

IN THE SUPREME COURT OF NEW ZEALAND

SC 17/2010

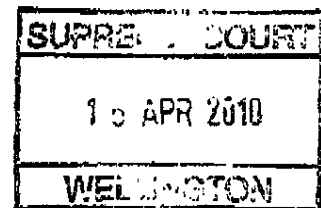
BETWEEN **KIMBERLY BIRKENFELD**
Applicant

AND **ANTHONY BRUCE KENDALL**
First Respondent

AND **YACHTING NEW ZEALAND INCORPORATED**
Second Respondent

Written Submissions in Support of
Application for Leave to Bring Appeal to the Supreme Court of New Zealand
Article 14(1) of the International Convention on Civil and Political Rights

April 14, 2010



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Table of Contents

I. Question of Law on Proposed Appeal:

Whether the regulations made in High Court (Access to Court Documents) Amendment Rules 2009 and Court of Appeal (Access to Court Documents) Rules 2009 (both which provide no right to general public access to documents on a court file in a pending proceeding even upon payment of a prescribed fee) are in violation of the right to a fair and public hearing provision of the ICCPR given effect in New Zealand by the New Zealand Bill of Rights Act 1990.

II. Narrative of Facts of the Case Relevant to the Question of Law on Proposed Appeal

III. Points of Law Involved

IV. The Decision to be Appealed Against

V. The Reasons Why in Terms of SCA 2003 s 13 Leave to Appeal Should be Given Based on General or Public Importance

VI. Merit of Question of Law on Proposed Appeal

VII. SCA 2003 s 13(4): Interests of Justice Require Leave to Appeal Interlocutory Order

VIII. Other: Supreme Court Rules 2004 r 20(4): Hearing Date

IX. Other: Supreme Court Rules 2004 r 26(2): Security for Costs

X. Conclusion

May it Please the Court:**I. Question of Law on the Proposed Appeal**

- 1 The International Covenant of Civil and Political Rights (“ICCPR”) Article 14(1) provides right to a fair and public hearing. Having ratified the ICCPR, New Zealand has obligation to provide right to a fair and public hearing. The question of law on the proposed appeal is whether the regulations made in High Court (Access to Court Documents) Amendment Rules 2009 and Court of Appeal (Access to Court Documents) Rules 2009 (both which provide no right to general public access to documents on a court file in a pending proceeding even upon payment of a prescribed fee) are in violation of the right to a fair and public hearing provision of the ICCPR given effect in New Zealand by the New Zealand Bill of Rights Act 1990 (“NZBORA”).

II. Narrative of Facts of the Case Relevant to the Question of Law on Proposed Appeal¹

- 2 On 2 August 2006, the Law Commission tabled in Parliament the report *Access to Court Records* NZLC 93. It recommended a new Court Information Act based on a presumption of open access to court records, limited only by principled reasons for denying access. The Court Information Act would also empower the making of access regulations. A media release stated:

“... the report’s recommendations include ... greater public access at the time of a court hearing to material that is before the court, to ensure accuracy of reporting and improve public scrutiny of court proceedings...”²

- 3 The government presented response to the House of Representatives in May 2007 generally agreeing with the Law Commission’s recommendations. The response provided:

“The Government considers that a definition of open justice should be the centerpiece of any new legislation governing access to court records. The best definition will be one that carefully balances the presumption of openness and an individual’s rights and expectations of privacy...”

¹ Bates-number references (“Bates”) in this section are to documents identified by Bates-stamp number in *Written Material Relevant to Application for Leave to Bring Civil Appeal SCA 2003 s 15(1)(a)*, filed 14 April 2009.

² Law Commission, *Law Commission Recommends Increased Access to Court Records*, 2 August 2006, available on the Law Commission’s website www.lawcom.govt.nz.

The Government therefore favours legislation to clarify access to court record information as a single point of reference...

Before changes are made to the current court records access regime, the Government considers that the public and other interested stakeholders (such as the judiciary, the Law Commission, the Bar Association and media) should have an opportunity to contribute to the debate on what open justice means.

