IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA186/2023
[2023] NZCA 375

BETWEEN	BHARATH RAJA SUBRAMANI Appellant
AND	A PROFESSIONAL CONDUCT COMMITTEE OF THE DENTAL COUNCIL Respondent

Hearing: 25 July 2023

Court: Miller, Moore and Palmer JJ

Counsel: A H Waalkens KC and S R Courtney for Appellant
J P Coates and A N Lane for Respondent

Judgment: 18 August 2023 at 2.00 pm

JUDGMENT OF THE COURT

The appeal against the refusal to grant a stay is dismissed.

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] In a decision dated 16 December 2022,[1] the Health Practitioners Disciplinary Tribunal | Tarapuinara Whakatika Kaimahi Hauora (the Tribunal) found Dr Bharath Subramani guilty of one charge of professional misconduct.[2]

[2] The Tribunal ordered the cancellation of Dr Subramani's registration as a dentist,[3] effective six weeks from the date of the decision, and imposed a $10,000 fine. It also censured Dr Subramani and ordered him to pay $150,000 in costs.[4]

[3] On 14 February 2023, Osborne J declined Dr Subramani's application for an interim stay of the order cancelling his registration.[5] Dr Subramani now appeals that refusal.

Procedural background

[4] Dr Subramani filed an appeal of the Tribunal's decision insofar as it related to the order for cancellation and fine. That appeal is due to be heard by the High Court on 4 and 5 September 2023.

[5] Pending the substantive appeal, Dr Subramani sought, on a without notice basis, an interim stay of the Tribunal's decision.[6] On 23 December 2022, Osborne J made orders that the date on which Dr Subramani's registration would be cancelled would be 17 February 2023[7] and that the Tribunal's decisions as to censure, fine and costs were stayed until further order of the Court.[8]

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1 *A Professional Conduct Committee Appointed by the Dental Council of New Zealand v Subramani* HPDT 1282/Den21/511P, 16 December 2022 [Tribunal decision].

2 Health Practitioners Competence Assurance Act 2003, s 100(1)(a)–(b).

3 Tribunal decision, above n 1, at [655] and [668]. It did so pursuant to s 101(1)(a) of the Health Practitioners Competence Assurance Act.

4 At [656], [666] and [668].

5 *Subramani v A Professional Conduct Committee Appointed by the Dental Council of New Zealand* [2023] NZHC 189 [Decision under appeal].

6 High Court Rules 2016, r 20.10.

7 It was previously to be 27 January 2023.

8 *Subramani v A Professional Conduct Committee Appointed by the Dental Council of New Zealand* [2022] NZHC 3619.

[6] An on notice application for stay was then filed. This was heard by Osborne J on 7 February 2023. On 14 February 2023 the Judge declined continued relief, save for an extension of existing interim relief until 7 March 2023.[9]

[7] Dr Subramani then sought leave to appeal to this Court.[10] This was granted by Osborne J on 5 April 2023 on the basis that the proposed issues were of sufficient importance to justify, in the interests of justice, leave to appeal.[11] The Judge was also persuaded, albeit he said by a fine margin, that a further period of stay should be granted in respect of the cancellation of Dr Subramani's registration.[12] This was to be extended until the hearing of his appeal against the refusal to grant a stay, on conditions.[13]

[8] This judgment deals with whether the interim orders should be extended until the hearing and determination of Dr Subramani's substantive appeal.

Background

[9] Dr Subramani was a registered dentist practising on the West Coast of New Zealand. The charge of professional misconduct arises from his care of 11 patients between October 2017 and October 2018. During this period Dr Subramani was the sole dentist in charge at the Lumino dental practice in Greymouth.

[10] In September 2018, the Lumino Group received complaints about Dr Subramani's care of patients. An internal review undertaken by Dr Chris Brooks, a clinical advisor with the Lumino Group, resulted in the termination of Dr Subramani's contract. In October 2018, Dr Brooks also wrote to the Dental Council of New Zealand (the Council) outlining his concerns. This led to the

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9 Decision under appeal, above n 5.

10 Senior Courts Act 2016, s 56(3).

11 *Subramani v A Professional Conduct Committee Appointed by the Dental Council of New Zealand* [2023] NZHC 757.

