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IN THE COURT OF APPEAL
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

AC 9 of 2023
(CV 59/2021)

BETWEEN 'ATENISI INSTITUTE
INCORPORATED

Appellant

AND TONGA NATIONAL
QUALIFICATIONS AND ACCREDITATION
BOARD

Respondent

Hearing: 14 August 2023

Court: Blanchard J
Hansen J
Heath J

Appearances: M Horowitz (lay advocate) for Appellant
A Kafoa for Respondent

Judgment: 17 August 2023

JUDGMENT OF THE COURT

The appeal

[1] With leave granted on 3 August 2023, 'Atenisi Institute Incorporated ('Atenisi) appeals against an interlocutory order made by Cooper J, on 3 May 2023, during a case management hearing in the Supreme Court. The appeal arises out of long-running litigation between 'Atenisi and the Tonga National Qualifications and Accreditation Board (the Board). The disputes, which have been aired in three sets of proceedings in the Supreme Court,¹ concern the Board's process of accreditation of certain tertiary courses that 'Atenisi proposes to offer. The accreditation process is governed by Tonga National Qualifications and Accreditation Board Act 2004 (the Act) and the Tonga National Qualifications and Accreditation Regulations 2010 (the Regulations).

¹ See paras [6] and [7] below.

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th.

[2] The orders under appeal permitted the Board to present a defence at the hearing of two preliminary questions that had been identified by Lord Chief Justice Whitten on 28 July 2022,² at a substantive hearing during the week of 25 September 2023.³ 'Atenisi's complaint is that the order allowing participation ought not to have been made given the Board's continued non-compliance with directions made by the Lord Chief Justice on 28 July 2022, for the provision of a statement of response and discovery.⁴ The Board remained in default of those orders at the time of the case management conference on 3 May 2023.

[3] As it happens, the commencement date for the substantive hearing, 25 September 2023, coincides with the first sitting day for the next scheduled Court of Appeal session. Having regard to the history of claims between 'Atenisi and the Board and the need, if possible, to preserve the trial date, it was important that any appeal be heard promptly. As a result, a special Court of Appeal hearing was convened on 14 August 2023 to deal with this appeal.

[4] 'Atenisi argues that the Judge, in making directions for a proposed trial of preliminary issues commencing on 25 September 2023, failed to hear adequately from it given prior indications from the Lord Chief Justice on 28 July 2022,⁵ that it would be difficult for the Board to persuade the Court that it should participate in the substantive hearing, due to its continued default. The Board's position is that the Judge did not fail to comply with the principles of natural justice and that the Board should be allowed to participate in the substantive hearing on the basis of Cooper J's directions.

Background

[5] To provide context for the appeal, it is necessary to refer to earlier proceedings between the parties, and to various procedural hearings held in respect of the present proceeding. In referring to the earlier proceedings, we do not intend to comment (or offer any views) on the decisions made at various times. We are doing no more than providing context for our decision on the present appeal. This Court's leave judgment of 3 August 2023 should be read in the same way.⁶ We emphasise that our summary does not purport to be an exhaustive analysis of the relevant procedural history, and nothing adverse should be taken from our comments, whether in respect of 'Atenisi or the Board.

² Set out at para [9] below.

³ See para [21] below.

⁴ See para [12] below.

⁵ See para [15] below.

⁶ *'Atenisi Institute Incorporated v Tonga National Qualifications and Accreditation Board* AC 9 of 2023 3 August 2023 at para [3]–[5].

[6] Initially, 'Atenisi challenged the applicability of the Act, by which the Board accredits courses of study for tertiary institutions, to it. In a judgment given on 15 October 2019, the Lord Chief Justice held that 'Atenisi was subject to the Act.⁷ That decision was not disturbed on appeal.

[7] In April 2020, 'Atenisi issued a second proceeding. For reasons into which it is unnecessary to go, the claim was dismissed.

[8] Leave to bring the present proceeding by way of judicial review was sought. On 14 January 2022, following a hearing on 25 October 2021, the Lord Chief Justice granted leave to 'Atenisi to bring the judicial review proceeding out of time. More precisely, His Lordship "granted leave [for 'Atenisi] to apply for judicial review by way of *mandamus* requiring [the Board] to process and determine ['Atenisi's] application for accreditation [of certain tertiary courses] according to law".⁸ The Lord Chief Justice also made directions for the filing and service of a Statement of Claim and Statement of Defence. Statements of Claim and Defence have been filed. The Statement of Claim was filed on 31 January 2022, and the Statement of Defence on 18 March 2022.