Therefore, the Government considers that the select committee inquiry process would provide an effective mechanism for ensuring wide public debate ...³

- 4 A new Government was elected in 2008. As reported in Canadian research: "...Access to Court Records was tabled in Parliament, and the government issued a response in May 2007 referring its recommendations to the Select Justice and Electoral Committee of the Parliament for further study. The fate of this study is unclear – New Zealand's 48th Parliament was dissolved for an election in September 2008."⁴
- 5 Then, Access to Court Documents⁵ regulation was made by The Rules Committee. The new regulations deny right of public access to court documents in a pending proceeding. In the minutes of The Rules Committee meeting held Monday 9 June 2008, it is documented: "Legislation might be appropriate given the significant gaps in the Rules Committee's jurisdiction over matters relating to records."⁶
- 6 This concern, in combination with New Zealand's international obligations under ICCPR Article 14(1) raises the question of law on proposed appeal.
- 7 New Zealand ratified the ICCPR 28 December 1978.⁷
- 8 ICCPR Article 14(1) provides:

³ Government Response to Law Commission Report on Access to Court Records, May 2007 at [8]-[10].

⁴ Kristen Douglas and Alysia Davies, Access to Information Legislation in Canada and Four Other Countries, Library of Parliament, PRB 06-08E, revised 8 October 2008. Accessed March 26, 2010 on Google's cache of <http://www.parl.gc.ca/infomation/library/PRBpubs/prb0608-e.htm>

⁵ Court of Appeal (Access to Court Documents) Rules 2009, High Court (Access to Court Documents) Amendment Rules 2009, and District Courts Rules 2009 rr 3.11-3.22.

⁶ The Rules Committee, 17 June 2008, Circular No. 79 of 2008, Minutes of meeting held Monday 9 June 2008. See www.courtsofnz.govt.nz/about/system/rules_committee. Accessed March 20, 2010.

⁷ United Nations ICCPR Ratification Document: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#12 Accessed March 20, 2010.

“All persons shall be equal before courts and tribunals. In the determination of any criminal charge against him, or of **his rights and obligations in a suit at law** (emphasis added to highlight this right applies in civil as well as criminal matters), everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice...”

9 According to its Long Title, one of the twin purposes of the NZBORA is to “affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights.”⁸

10 The Applicant (“Birkenfeld”), not from New Zealand, is a litigant in New Zealand. [Bates 98].

11 Birkenfeld has right to a fair and public hearing in New Zealand in determination of her rights and obligations in a suit at law.

12 Birkenfeld’s *Interlocutory Application on Notice for Order for Stay of the Decision of the High Court to Pay Fund into Trust and Permanently Stay Proceedings* filed 16 December 2009 [Bates 45], was determined by the Court of Appeal on 22 December 2009 [Bates 76] without:

- right to reasons for decisions, and without
- right to public access to court records on file in a pending proceeding.

13 New Zealand does not provide right to reasons for judicial decisions.

14 New Zealand does not provide right to public access to court records on file in a pending proceeding.

III. Points of Law Involved

15 Whether the regulations made in High Court (Access to Court Documents) Amendment Rules 2009 and Court of Appeal (Access to Court Documents) Rules 2009 (both which provide no right to general public access to documents on a court file in a pending proceeding even upon payment of a prescribed fee) are in violation of the right to a fair and public hearing provision of the ICCPR given effect in New Zealand by the NZBORA.

⁸ New Zealand Bill of Rights Act 1990 Preamble.

IV. Decision to be Appealed Against

- 16 Application for the leave to bring appeal is made against the interlocutory order made 22 December 2009 in Court of Appeal 793/2009: [2009] NZCA 619.

V. The Reasons Why in Terms of SCA 2003 s 13 Leave to Appeal Should be Given Based on General or Public Importance

- 17 The right of public access to court records is of general or public importance as evidenced by the Law Commission's 175-page report "Access to Court Records," published June 2006.⁹ Not a small amount of public monies was spent on the Commission's recommendations including Recommendation 16: Subject to statute and court order, in the pre-trial period, non-parties should be entitled to access without leave: ... notices of proceeding and pleadings."¹⁰ That the question of law on proposed appeal is of general or public importance is confirmed by the Government response presented to the House of Representatives in 2007. The response includes statement that:

"During its inquiry the Commission found that although most hearings are open to members of the public, access to court record information is not so open. As a result, the Commission has recommended a Court Information Act, based on the framework of the Official Information Act, with a presumption that court record information will be accessible unless there is good reason to withhold. **The Court Information Act would empower the making of access rules** (emphasis added) for all jurisdictions..."¹¹

- 18 For reason of the ICCPR right to a fair and public hearing, litigants in the New Zealand legal system have right to the protection of public scrutiny of records on file in a pending proceeding. Under Access to Court Documents¹² regulations, there is no right to public scrutiny of records relied on by the Court in the procedural or substantive decision-making process in a pending proceeding.

⁹ Law Commission, Access to Court Records, June 2006 NZLC R93, available at www.lawcomm.govt.nz.