12 At [32].

13 At [33]. The appellant was to file an application to this Court for urgency in hearing his stay appeal, and to retain the services of a supervisor of his practice in accordance with the supervisory arrangements that were previously in place.

convening of a Professional Conduct Committee (the Committee) to investigate the matters raised.

[11] From early 2019, Dr Subramani established his own practice in Greymouth and practised under interim conditions imposed by the Council, including supervision.

[12] Following the Committee's investigation, a disciplinary charge was brought against Dr Subramani. He accepted that his conduct amounted to professional misconduct. The particulars of misconduct included that he had:

(a) failed to undertake necessary diagnostic evaluations;

(b) taken x-rays of such an inadequate standard that they served little or no purpose for diagnostic and treatment planning;

(c) provided inappropriate and unnecessary treatment, including the placing of fillings and providing bite splints;

(d) recommended inappropriate and unnecessary treatment for patients, including extractions;

(e) provided dental treatment of an inadequate standard, including small fillings;

(f) charged excessive fees for some aspects of treatment;

(g) failed to obtain informed consent from patients prior to providing services; and

(h) kept inadequate documentation and clinical records.

[13] The matter proceeded to hearing before the Tribunal in February 2022 in relation to penalty. No witnesses were required, and statements were taken as read.

[14] In its decision of 16 December 2022, the Tribunal found that the professional misconduct was serious because it was wide ranging, repetitive, and unethical. Some of the patients were vulnerable. The failure to record patients' medical histories was said to constitute a major departure from accepted practice and was potentially fatal.[14] In respect of one patient in particular, the Tribunal described Dr Subramani's dental care as "woefully inadequate, extensive and invasive", requiring significant remedial work.[15] The cumulative effect of all of these shortcomings was determined to be "very serious indeed".[16]

[15] The Tribunal's view was that Dr Subramani was operating at the level of a junior dental student.[17]

[16] In assessing the risk to the public, the Tribunal stated:[18]

> Despite the fact that he has experienced positive direct and indirect supervision of about 700 hours over the past 18 months [from] Dr Shand, he still requires further education. The Tribunal concluded that Dr Subramani has done a lot but achieved little.
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> Dr Subramani's "rehabilitation" seems to be a lifelong journey. Based on his progress to date, it is difficult to understand that within the foreseeable future he will be operating at the standard expected of a reasonable dentist. The public safety cannot take second place to Dr Subramani's ongoing learning on the job, to achieve the level of competence expected of a graduate.

[17] As to the appropriate penalty, the Tribunal concluded:[19]

> Because of the seriousness of the conduct and our lack of confidence in Dr Subramani's ability to reach and maintain the standard required of a dentist, the Tribunal does not believe anything short of cancellation is appropriate. The Tribunal is not satisfied that Dr Subramani can work without supervision, or that Dr Subramani would be able to work without supervision after a further three years, which is the longest period the Tribunal could order for. Therefore, a term of suspension followed by conditions that he work under supervision would provide no long-term protection for the public.
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> …

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14 Tribunal decision, above n 1, at [650].
15 At [650(g)].
16 At [650(h)].
17 At [617].
18 At [638]–[639].
19 At [652]–[653].

> Temporary periods of supervision and support are appropriate where there is a prospect of rehabilitation. The Tribunal is not persuaded that is the case here.

Relevant law

[18] The applicable law is as set out in the decision under appeal.[20] The stay application was brought pursuant to r 20.10 of the High Court Rules 2016, which provides:

> **20.10 Stay of proceedings**
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> (1) An appeal does not operate as a stay—
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> (a) of the proceedings appealed against; or
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> (b) of enforcement of any judgment or order appealed against.
>
> (2) Despite subclause (1), the decision-maker or the court may, on application, do any 1 or more of the following pending determination of an appeal:
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> (a) order a stay of proceedings in relation to the decision appealed against:
>
> (b) order a stay of enforcement of any judgment or order appealed against:
>
> (c) grant any interim relief.
>
> (3) An order made or relief granted under subclause (2) may—
>
> (a) relate to enforcement of the whole of a judgment or order or to a particular form of enforcement:
>
> (b) be subject to any conditions for the giving of security the decision-maker or the court thinks just.

