

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

**CIV-2012-403-3787
[2013] NZHC 1507**

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 specific
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: 19 June 2013 (by teleconference)

Appearance: W Pyke for Applicants
Mr Orlov in person

Judgment: 21 June 2013

**JUDGMENT OF KATZ J
(Stay and implementation of previous orders)**

*This judgment was delivered by me on 21 June 2013 at 11:00am
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

Solicitors:
New Zealand Law Society, Wellington

Copy to:
WC Pyke, Hamilton
E Orlov, Auckland

Introduction

[1] Mr Evgeny Orlov is a barrister. The applicants (together “the Law Society”) have commenced disciplinary proceedings against him. The Law Society has also apparently reached the view that there are grounds to apply to this Court, in its inherent jurisdiction, to suspend Mr Orlov from practice.

[2] Against that background, the Law Society applied to inspect ten court files relating to matters in which Mr Orlov had acted as counsel (“Court Files”). Each Court File relates to a proceeding in which there is a judgment of this Court or the Family Court which makes adverse comments about Mr Orlov. The Law Society sought to copy documents from the Court Files relating to Mr Orlov’s conduct and competence, for possible use in disciplinary proceedings.

[3] In a judgment dated 6 November 2012 (“substantive judgment”) I granted the Law Society’s application, on terms which included an ongoing supervisory role for the Court in protecting any third party privacy and confidentiality interests.

[4] Mr Orlov sought a stay of the substantive judgment pending an appeal to the Court of Appeal. In a judgment dated 23 November 2012 (“stay judgment”) I permitted the Law Society to review and access the Court Files pending the appeal, but required it to seek further directions if and when it reached the stage of wishing to use any documents obtained from the Court Files in disciplinary proceedings.

[5] That stage has now been reached. The Law Society seeks orders enabling it to use copies of documents it has obtained from the Court Files (“Copy Documents”) in disciplinary proceedings in the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (“Disciplinary Tribunal”) or in this Court.

[6] Mr Orlov opposes the Law Society being permitted to use any of the Copy Documents in disciplinary proceedings against him.

Further background

[7] The substantive judgment took a “staged” approach to access to the Court Files by the Law Society and subsequent use of any documents. In particular, I granted the Law Society’s application on the following terms:

[67] The Law Society’s application is granted, on the terms set out below:

- (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.

[8] The primary reason for this “staged” approach was to ensure that if any privacy or confidentiality concerns arose in relation to third parties, the Court could ensure that these were appropriately addressed.

[9] Mr Orlov then sought a stay of the substantive judgment pending appeal. The grounds included that his appeal rights would be rendered nugatory if the judgment were not stayed and that the appeal raised issues of significant public importance. The Law Society opposed the stay application and submitted, amongst other things, that delay pending appeal would frustrate the expeditious conduct of its disciplinary investigations. The Law Society’s position was that the appeal was without merit and did not raise any significant public interest issues.

[10] Notwithstanding its opposition to a stay, 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 adjourn the further question of

any stay pending appeal to the point at which “the applicant signals a desire to produce the documents inspected in evidence in a proceeding”.

[11] The stay judgment reflected that approach. I ordered as follows:

[14] Accordingly, I decline the stay application in so far as it relates to orders (a) and (b) in the [6 November 2012] Judgment...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.

[12] On 7 June 2012 the Law Society filed a memorandum seeking further directions and orders for the production of Copy Documents pursuant to the leave allowed at [67] of the substantive judgment. In accordance with [14] of the stay judgment the balance of the stay application came on for hearing at the same time.

Issues

[13] The combined effect of the substantive judgment and the stay judgment is that I am now *functus officio*, save in relation to the following issues:

- (a) Should I stay any further implementation of the substantive judgment, pending the outcome of Mr Orlov’s appeal? In particular, should I prohibit the use of any Copy Documents in proceedings in the Disciplinary Tribunal or this Court, pending the outcome of that appeal?
- (b) If a stay is not granted, what directions are required as to how any confidentiality or privacy issues which arise in relation to the Copy Documents are to be addressed? Do the draft orders provided by the Law Society adequately address such issues?

[14] I will deal with each issue in turn.

Should any further implementation of the substantive judgment be stayed, pending appeal?

[15] The issue I must determine is whether I should stay the substantive judgment in part, by declining to allow the Law Society to use any Copy Documents in disciplinary proceedings, pending the outcome of Mr Orlov's appeal.

Mr Orlov's submissions

[16] Mr Orlov submitted that a stay should be granted because he has now filed further judicial review proceedings¹ which challenge the Law Society's alleged decision to apply to the High Court in its inherent jurisdiction to suspend him. He submitted that, pending the outcome of those proceedings, the Law Society should be prohibited from using any Copy Documents in proceedings in either the Disciplinary Tribunal or this Court. Mr Orlov indicated that his "main focus" is now the judicial review proceedings, rather than the appeal.

