IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-3787
[2012] NZHC 2911

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 ZEALND LAW SOCIETY Third Applicant
AND	EVGENY ORLOV Respondent

Hearing: 29 October 2012

Counsel: W C Pyke for Applicants
E Orlov in Person

Judgment: 6 November 2012

JUDGMENT OF KATZ J

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 12 p.m. on 6 November 2012.

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Introduction

[1] Mr Orlov is a barrister. The applicants are the New Zealand Law Society, the National Standards Committee and the Auckland Standards Committee (together "the Law Society," unless the context otherwise requires).[1]

[2] The Law Society has commenced disciplinary proceedings against Mr Orlov and has also reached a view that there are grounds to apply to this Court in its inherent jurisdiction to suspend Mr Orlov from practice. In that context, it applies to inspect and copy certain Court files relating to matters in which Mr Orlov acted as counsel ("Court Files") in order "to provide evidence of the conduct and competence of counsel in the proceedings for which inspection is sought."[2] Each 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's alleged conduct as counsel. A list of the relevant court files is annexed to this judgment ("Annexure").

[3] Mr Orlov submits that the relevant judgments are inadmissible as evidence against him, based on the principles in *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal.*[3] The Law Society disputes that the effect of *Dorbu* is that the judgments are inadmissible. It says that the judgments will be admissible in any proceeding in which the conduct and competence of Mr Orlov, as counsel, is in issue, including pursuant to s 239 of the Lawyers and Conveyancers Act 2006 ("Act"). Nevertheless it wishes to look beyond the judgments to the underlying Court Files. It seeks to review those files as part of its ongoing investigations and, if appropriate, use documents from them as

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1 The New Zealand Law Society and its Council and Board are separate entities from lawyers standards committees, which are established under Practice Rules. However the New Zealand Law Society is responsible for monitoring the complaints service and lawyers standards committees.

2 Affidavit of Mary Elizabeth Ollivier, sworn 2 July 2012.

3 *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal* HC Auckland CIV-2009-404-7381, 11 May 2011.

evidence in any proceedings regarding Mr Orlov, either in the Lawyers and Conveyancers Disciplinary Tribunal ("Tribunal") or this Court.

[4] Mr Orlov opposes the application for access to the Court Files. As a preliminary issue, he submits that the parties to the various proceedings must be served and that they are entitled to be heard on the Law Society's application. In terms of the substantive merits, he submits that the application is an abuse of process and that the Court has no jurisdiction to grant the orders sought. Alternatively, if the Court does have jurisdiction, he submits that the application should be declined.

[5] The key issues I must consider are:

(a) Have all persons who are adversely affected by the application been given notice of it, in terms of r 3.13(5)?

(b) Should the Law Society be given access to the Court Files, taking into account the various matters set out in r 3.16 of the High Court Rules, including in particular:

(i) the nature of, and the reasons for, the application;

(ii) the orderly and fair administration of justice (r 3.16(a)); and

(iii) the protection of confidentiality, privacy interests and privilege (r 3.16(b))?

[6] In terms of issue (a) above, I have concluded that Mr Orlov is the only person adversely affected by the application and that it is therefore not necessary to give the 35 parties to the various proceedings notice of the application. There is considerable overlap, however, between the issue of who is "adversely affected" by the application and the issues of confidentiality and privacy I must consider in terms of issue (b). I therefore address the

substantive merits of the application first, before setting out the reasons for my finding that no other persons are required to be given notice of the application.

Procedural issues

[7] A number of procedural matters were canvassed during the course of the hearing. I briefly address those before turning to the substantive merits of the application.

Cross-examination of Ms Ollivier

[8] Mr Orlov sought to cross-examine Ms Ollivier, the General Manager (Regulatory) of the Law Society. Ms Ollivier, who is based in Wellington, swore an affidavit in support of the Law Society's application. Ms Ollivier was not in Court (or in Auckland) and an adjournment would have been necessary were I to grant leave to cross-examine her.

[9] I declined the application on the basis that insufficient notice had been given (only two working days[4] rather than the three working days required by r 9.74). Other factors weighing against the application were that, at no stage prior to the late service of the notice to cross-examine had Mr Orlov indicated any wish to cross examine Ms Ollivier.

