided not to proceed with her complaint against Dr C because she and Dr C had reached "a private agreement". The complainant was aware of a pending appeal and did not

want to "prejudice matters" for her. She wanted the CAC's written confirmation that it would not proceed with her complaint.

17. On 18 February 2004 the complainant emailed Mr Lange that her solicitor was concerned that she had told him (Mr Lange) she had reached an agreement with Dr C; and following a telephone communication with Mr Lange that day she emailed him later in the day to confirm she no longer wanted to pursue her complaint against Dr C.

18. On 24 February 2004, the complainant emailed Mr Lange again to inform him she had just received a copy of the agreement with Dr C's signature on it.

19. On 27 February 2004, Mr Lange wrote to the complainant informing her that careful consideration had been given to her request but that the CAC and the Medical Council had decided they proposed to continue with the disciplinary proceedings; and gave reasons why in the following terms:

- *"While it is recognised that your preference would have been to have the charges withdrawn and the settlement proceed, you have indicated that you will give evidence if required at the disciplinary tribunal.*
- *The CAC and Medical Council view the conduct by a doctor that you have complained of as very serious.*
- *Where doctors are facing serious charges the CAC and Medical Council are concerned about medical practitioners attempting to influence the outcome of disciplinary proceedings through settlement of civil proceedings.*
- *Your complaint, in particular as regards the sexual matters, is supported by the recent complaint witness (Ms D) and email correspondence recovered from your home computer."*

20. On 1 March 2004, the complainant emailed Mr Lange again to inform him she had a copy of the settlement agreement with her and Dr C's signature on it.

21. There then followed some further correspondence, including correspondence between Mr Lange and Mr Waalkens.

22. Under the terms of the settlement agreement, the complainant was forthwith to withdraw the complaint and take all actions or steps which might reasonably be necessary to ensure the complaint and the disciplinary charge before the Tribunal was abandoned and discontinued by the CAC and that the Tribunal accepted that the disciplinary charge had been dismissed or struck out. The complainant agreed to use her best endeavours to obtain written confirmation of this from the Tribunal and to provide a copy of it to Dr C through his counsel. In the event that the Tribunal did not agree to discontinue the complaint, the complainant was free to give evidence at the hearing and to pursue the proceedings unless she had already been paid the sum of $50,000 in which event she would not do so nor offer any encouragement or support such action by the CAC other than to the extent required by law to do so.

23. The settlement agreement recorded that Dr C emphatically denied all the allegations which the complainant had made against him; that he denied any liability on his part towards the complainant; and that he was only entering the agreement out of a desire to settle all matters between him and the complainant.

24. Under the settlement agreement both the complainant and Dr C agreed not to have any further contact or correspondence with the other; each agreed that the terms of the agreement were to remain strictly private and confidential between them, their solicitors and counsel (and their respective spouses). The complainant agreed that she would make no disclosure regarding the terms of the agreement to any others including the CAC, its solicitors, this Tribunal or any other parties and that she would make no statement to the media. Both the complainant and Dr C agreed that if either breached confidentiality then either would be liable to the other in the sum of $10,000.

25. The Tribunal was not made aware of the settlement agreement until Mr Lange filed the present application dated 5 September 2008; and nor was the settlement agreement before the Court of Appeal or the Supreme Court in their earlier considerations in this proceeding.

The CAC's application relating to disclosure of the complainant's medical records

<u>The CAC argument</u>

26. The CAC invited the Tribunal to revisit its decision of 15 March 2007 subject to there being jurisdiction to do so. Counsel urged the Tribunal to agree with the obiter comments of the District Court Judge in his 4 February 2008 decision.

27. The CAC submitted that the Tribunal did have the power to revisit the matters addressed in its decision of 15 March 2007; and that this power could be derived from either common law or the MP Act. He referred to the High Court decision *Horowhenua County v Nash (No. 2)* [1968] NZLR 632:

> *"Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled – first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled."*

28. Mr Lange also addressed the matter of the Evidence Act 2006. He contended that the Evidence Act 1908 continued to apply in the Tribunal; and therefore the new approach mandated by s69 of the 2006 Act should not apply.

29. He accepted, however, that in the event a stay was not granted and the charge proceeded to a substantive hearing, the proceedings of the substantive hearing would be governed by the 2006 Act and the 1908 Evidence Act would not apply.

30. He submitted that if the Tribunal viewed the CAC's present application (to re-visit its earlier decision of 15 March 2007) as a continuation of that earlier hearing, then it should be dealt with under the 1908 Evidence Act; but if the Tribunal viewed the CAC's present application as a fresh interlocutory application then the Tribunal should deal with it under the 2006 Evidence Act.

31. Mr Lange then referred to the settlement agreement in the context of his argument that the Tribunal should revisit its earlier decision. He submitted that Dr C had always sought a direction that the complainant, as opposed to an independent third person, provide the medical records to the Tribunal. He referred to the Court of Appeal decision in which it had stated that the complainant's role was merely as a

witness and that the CAC had no ability to compel the complainant to do anything; and that the CAC's function was to prosecute the charge.

32. Mr Lange then referred to the terms of the settlement agreement and submitted that the agreement entered into by Dr C was improper and in effect amounted to an unlawful interference with the CAC's prosecution, by requiring a witness to take steps to ensure the disciplinary proceedings were abandoned or discontinued.

33. He referred to the case of *R v Wasley* (District Court Christchurch 29/5/06) where the District Court Judge commented that solicitors for parties have no place in endeavouring to resolve criminal complaints that are subject to a separate judicial process. Counsel for the CAC added that this principle must apply equally to proceedings before the Tribunal.

34. He submitted that the effect of the settlement agreement was clear, that is, that the complainant was required to take all steps to have the proceedings before the Tribunal dismissed but if unsuccessful she was not precluded from giving evidence.

35. He added that in the circumstances that, should the Tribunal decline to exercise its discretion to review its earlier order, then the appropriate course was to make a further order pursuant to clause 7 of the First Schedule to the MP Act.

Dr C's argument

36. Mr Waalkens submitted that the Tribunal was *functus officio*; it had given its decision and that ought to be an end of it. The Tribunal did not have inherent *"common law power"* to recall judgments, as did the Courts. The Tribunal was a creature of statute (the MP Act) and its jurisdiction was defined by that Act.

37. With regard to the District Court's decision of 4 February 2008, the Judge had made it clear that he was only expressing his opinion. The Tribunal was not bound by it. Mr Waalkens stated he did not agree with the Judge's opinion regarding the Tribunal's decision. He stated that the Judge's opinion had overlooked the 2006 Evidence Act, which was relevant; that the consent form, which had been drafted by the CAC and signed by the complainant, did not express any limitations on its use;

and that the complainant had waived any privilege she may have had by producing the documents to the CAC. He was prepared to expand on those points, if called upon.