[19] Subsection (1) reflects the general rule in litigation that a party is entitled to enjoy the benefits of judgment in their favour and that a party seeking a stay must persuade the court that, if a stay is not granted, the appeal right would be rendered nugatory.

[20] It is now well established that the considerations relating to a stay under r 12 of the Court of Appeal (Civil) Rules 2005 are equally applicable to the court's task

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[20] Decision under appeal, above n 5, at [20]–[23].

under r 20.10. In short, a balancing exercise is required, taking into account the consequences for all parties to the appeal. The following criteria are to be applied:[21]

(a) whether the appeal will be rendered nugatory if a stay is not granted;

(b) the bona fides of the applicant in the prosecution of the appeal;

(c) whether the successful party will be injuriously affected by the stay;

(d) any effect on third parties;

(e) the novelty and importance of the questions involved in the appeal;

(f) the public interest in the proceeding;

(g) the apparent strength of the appeal; and

(h) the overall balance of convenience.

Decision under appeal

[21] The Judge began by identifying the four main areas of discussion arising from the various affidavits before him:[22]

> (a) the standard of Dr Subramani's recent practise — while it was appropriate for the Committee to draw to the Court's attention information of which the deponents had become aware, it would be inappropriate to rely on the information being reported as sufficiently accurate to constitute evidence against the granting of a stay — questioning of the original sources of the reported information might well alter the impression provided by the reports;
>
> (b) the supervision arrangements — the replacement of Dr Shand by Dr Gorrie means there would be continuing supervision in place should a stay be granted;
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> (c) the impact on Dr Subramani and associated persons — the supplementary evidence points clearly to the significant financial

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21 *Yan v Mainzeal Property and Construction Ltd (in rec and in liq)* [2014] NZCA 86, (2014) 22 PRNZ 296 at [25].

22 Decision under appeal, above n 5, at [41] (footnote omitted).

consequences for Dr Subramani and his staff should the cancellation take effect; and

(d) availability of dentists on the West Coast — whereas Dr Gray pointed out that an article relied on by Dr Subramani as to dentist shortages on the West Coast was first published in 2002, the Council's own up-to-date figures indicate clearly the extent to which adults on the West Coast are behind all other regions in their access to dentists.

[22] As to the approach to the Tribunal's findings, the Judge stated that deference to a specialist tribunal is appropriate,[23] endorsing the observation of Simon France J in *A v A Professional Conduct Committee* that "a specialist tribunal may, and indeed is expected to, assess the evidence using its professional knowledge and experience".[24]

[23] The Judge went on to consider the factors relevant to stay, prefacing the discussion by noting Mr Waalkens KC's submission for Dr Subramani that the supervision arrangements in place for Dr Subramani's practice made the case and the application unique. Dr Subramani was restricted to basic dentistry with those services closely and reliably supervised which, Mr Waalkens submitted, removed any real risk of harm to the public. The Judge also referred to Mr Waalkens' emphasis on the time that has elapsed since the misconduct (at least five years) and the wider interests of the community in having a dental practitioner such as Dr Subramani available.[25]

Would the right of appeal be rendered nugatory?

[24] The Judge found that the refusal of a stay would not render the appeal nugatory in the usual sense. The appeal seeks to overturn the cancellation of registration and the fine. The fine, if quashed, having previously been paid, could be refunded. The cancellation, if quashed, would enable Dr Subramani to practise as a dentist in New Zealand once more. There was no evidence that he would not find employment as a dentist if successful in his appeal.[26]

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23 At [42].
24 *A v A Professional Conduct Committee* [2018] NZHC 1623 at [17].
25 At [43].
26 At [44]–[45].

Bona fides of the appellant

[25] The Judge found nothing to suggest the appellant was other than bona fide in bringing and pursuing his appeal.[27]

Would the successful party be injuriously affected by the stay?