[10] I also note that Ms Ollivier's evidence was largely of a procedural and administrative nature. Given the extensive information before the Court regarding the nature and history of the proceedings against Mr Orlov, cross-examination of Ms Ollivier was unlikely to provide any significant further assistance. It appeared that Mr Orlov primarily wished to cross-examine Ms Ollivier on matters relevant to the substantive merits of the Law Society's proceedings against Mr Orlov, which are issues for another day.

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4 Calculated in accordance with r 1.17.

Relevance/admissibility of other documents

[11] The Law Society also submitted that a number of other documents filed in the proceedings were irrelevant, non-compliant with the High Court Rules, contained inadmissible evidence and were argumentative and otherwise objectionable.

[12] The specific documents objected to (in whole or in part) included Mr Orlov's "Memorandum of Counsel protesting jurisdiction" dated 22 August 2012, his affidavit sworn 31 August 2012 (which included extensive exhibits that were objected to) and affidavits purportedly filed "in opposition to view Court files" by RIG, PM and QR. Two of these affidavits (RIG's and QR's) appear to have been sworn and filed in Court at a time when Mr Orlov was evading service of the Law Society's application[5] (although he was aware of it and had been sent a copy of it via email). On their face they are documents filed by non-parties to the application. PM's affidavit does not appear to have been filed at all; it was simply included in a bundle for the hearing.

[13] There is considerable merit in the Law Society's objections. However, given that the present application relates to the obtaining of evidence for disciplinary proceedings in which Mr Orlov's right to practise is at issue, the interests of justice favour taking a somewhat more liberal approach to procedural issues than would normally be the case.

[14] In relation to the affidavits of RIG, PM and QR I am also influenced by the fact that the deponents are former (or current) clients of Mr Orlov's who are parties to the proceedings which are the subject matter of the Law Society's application. They are each persons who, on Mr Orlov's submission, should have been (or should now be) formally served with the application.

[15] I am therefore prepared to overlook the deficiencies in these various documents and consider them on their merits. To the extent that they contain

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5 Minute of Toogood J as to substituted service dated 23 August 2012.

material on which Mr Orlov relies in support of his opposition to the Law Society's application, I have considered that material.

The form and contents of the Notice of Opposition

[16] Toogood J directed Mr Orlov to file any interlocutory applications and affidavits in support by 1 September 2012. No such applications were filed. However, Mr Orlov's Notice of Opposition to the application (dated 30 August 2012) purports to include within it a request for an order for discovery against the Law Society as well as an order that the Law Society's application be consolidated with a similar application which has been filed in relation to another lawyer.[6]

[17] I accept the Law Society's submission that the relevant High Court Rules do not permit the filing of an "omnibus" Notice of Opposition which includes discreet interlocutory applications within it. I therefore treat the Notice of Opposition solely as a Notice of Opposition to the Law Society's application. If Mr Orlov wished to make any interlocutory applications of his own, they needed to be filed in the appropriate form in conformance with r 7.19 and the Minute of Toogood J.

Approach to the Law Society's application to access the Court Files

[18] Applications for permission to access documents on the Court file, other than at the substantive hearing stage, must be made under r 3.13. Rule 3.16 then sets out the matters which must be taken into account when considering an application under r 3.13. It provides as follows (emphasis added):

> **3.16 Matters to be taken into account**
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> In determining an application under rule 3.13, or a request for permission under rule 3.9, or the determination of an objection under that rule, the Judge

6 *New Zealand Law Society v Deliu*, CIV 2012-404-3785.

or Registrar must consider **the nature of, and the reasons for, the application or request** and take into account each of the following matters that is relevant to the application, request, or objection:

(a) **the orderly and fair administration of justice**:

(b) **the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:**

(c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:

(d) the freedom to seek, receive, and impart information:

(e) whether a document to which the application or request relates is subject to any restriction under rule 3.12:[7]

(f) any other matter that the Judge or Registrar thinks just.

[19] Argument in this case focussed on the issues set out in the highlighted passages above.

[20] A matter of common ground was that the judgment of Asher J in *Commerce Commission v Air New Zealand & Ors*[8] sets out the correct approach to the balancing exercise the Court must undertake pursuant to r 3.16, which is essentially that:[9]

(a) No primacy is to be given to any of the factors listed in r 3.16, they are all to be weighed in the balance in the circumstances of the particular case.

(b) Rule 3.16 does not exist in a vacuum. It requires consideration of the reason for the request. An understandable and legitimate

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7 Rule 3.12(3) lists a number of specific enactments such as the Adoption Act 1955, the Status of Children Act 1969 and the Family Protection Act 1955. Proceedings brought under the specified enactments may only be searched with court permission. This reflects that proceedings brought under such Acts will often contain personal or sensitive information.

