

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

**CIV-2013-404-1025
CIV-2013-404-1512
[2013] NZHC 2502**

BETWEEN EVGENY ORLOV

Applicant

AND

THE NATIONAL STANDARDS
COMMITTEE 1 AND THE AUCKLAND
STANDARDS COMMITTEE 1

Respondents

Hearing: On the papers

Appearances: E Orlov in person
W Pyke for Respondents

Judgment: 25 September 2013

**JUDGMENT OF KATZ J
(Costs)**

*This judgment was delivered by me on 25 September 2013 at 11:00 am
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

Solicitors: New Zealand Law Society

Copy to: E Orlov, Auckland
WC Pyke, Hamilton

Introduction

[1] Mr Evgeny Orlov is a barrister practising in Auckland. He is currently facing disciplinary proceedings brought by two Standards Committees established by the New Zealand Law Society (“Law Society”) under the Lawyers and Conveyancers Act 2006 (“Act”).

[2] Mr Orlov unsuccessfully applied to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (“Tribunal”) to dismiss the charges against him, prior to the substantive hearing. Mr Orlov’s argument was broadly equivalent to a civil “no case to answer” submission or a discharge application under s 347 of the Crimes Act 1961 in criminal proceedings. Mr Orlov also requested that the Tribunal either give him a “sentence indication” or convene a settlement conference. The Tribunal declined to pursue either of these options. Finally, the Tribunal also declined an application by Mr Orlov to stay the disciplinary proceedings on the grounds of undue delay.

[3] Mr Orlov appealed to this Court against each of these decisions. The Standards Committees did not accept that a pre-hearing right of appeal existed in relation to such issues. Mr Orlov therefore filed judicial review proceedings, in addition to his appeal.

[4] Both Mr Orlov’s appeal and the judicial review proceedings in respect of the decisions referred to at [2] above were unsuccessful,¹ for the reasons set out in my Judgment dated 6 August 2013 (“Judgment”). In that Judgment I expressed a preliminary view that costs should be awarded to the Standards Committees on a category 2B basis, together with disbursements as fixed by the Registrar. I reserved leave to file memoranda if costs could not be agreed based on that indication. Costs have not been agreed and accordingly now fall for determination by the Court.

¹ *Orlov v The National Standards Committee 1 and the Auckland Standards Committee 1* [2013] NZHC 1955, 6 August 2013.

Submissions

[5] The Standards Committees submitted that costs calculated on a category 2B basis are appropriate in relation to both the appeal proceeding (CIV-2013-404-1025) and the judicial review proceeding (CIV-2013-404-1512). However, in order to avoid duplication, the Standards Committees claimed costs for an appeal on a category 2B basis, with two additional items. The two additional items were for filing a statement of defence in the judicial review proceeding and additional matters required for the second case management conference. The costs claim has accordingly been adjusted to reflect the fact that the two proceedings were heard together.

[6] Mr Orlov did not take any particular issue with the calculation of the category 2B costs. Rather, he submitted that he should not be ordered to pay costs at all. The basis for this submission was expressed as follows:

Although your Honour made a decision that the Tribunal had in fact erred in holding that it had no jurisdiction to strike out an appeal, your Honour nevertheless declined the appeal on the basis that the Tribunal had a discretion as to whether or not to hear the strike out pre-trial. However the fact is that the Tribunal did in fact hear the strike out but nevertheless declined only on the basis of no jurisdiction.

Since the Tribunal did on your Honour's finding make an error of law I was entitled to appeal and therefore should not be penalised by a costs award especially when these matters concern professional rights. An award of costs would not only be inappropriate but penalise me for taking a rightful and arguable appeal.

[7] Mr Orlov accordingly submitted that awarding costs against him would constitute a miscarriage of justice and a reversal of the rule that the successful party is entitled to costs.

Discussion

[8] Costs are at the discretion of the Court.² The applicable principles are that:³

(a) The party who succeeds ordinarily gets costs.

² High Court Rules, r 14.1.

³ Ibid, r 14.2.

- (b) The award ought to reflect the complexity and significance of the proceeding or application.
- (c) The applicable daily recovery rate ought to be used. The costs awarded ought not to exceed actual costs.

Which party “succeeded”?

[9] Mr Orlov’s opposition to costs is predicated on the assumption that this Court found that the Tribunal made an error of law in “holding that it had no jurisdiction to strike out an appeal” pre-trial, but declined to grant relief.

[10] Mr Orlov’s appeal and review both proceeded on the basis that the Tribunal had concluded that it lacked jurisdiction or power to hear a dismissal application pre-trial. This was expressed in Mr Orlov’s Notice of Appeal as follows:

The decision maker erred in law in holding that it had no jurisdiction to strike out or stay the charges prior to trial due to lack of evidence and/or erred in holding that there was sufficient evidence to proceed to trial.

[11] The Judgment, however, did not find that the Tribunal had made such an error. Rather, it appeared that Mr Orlov may have misinterpreted a key passage in the Tribunal’s decision. The Tribunal had not held that it lacked jurisdiction or power to strike out or stay the charges prior to trial. Rather, the correct interpretation of the Tribunal’s decision was that it had declined to deal with Mr Orlov’s dismissal application pre-hearing because it did not believe it was appropriate to do so in all the circumstances. I concluded that, as master of its own procedure, this was a course that was a course open to the Tribunal. Accordingly there was no jurisdictional error.⁴

[12] Accordingly, the assumption underpinning Mr Orlov’s objection to costs is incorrect. This Court has not “made a decision that the Tribunal ... erred in holding that it had no jurisdiction to strike out an appeal”. On the contrary, the Tribunal did not make the error alleged. It did not hold that it lacked jurisdiction to strike out an appeal pre-trial. It simply declined to exercise its jurisdiction at a pre-hearing stage,

⁴ At [43] to [49].

in all the circumstances before it, as it was entitled to do. It necessarily follows that there is no basis for Mr Orlov's opposition to payment of the Law Society's costs.

[13] For completeness I note that, in my view, the Law Society also advanced its submissions on the jurisdiction issue (only) on an erroneous basis. This does not assist Mr Orlov, however. The onus was on Mr Orlov as applicant/appellant to satisfy the Court that the Tribunal had erred in the manner alleged. He failed to do so.

Quantum of costs

[14] There was a degree of complexity in these proceedings, given the number of issues. The case was of considerable significance to Mr Orlov and he approached it on that basis. From the respondents' perspective the case was also significant, in that it related to the effective functioning of the lawyers disciplinary system. The respondents have indicated that the legal fees actually incurred by them were a little over \$15,000.00 inclusive of GST but excluding expenses and disbursements.

[15] On a category 2B basis the total costs sought in respect of the various steps set out in the respondents' memorandum are \$14,527.00. In addition, disbursements of \$197.90 are claimed.

[16] The Law Society claims three days for the preparation of written submissions for the appeal. Although this is in accordance with the High Court Rules, in my view it is appropriate to reduce the time allocation for this particular item to two days. I suspect this more closely equates to the actual time spent preparing submissions, given the respondents' high degree of familiarity with the subject matter. This would reduce the category 2B costs from \$14,527.00 to \$12,537.00. With the addition of \$197.90 for disbursements the total costs to which the respondents are entitled, on a category 2B basis, are \$12,734.90.

Result

[17] Costs are awarded in favour of the respondents, in the sum of \$12,734.90.

Katz J