The Law Society's submissions

[17] The Law Society submitted that any further stay of the substantive judgment should not be granted. It should be permitted to seek to use the Copy Documents in the Disciplinary Tribunal or this Court, subject to any confidentiality orders I make. Any further delay in the progress of its disciplinary functions should not be countenanced, particularly given the focus in the Lawyers and Conveyancers Act 2006 on efficiency and expedition.

Discussion

[18] I note at the outset that the sole issue which I must determine is whether I should permit the Law Society to use the Copy Documents in the Disciplinary Tribunal proceedings or in this Court, or whether I should totally prohibit any such possible use of the documents pending the outcome of Mr Orlov's appeal. The

¹ There are currently six proceedings in the High Court (in addition to these proceedings) challenging aspects of the Law Society's disciplinary processes (CIV-2010-404-2868, CIV-2010-404-5778, CIV-2013-404-1512, CIV-2013-404-1025, CIV-2013-404-1512, CIV-2013-404-2422 and CIV-2013-404-2449).

ultimate admissibility of any of the Copy Documents is not an issue before me. In the event of a challenge to admissibility, that would need to be determined by the relevant Disciplinary Tribunal or Court.

[19] Mr Orlov's primary argument is misconceived. Granting a stay of the substantive judgment pending determination of his most recently filed judicial review proceedings would exceed my jurisdiction. I am now *functus officio* save for the specific matters identified at [14] above. The issues I must focus on when considering whether to grant a stay must relate to Mr Orlov's appeal from the substantive judgment, not to proceedings he has filed subsequent to the substantive judgment.

[20] Mr Orlov's request that any stay be linked to his most recently filed judicial review proceedings appears to be partly because Mr Orlov has lost some enthusiasm for his appeal. Security for costs has not yet been paid and it seems that at least one previously scheduled appeal date was postponed. The appeal is currently scheduled for hearing on 6 August 2013, but Mr Orlov indicated that an adjournment may be sought to enable more time for the payment of security for costs.

[21] The factor which has the potential to weigh most heavily in Mr Orlov's favour is whether the refusal to grant a stay would render his appeal rights nugatory. In particular, would Mr Orlov's appeal be rendered nugatory if a stay were not granted? That factor alone would not be determinative, but it is usually a matter that is weighed carefully in the balance when an application is made for a stay pending appeal.

[22] In my view Mr Orlov's appeal rights will not be rendered nugatory by any use of the Copy Documents in the forthcoming Disciplinary Tribunal proceedings (scheduled to commence on 2 September 2013). Obviously, if Mr Orlov's appeal were to succeed, a possible consequence would be that the Disciplinary Tribunal considered evidence which it should not have. That could potentially taint any Disciplinary Tribunal decision and would likely found a ground of substantive appeal or review in this Court. The Law Society will have to accept that as a

possible risk of production of the documents before the Disciplinary Tribunal at this stage, while the appeal is still extant.

[23] Although there appears to have been some delays in prosecuting the appeal to date (which weighs against a stay) I note that the appeal is currently scheduled for hearing on 6 August 2013. The Disciplinary Tribunal hearing is not scheduled to take place until 2 September 2013. Mr Orlov will therefore have an opportunity (assuming he proceeds with his appeal) to raise his concerns with the Court of Appeal prior to the Disciplinary Tribunal hearing taking place.

[24] The statutory context is also a factor which I give considerable weight to in considering whether a stay is appropriate. The Lawyers and Conveyancers Act 2006, pursuant to which the Law Society's disciplinary investigations and proceedings have been undertaken, has a strong consumer protection focus. There is a clear public interest in matters relating to the discipline of the legal profession being dealt with expeditiously. Part 7 of the Act states that the framework in relation to complaints against lawyers is intended to ensure that such complaints be "processed and resolved expeditiously"² and that disciplinary charges "be heard and determined expeditiously".³

[25] The Court of Appeal has recently reaffirmed the importance of this statutory context in related proceedings involving Mr Orlov. In *Orlov v New Zealand Law Society & Ors*⁴ the Court made the following observations:

[165] These and all other charges should now be heard by the Tribunal without delay. On this point we add the following observations. We direct them particularly to Mr Orlov.

[166] As a legal practitioner, Mr Orlov is subject to his profession's disciplinary regime. It exists primarily for the benefit of the consumers of legal services. That is, people who include Mr Orlov's own clients. But it exists also for the benefit of all legal practitioners, not least Mr Orlov himself.

[167] We mentioned at the outset of this judgment, and we reiterate, that one of the central objectives of the Act is to provide for "a more responsive regulatory regime in relation to lawyers and conveyancers".³¹

² Lawyers and Conveyances Act 2006, s 120(2)(b).

³ Ibid, s 120(3).

⁴ *Orlov v New Zealand Law Society & Ors* [2013] NZCA 230.

[168] By raising the numerous procedural objections this judgment considers and rejects, Mr Orlov has thwarted and delayed the disciplinary process. He now complains of these largely self-inflicted delays.

[169] The oldest of the complaints dates back to 19 May 2008. It is imperative that the charges against Mr Orlov now be heard by the Tribunal on their merits, and without still further delays.