8 *Commerce Commission v Air New Zealand & Ors* [2012] NZHC 271.

9 Ibid [27], [29]-[33]

reason for wanting access to the documents will have more weight than a "general wish" to fish for information.

Reasons for the application and the orderly and fair administration of justice

[21] These related issues were the key focus of argument.

[22] I am required to take into account the nature of, and the reasons for, the Law Society's application. In this case the reasons for the application are inextricably linked to the "orderly and fair administration of justice" factor in r 3.16. In essence the Law Society says that it seeks access to the files to facilitate the discharge of its statutory responsibilities and that the proper discharge of its statutory duties will, in turn, promote the orderly and fair administration of justice.

[23] Mr Orlov submitted on the other hand that granting the application would seriously undermine the orderly and fair administration of justice for a number of reasons, the key ones being that:

(a) The application is an abuse of process in that it is an attempt to circumvent the failure by the Law Society to follow the requirements of the High Court case of *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal*.[10]

(b) Evidence in the disciplinary proceedings currently before the Tribunal proceedings is now closed. The permission of the Tribunal to adduce further evidence has not been sought. The Law Society has proceeded on the basis that there is sufficient evidence on which to prosecute and should not be allowed to go on a "fishing expedition" to try and bolster its case at this late stage.

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[10] *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal*.

(c) The applicants have no jurisdiction to make the application and the Court has no jurisdiction to make the orders sought.

(d) The Law Society's disciplinary proceedings are themselves an abuse of process and are, in essence, "politically motivated."

[24] The Law Society denied that *Dorbu* applied or that the judgments relied on are inadmissible as evidence before the Tribunal or in this Court. This Court does not have to determine such admissibility issues on this application. Those issues will need to be determined in any proceedings in which the judgments might be produced. In any event, the Law Society argued, objections as to the inadmissibility of the judgments *support* the present application. If the judgments were held not to be admissible then it is even more important that the relevant Court or Tribunal have the primary material which underpins the judgments.

[25] The Law Society also disputed the assertion that no further evidence can be put before the Tribunal. Although supporting affidavits are filed when the charges are laid by Standards Committees this does not mean that it is not possible to file further evidence. The Standards Committees are entitled to gather further evidence and seek directions from the Tribunal in relation to that evidence.[11] It is also possible to amend or add to the current charges.[12] The use which may be made of any material obtained from the Court Files will accordingly be a matter for the Tribunal to determine.

[26] Further, the Law Society has determined that there are grounds to invite this Court to exercise its inherent jurisdiction to suspend Mr Orlov[13] and the evidence from the Court Files may well be relevant to such proceedings.

[27] Against this background, I must consider whether the "orderly administration of justice" factors in r 3.16 favour the Law Society or Mr Orlov in this case.

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11 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008, reg 32.
12 Ibid, reg 24.
13 See ss 120(6), 268 and 270 of the Act.

[28] The Act is designed to maintain public confidence in the provision of legal services and to protect consumers of such services.[14]

[29] The functions of the New Zealand Law Society under s 65 of the Act include the responsibility:

(a) to control and regulate the practice of lawyers; and

(b) to uphold the fundamental obligations in s 4 of the Act (including the administration of justice in New Zealand and the duties lawyers owe to the Court).

[30] Pursuant to s 67 of the Act the New Zealand Law Society has all such powers, rights and authorities as are necessary or expedient for or conducive to the performance of its regulatory functions, including the institution of prosecutions against lawyers relating to the provision of legal services.

[31] The disciplinary regime in Part 7 of the Act is clearly designed to promote the statutory objectives. It provides a mechanism for complaints to be addressed and for disciplinary charges to be heard and determined expeditiously.[15] The Act is designed to provide an efficient and fair process, having regard to the interests of the complainant and the practitioner.[16]

[32] The ability of a Standards Committee to initiate "own motion" inquiries (as has occurred in relation to some of the charges against Mr Orlov) stresses the public interest in ensuring that practising lawyers maintain appropriate standards, even in a case where there is no specific complainant.[17]

[33] Mr Orlov raised various arguments to the effect that the underlying disciplinary proceedings are an abuse of process and that this Court should not grant an application in aid of proceedings which are themselves improper. I note however that this application is not the correct forum for determination of

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14 Section 3(1).
15 Section 120(3).
16 See for example ss 27 and 142.
17 *Orlov v New Zealand Law Society & (No 8)* [2012] NZHC 2154.

such issues. Separate judicial review proceedings are before the Court in relation to these and similar issues. Heath J has recently delivered a judgment[18] in those proceedings which generally rejected such allegations, albeit some issues (including issues under the Bill of Rights Act) have been adjourned for separate hearing. Obviously, if the disciplinary proceedings were ultimately struck out by this Court or an appellate court, then the documents obtained pursuant to this application could not be used for that particular proceeding. That does not however justify declining access to the Court Files at this stage.

