

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40174/91

MAHONEY JA

Thursday 18 April 1991

KATELARIS v WALTON

JUDGMENT
(MOTION)

MAHONEY JA: On 15 March 1991 the Medical Tribunal of New South Wales ordered that Dr Andrew John Katelaris be suspended from practising medicine for a period of twelve months and directed that thereafter certain restrictions be placed upon him. On 5 April 1991 Dr Katelaris appealed to this Court against the orders which had been made.

On 5 April 1991 Dr Katelaris applied for an order that the orders of the Medical Tribunal be stayed "pending the determination of the appeal". That application came before me on 15 April 1991.

Dr Katelaris has deposed that he wishes "to remain in practice pending the determination of the appeal". The basis of his application is contained in two short paragraphs of his affidavit of 5 April 1991 which read:

"3. Since the decision of the Medical Tribunal I have been unable to continue to be employed in my

previous positions as a medical practitioner with the Central Coast Area Health Service and Health Watch Asthma Clinic at Merrylands. It also prevents me from seeking other similar employment. This is causing me financial hardship.

4. My inability to practise medicine is also causing me professional embarrassment and a disruption to the progression of my medical career."

Dr Katelaris has not placed before the court any evidence to indicate that there is now any person who will offer employment to him. There is no indication whether the Central Coast Area Health Service or the Health Watch Asthma Clinic are, in the light of the orders made by the Medical Tribunal and the reasons given for those orders, willing to offer further employment to him. I note that, in the judgment of the Medical Tribunal, reference is made to "a letter from the Director of the Woy Woy Emergency Medical Services": that letter, it is said, indicates, that there were "no complaints regarding the respondent's conduct during his bi-weekend attendances and patients and staff have expressed compliments and also that the respondent is working towards the completion of his thesis for a Doctorate degree in Medicine as detailed previously".

The application for a stay is opposed by the respondent to the appeal, the Director of the Complaints Unit, Department of Health.

If the stay sought be granted, the result is apt to be that, subject to the matters to which I shall refer, the effect of the suspension ordered by the Medical Tribunal will

be defeated. The suspension was for a period of twelve months. That would, it has been assumed, date from the date of the Tribunal's order, namely, 15 March 1991. In the ordinary course, the appeal would not be heard until the appeal papers had been prepared and an appropriate date for hearing given. This would ordinarily be some months from the present. If the effect of the stay were to defeat the Medical Board's order and the achievement of its purpose in ordering the suspension, that would weigh significantly against the grant of the stay.

It has been suggested for Dr Katelaris that this could be mitigated by the grant of an urgent hearing of the appeal and/or by the making of an appropriate order by this Court at the time of the appeal. The parties suggest that the appeal should be heard as a matter of urgency but, even were such ordered, a delay of some months would occur.

In any application for a stay of this kind, it is relevant to consider the matters to be argued on the appeal and the relevance of them to the orders the effect of which it is sought to stay. The proceeding before the Medical Tribunal followed proceedings by the Professional Standards Committee in relation to the doctor's dealing with drugs of the relevant kind. The present complaints were referred by the Committee to the Tribunal. Before the Tribunal the doctor appeared for himself without legal representation.

The complaint made to the Medical Tribunal was that the doctor "has been guilty of professional misconduct ..." and

the particulars of that misconduct were:

1. Between about July and December 1986 the practitioner administered cocaine to himself on approximately 4 (four) separate occasions.
2. Between about December 1985 and December 1986 the practitioner administered approximately 40 ampoules of morphine to himself.
3. In the early part of 1988 the practitioner administered approximately 20 ampoules of morphine to himself.
4. In July 1988 the practitioner administered pethidine to himself.
5. The practitioner authorised the administration of addiction at various times during the period 30 July 1989 to 7 October 1990 at Woy Woy Hospital without an authority to prescribe drugs of addiction.
6. The practitioner possessed ampoules of Pethidine on 7 October 1990 without an authority to possess drugs of addiction, to wit, Pethidine.
7. The practitioner wrote a prescription for Percodan dated 18 July 1990 when he did not hold an authority from the NSW Department of Health to prescribe drugs of addiction".

Before the Medical Tribunal the doctor formally admitted the matters particularised in pars 1-3 (15 ampoules being admitted in lieu of the 20 ampoules referred to in par 3). He admitted also par 5 (except for the words "without an authority to prescribe drugs of addiction") and pars 6 and 7.

As to par 4, the Medical Tribunal noted that the doctor had, before the Committee on 12 October 1990, "admitted that in June 1988 he had administered pethidine to himself" but claimed, in effect, that he had wrongly done so. The Tribunal recorded that it was "not satisfied to the requisite onus of proof of this particular, even though it has formed the view

that the respondent's recollection of many matters reflects confusion and an unreliability often developed by the respondent's self delusion".