38. Mr Waalkens reproduced the submissions he had made to the District Court regarding the Evidence Act 2006.

39. He submitted that the significance of the repeal of the previous 1908 Evidence Act was apparent from the Supreme Court and Court of Appeal decisions in this matter. Unlike legal privilege, he said there was no common law protection or privilege attaching to medical information. Instead a number of jurisdictions in the world, New Zealand included, had legislated to provide a statutory privilege. With the removal of the statutory privilege or protection (due to the repeal of the 1908 Evidence Act) matters now stood to be dealt with under the less protective provisions of subpart 8 of the 2006 Act and, in particular, s.69.

40. Mr Waalkens submitted that if this matter were to proceed to a substantive hearing, then the 2006 Evidence Act would apply. Mr Lange, in his submissions, agreed with this.

41. Mr Waalkens submitted that it was a paradox that the CAC should call in aid the Evidence Act 2006 and its provisions which give the Tribunal a broader, not more limited, power to make the very orders that it has already made without the archaic restrictions of the privileges said to have arisen under the Evidence Amendment (No. 2) Act 1980.

42. With regard to the settlement agreement, Mr Waalkens submitted that if the CAC wished to rely on the settlement agreement, then it should have done so at an earlier time as the CAC was well aware of the settlement agreement as early as the day or the day before it was signed and had a copy of it, at least from March 2004. He stated the CAC had chosen not to raise the matter of the settlement agreement before any of the Court hearings that subsequently occurred or bring it to the attention of this Tribunal prior to its decision in question. He submitted the CAC had waived its right to put the settlement agreement in issue now.

43. Mr Waalkens rejected the CAC's submission that the settlement agreement was improper and amounted to an unlawful interference with the CAC's prosecution.

44. He addressed the history of the settlement agreement. He said it had come about because the complainant had sued Dr C in the District Court seeking damages and that her solicitors had written to Mr Waalkens, within a week of issuing the proceedings, raising on behalf of the complainant the possibility of settlement.

45. Mr Waalkens referred to various items of correspondence, and to the terms of the settlement agreement itself which did not, in certain circumstances, prohibit the complainant from giving evidence. He distinguished the case of *Wasley* (above), on which the CAC had relied on both factual and legal principals stating it arose out of a criminal proceeding (not civil, as here) where the complainant was essentially forced into the agreement by the accused.

46. Mr Waalkens said he had not suggested and was not suggesting that a settlement prevented a CAC from proceeding with a charge or the Tribunal hearing it.

47. Mr Waalkens concluded that the settlement agreement and/or its fact did not create any basis for the Tribunal to make a different decision from the one it had already made in its decision of 15 March 2007.

48. However, Mr Waalkens accepted that the Tribunal, when considering both the present applications before it, was entitled to have regard to the settlement agreement in the context of the entire factual setting before it.

Decision on CAC Application relating to Disclosure of Medical Records

49. The CAC has asked the Tribunal to re-visit and vary its decision of 15 March 2007.

50. Rule 542 of the High Court Rules provides (inter alia):

> *A judgment takes effect when it is given* (rule 542(1)). *A judgment, whether given orally or in writing, may be recalled by the Judge at any time before a formal record of it has been drawn up and sealed* (rule 542(3).

51. The practice of the Tribunal is to distribute its decisions once they are approved by the members of the Tribunal and dated and signed by the Chair who presided. They are not "sealed" in the ordinary sense. The Tribunal does not affix a "seal" to its decision.

52. As the commentary in *McGechan on Procedure* explains, despite the unfettered discretion given by rule 542(3), the Court regards the recall of a judgment as a serious step to be taken only in reasonably well identified situations.

53. The leading statement regarding recall remains that enunciated in *Horowhenua County v Nash* (above) which has been referred to in subsequent judgments.

54. The Tribunal has had regard to that decision and other relevant authorities referred to in the commentary in *McGechan*. The Tribunal does not consider that its previous decision should be recalled. The Tribunal is *functus officio*.

55. The CAC urged the Tribunal to re-visit its decision as a consequence of the Judge's opinion expressed in his decision of 4 February 2008. The Tribunal is not bound by the Judge's opinion and, in any event and with the greatest of respect, does not agree with it. The Judge was careful to make clear that his comments were an expression of opinion and were not binding on the Tribunal.

56. The Tribunal does not consider the CAC's present application to be a continuation of the earlier hearing. It is a fresh interlocutory application.

57. It is the Tribunal's view that the provisions of the Evidence Act 2006 applies and the question of privilege would need to be considered in light of that Act.

58. The Tribunal's decision of 15 March 2007 and the orders made at paragraphs 94 and 95 thereunder stand.

Dr C's application for an order striking out and/or staying the disciplinary charge

Dr C's argument

59. As stated above the grounds upon which Dr C relied were:

(a) Delays by the complainant, the CAC and overall.

(b) The prejudice caused to Dr C both generally and specifically by reason of delays.

(c) The complainant's refusal to comply with the Tribunal's decision requiring her medical records to be provided.

(d) The settlement agreement.

60. With regard to delay, Mr Waalkens referred to the legal principles which are relevant to an application for stay of proceedings which are well settled. Those principles were set out in the Tribunal's decision regarding Dr YZ (26 October 2007 – 132/Med07/65D) which decision was affirmed by the High Court (15 September 2008 – CIV-2007-485-2631). Mr Waalkens referred to a number of other cases relating to the principles of delay and their particular factual backgrounds.

61. He also referred to s.25(b) of the New Zealand Bill of Rights Act 1990 which provides minimum standards of criminal procedure for everyone who has been charged with an offence and which provides that everyone has "the right to be tried without undue delay".

62. Mr Waalkens stated that inexcusable delay by a prosecuting authority was to be distinguished from a delay on the part of complainants, the latter being a situation where he submitted the Courts were more inclined to excuse delay. He referred to judicial observations that where there had already been inordinate delay by complainants, the prosecuting authorities must be diligent to minimise the risk of any further prejudice and referred to the case of *R v P, T* (919/00 High Court Auck. jment 15/9/00 Rodney Hansen J) in which case a stay was granted.

63. Mr Waalkens submitted that in the present case, the CAC had created an inordinate delay by the appeal processes with respect to interlocutory orders made by the Tribunal. He said the CAC was the author of its own misfortune because all the delays, bar for one year when the Court of Appeal gave its decision (April 2005) to when the Supreme Court gave its decision (June 2006) the five years of remaining delay were attributable to the CAC appeals including two appeals to the District Court twice. He added that the prejudice in this regard was further compounded by

the complainant's declinature to comply with the Tribunal's orders which had withstood the appeal challenges by the CAC.

64. Mr Waalkens submitted that even if the CAC was not to be blamed for the delays through the appeal process (which he denied) the delays that had arisen in this regard were extreme and inordinate.

65. Mr Waalkens addressed the various disciplinary cases and submitted the Tribunal had recognised its jurisdiction to strike out/stay for abuse of process arising from delay. He referred to the decision in *Phipps* (88/99/43C 9 September 1999) which involved a delay of just over five years and in circumstances which did not warrant the Tribunal staying the proceeding but in which the Tribunal recognised its jurisdiction to strike out.

66. He referred to the case of Dr M (252/03/017C 22 October 2003) where some of the particulars of the charge were struck out on the grounds of a combination of general as well as specific prejudice. That was a case where general prejudice arose from delays of approximately 20 years.