[34] For present purposes I am satisfied that, in seeking access to the Court Files, the Law Society is acting in accordance with its statutory functions and responsibilities in relation to the control and regulation of lawyers. The Law Society is entitled to obtain evidence and to make inquiries to ensure compliance with the Act by lawyers, as part of its lawful functioning as regulator of the legal profession.

[35] Maintaining public confidence in the provision of legal services and protecting consumers of such services are important and onerous statutory responsibilities. There is clear prima facie evidence, derived from the judgments which have been put before the Court in relation to each file that the Law Society seeks access to, that the Court Files may contain information that is directly relevant to the discharge of the Law Society's functions. Ultimately it will be for the Disciplinary Tribunal, however, to rule on the admission of evidence in the Tribunal proceedings and this Court cannot second-guess what such rulings might be.

[36] I find that the Law Society is seeking access to the Court Files for a proper and legitimate reason, in accordance with its statutory functions. The "orderly and fair administration of justice" factor in r 3.16 favours the Law Society.

Confidentiality, privacy and privilege interests

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[18] *Orlov v New Zealand Law Society & (No 8)* [2012] NZHC 2154.

[37] In this case the interests in the orderly and fair administration of justice under r 3.16(a) must be balanced against the protection of confidentiality, privacy interests and any privilege held by, or available to, any person in terms of r 3.16(b). This gives rise to some difficult issues.

[38] Mr Orlov addressed privacy issues primarily in the context of a submission that the parties to the various proceedings are adversely affected and should be served with the application (discussed further below). However, the same arguments are relevant to a consideration of privacy interests in terms of r 3.16(b).

[39] Mr Orlov relied on affidavits sworn by RIG, PM and QR, who are all current or former clients of Mr Orlov's. They were each parties to one of the proceedings which the Law Society seeks access to. The main focus of these affidavits is that Mr Orlov's clients were extremely happy with the legal services he provided to them and that they believe he is an outstanding lawyer. The deponents express dismay at the Law Society's investigation of Mr Orlov.

[40] PM's affidavit addresses this issue only and does not raise any specific objection to the Law Society's application for access to the Court Files. RIG and QR on the other hand object to the Law Society being able to have access to any files relating to proceedings they were involved in, on the following bases:

> *RIG:*
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> I categorically object to the Law Society having to look at any of my files. I have been seriously traumatised. The events related to these files are highly private to me regarding the loss of my daughter. I do not want anyone prying to my case file that is not related to the case.
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> *QR:*
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> As a result of Mr Orlov's work I have entered into a settlement with [the other party] which has been to my satisfaction. One of the terms of the Settlement is that I am not supposed to talk about the case or to reveal any details of the case. On those grounds I cannot discuss the details of the case what was negotiated between Mr Orlov and [the other party] in relation to the settlement of my case. Therefore to an extent I do strongly object to any release of documents from the Court for use for anybody including the Law Society. These documents are highly privileged and contain confidential information

> about the case and about the matters pursued in the case and I do not want them to get into the wrong hands as it may implicitly constitute not only breach of my Settlement Deed but also reveal Confidential information that is extremely sensitive.

[41] Firstly, I note that considerable information regarding all of the proceedings which the Law Society seeks access to is already in the public domain as a result of judgments (either interlocutory or final) having been issued in relation to each file. All judgments in relation to RIG's proceedings have been anonymised to protect RIG's identity. In all other cases judgments are publicly available which identify the parties to the proceedings listed in the Annexure and the broad subject matter of those proceedings.

[42] For example, a number of judgments have been issued in relation to the dispute which QR was involved in. QR's concern that the Law Society reviewing the file could be an "implicit" breach by him of his confidentiality obligations under the Settlement Agreement in those proceedings is clearly unfounded. Further, the draft orders sought by the Law Society expressly exclude any privileged material, including any material relating to without prejudice settlement negotiations (in the somewhat unlikely event that privileged material was on the Court file).