The Medical Tribunal dealt at some length with the matter set forth in par 5 of the particulars and concluded that the doctor either did not believe that he had the authority which was there in question or that "if he is not dishonest in his assertions as to belief, he has at least deliberately deluded himself to fashion his situation to what he wanted, regardless of authority".

The notice of appeal filed by the doctor makes no complaint of the Medical Tribunal's findings in respect of the first three of the paragraphs in the particulars. Complaint is made that the finding of pars 5, 6 and 7 as proved was "erroneous" and that the conduct did not "constitute professional misconduct". And the notice of appeal claims that the order suspending the doctor from practice was "too severe a penalty".

I shall approach the matter upon the basis that the appeal has been brought bona fide for the purpose of contesting the matters set forth in the notice of appeal. If the findings made in respect of pars 1-3 and 5-7 are correct, the professional misconduct involved is of some seriousness. I do not pre-empt the decision of this Court on appeal, but the likelihood of another order being made is a matter to be taken into account. A suspension for a period of twelve months may, I think, be thought less than could have been

ordered. But, of course, the doctor is entitled to have on this the view of the court on appeal. The findings on pars 1-3 alone are, I think, of some seriousness. Without further details of the circumstances, and such detail is not before me on this application, the orders made by the Medical Tribunal do not appear excessive. But, of course, I make no final judgment on that matter. It may be that, when the full facts are before the court on the appeal, a different view may be taken.

I have referred to these matters because the right of a doctor to practice in circumstances such as the present, carrying with it the right to prescribe the relevant drugs, may be abused. It is therefore appropriate that what was said by the Medical Tribunal and the likelihood of success in the appeal be considered. Such matters may be considered only in the light of the evidence as it is before the court on this application. It is sufficient to indicate that, so viewed, there must, I think, be serious doubt as to the likelihood of success on the appeal.

The respondent has, in opposing the application, submitted that if a stay were granted it should be on terms such as: that the doctor inform any employer that his authority to possess and supply drugs of addiction as a medical practitioner have been withdrawn; that he not supply or possess drugs of addiction; and that he inform the Medical Board and the Public Health Services Branch of the Department of Health of the name and address of any such employer. However, the thrust of the submissions made was that

conditions were not likely to be observed by the doctor and that therefore grant of a stay subject to conditions was not appropriate.

In support of this, reference was made without objection in the affidavit of the respondent to the conclusions which have been reached in that regard both by the Committee and by the Medical Tribunal. The Committee had concluded that "the imposition of conditions on the respondent's registration was unlikely to have the desired effect and (that) the respondent was unlikely to adhere to any if they required cooperation on his part". The Medical Tribunal had recorded the conclusion "that the respondent still does not seem to appreciate the gravity of his conduct, ..." and that "he believed he was justified in resisting proper conditions imposed by his experienced professional colleagues".

In ordering the suspension from practice, the Medical Tribunal said:

"A period of time out of practice is appropriate having regard to the conduct and also because the Tribunal believes that time is required for the respondent to reflect upon the necessity to conduct himself in a manner approved by his peers and not merely according to his own opinions of what is right and wrong. The Tribunal has no confidence in the attitude of the respondent towards prescribing drugs at this time and would leave that matter for further review by the Medical Board which can consider the respondent's attitudes at the relevant time. As the ability to fully practice medicine depends so much upon the attitude of the practitioner towards drug use and upon the right to prescribe drugs, the Tribunal has decided to impose a further condition on the right to practice following completion of the suspension period."

As I have said, these matters were referred to in evidence without objection. It may be that this course was taken in order to avoid the necessity and delay of proving the relevant facts in evidence before me. It is not necessary for present purposes to form the conclusion that what was stated by the Committee and the Tribunal was correct: it is sufficient to note that the issues raised by these conclusions are issues upon which, to put the matter no higher, I am not satisfied in favour of the doctor.

I have dealt with the main matters put before me on this application at length because of the significance of a suspension if, in the event, the doctor should succeed in his appeal. In all the circumstances, I am not satisfied that this is a case in which a stay of proceedings should be ordered. I decline to make an order at this time.

It may be that, pending the appeal, circumstances may be shown to have changed sufficiently to warrant the grant of a full or limited stay. On that I express no opinion. If circumstances relevantly change, an appropriate application can be made.

Before disposing of the application it is proper to add that there is before the court no formal application for the expedition of the appeal. Such an application would ordinarily involve conditions as to preparation of appeal papers, payment for appeal books and the like. Both parties have expressed generally the desire to have the appeal dealt with without delay. However, it would not be proper without

hearing the parties further to make formal orders in that regard which might, for example, impose upon the doctor as appellant monetary obligations in respect of appeal books or otherwise. However, this is in my opinion an appeal which may warrant an order for an expedited hearing.

The only order that I make is that the present application be dismissed with costs.

I hereby certify that this and the preceding 3 pages are a true copy of the reasons for judgment herein of His Honour Mr. Justice Mahoney

[Handwritten Signature]

Associate.

Date: 18/12/1991