67. He referred to the case of *E v MPDT and CAC* where Goddard J concluded that factors of delay, prejudice, unfairness and revisiting an issue which had already been determined provided grounds to warrant a stay.

68. Reference was made to *Faris v MPDC* [1993] 1 NZLR 60 where the High Court granted a permanent stay due to the particular circumstances of that case as well as delays and where the Court had observed that in certain situations delay even without fault can justify intervention. That was a case where more than 17 years had elapsed.

69. Reference was made to *Herron v McGregor* (1986) 6 NSWLR 246 where the New South Wales Court of Appeal permanently stayed medical disciplinary proceedings where they had arisen some 9 to 13 years after the matter in issue and which was a case which involved psychiatric treatment using deep sleep therapy. In that case the Court of Appeal had observed (among other things) that "when a number of years

has elapsed since the conduct occurred, the lodging of a complaint prima facie needs justification although, of course, there can be no fixed rule".

70. *Staite v Psychologist Board* 11 PRNZ 1 was cited by Mr Waalkens where the High Court recognised taking a flexible approach when investigating issues of delay and the prosecution of a disciplinary offence. In that case the disciplinary proceeding was stayed where the delay by the prosecution had been over three years and where a considerable prejudice to the applicant was established.

71. He cited *L v Dentists Disciplinary Tribunal* where the High Court recognised that significant prejudice could arise from the absence of clinical records but due to concessions which Dr L had made, significant prejudice did not of itself warrant a stay. Although a stay was ordered it was on the grounds of utility of proceeding as by that time Dr L was elderly and had retired from practice.

72. Coming to the present case, Mr Waalkens submitted that the facts demonstrated excessive delay on the part of both the complainant and the CAC. Mr Waalkens submitted the general delay was of sufficient prejudice to warrant striking out the charge; and that specific prejudice had also occurred. In this regard he referred to the medical records of and relating to the complainant at the medical centre where Dr C worked no longer being in existence. He stated this was prejudicial because those records, had they been available, would show that Dr C was not the complainant's doctor. He submitted that the absence of medical records also made it difficult for Dr C to challenge the contentions made by the complainant that she was his patient and that his ability to effectively cross examine and challenge the CAC's evidence in this regard would be seriously hampered by the absence of records. Additionally, the need for the Tribunal to form an assessment on the issue of the doctor/patient relationship, if one were established, would be undermined by Dr C's disadvantage through the absence of records.

73. He referred to the complainant's psychological records relating to her psychological counselling as being evidently missing together with other medical records and that those records which were closer to the time when she alleged the misconduct occurred (which was denied) would be of high relevance.

74. He referred to the absence of other records such as appointment books being material. He referred to one of the complainant's allegations that she was given the "morning after" pill which Dr C had prescribed but that due to delay no pharmaceutical records were available and that this could be categorised as an item of specific prejudice.

75. He referred to the effect of delay on the memory of key witnesses being apparent and referred to the statements of a Ms H and a Ms B which had been affected by delay.

76. Mr Waalkens referred to the complainant's refusal to comply with the Tribunal's direction that she produce medical records which was a further ground warranting striking out or staying of the charge; and that the xx Hospital records (now xx Hospital) would have been of particular assistance to Dr C demonstrating, as they would be bound to, an absence of any complaint about Dr C by the complainant in 1988.

77. Mr Waalkens also referred to the settlement agreement which he said was initiated by the complainant with the inference, which he said could not be overlooked, that her complaint was driven by a quest for money. He referred to the proceedings which the complainant had issued in the District Court against Dr C accompanied by a letter from her solicitors suggesting an out of court settlement which was to include "*a meaningful monetary sum to enable her to obtain the closure she seeks*".

78. In all the circumstances he submitted that the charge should be struck out or stayed.

The CAC's argument

79. Mr Lange on behalf of the CAC opposed the application for strike out/stay.

80. He too submitted that the starting point for the legal principles was the Tribunal's decision of *Dr YZ* (above) which was affirmed by the High Court (above).

81. Mr Lange referred to the decision of *Chow v Canterbury Law Society and NZ Law Practitioners Disciplinary Tribunal* (High Court Chch CIV-2004-409-002191 7

March 2005) in which the High Court had declined a stay and made observations about the principles of stay which were to be exercised carefully, sparingly, and only for compelling reasons as it was *"an extreme step"*.

82. Counsel cited a number of authorities including the full Court decision in *Fox v Attorney-General* [2002] 3 NZLR 62 which summarised the principles and concluded that to stay a prosecution and thereby preclude the determination of the charge on its merits was an extreme step which was to be taken only in the clearest of cases. Mr Lange referred to the opinion of the Privy Council in *McCalla v The Disciplinary Committee of the General Legal Council* [1998] UK PC37 (at [20]-[22]).

83. Mr Lange referred to the decision of Gendall J in *Ford v Medical Practitioners Disciplinary Tribunal & Anor* where Gendall J, when considering an application for stay based on delay, stated: *"The test remains the same: can a fair trial be obtained despite delay?"*

84. The CAC submitted that in assessing whether a fair trial was possible the circumstances of the case had to be considered.

85. Mr Lange referred to the allegations set out in the complainant's brief of evidence that she first met Dr C when aged about 13 years when her family moved to a particular suburb and when her mother registered her at the medical centre where Dr C was one of the partners. From age 14 years she babysat for Dr C and his wife and at age 15 accompanied the family on a holiday to look after the doctor's children. In February 1985 the complainant attended a festival where she was subjected to a serious sexual assault and following on from that her mother asked Dr C for help who acted as a counsellor. The complainant referred to an occasion when babysitting for Dr C at his home when they were together which led, according to her allegation, to sexual intercourse of a consensual nature taking place. The complainant had referred to a further occasion, approximately two weeks later, when the doctor and the complainant had sexual intercourse on a second occasion at his home. She referred to a further occasion at a party at Dr C's home where she alleged the doctor gave her alcohol and cannabis and encouraged her to inhale laughing gas and that later that evening had urged her to snort cocaine. Later that

year the complainant moved to another centre in New Zealand and later went overseas, returning to New Zealand in May 2000. The complainant had stated that email correspondence then commenced between herself and the doctor following her return.

86. On 21 February 2003 the CAC caused a forensic examination to be undertaken of the complainant's computer system which accessed the email correspondence. The results of the examination are set out in detail in an affidavit before the Tribunal of Mr John Thackray sworn 13 February 2004. The reason for the forensic examination was due to a suggestion by Dr C that there had been manipulation of the emails or some aspects of them. The affidavit of Mr Thackray has described the process and what occurred as regards recovery of the email data from the computer and the investigation undertaken to ascertain whether or not there had been any manipulation of emails. Mr Thackray has sworn that there was no manipulation.

87. The CAC referred to the email correspondence which it is alleged took place between the complainant and Dr C. The CAC submitted that this showed Dr C remembered the complainant when she was aged between 15 and 17 years, that is, between 1983 and 1985. In this regard counsel for the CAC referred to some of the emails and some extracts from them.