[9] On 7 July 2022, the Lord Chief Justice considered questions about the composition of the panel that had been appointed to determine the accreditation application. His Lordship directed that 'Atenisi was to file its proposal in relation to the expert panel by 15 July 2022. That proposal was to include the composition of the panel (including the way in which their costs would be met) by reference to the Board's nominations in October 2020. The Board was to file a response to that proposal by 22 July 2022. The proceeding was adjourned for further mention on 28 July 2022.

[10] The proceeding came before Lord Chief Justice Whitten for the purpose of case management on 28 July 2022. His Lordship recorded that the parties had not been able to resolve their differences "in relation to the composition of the expert panel or payment of the costs of the panel". He decided that preliminary issues should be determined, with the balance of the claim remaining for decision later.

⁷ *'Atenisi Institute Incorporated v Tonga National Qualifications and Accreditation Board* [2019] TOSC 45, at paras 278–280.

⁸ *'Atenisi Institute Incorporated v Tonga National Qualifications and Accreditation Board* [2022] TOSC 2 at para 20.

[11] Given the competing approaches taken to the composition of the panel, the first preliminary issue concerned the question whether proposed panel members were appropriate appointees, having regard to allegations of apparent bias and lack of competence. The second concerned the period over which an assessment should be undertaken. The Lord Chief Justice directed the following two preliminary issues to be tried separately:

- (a) Whether the inclusion in the expert panel of Dr Ana Taufeu lungaki, Dr Ungatea Kata, Dr Tangikina Steen and Dr Robin Havea, or any of them, as proposed by the Board, was unlawful by reason of:
 - (i) apprehended bias; and/or
 - (ii) inadequate or inappropriate qualifications, thereby constituting a breach by the Board of an alleged recognised custom when appointing external experts, for the purposes of regulation 18(3) of the Tonga National Qualifications and Accreditation Regulations;
- (b) Whether the Board's assessment of 'Atenisi's application for accreditation was to be confined to 'Atenisi's courses and operations during the period from 2014 to 2019.

[12] After making those orders, the Lord Chief Justice proceeded to issue timetabling directions, in respect of the preliminary issues only, in the following terms:

1. ['Atenisi] is to file a notice stating its position and grounds by 12 August 2022.
2. The [Board] is to file a notice of response and grounds by 26 August 2022.
3. ['Atenisi] is to file any notice of reply by 2 September 2022.
4. Discovery of documents relevant to the preliminary issues is to be completed by 9 September 2022.
5. Inspection of discovered document is to be completed by 16 September 2022.
6. ['Atenisi] is to file any further affidavits or outlines of evidence expected to be given by any witnesses attending pursuant to subpoena by 30 September 2022.
7. The [Board] is to file any affidavits upon which it intends to rely by 14 October 2022.
8. Notices of deponents required for cross-examination at trial are to be filed by 28 October 2022.

9. A trial of the preliminary issues will commence on 21 November 2022 on an estimate of three days.

[13] 'Atenisi complied with the order that it provide a notice stating its position and grounds. It also requested discovery of certain documents from the Board, by letter dated 18 August 2022.⁹ For reasons that follow, although required to file a notice of response by 26 August 2022 and complete discovery by 9 September 2022, the Board did not comply until 12 July 2023, nearly a year after compliance was due.

[14] Throughout the various proceedings, 'Atenisi has been represented by a lay advocate, Dr Horowitz. At times, during procedural conferences, there had been robust debate between Dr Horowitz and the Lord Chief Justice. On 7 September 2022, Whitten LCJ decided to recuse himself and directed that the proceeding be assigned to Tupou J. Subsequently, it became clear that Tupou J, herself, had a conflict, having previously acted for 'Atenisi in relation to part of the dispute with the Board. As a result of Tupou J's conflict, the Lord Chief Justice (without objection from the parties), presided over a further procedural hearing on 14 October 2022, at which time he assigned the proceeding to Cooper J.

[15] During the course of the 14 October hearing, there was an exchange between Dr Horowitz and the Lord Chief Justice about the Board's non-compliance with the earlier timetabling directions, and the need for 'Atenisi to provide briefs of evidence notwithstanding that default. Dr Horowitz was concerned that, if briefs were provided, counsel for the Board would seek to appear later and take 'Atenisi by surprise. The Lord Chief Justice observed, during the course of argument (at which Mr Tu'utafaiva is recorded as representing the Board) but not in his formal decision:

... if [Mr Tu'utafaiva, then counsel for the Board] didn't file a notice of response and grounds by 26 August then you are entitled to proceed on the basis there is no response or grounds for opposition. And you continue on with the timetable.

