



**5/Den05/04D**

-AND-

Dentist of Auckland

Ms S D'Ath (Executive Officer)

Hearing held: by telephone conference on 10 March 2005

**APPEARANCES:** Mr J Tamm for the Director of Proceedings .

No appearance for Dr Aladdin.

## Introduction

- 1 Doctor Aladdin is a dentist who practises in Auckland. The Director of Proceedings<sup>1</sup> has laid two separate charges against Dr Aladdin. Those charges have been laid pursuant to s.91(1) Health Practitioners Competence Assurance Act 2003 (“HPCA Act”).
- 2 The charges against Dr Aladdin can be briefly summarised:
  - (a) The first charge relates to complaints from LS. It is alleged Dr Aladdin failed to adequately perform root canal therapy in relation to two teeth, and/or refer his patient to an endodontist in a timely manner. The allegations in relation to LS concern the period 12 February 2001 to 10 October 2002.
  - (b) The second charge relates to an allegation Dr Aladdin failed to properly treat CR when mounting a crown on a tooth. It is also alleged Dr Aladdin failed to properly treat the same tooth that was the subject of the crown work. The allegations in relation to CR cover the period from 25 September 2001 to 24 March 2003.
- 3 Both charges allege Dr Aladdin’s conduct amounted to professional misconduct as defined in s.100(1) of the HPCA Act.<sup>2</sup> The charge involving the complaints by CR are to be heard on 1 and 2 June. The charge involving the complaints by LS are to be heard on 20 and 21 June.

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<sup>1</sup> The office of Director of Proceedings is created by s.15 Health and Disability Commissioner’s Act 1994.

<sup>2</sup> Professional misconduct is defined in s.101(1)(a) and (b) of the HPCA Act:

“(a) ... any act or omission that in the judgment of the Tribunal, amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner was registered at the time the conduct occurred; or  
 (b) ... any act or omission that, in the judgment of the Tribunal, has brought or was likely to bring discredit to the profession that the health practitioner practiced at the time the conduct occurred; ...”

- 4 Doctor Aladdin has applied for orders suppressing publication of his name and identifying features pending the Tribunal determining the charges laid against him.
- 5 At the time Dr Aladdin applied for interim name suppression he was represented by Mr Waalkens QC. By agreement the applications for interim name suppression in relation to both cases were set down to be heard at the same time. Exactly the same evidence and submissions were relied upon in relation to both applications.
- 6 Mr Waalkens instructions were terminated before the Tribunal convened to hear both applications. Doctor Aladdin was served with the Director of Proceedings submissions in opposition to his applications, and provided with instructions by the Executive Officer of how to join the telephone conference call convened by the Tribunal to consider Dr Aladdin's application. The Tribunal is in no doubt Dr Aladdin was aware of the date and time the Tribunal would consider his applications and that he could, if he so wished, have appeared in person and made submissions to the Tribunal when it considered his applications.

### **Basis of Applications**

- 7 The grounds upon which Dr Aladdin has applied for interim name suppression in both cases can be succinctly stated. It is his case that his interests, and the interests of immediate members of his family outweigh public interest considerations and it is desirable that he be granted interim name suppression pending determination of the charges against him.
- 8 Doctor Aladdin has sworn an affidavit explaining his professional and academic background. He graduated BDS from Baghdad University in 1976 and subsequently obtained a PhD in applied oral biology from London University in 1985. Doctor Aladdin held a number of senior academic positions before emigrating to New Zealand in 1996.
- 9 Doctor Aladdin is very concerned that if he is not granted interim name suppression, any publicity which might be given to the fact he is facing these two charges will unfairly impact upon his reputation and his dental practice in Auckland. Doctor Aladdin points out that he has a distinctive name and that he would be readily identified as the person who is the subject of the charges if he were not granted interim name suppression.

- 10 Doctor Aladdin is also concerned about his wife. She is a registered medical practitioner. Doctor Aladdin's wife practises under a different surname from Dr Aladdin but Dr Aladdin is nevertheless concerned that his wife will suffer damage as a consequence of any publicity naming him in conjunction with the charges.
- 11 Doctor Aladdin has also explained in his affidavit that he has a 16 year old daughter who attends a private girls school in Auckland. Doctor Aladdin is understandably concerned that his daughter would be "devastated" if Dr Aladdin's name was published in conjunction with the charges.
- 12 In his affidavit Dr Aladdin candidly explains that the two charges before the Tribunal are not the only disciplinary matters he is facing. Doctor Aladdin is facing another charge which is to be heard by the Dentists Disciplinary Tribunal during the week of 14 March 2005. Under the transitional provisions of the HPCA Act, the Dentists Disciplinary Tribunal continues to have jurisdiction over some matters that were the subject of investigation and/or charges laid before the commencement of the HPCA Act on 18 September 2004.