88. Mr Lange addressed the first particular of the charge against Dr C which, for the purposes of the argument, he said could be broken into three parts:

(a) In or about March 1985 (the time frame);
(b) Dr C had sexual intercourse with the complainant (the essence of the allegation);
(c) The complainant was at that time or had been until recently his patient (the relationship between Dr C and the complainant).

89. Mr Lange referred to the timeframe which was required to be considered by the Tribunal which related to the alleged events having occurred in March/April 1985. He referred also to the complainant's date of birth and submitted that the time of the alleged sexual incident would have been shortly prior to her 17th birthday being the age referred to in the emails by Dr C himself.

90. He said it was not advanced on behalf of Dr C that any specific or general prejudice arose from the timeframe alone and in accordance with the legal principles nor could that submission arise as the law was clear the passage of time was not of itself sufficient to justify a stay: *R v Davis* (2007) NZCA 577 at [60].

91. Mr Lange referred to the email correspondence from Dr C to the complainant which demonstrated that Dr C remembered the complainant when she was aged 15 to 17 (1983 to 1985):

(a) Email 11 December 2000 – *"… Ruby in the dust is a line from a Neil Young song (Cowgirl in the Sand). You won't remember but I used to play it when you were around 15 years old.*
(b) Email 12 December 2000 – *"Quite why a 32 year old man got into that situation with a 17 yr old girl is open to all sorts of speculation …"*

92. Mr Lange added that in later emails from Dr C to the complainant, Dr C had referred to the years that had passed as 15 years (emails 20, 21 and 28 December 2000) which would be a reference back to 1985:

(a) Email 20 December – *"Do we count all the years involved, too?"*
Dr C replied: *"Ok, ok, 15 yrs and 3 weeks. I still love you."*
(b) Email 21 December – *"I want you, a discreet place, champagne and talking and laughing for hours and catching up on 15 missed years and looking at you and holding you."*
(c) 28 December 2000, 11.39 hours: *"You have been a constant presence for me for the last 15 years"*.

93. Mr Lange again identified the complainant's date of birth and that the time of the alleged sexual incidents would therefore have been shortly prior to her 17th birthday, being her age referred to in the emails of 11 December and 12 December 2000.

94. With regard to the allegation that sexual intercourse took place, the CAC submitted that no specific or general prejudice arose in the context of this case, and referred to the emails from Dr C to the complainant containing an acknowledgement by Dr C of sexual contact with the complainant:

(a) 11 December 2000, 20:03 hours: *"We (doctors) have it drummed into us that any sexual contact with a patient (especially a 17 year old) is predatory …"*
And later in the same email: *"… Yeah, it was great sex."*

(b) 12 December 2000, 16:25 hours: *"Quite why a 32 year old man got into that situation with a 17 year old girl is open to all sorts of speculation and everyone will interpret it according to their own frame of reference, but I felt love for you then and do again now."*

(c) 19 December 2000, 16:51 hours: *"You know, when you were raped, my friend … wanted us to go round and beat the crap out of the guy. I demurred, mainly on the grounds I didn't want to go to Prison for GBH, but I wished I had. Then I later thought you hypocritical prick, you're no better, but now I'm coming to realize it wasn't that bad after all."*

(d) 28 December 2000, 11:39 hours: *You have been a constant presence for me for the last 15 years. I can't drive up … Road without thinking of that night up there (that was my best night with you) …"*
And later: *"I haven't had a string of affairs. There was … in [place] in [year] and you and …*
I was in love with my first real steady girlfriend, then …, then you …"

(e) 29 December 2000, 09:37 hours: *"That first night is imprinted on my brain. I can visualise sitting on the sofa and listening to music and then me plucking up enough courage to kiss you. You were so lovely."*

95. Mr Lange then addressed the complainant's status as a patient, which was a ground in respect of which Dr C alleged specific prejudice arose, due to the absence of medical records, appointment books and a record of prescription for the "morning after" pill. He referred to Mr Waalkens' contention on behalf of Dr C that it was difficult for him to challenge that the complainant was a patient of his. Mr Lange accepted that the medical records, appointment book and prescription records had not been located.

96. On behalf of the CAC, Mr Lange contended that Dr C was not prejudiced and that he had acknowledged that the complainant was a patient, in particular the email correspondence of 11 December 2000 to the complainant in which Dr C had stated to the complainant: *"We (doctors) have it drummed into us that any sexual contact with a patient (especially a 17 year old) is …"*

97. Mr Lange also referred to the letter which the CAC wrote to Dr C on 28 February 2002 requesting a copy of medical notes held in the following terms:

> *"In the meantime, we can say that the complainant alleges inappropriate behaviour by you when the complainant was a patient of yours in 1985. It would be very helpful to the CAC if it could have copies of any medical records for [the complainant] you have in your possession, or at the Health Centre. As far as we are aware, they would be under the name of [the complainant] date of birth …*
>
> *I enclose a copy of the consent form signed by [the complainant] authorising you to pass these records to us.*
>
> *If the records have been sent to another doctor or medical centre any information you might be able to give of the present whereabouts would be most helpful to the work of the CAC."*

98. He referred to the CAC's further letter to Dr C of 27 March 2002 in the following terms:

> *"On 28 February I wrote to you enclosing a copy of a consent form signed by [the complainant] asking for copies of any medical records pertaining to [the complainant]. To date I have had no response to that letter and it would be very helpful if you could expedite a response to that request."*

99. On 10 April 2002, Dr C responded:

> *"Thank you for your letter. We have no medical records for [the complainant]. **She has not been a patient here for 17 years.** (emphasis added by Counsel for CAC).*
>
> *There is no record of where they might have been sent."*

100. Mr Lange submitted that rather than a denial that the complainant was a patient, the letter written by Dr C indicated that she had been a patient but not since 1985.

101. Mr Lange informed the Tribunal that he had not been aware that the fact of the doctor/ patient relationship was in issue until this hearing.

102. He referred to an unsigned written brief of evidence of a brother of the complainant which Mr Lange had forwarded to Mr Waalkens at a much earlier time enquiring whether it could be admitted by consent and to which he had not had a response. Mr

Lange said this information (which was in correspondence before the Tribunal) was not raised as a criticism of the defence but by way of explanation that if the doctor/patient relationship was going to be in issue then that would be formally addressed by the CAC by filing fuller and updated briefs of evidence prior to a fixture date being made for the hearing, should the application for stay not be granted. Both Mr Lange and Mr Waalkens agreed that the Tribunal could have regard to the proposed brief of evidence of the complainant's brother. This stated in brief terms that when the complainant's family moved to the area in question, their mother changed their family doctor to Dr C at Dr C's medical centre. The brother had added in his brief that he was aware that the complainant saw Dr C for medical treatment from time to time as the family's general practitioner until she was 17 years.

103. Mr Lange concluded that on the particular aspect of doctor/patient relationship, the absence of medical records did not create specific prejudice such as to justify a stay.