...

You need to prove your position on. Now whether or not that involves any participation by [the Board] at that hearing is yet to be seen but if [counsel for the Board] would come along today or some point in the future and say well I'm sorry we've been late we want another go, he might have a hard time to explain to the court given that further indulgence particularly given the procedural history of these matters where that has been repeated default by [the Board] in complying with direction timetable.

⁹ See para [31] below.

[16] Further procedural progress was stalled by an objection that 'Atenisi raised about Cooper J's role as the assigned judge. On 'Atenisi's application, Cooper J declined to recuse himself. In a judgment given on 6 April 2023, the Court of Appeal dismissed an appeal from that decision.¹⁰ Cooper J remains the assigned Judge.

[17] In giving judgment, the Court of Appeal referred expressly to concerns expressed by Dr Horowitz about the Board's failure to comply with previous timetabling directions and emphasised the need for "firm case management" of the proceeding to trial. The Court of Appeal concluded its judgment of 6 April 2023 by observing:¹¹

[47] *Dr Horowitz submitted that after nearly five years of prosecution and four attempts by three of its advocates to settle the matter, 'Atenisi's enrolment and solvency was in jeopardy. He pointed out that the Court below had admonished the [Board] for repeatedly defaulting or filing proceedings out of time and submitted that this Court retained a discretion to impose a remedy based on a review of the prima facie record. He maintained that 'Atenisi merited accreditation in December 2017 based on its compliance with the relevant legislation and prima facie evidence of its academic performance over the period February 2014 to October 2017. Issues of costs and damages were also canvassed.*

[48] *We understand 'Atenisi's frustration with the progress of this litigation. There has undoubtedly been delay attributable to the [Board] but 'Atenisi must accept that there can be no substantive resolution while its challenge to the membership of the accreditation panel and its scope remain outstanding. The determination of those preliminary issues was correctly identified and directed by the Lord Chief Justice on 28 July 2022 yet matters continue to be delayed by issues such as the challenges raised in this appeal.*

[49] *This matter requires firm management by the trial Judge and a willingness by both sides to grapple with the real issues.*

(Emphasis added)

[18] The proceeding came before Cooper J for case management purposes on 3 May 2023, less than one month after the Court of Appeal judgment had been given. By this stage, the Board remained in default of the orders that Whitten LCJ had made against it on 28 July 2022.¹² For the first time in this proceeding, Ms Kafoa (rather than Mr Tu'utafaiva) appeared for the Board. Ms Kafoa laid the fault for the Board's failure to comply with the earlier timetabling orders firmly at the feet of its former counsel, Mr Tu'utafaiva. However, there was

¹⁰ 'Atenisi Institute Incorporated v Tonga National Qualifications and Accreditation Board [2023] TOCA 11.

¹¹ Ibid, at paras [47]-[49].

¹² See para [12] above.

no evidence before Cooper J to substantiate that assertion or, indeed, to indicate what steps had been taken by the Board to oversee Mr Tu'utafaiva's carriage of the proceeding.¹³

[19] Relying on the Lord Chief Justice's 14 October remarks,¹⁴ Dr Horowitz submitted to Cooper J that 'Atenisi should be entitled to proceed to trial without participation on the part of the Board. Notwithstanding that submission, Cooper J decided that it would be unfair to prevent the Board from participating fully at a substantive hearing that he scheduled to commence on 25 September 2023.

[20] In his "Record on Mention" of the 3 May 2023 hearing, Cooper J recorded:

...

2. [The Board is] now being represented by Miss Kafoa who was only very recently instructed and requested a month to prepare and comply with the directions. Dr Horowitz had no observations about that, so that request was granted.

Directions:

3. [The Board is] ordered to respond to ['Atenisi's] position statement of **9th August 2022** and also to respond to ['Atenisi's] disclosure requests dated **18th August 2022** no later than **31st May 2023** 1600 hrs e and hard copy.
4. Trial to be listed **25th September** 1000 hrs for 1 week.
5. The Court acknowledges ['Atenisi's] opposition to the defence participation. Yet, on being informed that the lack of compliance with previous directions was due to Mr Tu'utafaiva's failures in his representation. That being so it would be unfair to deprive [the Board] of the ability put forward their case in reply as lack of compliance has not been the fault of [the Board]. I therefore rule the trial must proceed with [the Board] allowed to participate.