[43] At the conclusion of the hearing I indicated to Mr Orlov and Mr Pyke (for the Law Society) that I proposed to undertake a preliminary review of the files which are the subject of this application before issuing judgment. Both parties confirmed that they had no objection to that course. I have now undertaken a high level review of nine of the ten Court Files (one file cannot currently be located).[19] Four of those files (two of which involve RIG) contain some material which is of a confidential or private nature. Those files are numbered 1-3 and 5 on the Annexure.

[44] Files 2 and 3 relate to the litigation involving RIG. The decision of Cooper J in *RIG v Chief Executive of the Ministry of Social Development &*

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[19] *Order of St John Northern Regional Trust v Gemini 10 Ltd & Ors* HC Auckland CIV-2009-404-1559.

Ors[20] sets out in some detail the background to RIG's custody issues relating to her daughter, as do a number of other decisions in that long-running litigation.

[45] Further, there are also publicly available High Court judgments in relation to SC's proceedings (number 5 on the annexed list) which set out the factual context of her proceedings in some detail. Her identity is not anonymised. In relation to RL's proceedings (number 1 on the annexed list), her name and the general nature of her proceedings is also a matter of public record. I note however that less detail regarding the factual context of her proceedings appears to be publicly available than is the case in relation to RIG and SC.

[46] It is important however that no *further* private or confidential information regarding any of these litigants enter the public domain as a consequence of the Law Society's application. In this context I note that the draft orders sought by the Law Society expressly seek to protect any material which is of a private or confidential nature or which is subject to existing suppression orders. Counsel for the Law Society invited me to "tighten up" the proposed draft orders even further in this respect if I felt this to be necessary or appropriate. I propose to do so.

[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.

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[20] *RIG v Chief Executive of the Ministry of Social Development & Ors* HC Auckland CIV-2008-404-3461, 27 July 2009.

[48] In terms of r 3.16(b) interests of privacy and confidentiality are raised by the Law Society's application. However such concerns can be appropriately addressed through the terms of the orders pursuant to which access to the files is granted. They do not therefore tip the balance in favour of declining the application.

Service on "adversely affected" persons

[49] I now address Mr Orlov's argument that the application should have been served on the parties to the various proceedings, on the basis that they are all "adversely affected" by it. The total number of parties involved is 35.

[50] Applications for permission to access documents on the Court File, other than at the substantive hearing stage, are made under r 3.13. That rule provides as follows (emphasis added):

> **3.13 Applications for permission to access documents, court file, or formal court record other than at hearing stage**
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> (1) This rule applies whenever the permission of the court is necessary under these rules and is sought to access a document, court file, or any part of the formal court record, except where access may be sought under rule 3.9.
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> (2) An application under this rule is made informally to the Registrar by a letter that—
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> (a) identifies the document, court file, or part of the formal court record that the applicant seeks to access; and
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> (b) gives the reasons for the application.
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> (3) The application is heard and determined by a Judge or, if a Judge directs the Registrar to do so, by the Registrar.
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> (4) On receipt of an application made in accordance with subclause (2) , the Judge or Registrar may direct that the person file an interlocutory application or originating application.
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> (5) The applicant must give notice of the application to any person who is, in the opinion of the Judge or Registrar, **adversely affected by the application.**
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> (6) The Judge or Registrar may dispense with the giving of notice under subclause (5) if it would be impracticable to require notice to be given.

> (7) The Judge or Registrar may deal with an application on the papers, at an oral hearing, or in any other manner the Judge or Registrar considers just.

[51] In accordance with the requirements of r 3.13 the Law Society wrote to the Registrar on 13 April 2012 seeking access to the Court Files. The Law Society advised that it wished to inspect them in relation to disciplinary proceedings against two lawyers under Part 7 of the Lawyers & Conveyancers Act 2006. It did not identify the lawyers but indicated that it was willing to do so on request. The letter further stated that:

> The Lawyers' Complaints Service considers that there is no party or third party who may be adversely affected by the application and that it is not necessary to notify the lawyers of the application, but will abide the directions of the Court under r 3.13(5).