### **Basis of Opposition**

- 13 The Director of Proceedings submits that public interest considerations outweigh the personal interests of Dr Aladdin and members of his family. In particular the Director of Proceedings has referred to an analysis of public interest considerations set out in an earlier decision of the Tribunal<sup>3</sup> and suggests the following public interest considerations make it undesirable to grant Dr Aladdin's applications:
- (a) Openness and transparency of the disciplinary process;
  - (b) Accountability of the disciplinary process;
  - (c) The public interest in knowing the name of a dentist charged with a disciplinary offence;
  - (d) The importance of freedom of speech and the right enshrined in s.14 New Zealand Bill of Rights Act 1990;

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<sup>3</sup> *Re A 2 Med/04/01D*, 15 February 2005

- (e) The extent to which other dentists may be unfairly impugned if Dr Aladdin's applications are granted.

### Relevant Legislation

- 14 The starting point when considering applications for name suppression by health professionals is s.95(1) and (2) of the HPCA Act, which substantially replicates s.106(1) and (2) of the Medical Practitioners Act 1995. Subsections 95(1) and (2) of the HPCA Act provide:

“(1) *Every hearing of the Tribunal must be held in public unless the Tribunal orders otherwise under this section ...*

(2) *If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make one or more of the following orders:*

...

(d) *an order prohibiting the publication of the name, or any particulars of the affairs, of any person”.*

15. Subsection 95(1) of the HPCA Act emphasises the Tribunal's hearings are to be held in public unless the Tribunal, in its discretion applies the powers conferred on the Tribunal by s.95(2) of the Act. Another exception to the presumption that the Tribunal's hearings will be conducted in public can be found in s.97 which creates special protections for witnesses required to give evidence of a sexual, intimate or distressing nature.
16. Whereas s.95(1) of the HPCA Act contains a presumption that the Tribunal's hearings shall be held in public, there is no presumption in s.95(2) of the Act. Where the Tribunal considers an application to suppress the name of any person appearing before the Tribunal, the Tribunal is required to consider whether it is desirable to prohibit publication of the name of the applicant after considering:

- (a) The interests of any person (including the unlimited right of a complainant to privacy); and
- (b) The public interest.

17. **Public Interest**

18. As foreshadowed by the Director of Proceedings' submissions the following public interest considerations have been evaluated by the Tribunal when considering Dr Aladdin's applications:

- (a) Openness and transparency of the disciplinary process;
- (b) Accountability of the disciplinary process;
- (c) The public interest in knowing the name of a doctor charged with a disciplinary offence;
- (d) The importance of freedom of speech and the right enshrined in s.14 New Zealand Bill of Rights Act 1990<sup>4</sup>;
- (e) The extent to which other dentists may be unfairly impugned if Dr Aladdin's applications are granted.

19. Each of these considerations will now be examined by reference to Dr Aladdin's applications. In focusing on these public interest considerations the Tribunal notes no specific submissions were received relating to the complainant's interests in this case. The interests of the complainants have been subsumed into the public interest factors urged upon the Tribunal by the Director of Proceedings.

Openness and Transparency of Disciplinary Proceedings

20. The following cases illustrate the importance of openness in judicial proceedings:

- (a) In *M v Police*<sup>5</sup> Fisher J said:

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<sup>4</sup> "Freedom of expression – everyone has a right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any forum".

<sup>5</sup> (1991) CRNZ 14

*“In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice be seen to be done”.*

(b) In *R v Liddell*<sup>6</sup> the Court of Appeal said:

*“... the starting point must always be the importance in a democracy of ... open judicial proceedings ....”*

(c) In *Lewis v Wilson & Horton Ltd*<sup>7</sup> the Court of Appeal reaffirmed what it had said in *Liddell*. The Court noted:

*“...the starting point must always be ...the importance of open judicial proceedings ....”*

21. To these leading cases can be added *Scott v Scott*<sup>8</sup> and *Home Office v Harman*<sup>9</sup> where Lords Shaw and Diplock explained the rationale for openness in civil proceedings.
22. The Tribunal appreciates it is neither a criminal nor a civil Court. However, as Frater J noted in *Director of Proceedings v I*<sup>10</sup> when explaining the scope of s.106 of the Medical Practitioners Act 1995:

*“The presumption in s.106(1) of the Act, in fair and public hearings makes it clear that, as in proceedings before the civil and criminal Courts, the starting point in any consideration of the procedure to be followed in medical disciplinary proceedings must also be the principle of open justice.”*

#### Accountability of the Disciplinary Process

23. Closely aligned to the concept of openness and transparency is the need to ensure that the disciplinary process is accountable and that members of the public and profession can have confidence in its processes. This point was noted by Baragwanath J in *Director of Proceedings v Nursing Council*<sup>11</sup> where His Honour drew upon the writings of Jeremy Bentham and Viscount Haldane in *Scott v Scott* to illustrate the importance of accountability in professional disciplinary proceedings.

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<sup>6</sup> [1995] 1 NZLR 538

<sup>7</sup> [2003] 3 NZLR 546

<sup>8</sup> [1913] AC 47

<sup>9</sup> [1982] 1 All ER 532

<sup>10</sup> [2004] NZAR 635

<sup>11</sup> [1999] 3 NZLR 360

Public Interest in Knowing the Identity of a Dentist Charged With a Disciplinary Offence

24. There is a well recognised public interest in members of the public, as well as other members of the profession knowing the identity of a health professional charged with a disciplinary offence. The interest lies in providing members of the public and other members of the profession with information which may influence their decision to consult with the person who is the subject of the charge.
25. The public interest in knowing the identity of a health professional who is the subject of a disciplinary charge was referred to in *Director of Proceedings v Nursing Council* under the heading of “Education and alerting the community to risk”. It was also a factor referred to in *F v Medical Practitioners Disciplinary Tribunal*<sup>12</sup> where the Court, relying on *S v Wellington District Law Society*<sup>13</sup> noted:

- “(a) *The public interest is the interest of the public, including members of the profession, who have a right to know about proceedings affecting a practitioner ...*
- (c) *In considering the public interest the Tribunal is required to consider the extent to which publication of the proceedings would provide some degree of protection to the public or the profession ...”.*

Importance of Freedom of Speech and the Right Enshrined in s.14 New Zealand Bill of Rights Act 1990

26. The public interest in preserving freedom of speech and allowing the media “as surrogates of the public” to report Tribunal proceedings has been approved on a number of occasions by appellate Courts<sup>14</sup>.
27. The Tribunal does not know if the media proposes reporting anything about the charges faced by Dr Aladdin. If the media wish to publish reports about the Tribunal’s proceedings and identify Dr Aladdin then clearly the importance of freedom of speech

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<sup>12</sup> Unreported HC Auckland, AP21-SW01-5 December 01, Laurensen J

<sup>13</sup> [2001] NZAR 465

<sup>14</sup> See for example, *Liddell and Lewis* (supra)



enshrined in s.14 New Zealand Bill of Rights Act 1990 is a factor which weighs against Dr Aladdin's applications.

#### Unfairly Impugning Other Dentists

28. A further factor in the public interest is the concern that other doctors may be unfairly impugned if Dr Aladdin's name is suppressed. This point has been emphasised on numerous occasions in Criminal Courts where Judges have declined name suppression to avoid suspicion falling on other members of the profession .

#### **Decision**

29. The Tribunal has carefully weighed Dr Aladdin's interests (including the interests of his wife and daughter) against the public interest consideration set out in this decision.
30. Whilst the Tribunal is satisfied there is a risk of harm to Dr Aladdin's reputation and his practice, and that his wife and daughter may suffer some stress if Dr Aladdin's applications are declined, the Tribunal is satisfied the personal interests of Dr Aladdin and his family do not outweigh the public interest considerations and that it is not desirable to grant Dr Aladdin's applications.
31. The Tribunal is particularly influenced in its decision by the fact Dr Aladdin is facing two separate charges before the Tribunal based upon two separate complaints. In addition, he is facing a charge before the Dentists Disciplinary Tribunal. The Tribunal understands no orders for interim name suppression have been made by the Dentists Disciplinary Tribunal.
32. The Tribunal is of the view that where a dentist is facing multiple charges concerns about the dentist's professional reputation and the interests of his family are outweighed by the public interest factors identified by the Tribunal in its decision. In particular, the principles of openness, accountability and the "public's right to know" are in the circumstances of these cases, compelling grounds for rejecting Dr Aladdin's applications.

**DATED** at Wellington this 21<sup>st</sup> day of March 2005.

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D B Collins QC

Chair

Health Practitioners Disciplinary Tribunal