...

[21] In making those orders, Cooper J did not embark upon any form of "interests of justice" inquiry to ascertain the extent to which it might be necessary to allow the Board's participation

¹³ It appears that some judicial notice may have been taken of a judgment of Whitten LCJ in the course of a professional misconduct proceeding against Mr Tu'utafaiva: *Re Tu'utafaiva* [2023] TOSC 26 (26 April 2023).

¹⁴ See para [15] above.

on terms that would meet any material prejudice that 'Atenisi might otherwise suffer in relation to its trial preparation.

Analysis: the natural justice point

[22] This Court, in a Minute issued on the application for leave to appeal, sought evidence from the Board which, if the Court were satisfied leave to appeal should be granted, would assist in informing what decisions should be made on appeal. These directions were designed to secure compliance with those made by Cooper J on 3 May 2023. The Board had opted not to file and serve those documents once an appeal was filed on 29 May 2023. They were also framed to obtain proper evidence about the reasons why the Board had not complied with the Supreme Court's orders of 28 July 2022. In that Minute, Heath J, for the Court, said:¹⁵

[8] I make the following directions:

- (a) On or before 5 July 2023, the Board shall file and serve its response to 'Atenisi's statement of position of 9 August 2022 and its disclosure request of 18 August 2022, both electronically and in hard copy form. This requires compliance with the orders made by Cooper J on 3 May 2023, with a short extension of time to reflect the period after which the leave application was filed.
- (b) On or before 5 July 2023, the Board shall file and serve affidavits from Mr Tu'utafaiva and an authorised representative of the Board providing a particularised explanation of why the various orders were not complied with and, in the case of the Board's representative, what active steps were taken to ensure that compliance was made with the orders.

[9] Compliance with the order set out at para [8](a) above is required to enable me to understand the way in which the Board intends to run its case and to assess whether active participation at this late stage will cause material prejudice to 'Atenisi. It is conceivable that any material prejudice might justify either excluding the Board from the substantive hearing or requiring its participation to be on terms as to any costs and expenses that 'Atenisi might now be required to incur; or to compensate for any wasted costs and expenses to date. Those are the points I wish counsel to consider.

[10] Compliance with the order set out at para [8](b) above is required to enable a judgment to be made on whether the Board took proper steps to ensure that the Court's orders were met. The mere fact that counsel has not undertaken instructions in the manner expected does not necessarily absolve the client from responsibility for non-compliance, particularly when viewed in the context of prejudice caused to an opposing party by the error.

¹⁵ *'Atenisi Institute Incorporated v Tonga National Qualifications and Accreditation Board* Minute of Heath J, 28 June 2023 at paras [8]–[10].

[23] As a result of those orders, the Board filed and served its response to 'Atenisi's statement of position on 12 July 2023.¹⁶ The Board's response to the disclosure request was made on the same day, through an affidavit of its Chief Executive Officer, Dr Opeti Pulotu. An affidavit was also filed by the Board's former counsel, Mr Tu'utafaiva.

[24] Both Dr Pulotu and Mr Tu'utafaiva sought to explain non-compliance with the directions made by the Lord Chief Justice on 28 July 2022. Our assessment is that fault can be attributed to both Mr Tu'utafaiva (for not keeping his client informed of developments) and the Board itself (for failing to oversee progress with the proceeding). It is unnecessary for us to allocate responsibility for the fault between the Board and its counsel. For all practical purposes, counsel's fault equates to the Board's fault.

[25] We have sympathy for a first instance judge required to conduct a case management hearing in the course of a busy list, and in respect of a proceeding with an extensive history, particularly when one party is not represented by counsel and the other has only just instructed new counsel to represent its interests. The situation in which the Judge found himself was particularly difficult because of the need to timetable the proceeding for a prompt hearing on the preliminary questions, in circumstances where the Board was seeking to participate fully in a trial yet remained in default of orders made on 28 July 2022.

[26] Faced with that situation, the Judge, understandably, was anxious to ensure that a public body such as the Board was not prevented from defending proceedings against it. Serious allegations were being made about apparent bias on the part of those appointed to make accreditation decisions, and their competence to undertake that task. But, given the importance of the issues to it, 'Atenisi's situation ought also to have been weighed in the balance before any directions were made. The genuineness and cogency of 'Atenisi's concerns are reflected in the Court of Appeal's judgment on the recusal issue, given on 6 April 2023.¹⁷

[27] In our view, the Judge ought to have made inquiries about what material prejudice might be caused to 'Atenisi in the event that the Board was permitted to participate fully despite remaining in default of the Lord Chief Justice's orders of 28 July 2022, and to have conducted

¹⁶ A short extension of time was allowed because, due to an oversight in the Court registry, the Minute of 26 June 2023 was not made available to counsel until 4 July 2023.