[52] The Law Society's letter was referred to Peters J who directed that the Law Society was to make a formal application for permission to access the documents by way of originating application.[21] Her Honour also directed that the Law Society serve a copy of its 13 April 2012 letter, her minute and the originating application on the lawyers referred to in the letter. In terms of r 3.13(5) the Law Society was only directed to give notice to the lawyers involved, not the 35 parties to the various proceedings the Court Files relate to.

[53] That is not necessarily the end of the matter however. If further information subsequently becomes available that indicates additional persons should be served it is obviously appropriate to order accordingly.

[54] Mr Orlov submitted that the parties to proceedings will *always* be adversely affected by applications for permission to access the Court file. Accordingly, the phrase "adversely affected" should in effect, be interpreted as meaning "the parties to the proceedings and any other persons who may be adversely affected."

[55] A difficulty with this argument however is that r 3.9, which deals with access to documents during the substantive hearing stage, expressly provides

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[21] Minute of Peters J, dated 1 May 2012.

that when a request is made for access to a document during that period the Registrar must promptly give the parties or their counsel a copy of the request. A party who wishes to object must, before the relevant deadline, give written notice of the objection to the Registrar, to the person who made the request, and to the other parties or their counsel. The objection must then be referred to the Judge for determination.

[56] An identical approach could have been taken in relation to r 3.13, but was not. R 3.13 leaves it to the discretion of the Judge or Registrar to form an opinion as to who is adversely affected by the application. There is no automatic requirement that parties to the proceedings be served with an application, as there is under r 3.9.

[57] The Law Commission's 2006 report "Access to Court Records" considered the issue of whether notice should be given to the parties of an application to search Court records, as follows:

> **Notice to parties**
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> 5.58 In their comments on the consultation draft, the Chief Justice, the District Court judges and the NZLS expressed the view that where a non-party seeks access to a court record, notice to the parties should be required. The NZLS considered that this requirement was only necessary until the hearing was concluded, but the Chief Justice considered that all applications for access should be on notice until court records were transferred to Archives New Zealand, which she considered should be after 60 years.
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> 5.59 The current rules of court do not expressly require notice to be given where application is made for access to court records, but, in practice, judges and registrars often give the parties an opportunity to be heard. In the Supreme Court's decision in *Marfart and Prieur v Television New Zealand Ltd* [2006] NZSC 33 at 43, Justice Tipping noted:
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> > *Although applications under the Criminal Search Rules may be made informally, the judicial officer who determines them must be careful to ensure that any person who might be detrimentally affected is given an opportunity to be heard …*
>
> 5.60 In civil cases, where leave of a registrar is required for access to records (for example, before the proceedings are determined), it has been suggested that the registrar should allow submissions from the parties.

> 5.61 While we agree that there will often be occasions where the views of the parties will be highly relevant to an application for access, we are reluctant to impose a requirement in the rules that applications be made on notice. The risk is that this will greatly increase the formality of applications, and the time involved in hearing them. The NZLS supports the idea that applications should be informal, but if there is a regulatory requirement for notice, it is difficult to see how this informality can be maintained.
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> 5.62 With respect, in our view, requiring notice to the parties for up to 60 years in relation to an application for access will frequently be an insurmountable barrier to a successful application, because the chances of locating a party long after the hearing will greatly decrease.
>
> 5.63 We do not recommend that notice to the parties be a requirement set out in the new rules. Where leave is required to access a court record, it should be a matter for the discretion of the judge as to whether notice should be given to the parties. Once a hearing is concluded, in our view, notice would only be required in exceptional circumstances.

[58] Ultimately some, but not all, of the Law Commission's recommendations were implemented. The High Court Rules were amended in 2009 by the High Court (Access to Court Documents) Amendment Rules 2009, which apply to this application.

[59] The ultimate position adopted by the drafters of the 2009 amendments appears to be a hybrid between the two positions that were advanced before the Law Commission. Formal notice to the parties is an absolute requirement during the substantive hearing phase. Subsequently, however, the matter is left for the discretion of the Registrar or Judge to determine who should be given notice, with the criteria being that such a person "is "adversely affected by the application". The use of the word "is" rather than an alternative phrase such as "may be" suggests that the threshold is reasonably high. The Judge or Registrar is not required to err on the side of caution by requiring service on every person who may possibly be affected by an application.