104. With regard to the unavailability of witnesses, Mr Lange stated it had been submitted that Dr C was prejudiced by the unavailability of a Ms H. He said there was reference in the CAC's notes that the complainant had said she had spoken at the time of the alleged incidents to Ms H about the sexual relationship with Dr C. There is a note from the convenor of the CAC in the following terms:

> *"I managed to talk with [Ms] H a few days ago. At least we think it is the right [Ms] H. … She would be willing to talk with us but says at her, then, current state of memory it wouldn't be much use."*

105. Mr Lange said this evidence was formerly admissible as "recent complaint evidence" but the extent to which prior complaint evidence was now admissible would in part turn on the extent to which the provisions of the Evidence Act 2006 applied to these proceedings. Prior to the passing of the 2006 Act, such complaint evidence was admissible as recent complaint but, following the passing of the 2006 Act, recent complaint evidence was not admissible.

106. He added that the fact that Ms H may not now recall a conversation did not prove whether or not such a conversation took place at the time. However, if recent complaint evidence was admissible then the Tribunal did have a copy of the brief of

evidence of a Ms D to whom the complainant spoke in 1985 and told her of having sexual intercourse with Dr C.

107. Mr Lange concluded in this aspect of his submission that having regard to the purpose for which recent complaint evidence could be adduced, no specific prejudice arose.

108. Mr Lange then addressed the second particular of the charge. He submitted that when considering a stay in respect of the second particular, it was important that the Tribunal look at it separately (from the first particular). He said the absence of medical records, prescription records and appointment books had no direct relevance to the second particular.

109. He broke the second particular into three parts:

(a) In March/April 1985;
(b) Dr C supplied to the complainant – marijuana, cocaine and nitrous oxide;
(c) There was no medical reason or justification.

110. As regards the timeframe, Mr Lange said the submissions advanced in respect of particular one equally applied.

111. He submitted that as regards the essence of the allegation (supplying drugs) the email correspondence was of some significance in determining whether or not specific or general prejudice arose. He referred to the email of 20 December 2000 at 16:16 hours from Dr C to the complainant which recorded:

> *"I have never tried e, mainly because none has fallen into my lap. I still love the occasional smoke, justifying this on the boys-will-be-boys basis, usually on an annual rugby trip with my friends and the odd party, and occasionally on my own listening to music. I have dabbled with harder stuff at times over the years but can't be bothered any more …"*

112. In her brief of evidence, the complainant had stated after inhaling the cocaine:

> *"Then a friend of his [Ms B] came into the room and he [Dr C] got up and walked out. I had met [Ms B] through … and she had also been at the … the night I had been raped and had been supportive of me after this. She asked*

> *what … had been doing and I told her. I can't remember what happened after this … I think I just went back to sleep."*

113. Mr Lange referred to a letter from Ms B of 8 April 2002 to the CAC which Dr C had caused to be sent to the CAC and which corroborated some aspects of the complainant's statement that she was present at a party at Dr C's home at the relevant time; and that she was in the part of the house where the complainant says she was at the time.

Dr C's reply

114. Mr Waalkens made submissions seeking to distinguish cases on which the CAC relied including the *Dr YZ* case.

115. With regard to the emails, Mr Waalkens said there was a *"concern about manipulation of the emails, in particular, reference to the matter of the doctor/patient [relationship]"* which Dr C did not accept. He said that the CAC, in this case, had to prove the doctor/patient relationship which distinguished this case from the facts of *Dr YZ* and other cases.

116. Mr Waalkens referred to Dr C's letter of 27 March 2002 to the CAC stating that the complainant had *"not been a patient here for 17 years"*; and to the explanation provided by Dr C in one of his affidavits that he was replying on behalf of the medical centre and that it was not a concession that the complainant was his patient. Mr Waalkens submitted that cross-examination would not advance the position for the CAC because, no matter how many times Dr C was asked, his reply would be the same. He referred to an affidavit of Dr C which deposed there were five partners at the centre and submitted that the fact the complainant or her family were registered at the centre did not take the matter very far at all.

117. He referred to aspects of the complainant's affidavit which he submitted was very tenuous and very slim regarding the doctor/patient allegation. In his oral submissions Mr Waalkens said he wanted to emphasise that in Dr C's case it was not so much the nature of the relationship that was so significant; it was the allegation that the complainant was a patient and that was why medical records and

appointment books were so important because they would demonstrate that the complainant was never booked to see Dr C.

118. Dr Waalkens referred to the CAC's submissions about memory of witnesses. He said Mr Lange's reference in this regard to the Evidence Act 2006 was ill-founded and submitted those provisions related to criminal evidential issues and not civil proceedings, as here. Further, he referred to the MP Act (First Schedule clause 6) which empowers the Tribunal to receive what evidence, in its opinion, may assist it to deal effectively with the matters before it, whether or not it would be admissible in a court of law; and submitted that, more particularly, the reason to call such evidence on behalf of Dr C would be to challenge the complainant's credibility.

119. Mr Waalkens also addressed other matters including the complainant's failure to comply with the Tribunal's order in its decision of 15 March 2007 and the difficulties and problems this would pose for Dr C.

The law relating to strike out/stay

120. The Tribunal has jurisdiction to strike out/stay the charge before it if it is satisfied that the charge in issue amounts to an abuse of the Tribunal's processes.

121. The Tribunal is obliged to comply in all cases before it with the principles of natural justice arising both at common law and under its statutory regime. Section 101 of the MP Act states that the provisions set out in Schedule 1 apply to the Tribunal and its proceedings. Schedule 1 clause 5(3) provides that the Tribunal must observe the rules of natural justice as does section 27(1) of the New Zealand Bill of Rights Act 1990. Schedule 1 clause 5(1)(a) of the Schedule empowers the Tribunal (subject to the Act and any regulations made under it) to regulate its procedures in such manner as it thinks fit. This permits the Tribunal to stay or strike out a charge which it finds contravenes the principles of natural justice or which constitutes an abuse of its processes.

<u>The purpose of disciplinary proceedings</u>

122. Under the MP Act section 3 provides that its principal purpose is

> *… to protect the health and safety of members of the public by prescribing or providing for mechanisms to ensure that medical practitioners are competent to practise medicine.*

Abuse of process/delay

123. In *Moevao v Department of Labour* [1980] 1 NZLR 464 there was a full discussion regarding abuse of process. In that case the Court declined to intervene. The President of the Court (Richmond P) traversed the history of the common law which cautioned that the power to stay must be used sparingly and only in the clearest cases. He observed:

> *… However it cannot be too much emphasised that the inherent power to stay a prosecution stems from the need of the Court to prevent its own process from being abused. Therefore any exercise of the power must be approached with caution. It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the Court is itself being wrongly made use of* (p 470 L.51 to 471 L.1).

124. And per Woodhouse J:

> *… It is not always easy to decide whether some injustice involves the further consequence that a prosecution associated with it should be regarded as an abuse of process. And in this regard the Courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution* (at p 475 L.51 to 54).

and

> *… It is the function and purpose of the Courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase "abuse of process" by itself does not give sufficient emphasis to the principle that in this context the Court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general* (p 476 L.11 to 18).