¹⁷ *'Atenisi Institute Incorporated v Tonga National Qualifications and Accreditation Board* [2023] TOCA 11 at para [48], set out at para [17] above.

an inquiry into what orders would best meet the overall interests of justice. It is axiomatic that both parties to a Court proceeding are entitled to a fair trial.

[28] By not making inquiries of potential material prejudice on the part of 'Atenisi, no relevant information could be obtained. The requirement to conduct an "interests of justice" inquiry was all the more acute because of the need to ensure that Dr Horowitz, as a lay advocate, understood the reason for the inquiry, what information was needed, and why it was being sought. We note that, during the course of the hearing before Cooper J, Dr Horowitz had mentioned difficulties in gathering and marshalling evidence in circumstances where 'Atenisi had no real idea of what any witnesses to be called by the Board might say. Further, we observe (without making any criticism of her) that Ms Kafoa did not have a sufficient background of the case (or instructions) at that stage to be able to respond adequately to questions that may have been asked by the Judge.

[29] Although not a perfect analogy (because it deals with a without notice order), we refer to a decision of the High Court of New Zealand in *Skelton v Family Court at Hamilton*.¹⁸ In that case, in the context of a child abduction, the Principal Family Court Judge made a without notice order that certain proceedings in the Family Court that were normally of a confidential nature be published in the media. The order was made without hearing from either of the child's parents, in circumstances where the Family Court had already made adverse credibility findings about someone likely to face trial on a charge arising out of those events. The High Court held that fair trial concerns could not have been adequately addressed without an opportunity for both parties to be heard on relevant issues.¹⁹ The analogy lies in the fact that *Skelton* involved a Judge-initiated order on which no submissions were solicited by the Judge. Here, Cooper J determined to make orders without obtaining evidence about whether Mr Tu'utafaiva could be regarded as wholly responsible for the Board's non-compliance and without seeking submissions from Dr Horowitz on questions of material prejudice. Although Dr Horowitz was present and had a right to be heard, in the particular circumstances of this case it was necessary for the Judge to identify the issues on which submissions were required from him about potential prejudice to 'Atenisi.

[30] For those reasons, we consider that the Judge erred and that the appeal should be allowed.

¹⁸ *Skelton v Family Court at Hamilton* [2007] 3 NZLR 368 (HC).

¹⁹ *Ibid*, at paras [91], [101] and [105].

Discovery

[31] In a letter dated 18 August 2022, Dr Horowitz, on behalf of 'Atenisi, made the following request for discovery pursuant to Whitten LCJ's directions of 28 July 2022:

1. In re: [The Board's] Board of Directors

abridged resumes (i.e., page-long mini-CVs) of each member of the Board, at least containing positions of employment held since 2017, tertiary academic degrees, and leading publications, if any.
2. In re: Members of the [Board's] Appointed Review Panel poised to assess ['Atenisi's] Application for Accreditation

abridged resumes (i.e., page-long mini-CVs) of each appointed member of the Panel, at least containing positions of employment (including co-temporal government offices) held since 2010, tertiary academic degrees, and leading publications, if any.
3. In re: Putative Member of the [Board's] Staff in August 2018

The staff position of Kisione Manu in August 2018 or confirmation that he was alternatively a contractor representing the [Board].
4. In re: [the Board's] three Approval Record Books [ARBs] regarding ['Atenisi] issued in 2020

The name and title of each staff or contracted commentator of/by the [Board] whose remarks appear anonymously in said Books.
5. In re: one of the accredited programmes of Christ's University in Pacific, in order of the following preference:
 - a. an undergraduate programme in the discipline or any sub-discipline of secular philosophy; or
 - b. an undergraduate programme in "General Studies" or the "Arts"; or
 - c. an undergraduate programme in "Science" or its advertised sub-discipline of mathematics.
The controlling iteration of the ARB regarding said programme that was referred for assessment to a review panel appointed by the [Board].