[60] There appears to have been very little case law considering the issue of who may be "adversely affected" by an application to inspect Court records. Indeed the only relevant case appears to be the decision of Duffy J in *Body Corporate 188889 v Withers*[22] which was decided on the papers and which did

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[22] *Body Corporate 188889 v Withers* (2009) 19 PRNZ 608.

not involve any substantive argument of the issue. That case concerned an application by a barrister to search a Court file to obtain a precedent for drafting an application under s 48 of the Unit Titles Act 1972. Duffy J granted the application (without requiring service on the parties) on the basis that the barrister undertook to maintain confidentiality and destroy copies of any documents after they had been used for drafting purposes. Her Honour noted that the proceedings had been completed and that the information contained in the documents would have been disclosed in open Court. Accordingly she concluded that:

> I have no reason to think that anyone associated with the proceedings will be adversely affected by Mr Thornton viewing the Court file, particularly given the restrictions I intend to place on subsequent disclosure of the information he is to view.

[61] Most cases regarding access to Court records involve media applicants.[23] In such cases the parties are almost always notified of the application. Indeed in *Re Fourth Estate Periodicals Ltd* (which predated the 2009 amendments by 20 years) Williamson J suggested it would normally be appropriate when a party seeks access to a Court file "for the parties to a proceeding to be given an opportunity to make submissions if they wish to do so."

[62] Applications by the media under the current High Court Rules will often be under r 3.9 (applications during the substantive hearing phase), which expressly requires that parties be notified. However, even in an application under r 3.13 there will normally be a real risk that a party to a proceeding could be adversely affected by media coverage. In particular, the protection of the parties' confidentiality, privacy interests and privilege in terms of r 3.16(b) will often be a concern for the Court when faced with an application by the media. On the other hand, these concerns do not arise in relation to an application by a regulator who has specifically agreed to maintain privacy and confidentiality (and seeks Court orders on that basis).

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[23] For example, *Chapman v P* [2010] NZFLR 855; *United Civil Construction Ltd v Matauri Bay Properties Ltd* (2009) 19 PRNZ 610; *ASB Bank Ltd v Versalko* (2010) 20 PRNZ 634.

[63] In this case it is difficult to see how the parties to the various proceedings (all of which have now come to an end) would be adversely affected by the Law Society accessing the Court Files as part of its ongoing investigations. The parties' substantive rights cannot be affected. The relevant proceedings have all been determined and the Law Society has no interest in the underlying substantive issues in any event.

[64] As noted above however, to ensure that any privacy or confidentiality interests in the underlying documents are not inadvertently compromised, further directions will be required before documents obtained from the Court files can be used in any Tribunal or Court proceedings. At that stage the Court can also revisit whether notice should be given to any third party, with reference to the specific documents which the Law Society wishes to use.

[65] In such circumstances I see no basis for revisiting the initial decision that the only party adversely affected by the Law Society's application is Mr Orlov. Accordingly the 35 parties to the relevant proceedings are not required to be notified of the application in terms of r 3.13(5).

Costs

[66] My preliminary view is that the respondent should meet the applicants' costs of this application, on a 2B basis. However, as I have not heard argument on the issue of costs that view is preliminary only. If the parties are unable to agree costs based on this indication then:

(a) The applicants are to file a memorandum on costs by 23 November 2012; and

(b) The respondent is to file a memorandum on costs by 30 November 2012.

Result

[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.

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Katz J

ANNEXURE

COURT FILES THAT ARE PERMITTED TO BE INSPECTED

1. *RL v The Chief Executive of the Ministry of Social Development* HC Auckland CIV-2007-404-7031.

2. *RIG v Chief Executive Officer, Ministry of Social Development & Anor* HC Auckland CIV-2008-404-4975.

3. *RIG v The Chief Executive of the Ministry of Social Development & Ors* HC Auckland CIV-2008-404-3461.

4. *Anza Distribution (NZ) Limited (in liquidation) v USG Interiors Pacific Limited* HC Auckland CIV-2007-404-374.

5. *SC v DC* HC Auckland CIV-2009-404-2469.

6. *Sikwung Hung and the Trustees of the May Family Trust v Keung Tse & Ors* HC Auckland CIV-2008-404-8568.

7. *Mahinder Singh v The Manager of Custodial Services Waikeria Prison* HC Auckland CIV-2008-404-7677.

8. *Order of St John Northern Regional Trust v Gemini 10 Ltd & Ors* HC Auckland CIV-2009-404-1559.

9. *Liddle v BNZ* HC Auckland CIV-2009-404-6189.

10. *BNZ v Liddle* HC Auckland CIV-2009-404-6245.