125. And per Richardson J:

> *It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends*

> *to ensuring that the Courts' processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence and the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by concern that the Courts' processes may lend themselves to oppression and injustice.* (p.481 L.31 to 43)

And

> *The concern is with conduct on the part of a litigant in relation to the case which unchecked would strike at the public confidence in the Court's processes and so diminish the Court's ability to fulfil its function as a Court of law. As it was put by Frankfurter J in Sherman v United States 356 US 369, 380 (1958): "Public confidence in the fair and honourable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake".* (p.482 L.6 to 13)

And

> *The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court.* (p.482 L.21 to 27)

126. The leading cases on the principles applicable to strikeout/stay on the grounds of delay have involved criminal prosecutions. While disciplinary proceedings are not criminal prosecutions (*Re A medical practitioner* [1959] NZLR 782; *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139, *Guy v Medical Council of New Zealand* [1995] NZAR 67) nevertheless the principles developed in the criminal courts concerning strikeout/stay on the grounds of delay have been adopted in the disciplinary arena (*E v Medical Practitioners Disciplinary Tribunal and CAC* (Unrep. HC Wellington, 190/99 24.4.01, Goddard J; *L v Dentists Disciplinary Tribunal* (CIV-2006-485-807 High Court Wellington Lang J. 6 November 2006).

127. In *W v R*, (1998) 16 CRNZ 33 Randerson J summarised the principles relevant to staying criminal charges on the grounds of delay. His Honour referred to *R v The Queen* [1996] 2 NZLR 111 Tipping J, *S v R* Unrep. HC Hamilton T17/93, 10.9.93

Penlington J, and *R v Steedman* Unrep, HC New Plymouth T9/97, 14.11.97 Robertson J, when identifying the following principles:

> *"(1) That an order for a permanent stay of proceedings in the exercise of the Court's protective inherent jurisdiction on the grounds of delay is only to be made in exceptional cases.*
>
> *(2) The the onus will normally be on the accused to show on the balance of probabilities that, owing to the delay, he will suffer prejudice to the extent a fair trial is not impossible.*
>
> *(3) That how the accused discharges that onus will depend on all the particular circumstances of the case.*
>
> *(4) That where the period of delay is long it can be legitimate for the Court to infer prejudice without proof of specific prejudice.*
>
> *(5) That ultimately the pertinent issue is whether despite the delay an accused can in the particular circumstances of the case still receive a fair trial.*
>
> *(6) The reasons for the delay and its consequences should be examined.*
>
> *(7) The merits of the case are relevant to the overall assessment.*
>
> *(8) There may arise two types of unfairness to the accused. Specific prejudice such as through the death or unavailability of a witness or general prejudice through long delay such that it would be unfair to put the accused on trial at all.*
>
> *(9) Logically, general prejudice in the sense described must be prejudice which is additional to that which the accused would have faced through tolerable delay.*
>
> *(10) In considering whether it is fair to put the accused on trial at all through general prejudice arising from long delay, the process will normally involve the balancing of the accused's interests with those of the public and the complainant. Bearing in mind the starting point of no statutory limitation as to time, a case must be "truly extreme" before the inherent jurisdiction can be invoked on this basis. That is, on the basis of general prejudice.*
>
> *(11) The Court should exercise its discretion in a flexible manner so as to secure the overall objective of ensuring the accused receives a fair trial despite delay, and, as Robertson J put it in R v Steedman ensuring the trial will be "permeated with the necessary integrity"."*

128. Randerson J also referred to the following observations of Tipping J in *R v The Queen* when he said:

> *"1. The accused is entitled to a stay if he can show that the delay has caused specific prejudice jeopardising a fair trial to the extent that there is a serious risk of a miscarriage of justice if the trial proceeds.*
>
> *2. Even if he cannot show that, the accused is entitled to a stay if, in all the particular circumstances, the delay is so long and unjustified that it would be an abuse to put him on trial at all."*

129. In *L v Dentists Disciplinary Tribunal* Lang J, when contrasting the principles to be applied in criminal proceedings and disciplinary proceedings, observed:

> *[72] As the authorities demonstrate, the principles to be applied in applications for stay in the context of both criminal and disciplinary proceedings may in many cases be very similar. They are not, however, identical.*
>
> *[73] Charges that are laid under the general criminal law are brought in the interests of society as a whole. All citizens have an interest in ensuring that allegations of criminal offending are properly investigated and, where the allegations are substantiated, the offenders are punished. Slightly different principles apply to complaints that are made to a professional disciplinary tribunal. The general public does not necessarily have any interest in ensuring that such allegations are the subject of disciplinary proceedings. That interest is held only by the sector of the public that deals with, or has an interest in, the profession in question. That sector will, of course, include members of the profession.*
>
> *[74] The policy underlying disciplinary proceedings was explained by Gendall J in Ford in the following terms (at 61) [Ford v Medical Practitioners Disciplinary Tribunal* High Court Wellington CP268/01 18 February 2002 Gendall J]:
>
> > The disciplinary provisions of the Medical Practitioners Act 1995 are designed to protect the public and maintain proper professional standards and ensure that medical practitioners are accountable to their patients and the public. Members of the public (and members of the medical profession are also members of the public) are entitled to expect that doctors who are charged with offences have those charges heard after proper inquiry before what is, in the context of this case, an expert tribunal assisted by a legal assessor.
>
> *[75] The distinction between the approach to be taken in deciding an application for a stay of criminal charges and an application for a stay of disciplinary proceedings was explained in Walton v Gardiner 1993) 112 ALR*

289, the decision to which the Tribunal itself referred (at para 14). In that case the Court said:

> The question whether disciplinary proceedings in the tribunal should be stayed by the Supreme Court on abuse of process grounds should be determined by reference to a weighing process similar to the kind appropriate in the case of criminal proceedings **but adapted to take account of the differences between the two kinds of proceedings. In particular, in deciding whether a permanent stay of a disciplinary proceeding in the tribunal should be ordered, consideration will necessarily be given to the protective character of such proceedings and to the importance of protecting the public from incompetence and professional misconduct on the part of medical practitioners.** [Emphasis added by the Court]

130. A recent decision on stay involving a medical practitioner is that of the High Court in *YZ v Director of Proceedings and The Health Practitioners Disciplinary Tribunal* (CIV-2007-485-2631 High Court, Wellington 3 October 2008) in which Dobson J upheld the decision of the Tribunal declining stay and which traversed the relevant legal principles (132/Med07/65D 26 October 2007).

Decision on strike out/stay

131. The Tribunal has had regard to the submissions of counsel, both written and oral as well as the legal authorities. It has also had regard to the affidavit evidence and unsigned statements but appreciates that these remain untested at this stage. Not all matters before the Tribunal are necessarily mentioned in this decision but they have been considered.

Complainant delay

132. The alleged conduct in question is said to have occurred in about March/April 1985. According to the as yet untested affidavit materials, the complainant had contact with Dr C in 1989 by way of correspondence when they were both residing overseas in different countries and during which time Dr C sent the complainant by way of gift the sum of US$1,500.00. In one of his letters to her during this period he stated he had "*behaved very badly*" towards the complainant, expressed his apology and gave her his assurance it would not happen again.