[32] In his affidavit of 12 July 2023, Dr Pulotu provided an explanation as to why not all discovery sought by 'Atenisi had been provided. At para 6 of his affidavit, he deposed:

6. In respect of the matters ['Atenisi] is seeking [discovery] of, as contained in its letter dated 18 August 2022 *relating to the qualifications* of:

- a. [The Board's] Board of Directors;
- b. [The Board's] Appointed Review Panel member;
- c. Staff position of Kisione Manu;
- d. Names and title of staff whose remarks appear in the Approval Record Book; and
- e. Information regarding the accredited programmes of Christ University in Pacific

[the Board] opposes the disclosure of those information as they are privileged information.

(Emphasis added)

[33] Dr Pulotu exhibited to his affidavit a schedule of information that the Board was prepared to provide. The information contained in that schedule comprised:

- (a) The names of each of the Board's Board of Directors in 2017 and their then official position or employment;
- (b) The names of each of the Board's Board of Directors at the present time, including their official positions or employment;
- (c) The names of the panel appointed by the Board and their respective current positions. (Of interest is the fact that Dr Robin Havea has been omitted from that list and replaced by Dr Lesieli Tongatio);²⁰
- (d) Mr Kisione Manu's current employment;
- (e) The names and positions held by the analysts completed the first, second and third Approved Record Books; Ms Pauline Moa conducted the first two and Mr Manu the third.

²⁰

Dr Havea's name appears in the preliminary questions orders made by the Lord Chief Justice on 28 July 2022, but Dr Tongatio's does not: see para [10] above. See our directions at para [49](c)(i) and (ii) below.

[34] In determining the relevance of the requested documents, it is necessary to consider the functions of both the Board and the review panel as part of the overall accreditation process. Regulation 18 of the Regulations states:

18 Granting accreditation

(1) The Board shall –

- (a) grant accreditation for specified courses of study and short courses for a specified period provided that at the end of that period an application for review shall be made to the Board; and
- (b) require the Chief Executive Officer to evaluate any application made to it, conduct such verification of the contents of the application, including a site visit if deemed necessary, and duly report to it the level of compliance with the quality standards set for accreditation.

(2) The Board may grant accreditation when the applicant for accreditation meets the quality standards specified in Schedule C.

(3) The Board may enlist the assistance of such industry or subject experts as necessary to determine the capacity of the applicant to deliver the course of study and short courses.

(4) The applicant shall be informed of the involvement of specific industry or subject experts in the consideration of an application for accreditation.

(5) Accreditation shall be granted for specified courses of study and short courses subject to conditions imposed by the Board.

(6) In the event that an application for accreditation is not granted, the notification to the applicant shall include reasons.

[35] We inquired of Dr Horowitz about the relevance of the information that the Board had declined to provide to determine whether an order was required that further documents or information be made available to 'Atenisi. Dr Horowitz took the view that further information about Board and panel members was required to enable a proper assessment to be made of the other roles that they hold (which may create a conflict of interest) and their qualifications to assess 'Atenisi's application. As to the latter, Dr Horowitz sought information about the panel members' academic history; in particular their main publications, the University from which they gained their PhDs and any senior Government positions held.

[36] In its letter of 18 August 2022, 'Atenisi also sought information about accredited programmes of Christ's University in the Pacific. Dr Pulotu, on behalf of the Board, objected

to provision of this material on grounds of privilege. In the schedule to his affidavit, Dr Pulotu said that 'Atenisi either needed to request that information directly from Christ's University or the Board had to obtain permission from it to release the requested evidence. Dr Pulotu did not suggest that the information sought is not in the possession or control of the Board. In relation to the Christ's University issue, Dr Horowitz stated that its relevance lay in the mix of the panel assembled to conduct that university's assessment and the way in which it was undertaken.

[37] We consider that 'Atenisi is entitled to the type of discovery sought in relation only to the appointed panel members. Regulation 18(1) and (3)²¹ makes it clear that, while the Board has decision-making power to accredit, the panel is appointed to assist in determining the "capacity" of an applicant "to deliver the relevant course of study". To undertake that assessment, the panel must be drawn from "industry or subject experts". Accordingly, the type of information sought by 'Atenisi in para 2 of its letter of 18 August 2022,²² is relevant to an assessment of each panel member's qualification as an "industry or subject expert".

[38] We do not consider that the same information needs to be disclosed in relation to the Board of Directors. The preliminary question ordered by Whitten LCJ (in relation to apparent bias and competence) is referable solely to panel members. No issue arises at the preliminary question stage of this proceeding as to whether members of the Board's Board of Directors are similarly tainted.

