

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2012-404-3787
[2012] NZHC 3140**

UNDER the Judicature Act 1908

IN THE MATTER OF an application under Part 3, Sub-Part 2 of
the High Court Rules for access to
specified Court documents

BETWEEN THE NATIONAL STANDARDS
COMMITTEE (NO 1)
First Applicant

AND THE AUCKLAND STANDARDS
COMMITTEE (NO 1)
Second Applicant

AND THE NEW ZEALAND LAW SOCIETY
Third Applicant

AND EVGENY ORLOV
Respondent

Hearing: 22 November 2012

Counsel: W C Pyke for Applicants
E Orlov in Person

Judgment: 23 November 2012

**JUDGMENT OF KATZ J
[Stay application]**

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 2 p.m. on 23 November 2012.

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Introduction

[1] The applicants (“Law Society”) filed an originating application under r 3.13 of the High Court Rules for an order allowing them to review and copy documents from 10 court files (“Court Files”). Each of the Court Files relate to a matter in which Mr Orlov (who is a barrister) had represented one of the parties. I granted the Law Society’s application in a judgment dated 6 November 2012 (“Judgment”).

[2] Mr Orlov has filed an appeal in respect of the Judgment and accordingly seeks a stay under r 20.10 of the High Court Rules, pending the outcome of his appeal.

The Judgment under appeal

[3] The Judgment took a “staged” approach to the Law Society’s application. This was largely to ensure that if any privacy or confidentiality concerns arose, the Court could ensure they were appropriately addressed. The particular privacy and confidentiality concerns in issue related to the 35 parties to the 10 underlying substantive proceedings, rather than to Mr Orlov in his capacity as counsel. The approach taken was set out at [47] of the Judgment, in the following terms:

[47] In particular, to ensure that privacy and confidentiality interests are appropriately protected I intend to approach the matter in two stages. The Law Society will be permitted to *access* the Court Files on a confidential basis for the purposes of its investigations, and copy any relevant documents. However, if the Law Society wishes to *use* any documents it has obtained from the Court Files as evidence in proceedings before the Tribunal or this Court it is to provide a copy of the relevant documents to the Court (and Mr Orlov) and seek further directions. If any specific privacy or confidentiality issues arise, appropriate orders will be made at that stage. The issue of service on any particular third parties can also be addressed further at that stage, if the need arises.

[4] Reflecting this approach, the following orders made were made:

- (a) The applicants are permitted to inspect the files listed in the Annexure.

- (b) The applicants are permitted to copy any documents on those files (other than privileged documents). Any such copies (“Copy Documents”) must be kept confidential to the applicants and their professional advisers and used only for the purposes of the applicants’ investigations or inquiries regarding the respondent.
- (c) If the applicants wish to use any Copy Documents as evidence in proceedings before the Lawyers and Conveyancer’s Disciplinary Tribunal or this Court, the applicants must provide this Court and the respondent with copies of the relevant Copy Documents and seek further directions as to how any confidentiality or privacy issues which arise in relation to such documents are to be addressed.
- (d) Leave is reserved to either party to seek further directions regarding the implementation of these orders, if the need arises.

Grounds for Mr Orlov’s stay application

[5] The grounds on which a stay pending appeal is sought are set out in the stay application as follows:

- (a) Mr Orlov’s rights will be rendered nugatory if the Judgment is not stayed;
- (b) the issues raised by the appeal are novel and important and involve rights of lawyers and privacy interests of parties;
- (c) the Law Society will not be prejudiced by a stay;
- (d) there is high public interest in determining the matters on appeal;
- (e) the overall balance of convenience favours Mr Orlov;

- (f) the strength of the appeal is high and involves determinations of fundamental human rights.

[6] Mr Orlov's supporting affidavit notes his concern that if a stay is not granted and his appeal is successful, the Law Society will in the interim obtain the files and then "go fishing through the files so that they can start further Own Motion prosecutions or possibly utilise this in an application to strike me off". Mr Orlov is concerned that once the Law Society has the documents "there will be no remedy to stop them and therefore my appeal will be rendered nugatory".