[26] Taking all of these matters into account I decline Mr Orlov's stay application (I note that I have previously declined it only in relation to orders (a) and (b) in the substantive judgment).

Confidentiality issues

[27] The Law Society seeks orders that permission be granted to produce the Copy Documents before the Disciplinary Tribunal and in any High Court proceedings brought or defended by the applicants where Mr Orlov is a party. The Copy Documents include material of a sensitive nature (particularly in relation to Family Court proceedings). It is therefore important to protect the confidentiality and privacy of third parties who are referred to in those documents.

[28] In relation to confidentiality and privacy issues Mr Orlov submitted that:

- (a) Some of the Copy Documents are signed by or relate to other practitioners (and contain potentially adverse information regarding them). They should accordingly be consulted.
- (b) Some of the documents refer to privileged communications and should accordingly not be disclosed.

[29] In relation to the first point I note that the production of the documents is sought solely in relation to disciplinary proceedings against Mr Orlov. It will not be open in such proceedings for the Tribunal to make adverse findings regarding other practitioners. Their substantive rights are accordingly not affected.

[30] In relation to privilege, there are several documents included in the Copy Documents which contain material which would, at one stage, have been subject to

legal professional privilege. However, Mr Orlov has chosen to file those documents in Court proceedings, which is inconsistent with an ongoing claim to confidentiality. Privilege has accordingly been waived in terms of s 65(2) of the Evidence Act 2006. Indeed one of the documents is a statutory declaration by one of Mr Orlov's clients in which they appear to expressly waive privilege. Nevertheless I doubt there is any need (or particular interest) in publishing such material. To the extent that such material is sensitive, it should be adequately protected by the orders I propose to make.

[31] The Copy Documents include documents which relate to proceedings which were commenced under various statutes which are subject to ss 11B-11D of the Family Courts Act 1980. Section 11B prohibits the publication of a report of proceedings which includes identifying information where either a vulnerable person or a person under the age of 18 years is the subject of, party to, applicant in, or referred to in the proceedings (unless the Court grants leave). Section 11C defines identifying information as "information relating to proceedings that includes any name or particulars likely to lead to the identification of" a party to, applicant in, person the subject of, or person related to, the proceedings.

[32] I do not propose to grant leave to depart from the requirements of ss 11B-11D of the Family Courts Act 1980 in relation to the Copy Documents. Any published decision of the Tribunal, to the extent that it refers to documents in proceedings to which ss 11B-11D of the Family Courts Act 1980 applies, should be anonymised or redacted to the extent necessary to protect the identity of the parties to those proceedings and any children who are the subject of those proceedings. Potentially other issues under rr 3.12 and 3.16 of the High Court Rules arise, which I will endeavour to address in my orders.

[33] Of course if any discussion of relevant Copy Documents is at a sufficiently high level of generalisation, redaction may not prove necessary. As a specialist lawyers' disciplinary body the Tribunal is obviously well accustomed to dealing with sensitive issues of confidentiality and privacy. It is clear from its published decisions that they are carefully drafted so as to not identify specific complainants, unless such

information is already in the public domain. I anticipate that the information included in the Copy Documents will be treated with the same sensitivity.

[34] If the Copy Documents are produced in any proceedings in this Court, it will ultimately be for the Judge in those proceedings to deal with any issues of confidentiality or privacy that arise, save that my “default” orders in relation to the Copy Documents will apply unless or until varied or revoked by further order of this Court.

Result

[35] I order as follows:

- (a) The respondent’s stay application in respect of the Judgment of 6 November 2012 is dismissed. For the avoidance of doubt, the leave granted at [67](c) of that Judgment continues.
- (b) Permission is granted to the applicants to produce the Copy Documents before the Disciplinary Tribunal and in any High Court proceedings brought or defended by the applicants where the respondent is a party (subject of course to any admissibility or other issues that may arise).
- (c) The Copy Documents are not to be further published or inspected without leave of a High Court Judge.
- (d) The statutory suppressions in ss 11B-11D of the Family Courts Act 1980 (and any other statutory suppression orders which may apply) are to continue in force in relation to any Copy Documents which are sourced from proceedings (or appeals from proceedings) to which those provisions apply.
- (e) The contents of the Copy Documents are suppressed from publication beyond the parties, to the extent that such publication includes identifying information regarding individuals (but not companies,

public entities or governmental departments or agencies) who are parties to the proceedings or to children or vulnerable persons who are referred to in those proceedings.

- (f) In the event that the Disciplinary Tribunal admits any of the Copy Documents into evidence, any decision(s) referring to the Copy Documents are to be redacted to ensure compliance with these orders, before being placed on or in any database, library, website, Law Digest or Law Report.
- (g) Leave is reserved to seek clarification of these orders, should the need arise.

Costs

[36] The stay application has been finally determined. Accordingly it is now appropriate for costs issues in relation to both the substantive proceedings and the stay application to be determined. If costs cannot be agreed between the parties then the Law Society is to file its memorandum on costs within 21 days of this judgment, with any memorandum in response from Mr Orlov being filed within 14 days thereafter.

Katz J