[26] The Judge acknowledged that the immediate impact of cancellation would be significant on Dr Subramani's practice and its staff members, as well as on Dr Subramani and his family financially.[28] However, the question of injury was to be approached in accordance with the Health Practitioners Competence Assurance Act 2003 by looking at the impact of a stay on public safety and public confidence in the dental profession and its disciplinary processes.[29]

[27] The Judge recognised some force in Mr Waalkens' submission that the supervision arrangements in place had the function of protecting the public in order to remove a risk of harm.[30] In assessing risk of injury, however, the Judge stated that it would be inappropriate to depart from the conclusion of the specialist body reached on a substantial body of evidence following a lengthy penalty hearing. That conclusion was that the risk of injury to the public as at 2022 remained significant and that Dr Subramani did not have prospects of rehabilitation. This factor was said to weigh significantly against a stay.[31]

The effect on third parties

[28] The Judge considered this factor to be neutral.[32] Dr Subramani was providing a resource in a region significantly under-resourced in dentists, particularly those offering after-hours/emergency services. Refusal of a stay would mean that existing patients would need to see another dentist and could experience delays. On the other hand, the Judge noted the need to balance this factor against the risk of harm to

[27] At [46].
[28] At [47].
[29] At [48]–[49].
[30] At [50].
[31] At [52]–[53].
[32] At [57].

patients, and the apparent capacity of Dr Migda (a dentist at Dr Subramani's practice) to assume an increased workload.[33]

Novelty and importance of the question involved

[29] The Judge found there was no novelty in the issues raised on appeal, but significant importance both for Dr Subramani and the regime of professional discipline. He accepted Ms Lane's submission for the Tribunal that disciplinary importance operates in favour of the refusal of a stay. It would not be appropriate to override the Tribunal's clear conclusions leading to cancellation on the basis of limited material and argument on an interlocutory hearing; the appropriate point would be after the substantive appeal hearing.[34]

Public interest in the proceedings

[30] The Judge endorsed the High Court's observation in *Edwards v A Professional Conduct Committee* that there is an inherent public interest in disciplinary proceedings.[35] He stated that as with the previous factor, this leaned slightly in favour of matters being determined following a substantive appeal hearing.[36]

Apparent strength of the appeal

[31] The Judge regarded this factor as neutral. He stated:[37]

> I have regard to the technical nature of the subject matter and the Tribunal's specialist expertise in relation to the matters of penalty it had to determine. I have also had the benefit of considering the reasoning in the Tribunal's 669-paragraph decision. I do not consider the prospects of a successful appeal could be classified as "strong".

Conclusion

[32] On the basis of these factors, the Judge was clearly satisfied that the fair and just outcome was that the cancellation of Dr Subramani's registration not be stayed. He was further satisfied that there was no basis at all for staying the order for the

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33 At [54]–[56].
34 At [58].
35 At [59], citing *Edwards v A Professional Conduct Committee* [2022] NZHC 971 at [36].
36 At [60].
37 At [61].

payment of the fine.[38] The previous stay of the censure, fine and costs order was rescinded.[39]

Approach on appeal

[33] An appeal against refusal to grant a stay is an appeal against the exercise of a discretion.[40] This Court will not interfere with the decision unless it can be shown that the Judge:[41]

(a) made an error of law;

(b) failed to take a relevant consideration into account;

(c) took an irrelevant consideration into account; or

(d) was plainly wrong.

[34] The appeal will be dismissed in any other case.

Discussion

[35] We propose to deal with the relevant factors in the same order as they were addressed by the Judge, incorporating the respective submissions of the parties in relation to each.

Would the right of appeal be rendered nugatory?

[36] As Mr Waalkens responsibly accepted, this is not a case in which the refusal of a stay would render the appeal nugatory. We agree with Osborne J's reasoning on this point. The fine can be refunded if paid. Cancellation and its likely consequences

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38 At [62].

39 At [64].

40 *Tana v Housing New Zealand* [2017] NZHC 1768 at [9]; *Northland Co-Operative Dairy Co Ltd v Jensen* HC Whangarei M2445/91, 21 December 1991 at 3–4; and *New Zealand Insulators Ltd v ABB Ltd* (2006) 18 PRNZ 459 (CA) at [12]–[13].

41 *May v May* (1982) 1 NZFLR 165 (CA) at 170; and *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

are not irreversible or irreparable, nor does any of the evidence adduced by the appellant seriously suggest otherwise.

Bona fides of the applicant

[37] This factor is not in dispute. The applicant is plainly bona fide in bringing and pursuing the appeal.