Law Society's opposition

[7] The Law Society opposes the application on the following grounds:

- (a) the appeal does not raise any issues that are novel or of wider public importance;
- (b) the delay pending appeal will frustrate the expeditious conduct of disciplinary inquiries and proceedings under the Lawyers and Conveyancers Act 2006;
- (c) the appeal lacks merit and largely seeks to challenge findings of fact without articulating the nature of the alleged errors;
- (d) the balance of convenience favours a refusal of stay.

[8] Notwithstanding its opposition, the Law Society suggested that the Court could make orders (which it would consent to) enabling the Law Society to access, inspect and copy the relevant Court files, but defer the question of any stay pending appeal to the point at which "the applicants signal a desire to produce the documents inspected in evidence in a proceeding".

Discussion

[9] The general rule is that a party is entitled to enjoy the fruits of a judgment in its favour. A party seeking a stay will usually have to establish that its appeal rights would be rendered nugatory if a stay is not granted.¹ In exercising its discretion as to whether to grant a stay the Court needs to engage in a balancing exercise, weighing up the position of both parties.²

[10] In my view little or no prejudice to Mr Orlov will arise solely as a result of the Law Society *accessing* the Court Files and reviewing them as part of its ongoing investigation. Any meaningful prejudice will only (potentially) arise if the Law Society was to *use* such material as evidence in disciplinary proceedings against Mr Orlov. They currently have no automatic right to do so. If they wish to use any documents from the Court Files in disciplinary proceedings they must provide the Court and Mr Orlov with copies of such documents and seek further directions in relation to them, as set out in the Judgment.

[11] Mr Orlov submitted that prejudice will arise solely from *access* to the relevant documents as opposed to their *use*. In particular, his privacy will be invaded by having the Law Society “trawl through” the various Court Files trying to find evidence to use in proceedings against him. The right not to have someone go through your personal affairs is an important human right. Once privacy is lost, it cannot be regained.

[12] Mr Pyke for the Law Society submitted that there is no legitimate “privacy interest” of counsel (as opposed to the parties) in relation to litigation matters in which they have been involved. If there is, it is an interest which should be given little weight in the circumstances of this case. The Law Society is not attempting to access private or confidential information relating to Mr Orlov personally (such as medical records). It primarily wishes to review pleadings, submissions and other court documents he has drafted, many of which will have been extensively discussed in open Court. It was submitted that there will be no *illegitimate* prejudice to Mr

¹ *Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd* [1977] 2 NZLR 41.

² *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85.

Orlov arising from such an exercise. Obviously, if the Law Society was to find evidence of incompetence that would be potentially prejudicial to Mr Orlov, but it is not the kind of prejudice that may properly be taken into account on a stay application.

[13] Having weighed the various issues raised by the parties, it is my view that Mr Orlov's appeal will not be rendered nugatory simply by virtue of the Law Society accessing and reviewing the Court Files as part of its ongoing investigations. The point of "no return" will only potentially be reached if and when material from the Court Files is used as evidence in disciplinary proceedings. However, the Law Society must revert to the Court for further directions before it is able to do that. The appropriate time to consider whether a stay is needed is after such an application has been made. Accordingly there is no need to bring the first stage of the Law Society's ongoing investigation (i.e. inspection of the Court Files) to a complete halt while the appeal is pursued.

Result

[14] Accordingly, I decline the stay application in so far as it relates to orders (a) and (b) in the Judgment (set out in paragraph 4(a) and (b) above) which entitle the Law Society to review and access the Court Files on a confidential basis. I otherwise adjourn the stay application to be heard contemporaneously with any application for directions made by the Law Society pursuant to order (c). The interim stay, prohibiting access to the Court Files pending this decision, is now lifted.

[15] The issue of costs is reserved, pending the outcome of the appeal.