133. Dr C subsequently returned to New Zealand. While still overseas, the complainant married and in 2000 returned to New Zealand with her husband.

134. The complainant has stated that within two or so months of her return, she made contact by email with Dr C who responded immediately. They kept corresponding by email, according to the complainant, until around early in 2001. In her affidavit, according to the complainant's statements, they had no further direct contact after April 2001 although there has been contact of an indirect nature through their respective counsel, as evidenced by the settlement agreement.

135. In her brief of evidence/affidavit the complainant stated that by May 2001 she still felt confused about the relationship and how to make sense of things. She stated she was by then at an age when Dr C had had the affair with her when she was 16 years old and a patient, and she could not understand how he could even have considered doing so. She was thinking about having children and thought how she would feel if a doctor treated one of her children as Dr C had treated her.

136. It was then she decided to make a complaint, stating that she did not have to cope with the matter on her own any more and that the authorities could sort it out for her.

137. There was by then delay of some 16 years from the alleged conduct to the making of the complaint.

138. On 4 May 2001 the complainant first made a complaint against Dr C to the Health & Disability Commissioner who, in turn, referred it to the Medical Council of New Zealand. By 10 October 2001 Dr C was aware of the complaint. He instructed counsel who wrote to the Medical Council on that date informing the Council he was representing Dr C.

139. As the cases make clear, this period of complainant delay is not of itself unusual when the alleged conduct is of a sexual nature involving a young person. As Randerson J held in *WvR* , the reasons for the delay and its consequences should be examined and the merits of the case are relevant to the overall assessment.

140. While there has been significant complainant delay of 16 years, taking into account all matters before it at this time, the Tribunal does not consider the delay was of such a nature or extent as to justify a strike out or stay of the proceedings.

Delay by the CAC and overall

141. The history of the interlocutory proceedings has been lengthy and protracted, as is evidenced by the chronology of events (Schedule One).

142. On 14 February 2003, the then Chair of the Tribunal made certain orders relating to disclosure of documents including the complainant's medical records.

143. These orders were then appealed by the CAC to the District Court and then to the High Court and then to the Court of Appeal. On 19 April 2005 the Court of Appeal quashed the decision of the High Court and referred the matter back to the Tribunal.

144. In May 2005, Dr C sought leave to appeal to the Supreme Court which was granted and, following a hearing on 15 December 2005, the Supreme Court delivered its decision on 29 June 2006. It was a majority decision with one of its members dissenting. It allowed the appeal. While it affirmed the Court of Appeal's order setting aside the orders made in the High Court, it set aside the directions which the Court of Appeal gave as to consent; and referred back to the Tribunal for re-hearing Dr C's application for disclosure in light of its (the Supreme Court's) directions.

145. While this process of appeals took some four years, fault should not be attributed to the CAC as it wished to have tried important principles of law which it was entitled to do.

146. The Supreme Court does not grant leave lightly. Under its 2003 Act, it can only do so if it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal if the appeal involves "a matter of general or public importance" (being one of the three criteria).

147. In these circumstances, it is difficult for the Tribunal to criticise either the CAC or Dr C for exercising their respective appeal rights.

148. Following the Supreme Court decision the Tribunal re-heard Dr C's application on 16 November 2006 giving its decision on 15 March 2007.

149. The CAC then appealed to the District Court the Tribunal's decision of 15 March 2007. This District Court's judgment was delivered in February 2008. The appeal was disallowed for want of jurisdiction. The CAC then made its present application (in September 2008) while Dr C made his application for stay which were heard on 30 October 2008.

150. While there has been delays regarding the appeal processes, the Tribunal does not find, in the particular circumstances, that it warrants a strike out or stay of the proceeding.

151. The Tribunal accepts that the records relating to the complainant at the medical centre where Dr C practised at the relevant time (and where he continues to practise) cannot be located.

152. With regard to the allegation that sexual intercourse took place, this would not be something which would be recorded in the patient's notes and, if it did occur, is most likely to have taken place where there would be no witnesses.

153. The Tribunal has referred not only to the complainant's assertions but also to the emails allegedly sent by Dr C to the complainant.

154. If the emails were sent by Dr C to the complainant then, on the face of them, they appear to contain an acknowledgement of the timeframe and of sexual intercourse as the CAC contended.

155. The CAC has referred to only some extracts from some of the emails. There are other emails allegedly sent by Dr C to the complainant, which are annexed to the affidavits of the complainant and Mr Thackray. A number of the emails allegedly sent by Dr C to the complainant contain detailed information of an intimate and personal nature relating to Dr C, his family, his medical practice and his social life.

156. While Dr C has asserted through his counsel, that there was a concern about manipulation of the emails, the Tribunal also has before it the affidavit of Mr Thackray, which sets out his credentials and experience as a computer forensic

expert. Mr Thackray has deposed there has been no manipulation and, in particular has deposed (at para. 10.4):

> *"To modify this file without corrupting the web page would require a good working knowledge of web page coding. There is no evidence to indicate that such a manipulating process has taken place."*

157. This is a matter which can only be tested and challenged at a substantive hearing. It is not a matter upon which the Tribunal can or should determine at this juncture.

158. Dr C's counsel emphasised the significance of the absence of medical records regarding the issue as to whether the complainant was a patient of Dr C at the relevant time.

159. In the circumstances, the Tribunal does not consider that the absence of medical records warrants a strike out or stay of the proceedings.

160. The Tribunal has had regard to the submission that the absence of the records could pose a disadvantage for Dr C, but it does not consider that the absence of those records warrants a strike out or stay, in the particular circumstances of this case.

161. Again, the content and tenor of the emails which Dr C allegedly sent to the complainant, on the face of them, appear to acknowledge that the complainant was a patient of his. In particular, there is specific reference to the doctor/patient relationship in the email correspondence of 11 December 2000 from Dr C to the complainant which records: *"We (doctors) have it drummed into us that any sexual contact with a patient (especially a 17 year old) is predatory …"; "… Yeah, it was great sex."*

162. Mr Lange referred to the CAC letters of 28 February and 27 March 2002 and Dr C's response of 10 April 2002 where Dr C did not deny the allegation of doctor/patient relationship (in the 28 February 2002 letter) but replied the complainant had *"not been a patient here for 17 years"* which he submitted implied she was his patient.

163. It may be that Dr C's response is capable of differing interpretations but the Tribunal considers it is another piece of evidence, like the emails, which would more

appropriately be addressed at a substantive hearing for determination in the context of all the evidence.

164. The CAC referred to the unsigned brief of evidence of a brother of the complainant which, on the face of it, confirms the doctor/patient relationship. Mr Waalkens agreed the Tribunal could have regard to it for present purposes.

165. Mr Lange informed the Tribunal that it was not until this hearing that he was aware the doctor/patient relationship was in issue. He referred to earlier correspondence to Mr Waalkens which may have led to a misunderstanding. He informed the Tribunal that now he was aware, this issue would be more fully addressed at a substantive hearing by the filing of fuller and updated briefs of evidence.