[39] Ms Kafoa acknowledged that a document could be collated dealing with the professional history of members of the expert panel, as well as information about their publications and the senior Government positions they held or hold during the period from 2017 to the present time. We consider that information is properly disclosable to 'Atenisi. It goes to a fundamental question: whether the panel members have appropriate qualifications to make decisions under reg 18(3) of the Regulations²³ about "the capacity of ['Atenisi] to deliver" the relevant course of study. We direct that the summary to be provided by Ms Kafoa should include all information requested in para 2 of 'Atenisi's letter of 18 August 2022.²⁴

[40] While the information about the review for Christ's University is more marginal, we accept that it may be relevant to the way in which 'Atenisi intends to run its case on bias and

²¹ Set out at para [34] above.

²² Set out at para [31] above.

²³ See para [34] above.

²⁴ See para [31] above. See our direction at para [49](c)(iii) below.

qualifications. We do not consider any of this information is privileged or confidential. It would not seem that general information about the nature of programmes to be delivered by Christ's University in Pacific could properly be treated by the Board as privileged or confidential. We direct that all of this information be supplied to 'Atenisi, in terms of the request set out in para 5 of 'Atenisi's letter of 18 August 2022.²⁵

Consequential directions

[41] We are aware that, for good reasons, Cooper J is unable to deal promptly with the question of what substituted orders should be made. Neither Whitten LCJ nor Tupou J can deal with those questions because both are disqualified. As a result, having heard from the parties, we propose to make consequential directions ourselves. This approach should not be regarded as a universal precedent, as the usual course would be to remit to the case management judge for reconsideration.

[42] On the basis of the preliminary questions, there appear to be two material issues that the Judge will need to determine:²⁶

- (a) Were all or any of Dr Ana Taufeulungaki, Dr Ungatea Kata, Dr Tangikina Steen and Dr Robin Havea disqualified from acting as a member of the panel of experts due to apparent bias or inadequate qualifications.
- (b) Over what period should the Board assess 'Atenisi's application for accreditation.

[43] Dr Horowitz acknowledged that 'Atenisi's case on the preliminary questions can be conducted on the basis of affidavits, written briefs of evidence and exhibits produced to date from Dr Tima Smith (National President of the Tertiary Education Union in New Zealand), Dr Allan Botica (a principal of a public relations consultancy in New Zealand), Mr Kalafi Moala (among other things, a lecturer in investigative journalism at the Tonga Institute of Higher Education) and Dr David Eubanks (an academic from the United States of America who has reviewed 'Atenisi's course offerings after perusing its Approval Record Books of May, June and September 2020, issued by the Board). Ms Kafoa indicated that the Board wished to cross-examine Dr Smith, but no other witness.

²⁵ Set out at para [31] above. See our direction at para [49](c)(iii) below.

²⁶ Subject to clarification as to Dr Robin Havea's position.

[44] We asked Ms Kafoa whether the Board intended to adduce any further evidence on the preliminary questions. We made it clear that we were concerned about material prejudice to 'Atenisi if further evidence were adduced by the Board both after it had been in default of timetabling orders for so long and in such close proximity to the proposed trial of the preliminary questions. Ms Kafoa, after some discussion, confirmed that the Board's evidence would be confined to two affidavits that Dr Pulotu swore, in June 2022 and July 2023 respectively, both of which have been made available to 'Atenisi. No request was made for Dr Pulotu to be called for cross-examination.

[45] We have given consideration to whether the Board should be entitled to have Dr Smith called for cross-examination. The usual rule, in judicial review proceedings, is that no cross-examination is permitted. In *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd*,²⁷ Richardson P, for the New Zealand Court of Appeal, put the position in this way:

Cross-examination: the practice in judicial review proceedings

It is well settled as a desirable practice that cross-examination is not permitted as of right in judicial review proceedings. ...

... In *Attorney-General v Air New Zealand Ltd* (1991) 4 PRNZ 1, 2 where cross-examination of Ministers was again the issue, the Court repeated that Ministers are not to be cross-examined unless it is clearly necessary to enable the case to be disposed of fairly; described it as a rule of practice; and noted that the Court retained power to permit cross-examination. *And the practice in New Zealand in refusing cross-examination except where it is shown that the justice of the case requires otherwise is consistent with the practice in the United Kingdom* as stated in de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) p 672, para 15-034:

“Although the court has a discretion to order cross-examination, unlike in other proceedings cross-examination is used not as a matter of course. Rarely has cross-examination of deponents on their affidavit evidence been ordered. Cross-examination may be appropriate where there is a conflict of evidence or where the applicant alleges that a precedent fact to the making of a decision did not exist. But cross-examination is only exercised when justice so demands.”