¹⁰ Ibid at p 171.

¹¹ Government Response to Law Commission Report on Access to Court Records, May 2007 at [3].

¹² Court of Appeal (Access to Court Documents) Rules 2009, High Court (Access to Court Documents) Amendment Rules 2009, and District Courts Rules 2009 rr 3.11-3.22.

- 19 Without the protection of public scrutiny of documents on file in a pending proceeding, the protective benefit of litigants' right to a public hearing is oppressed.
- 20 The government must be subject to the law. Unless this is the case, Court rulings may be viewed as arbitrary. In democratic societies, commitment to the rule of law must prevail over what may be viewed prima facie as arbitrary rule of man.

VI. Merit of Question of Law on Proposed Appeal

- 21 According to its Long Title, one of the twin purposes of the NZBORA is to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights."¹³
- 22 Article 31 of the Vienna Convention on Treaties, in like form of Interpretation Act s 5 reads:
*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose.*¹⁴
- 23 In interpretation of a statute such as the NZBORA, there is a presumption that Parliament does not intend to legislate contrary to New Zealand's international obligations. *Statute Law in New Zealand* states: "The New Zealand Court of Appeal has put the matter thus: We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations..."¹⁵
- 24 The issue of statutory interpretation and international treaty obligations was also considered in the leading case of *Tavita v Minister of Immigration*¹⁶. "(T)he question arose whether, in hearing an appeal ... the minister was obliged to have regard to conventions such as the International Convention on Civil and Political Rights... Of the argument that the minister was entitled to ignore the international instruments, Cooke P, in delivering the judgment of the Court of Appeal, said:

*That is an unattractive argument, implying that New Zealand's adherence to the international instruments has been at least partly window-dressing.*¹⁷

¹³ New Zealand Bill of Rights Act 1990 Preamble

¹⁴ JF Burrows, *Statute Law in New Zealand*, Wellington, LexisNexis 2003, p. 339.

¹⁵ Ibid p. 342, referring to *New Zealand Airline Pilots' Association v AG* [1997] 3 NZLR 269 at 289 per Keith J.

¹⁶ [1994] 2 NZLR 257.

¹⁷ Ibid at 266.

- From *Statute Law of New Zealand*.¹⁸

- 25 Although the public has access to attend hearings, the public does not have right to access court records before the hearing.
- 26 Without access to court records before a hearing - in a pending proceeding - it is not reasonable to hold that the public has had opportunity to gain reasonable understanding of the court event/hearing they are attending.
- 27 A litigant's right to a public hearing is ineffective when members of the public attending have not had reasonable opportunity to gain an understanding of the issues before the Court. Without right to members of the public and media gaining an understanding of the issues before the Court in a pending proceeding, a litigant does not have opportunity for effective protection of public scrutiny of a proceeding.
- 28 While it may be found that other jurisdictions may not allow the right of public access to court documents, it will be found that those jurisdictions do require judges to give reasons for decisions. In example, although in some Australian jurisdictions the public has right to access court documents and in other Australian jurisdictions the public does not have right to access court documents, Australian Judges are required to give reasons for decisions.
- 29 New Zealand is unique in that there is:
- No right to reasons for judgments, and
 - No right of public access to court records on file in a pending proceeding.
- 30 New Zealand is unique to deny both rights. In effect no right to a fair and public hearing.
- 31 The question of law on the proposed appeal will focus on the unique position of New Zealand. The unique combination of no right to reasons and no right of public access of documents has the effect of obstructing reasonable opportunity for public scrutiny to reveal:
- that a litigant in a pending proceeding is being denied the protection of rules of procedure, or
 - that an issue for determination was fully omitted from reference or misstated in a decision.

VII. SCA 2003 s 13(4): Interests of Justice Require Leave to Appeal Interlocutory Order

¹⁸ JF Burrows, *Statute Law in New Zealand*, Wellington, LexisNexis 2003, p. 343.