Would the successful party be injuriously affected by the stay?

[38] Mr Waalkens submits that the Judge was wrong to consider the wider public interest in his discussion of this criterion. He says that injury to the respondent is not a factor that has application in this case. That is because there is no exposure to harm or risk of injury to the Tribunal.

[39] We agree with Osborne J's reasoning. The Judge recognised the conceptual awkwardness of considering issues of public safety and public confidence in the dental profession and its regulatory processes as features which might be considered under this criterion.[42] In our view Mr Waalkens' submission is unnecessarily literal. The criteria in *Yan* are not to be interpreted as rigid, hard-edged rules.[43] They are designed to inform the various considerations which may be relevant to whether a stay in a particular case should be granted. Some may apply. Others may not. They are self-evidently of general application and their utility will necessarily depend on the nature of the case involved.

[40] It follows we do not accept that the Judge erred in importing the statutory overlay in this manner. As observed by Mr Coates for the Tribunal, the jurisdiction is protective. Further, the approach taken by Osborne J is consistent with that taken by Wylie J in *Edwards v A Professional Conduct Committee*, where the Judge accepted counsel for the Committee's submission that in a case where the respondent is not itself affected by any stay, the central question is whether a stay would have an impact on the health and safety of members of the public.[44]

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42 Decision under appeal, above n 5, at [48].
43 *Yan v Mainzeal*, above n 24.
44 *Edwards v A Professional Conduct Committee*, above n 42, at [28]–[31].

[41] That must be correct. The protection of the health and safety of the public by ensuring health practitioners are competent and fit to practise sits at the heart of any such determination. It informs the discussion under several of the accepted stay criteria.

[42] Mr Coates submitted that the statutory regime is of such central importance that it should found the creation of a new criterion, or be added as a rider to that which deals with the public interest in the proceedings. Without minimising the importance of this factor, we do not believe this is a case justifying a change to the well-established principles in *Yan* for the reasons already discussed. The protective purpose of the legislation, here the protection of the public from harm caused by an incompetent dentist, may properly be considered under the present head, that relating to public interest, or as part of the overall assessment of where the balance of convenience lies. The Judge plainly had the statutory objective at front of mind as is apparent not only from his discussion under this head but from the judgment read as a whole.

The effect on third parties

[43] Mr Waalkens submits that if the stay is not granted the collateral damage to third parties will be considerable. Dr Subramani's dental practice will close. Consequentially, patients, staff and the appellant will be disadvantaged. He submits that the High Court was wrong to weigh these effects against the risk of harm to patients. In doing so the Court failed to adequately consider the undisputed evidence of supervision arrangements and erred in relying on the findings of the Tribunal as to the appellant's incompetence and his dismal prospects of rehabilitation.

[44] We accept the impacts of cancellation on Dr Subramani, his practice and his family will be significant. However, we do not consider the Judge erred in balancing these impacts against the risk to the public and assessing this factor as neutral.

[45] In assessing the risk to the public, it was entirely appropriate for the Judge to show deference to the Tribunal's expertise. The Tribunal received and considered all of the evidence. It made formal findings contained in an extremely detailed and comprehensive 669 paragraph decision. The misconduct was not contested.

[46] An interlocutory application for stay is not the appropriate forum to undertake a separate analysis of the appellant's competence or the adequacy of any supervision arrangements. As Mr Coates submitted, to do so would require a highly technical, evidential review of the Tribunal's findings. That is appropriately dealt with by the High Court on the substantive appeal. We wish only to make the following brief observations.

[47] First, despite the significant investment in supervising the appellant, Dr Subramani continues to operate at a significantly sub-optimal level of proficiency. The Tribunal described it as equivalent to that of a second-year dental student. That was as at 2022. Mr Waalkens submits that this assessment was made in respect of work undertaken some five years ago which Dr Subramani accepts was unacceptable. His subsequent supervision by various senior dentists, particularly by Dr Shand, reveals a marked improvement in proficiency, albeit only in basic dentistry. However, both the Tribunal and Osborne J took the evidence of Dr Subramani's supervision into account. We are not in a position, nor is it our role on this appeal, to undertake a detailed analysis of the evidence to determine of the correctness of those conclusions.

