



## **Introduction**

[1] This is an application for strike-out for non-payment of security for costs. The appeal has a fixture date of 6 August 2013.

## **Background**

[2] On 13 November 2012, Mr Orlov filed an appeal against a decision of Katz J that the New Zealand Law Society could inspect various High Court files.<sup>1</sup> The Society's application was made in the context of disciplinary proceedings brought against Mr Orlov. The Court files in issue relate to matters in which Mr Orlov acted as counsel and where Katz J said the judgments contained criticism of Mr Orlov.

[3] In February 2013, the Registrar declined an application from Mr Orlov to dispense with the requirement to pay security for costs. Security for costs was set at \$5,880. Mr Orlov was to pay security by 1 March 2013.

[4] Mr Orlov sought a review of the Registrar's decision refusing to waive or vary security. That application was unsuccessful and, on 11 April 2013, Ellen France J directed that Mr Orlov pay security in the amount of \$5,880 within 20 working days of the date of that judgment.<sup>2</sup>

[5] When, by 5 July 2013, security had not been paid, the respondents applied to strike out the appeal. Mr Orlov's response was to seek an extension of time until the end of July for payment on the basis of financial trouble and the absence of any prejudice arising from non-payment.

[6] On 10 July 2013, Ellen France J granted Mr Orlov an extension of time until 5 pm, Wednesday 17 July 2013 to pay security. Security has still not been paid and the respondents renewed their application to strike out. Mr Orlov was given an opportunity to provide submissions as to why the appeal should not be struck out. No submissions have been forthcoming.

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<sup>1</sup> *National Standards Committee (No 1) v Orlov* [2012] NZHC 2911.

<sup>2</sup> *Orlov v National Standards Committee (No 1)* [2013] NZCA 96.

## **Strike-out application**

[7] The respondents submit the appeal should be struck out under r 37 of the Court of Appeal (Civil) Rules 2005 for failure to comply with the order to pay security by the due date.

## **Discussion**

[8] An application to strike out under r 37(1) will be granted where the appellant has failed to pay security for costs within the allowed time.<sup>3</sup> The merits of the proposed appeal have also been treated as a relevant factor.<sup>4</sup>

[9] Mr Orlov has not paid security and has been given latitude in terms of the time within which to pay. The default is considerable. That factor alone justifies striking out the appeal. However we will for completeness consider the merits of the proposed appeal.

[10] As to the merits, some further background is necessary.

[11] We begin by noting that Katz J dealt with the respondents' application as one for access made under r 3.13 of the High Court Rules. As we have noted, the Judge decided that the Society could inspect the files. Further, Katz J said the Society could retain copies of any documents on the files but had to keep the documents confidential and could use them only for the purposes of its investigations concerning Mr Orlov. If the Society wanted to use any of the copied documents in proceedings before the Lawyers and Conveyancers Disciplinary Tribunal or the High Court, it would first have to seek further directions from the Court.

[12] Katz J, in reaching this view, considered the relevant factors for applications under r 3.13 set out in r 3.16. The particular factors applicable to this application were the "orderly and fair administration of justice" and the protection of privacy interests in rr 3.16(a) and (b) respectively.

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<sup>3</sup> *Corbett v Legal Complaints Review Officer* [2011] NZCA 223 at [17].

<sup>4</sup> *Riccarton Construction Ltd v Coljon Ltd* [2010] NZCA 430 at [8].

[13] The Judge was satisfied that in seeking access the Society was “acting in accordance with its statutory functions and responsibilities in relation to the control and regulation of lawyers”.<sup>5</sup> Further, she said there was “clear prima facie evidence” that the files may contain information “directly relevant” to the discharge of the Society’s functions.<sup>6</sup> The Judge took the view the privacy interests in the files of the clients represented by Mr Orlov were met by the staged process to access ordered.

[14] The challenges on appeal may be seen as falling into two categories. The first category can be characterised as procedural. For example, Mr Orlov is critical of the Judge’s decision that it was not necessary to give the parties involved in the cases forming the relevant files notice of the application. The second category of challenges relates to the merits of the Judge’s decision. For example, it is said the request is an abuse of process, involves a breach of the parties’ privacy, and that there is a lack of evidence as to the need for access.

[15] The two-stage approach adopted by the Judge (access first and then a referral back to the Court before documents may be used in proceedings) appears to deal with the procedural aspects. It also provides an adequate response to any privacy concerns.

[16] As to the substantive aspects, it is difficult to see any error in the Judge’s approach. Plainly, the files may contain information relevant to the Society’s investigations. The Society is required to carry out such investigations under the Lawyers and Conveyancers Act 2006 which is designed to maintain public confidence in the provision of legal services and to protect consumers of such services.

[17] Accordingly, on the basis of the information before us, and in the absence of any submission from Mr Orlov as to the merits, we conclude the appeal has no realistic prospect of success. It is also relevant to our assessment of the strike-out application that the Judge’s decision only deals with access to, and use of, the Court

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<sup>5</sup> At [34].

<sup>6</sup> At [35].

files in the investigative context and does not at this stage involve use of the material from the Court files in proceedings.

## **Result**

[18] The appeal is struck out.

[19] The Law Society seeks costs of \$1,393.00 and disbursements. Costs should follow the event and the Society has been put to cost. The appellant is accordingly ordered to pay the respondents \$1,393 and usual disbursements.

Solicitors:  
Harkness Henry & Co, Hamilton for Respondents