32 It is in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.

Relevant Facts of the Case: Leave to Appeal Interlocutory Order¹⁹

Date	Proceeding	Document	Bates
22 Dec 04	CIV 2004 485 1657	<i>Kimberly Birkenfeld v Anthony Bruce Kendall; Yachting New Zealand and International Sailing Federation (ISAF) High Court Wellington Statement of Claim Establishes CIV 2004 is preliminary and related to CIV 2005.</i>	91a - 104a
3 Mar 06	CIV 2005 085 596	<i>Johnston Lawrence v Kimberly Birkenfeld</i> District Court Oral Judgment of Judge C N Tuohy	1-6
13 Mar 07	CIV 2005 085 596	<i>Birkenfeld v Roger Chapman and Johnston Lawrence</i> District Court Reserved Judgment of Judge John Walker	7-16
22 Sep 08	CIV 2005 085 596	Fax to District Court Registrar and Johnston Lawrence from Birkenfeld: Unprejudicial scheduling necessary	17- 18
19 Oct 08	CIV 2005 085 596	Birkenfeld Memorandum to District Court: <i>I am fully engaged in preparations for imminent argument in the Court of Appeal. I am able to advance District Court matters from 14 November.</i>	19- 21
23 Oct 08	CIV 2005 085 596	Johnston Lawrence obtains unless order in District Court: <i>Unless Birkenfeld provides all documents requested by Johnston Lawrence by 31 October, Birkenfeld's defence and counterclaim shall be struck out.</i>	22- 24
25 Oct 08	CIV 2005 085 596	Birkenfeld letter: Service of documents to Johnston Lawrence	25
27 Oct 08	CIV 2005 085 596	Affidavit of Birkenfeld in support of application for stay in District Court CIV 2005 085 596 proceedings until final disposal of High Court proceedings CIV 2004 485 1657	26- 29
11/19/08; 12/3/08; 12/10/08	CIV 2005 085 596	Birkenfeld fax to District Court: <i>Has a decision been made yet?</i>	30- 33
3 Jul 09	CIV 2005 085 596	Johnston Lawrence to Birkenfeld: Notice of sealed judgments against Birkenfeld dated 5 June 2009 and 25 June 2009	34- 43
16 Dec 09	CA 793/2009	Court of Appeal: Birkenfeld <i>Notice of Appeal</i> of CIV 2004 485 1657 High Court judgments	44

¹⁹ Bates-number references ("Bates") in this section are to documents identified by Bates-stamp number in *Written Material Relevant to Application for Leave to Bring Civil Appeal SCA 2003 s 15(1)(a)*, filed 14 April 2009.

16 Dec 09	CA 793/2009	Court of Appeal: Birkenfeld <i>Interlocutory Application on Notice for Order for Stay of Execution of the Decision of the High Court to Pay Fund into Trust and Permanently Stay Proceedings</i>	45-46
16 Dec 09	CA 793/2009	Birkenfeld fax to Court of Appeal: Birkenfeld confirms fax number for service and delivery of documents is Duxton Hotel in Wellington, NZ	47-48
18 Dec 09	CA 793/2009	Birkenfeld fax to Court of Appeal: I wait for the Court of Appeal to allocate a hearing date for the Interlocutory Application on Notice accepted for filing on 16 December.	49
18 Dec 09	CA 793/2009	Yachting New Zealand Notice of Opposition to Application for order for stay of execution of the decision of the High Court	50-55
18 Dec 09	CA 793/2009	Birkenfeld Memorandum to Court of Appeal: The primary purpose of this memorandum is to request the Court to set a hearing date for the Interlocutory Application. I received copy of the Respondents Notice of Objection. Omissions and misstatements are noted which will be established by presentation of Court documents at hearing of the above application.	56-59
Dec 20, 09	CA 793/2009	Birkenfeld fax to Court of Appeal, High Court and Respondents: Birkenfeld confirms fax number for service and delivery of documents is +1 541 863-3315	60
21 Dec 09	CA 793/2009	Court of Appeal fax to Birkenfeld and Respondents	61
Dec 21, 09	CA 793/2009	Birkenfeld fax to Court of Appeal and Respondents	62-65
Dec 21, 09	CA 793/2009	Birkenfeld fax to Court of Appeal: Please fax the judgment to +1 541 863-3315	66
22 Dec 09	CA 793/2009	Court of Appeal fax to Birkenfeld and Respondents	67
Dec 21, 09	CA 793/2009	Birkenfeld Memorandum: CACR 205 r 34(1) <i>Amendment of Grounds of Appeal</i>	68-74
22 Dec 09	CA 793/2009	22 December 2009 10:30 AM Judgment of the Court of Appeal: The application for a stay pending disposition of the appeal is dismissed. Faxed to Birkenfeld at +1 305 854-5906 As noted at Bates 66, incorrect fax.	75-78
23 Dec 09	CA 793/2009	Yachting New Zealand sends notice of sealed order of the High Court. Faxed to Birkenfeld at +1 305 675-2947 As noted at Bates 66, incorrect fax.	79-83
Dec 23, 09	CA 793/2009	Birkenfeld fax to Court of Appeal No judgment has been received.	84-85
24 Dec 09	CA 793/2009	Court of Appeal faxes 22 December 2009 judgment to Birkenfeld at +1 541 863-3315	86-87