(Emphasis added)

[46] As *Roussel* makes clear, the presumptive position can be reversed if circumstances so demand. In each case, where cross-examination is sought, the party wishing to cross-

²⁷ *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA) at 656-657.

examine must persuade a Judge that there is a fact or opinion in issue that can only be tested properly through cross-examination. In our view, it is important for the Board to explore evidence from Dr Smith about the way in which a review of this type would ordinarily be conducted, as a matter of practice. We give leave for Dr Smith to be cross-examined at the hearing.

[47] Ms Kafoa confirmed that the Board did not require Dr Smith to be present in person for cross-examination. The cross-examination will take place by audio-visual link. It will be for Dr Horowitz (or some other person on 'Atenisi's behalf) to make contact with Dr Smith to ascertain availability on 25 September 2023 to give evidence from New Zealand, or wherever else she may be. Once it has been ascertained that she is available on that day (or later in that week), a representative of the Board must make arrangements for an audio-visual link to the Court from a suitable venue, with the evidence to be taken in a manner to be approved by Cooper J. We do not expect cross-examination to take more than two hours, at most.

[48] The Board shall pay all costs and disbursements relating to the establishment of the audio-visual link and the presence of Dr Smith to give evidence. That order is made to mark the Board's failure to comply with timetabling orders. Had they complied much earlier, neither the Supreme Court nor we would have been troubled with trial arrangements of this type.

Result

[49] For the reasons given:

- (a) The appeal is allowed.
- (b) The orders made by Cooper J on 3 May 2023²⁸ are set aside.
- (c) In substitution, the following directions are made:
 - (i) On or before 19 August 2023, the Board shall file and serve a memorandum advising whether Dr Havea remains a member of its proposed panel, and whether Dr Tongatio has replaced Dr Havea or has been appointed as an additional member of the panel.²⁹

²⁸ Set out at para [9] above.

²⁹ See para [33](c) above.

- (ii) If the Board were to advise that Dr Tongatio has been added to the panel, the Board shall, on or before 19 August 2023, provide to 'Atenisi the information sought in para 2 of 'Atenisi's letter to the Board of 18 August 2022³⁰ in respect of Dr Tongatio. In response, 'Atenisi shall file and serve a memorandum on or before 22 August 2023 to advise whether any challenge is made to Dr Tongatio's appointment, and if so, on what grounds.
- (iii) Remaining discovery shall be filed and served on or before 25 August 2023.³¹
- (iv) All documents disclosed or information required by way of remaining discovery shall be filed and treated as evidence for the purposes of the preliminary question hearing, without the need for any affidavit to be filed to produce it.
- (v) The preliminary hearing will proceed on the following basis:
1. The evidence in chief on behalf of 'Atenisi shall be limited to the affidavits, written statements and exhibits filed to date from Dr Smith, Dr Botica, Mr Moala and Dr Eubanks.³²
 2. Dr Smith shall be made available for cross-examination on her written evidence.³³
 3. Dr Horowitz and Ms Kafoa shall co-operate to prepare and file a bundle of all documents to which the Court will be referred at the 25 September 2023 hearing, including written evidence and exhibits from all witnesses. That bundle shall be filed on or before 8 September 2023.
- (vi) Written openings shall be filed and served:

³⁰ See para [31] above.

³¹ See paras [39] and [40] above.

³² See para [43] above.

³³ See paras [47] and [48] above.

1. By Dr Horowitz, for 'Atenisi, on or before 15 September 2023;
 2. Ms Kafoa, for the Board, on or before 21 September 2023.
- (d) The trial will commence in the Supreme Court at 10.00am on 25 September 2023.
- (e) Leave to apply to Cooper J is reserved in the event of any unforeseen difficulties arising.

[50] Any applications to Cooper J under leave reserved will be limited to those strictly necessary to progress preparation for trial. We expect Cooper J to deal with any such applications in a manner consistent with what we have said in this judgment.

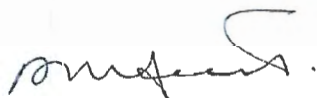
[51] Although 'Atenisi's appeal has been successful, it is not entitled to the benefit of an order for costs because it is represented by a lay person. However, it is entitled to recover all disbursements associated with preparation for and prosecution of the appeal from the date on which the application for leave to appeal was filed. Those costs shall be fixed by the Registrar and paid to 'Atenisi by the Board on or before 8 September 2023.



Blanchard JA



Hansen JA



Heath JA