166. Mr Waalkens referred to the complainant's allegation of having been given the "morning after" pill. Dr C has asserted that due to delay no pharmaceutical records were available thereby amounting to an item of specific prejudice.

167. The Tribunal considers this a dubious assertion. If sexual intercourse had taken place between Dr C and the complainant, then a doctor in that situation is most unlikely to have made a record of it or to have made a specific prescription for it in the name of the complainant.

168. Again this is a matter which can be tested by cross-examination at a substantive hearing. In essence, it amounts to an issue of credibility.

169. Dr C has not established to the Tribunal's satisfaction that any issues relating to memory of witnesses justify the charge being struck out or stayed.

170. Each case is fact specific. As Fraser J observed in *Hamelsveld v District Court at Timaru and the Attorney-General* (M11/95 High Court Timaru 29 September 1995) at pp 6 and 7:

> *"Some assistance can be obtained from examples of how the principle has been applied from time to time but the resolution of any case must, in the end, be dependent upon its own facts and the inferences which can be properly drawn from them."*

171. The relevant legal authorities indicate that the appropriate time to test the issues will be by way of cross-examination at a hearing of the substantive charge.

172. What the Tribunal must consider and decide now is whether the absence of medical records creates specific prejudice such as to justify a stay or in other words whether there can be a fair hearing despite the absence of medical records. The Tribunal is of the view that having considered the particular circumstances presently before it the absence of medical records does not justify a stay and there can be a fair hearing.

173. As Gendall J observed in *Ford* (above) at paragraph [25]:

> *"… It is very much a question of individual assessment and degree bearing in mind the particular circumstances of each case and the Court or Tribunal has to exercise its discretion in a flexible manner so as to secure the overall objective of ensuring that the accused, or respondent, receives a fair trial or hearing despite the delay. Whether you speak of "general prejudice" (inferred from long delay) or "specific prejudice" established through disappearance of evidence, unavailability of witnesses and the like, the test remains the same: can a fair hearing be obtained despite the delay?"*

Settlement Agreement

174. The Tribunal has had regard to the settlement agreement only as part of the narrative within the context presently before it. Both Mr Lange and Mr Waalkens requested the Tribunal to refrain from forming an adverse view of either the complainant or Dr C or both in relation to the settlement agreement.

175. Relevant issues relating to it can be dealt with at a substantive hearing.

Failure to comply with Tribunal's disclosure orders

176. There were two parts to the Tribunal's directions of 15 March 2007 (see para 4 above). Directions were made in relation to both the CAC and the complainant.

177. Mr Lange was asked directly whether the documents currently in the possession of the CAC which the complainant provided to it (and copies of which were given to Mr Waalkens at an earlier time but on limited conditions) would be made available at a substantive hearing without further objection.

178. Mr Lange replied that if the Tribunal's ruling of 15 March 2007 were to stand then the CAC was bound to provide them and would do so.

179. For the sake of clarity those documents are:

(a) A chronology of events provided by the complainant to the CAC which makes reference to some medical matters.

(b) An email dated 20 March 2002 from a counsellor at the xx to the complainant advising that the counsellor (whom it seems the complainant saw) left in 1988 to go overseas and who did not leave any records. The counsellor had made enquiries of the nurse (identified) who was still the nurse at the same place. The counsellor would talk with the nurse to see if she could check through the files when she had time to see if there were any medical notes and would let the complainant know.

(c) A letter of 27 March 2002 from a Dr J who had located the complainant's notes between 1988 and 1989 when the complainant had consulted her then GP, Dr S, who had since retired. Accompanied with this letter were Dr S's notes between 5 July 1988 and 12 January 1989; and some 11 pages of notes from the complainant's clinical file at xx Hospital (now xx Hospital) between 25 July 1988 and 8 September 1988.

180. To that extent, the directions of the Tribunal at paragraph 94 of its 15 March 2007 decision (paragraph 4 above) will be complied with.

181. With regard to the Tribunal's directions relating to the complainant, Mr Lange stated the only reason the complainant had given him for not complying was that she did not want Dr C *"going through"* her personal medical records as they contained private matters.

182. However, the Tribunal's directions relating to the complainant are limited.

183. In paragraph 95(a) the Tribunal required only the complainant's complete file and/or records at xx Hospital commencing in 1988. Dr C has already seen some 11 pages of that file which contains matter of a personal nature. It is not known if the hospital any longer has the file or if there are any more documents on it than those already

disclosed by the complainant to the CAC. In her correspondence with the CAC, the complainant had referred to them as a *"section of medical records from xx Hospital"* but on further enquiry from the CAC she stated they were the only ones in her possession. Whatever the state of the file, the enquiry needs to be made of the hospital and if there are further documents on it, they need to be disclosed.

184. With regard to the directions in paragraph 95(b), there is no reason why the enquiry of xx Hospital cannot be made and any file, if in existence, can be made available.

185. With regard to the directions in paragraph 95(c), this matter can be readily followed up with xx (formerly xx) to ascertain the outcome of the counsellor's enquiries.

186. With regard to the directions in paragraph 95(d), at this hearing Mr Lange produced a letter dated 27 April 2007 from the complainant's current medical general practitioner that she (the GP) did not hold any records for the complainant for the period requested, that is, between 1985 and 1989 (1989 being the year the complainant moved overseas). To the extent required, this direction has been complied with.

187. Mr Lange was also asked directly if the complainant would attend a substantive hearing, if the proceedings were not struck out or stayed.

188. Mr Lange said the only time the complainant had indicated she would not attend a hearing was around the time of the settlement agreement. He referred to correspondence.

189. The Tribunal notes a letter dated 27 February 2004 (attached to Ms Garvey's affidavit) from Mr Lange to the complainant in which he has recorded:

> *"While it is recognised that your preference would have been to have the charges withdrawn and the settlement proceed, you have indicated that you will give evidence if required at the disciplinary tribunal."*

190. Mr Lange said the CAC would issue summonses to the complainant and other witnesses for the CAC to attend.

191. It was evident from Mr Lange's exchange with the Tribunal that, if the proceeding were not stayed, he would do all he could to ensure compliance and would give early notice to the defence and to the Tribunal if there were indications of non-compliance.

192. In light all of the above no stay is warranted on the ground of the complainant's non-compliance.

Orders and Conclusion

193. Accordingly the Tribunal makes the following orders:

(a) The application by the CAC for the Tribunal to recall, amend, or reconsider its decision of 15 March 2007 relating to the disclosure of medical records or alternatively to exercise its powers pursuant to clause 7 of the First Schedule to the MP Act to direct a third party to obtain the complainant's medical records is declined.

(b) The application by Dr C for an order striking out and/or staying the disciplinary charge against him dated 10 October 2002 is declined.

(c) The charge should be set down for hearing at the first available opportunity.

DATED at Wellington this 30th day of January 2009.

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Sandra Moran
Chair
Medical Practitioners Disciplinary Tribunal