Jan 3, 10	CA 793/2009	Birkenfeld fax to Court of Appeal, High Court and Respondents: Birkenfeld confirms fax number for service and delivery of documents is +1 305 854-5906.	88-90
23 Feb 10	CIV 2005 085 596	Johnston Lawrence serves Birkenfeld and Public Trust with Garnishee Summons	91-96
2 Mar 10	CIV 2005 085 596	District Court fax to Birkenfeld The matter will be heard 21 May 2010.	97

Merit: The Interests of Justice Require Leave to Appeal Interlocutory Order

- 33 At Bates 95, the Affidavit of John Garry Stevens establishes at [5] that as result of the interlocutory order of the Court of Appeal, money was paid into the Public Trust. As the money is there, Johnston Lawrence garnishes it to cover a \$56,900.17 debt which is the result of the unless order [Bates 22-24] given 23 October 2008 despite Birkenfeld being fully engaged in preparation for the Court of Appeal [Bates 19-21], and in spite of Birkenfeld's application for a stay in District Court proceedings CIV 2005 085 596 until CIV 2004 485-1657 is finally disposed of.
- 34 Birkenfeld received no reply to inquiries [Bates 30-33] until a sealed judgment was served on her without any prior notice (on expiration of the appeal timeline), and whether intentionally or not, Johnston Lawrence would have means to know that 2 days prior she was dealing with a judgment from the Supreme Court. The actions of Johnston Lawrence show a pattern of obstruction of justice that adversely affects Birkenfeld in both CIV 2004 485 1657 and CIV 2005 085 596.
- 35 Note that the 3 March 2006 Oral Judgment of Judge C N Tuohy [Bates 5] at [20] provides
I consider it requires the full context of an oral hearing and consideration of all the written communications between those three parties on those issues at the relevant time. In other words, to use the words of Elias CJ, "The ultimate determination turns on a judgment only able to properly arrived at after a full hearing of the evidence."
- 36 Based on the above statement in the decision of Tuohy J, it can be viewed as a perversion of justice if the 22 December 2009 interlocutory order of the Court of Appeal is allowed to stand, allowing Johnston Lawrence to prevail without a full hearing, but on the basis of an unless order when they were aware that Birkenfeld was fully engaged in the Court of Appeal and is now fully engaged in the Supreme Court.

- 37 The order appears erroneous and will adversely affect the rights of the appealing party. The Court of Appeal did not hear Birkenfeld's submissions (neither oral submissions or on the papers). Birkenfeld was denied submission of argument on the issue at 2.3 [Bates 46]. Without hearing submission on this issue, which goes to placing Birkenfeld in a vulnerable position, the Court of Appeal denied stay of execution and the fund was paid into the trust.
- 38 As result, order given in the Court of Appeal to pay the fund into the Public Trust appears probable to result in the perversion of justice. A second proceeding involving Ms. Birkenfeld is by-product of the primary proceedings on appeal CIV 2004-485-1657 ("CIV 2004") in the Court of Appeal.
- 39 The unripe garnishment proceedings will be moot (pending final disposition of the primary CIV 2004-485-1657 proceedings) when the interlocutory order to pay funds into the trust is set aside and reversed.
- 40 The establishment of precedent is desirable.

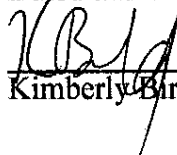
IX. Other: Supreme Court Rules 2004 r 26(2): Security for Costs

- 42 If the Court is satisfied under SCA 2003 s 13 that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal, the Applicant makes prayer to the Court to specifically address Supreme Court Rules 2004 r 26(2) in the decision with a statement to the effect that it is not appropriate to make leave to appeal subject to a condition of security.
- 43 The reason is that this is an appeal on an important question of public law interpreting New Zealand's international obligations under the International Covenant on Civil and Political Rights and the Applicant, citizen of the United States [BATES 98], is unable to earn a living due to catastrophic injuries sustained in the primary cause of action complained of in CIV 2004. As established in affidavits filed in SC 7/2009, she is dependent on United States Social Security Disability to pay for the cost of living.

X. Conclusion

- 44 For the above reasons, the requirements of SCA 2003 s 13 are satisfied for the Supreme Court to give leave to appeal the interlocutory order of the Court of Appeal in CA 793/09.

Dated this 14th day of April 2010



Kimberly Birkenfeld, Applicant