[48] Secondly, we do not accept that Dr Subramani's long-term prospects of rehabilitation are encouraging. The Tribunal listed the various dental supervisors who had monitored Dr Subramani's work, including Dr Shand, noting that:[45]

> A practitioner who has had more than 3 years to learn and rehabilitate should not now require ongoing intensive supervision at the level that Dr Subramani has, and further education in order to widen his scope to undertake general dentistry. Despite the fact that he has experienced positive, direct and indirect supervision of about 700 hours over the past 18 months [from] Dr Shand, he still requires further education. The Tribunal concluded that Dr Subramani has done a lot but achieved little.

[49] Relatedly, the Tribunal also referred to evidence which showed that when supervision is removed, Dr Subramani's proficiency levels appear to lapse.[46]

[50] We do not ignore the affidavits of Dr Shand in which he repeats the opinion he expressed in evidence before the Tribunal, namely that Dr Subramani under

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[45] Tribunal decision, above n 1, at [638].
[46] At [625].

supervision continues to practise satisfactorily and without risk to the public. Also in support is an affidavit from Dr Migda who practised for a short period in Dr Subramani's practice before returning to her native Poland. She described how his standards of practice have "substantially" improved and that "he should be entitled to another chance". This evidence does tend to provide support for the claim that Dr Subramani's dental competence may have improved but that is evidence which is more appropriately considered at the substantive hearing for the reasons already given.

[51] Thirdly, we accept Mr Coates' submission that it is difficult to see how the refusal of a stay will cause irreparable harm to the appellant and his wider network. Any such harm must be assessed in the context of his admitted professional misconduct. As for adverse media attention, Dr Subramani's case has already attracted media interest. The stay application itself is unlikely to attract significant interest. The same cannot be said of the substantive appeal.

[52] Finally, while we acknowledge the unfortunate reality that the appellant practises in a region which is underserved by dentists, we question whether permitting Dr Subramani to continue to practise represents a principled response to that deficit. It cannot be overlooked that his professional regulator found he was practising well below an acceptable standard. It determined his prospects of rehabilitation were poor. We also note the updated evidence that Dr Subramani has since been spending some time practising in Christchurch. The relevant considerations in play engage not only the protection of dental patients on the West Coast and Christchurch, but also the protection of the reputation of the dental profession as a whole.

Novelty and importance of the question involved

[53] We do not accept Mr Waalkens' submission that the ongoing supervision of the appellant's practice is a novel factor which marks this case apart from others. The issues raised by the appeal are entirely orthodox. The principles are well settled.

[54] We also agree with the Judge that the importance of the appeal to Dr Subramani and the professional disciplinary regime leans in favour of a stay not being granted. As noted above, an interlocutory hearing is not the appropriate forum in which to

conduct a forensic analysis of the Tribunal's conclusions as to the appellant's competence and the adequacy of any supervision arrangements.

Public interest in the proceedings

[55] The Judge correctly directed himself to the inherent public interest in disciplinary proceedings as observed by the High Court in *Edwards v A Professional Conduct Committee*.[47]

[56] Mr Waalkens submits that there is a strong public interest in not losing a dentist in the West Coast region. We have dealt with this argument above at [52]. In our view the greater public interest lies in protecting the health and safety of the public by ensuring health practitioners are competent and fit to practise.

Apparent strength of the appeal

[57] Finally, we do not consider this is a case where the merits of the proposed appeal are so obvious and so favour the appellant that this factor operates in favour of a stay. Although it will be for the High Court at the substantive appeal to decide, nothing in the material we have reviewed suggests that the prospects of success are strong.

Conclusion

[58] The appellant has failed to persuade us that the Judge erred in law, failed to take a relevant consideration into account, took an irrelevant consideration into account, or was plainly wrong.

[59] Dr Subramani will have a full opportunity to challenge the Tribunal's decision on cancellation when his appeal is heard later this year. In the interim, we are satisfied that a refusal of the stay is the appropriate outcome.

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47 *Edwards v A Professional Conduct Committee*, above n 42, at [36].

Result

[60] The appeal against the refusal to grant a stay is dismissed.

Solicitors:
Wotton + Kearney, Wellington for Appellant
Claro Law, Wellington for Respondent