IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-202-404-001077
[2021] NZHC 259

UNDER	the Judicial Review Procedure Act 2016, Parts 5 and 50 of the High Court Rules 2016
IN THE MATTER OF	a decision under the Care of Children Act 2004
BETWEEN	S Applicant
AND	FAMILY COURT AT MANUKAU First Respondent
	M Second Respondent

Hearing: 10 February 2021

Appearances: Applicant in person
AJ Cooke on behalf of LF Soljan as amicus curiae

Judgment: 24 February 2021

JUDGMENT OF DOWNS J

This judgment was delivered by me on Wednesday, 24 February 2021 at 10 am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
Crown Law, Wellington.
LF Soljan, Auckland.
AJ Cooke, Auckland.

Copy to: Applicant

What this case is about

[1] Courts have long restricted who may record their hearings. S, a self-represented litigant, recorded a Family Court hearing on his iPhone without that Court's knowledge. S argues the recording is admissible evidence at his forthcoming judicial review claim in this court. This brief judgment contains my reasons for concluding otherwise.

Background

[2] S has been a litigant in the Family Court for some time. He believes that court has not treated him fairly, at least at times. In December 2019, S learned of a Minute of Judge A G Mahon dated 15 November 2019.[1] The Minute concerned a November conference S had not attended (he was overseas). S believes serious, untrue allegations were made about him at that conference. S sought a recording of the conference but was told none was available. S says he decided to record future hearings in the event their happenings became crucial to an appeal.

[3] On 24 February 2020, the Family Court held a submissions-only telephone conference. The conference was directed at interim parenting orders in respect of S's son, and whether these should be varied. S was represented by a lawyer at the conference. S was also present, by telephone, with the Judge's permission. While S's telephone was on speaker mode, he used another iPhone to record the hearing. It is common ground S made the recording without telling anyone, that is, covertly. It is thus common ground S made the recording without the Judge's permission.

[4] The recording has been transcribed.

[5] S seeks judicial review of decisions of the Family Court at Manukau. The claim is to be heard 12 March 2021. As observed, S seeks to rely on the recording (or associated transcript or both) as part of his claim. Woolford J directed this issue be determined before the hearing of that claim.[2]

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1 *[M] v [S]* FC Manukau FAM-2018-055-169, 15 November 2019.

2 *[S] v Family Court at Manukau* HC Auckland CIV-2020-404-1077, 26 November 2020. I assume Woolford J considered admissibility determination a consequential direction under s 14(m) of the Judicial Review Procedure Act 2016.

S's position

[6] S makes two overarching points. First, that courts should keep recordings of all hearings in the interests of justice, including natural justice. Second, that no rule explicitly prevents a litigant from covertly recording a hearing. Amplifying this point, S notes the Judge did not forbid anyone from making a recording when the conference began nor at any time during the conference.

[7] S argues the evidence is important to his judicial review case. He says the recording reveals evidence of actual bias on the part of Judge Mahon. S says the Judge's tone was "hostile" and "dismissive", and the Judge made "disturbing" comments about him.

The Family Court's position

[8] On behalf of the Family Court, Ms Laurenson contends the recording should be excluded from evidence as an abuse of process.[3] She notes s 14(2)(j) of the Judicial Review Procedure Act 2016 outlines the procedure by which the record of the Court under review should be produced. Ms Laurenson says for S to record a hearing and then seek to adduce that recording subverts this procedure. So, even if the recording were technically admissible under the Evidence Act 2006, it should not be admitted as evidence.

[9] Ms Laurenson accepts a Judge may, in exceptional cases, allow a party to make a recording. But, she emphasises S did not make a request. Ms Laurenson says particular care must be taken when permitting recordings in the Family Court given the nature of the cases it hears.[4]

Counsel assisting's position

[10] Ms Soljan was appointed to assist the Court, and Mr Cooke appeared on her behalf. They note the private nature of Family Court cases, especially those involving

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3 Ms Laurenson filed a written submission. I excused her appearance.
4 Noting Family Court Act 1980, s 11B.

care of children,[5] and the authority of a Judge to regulate a courtroom. Like Ms Laurenson, Ms Soljan and Mr Cooke refer to several cases. These I come to.

Analysis

[11] S is correct that courts have a duty to keep records, and equally correct the maintenance of such records is an important facet of the administration of justice. So, for example, the Family Court must keep an official record of its proceedings (access to which is carefully prescribed).[6]

[12] However, S is incorrect this required the Family Court to record *this* conference, and quite incorrect to advance the absence of a recording as justification for covertly recording the hearing.

[13] First, no recitation of authority is required for the proposition that, absent some contrary statute, regulation or rule, a presiding Judge has the authority to regulate the conduct of a hearing. This is equally true of a Family Court Judge.[7] A Family Court Judge may, at any time, give any directions she or he thinks proper for regulating that Court's business.[8] This necessarily extends to decisions about the recording of hearings.

[14] Second, and contrary to S's submission, the Family Court was *not* required to record the conference on 24 February 2020, for, it was not a hearing in a proceeding for which there is a right of appeal without leave.[9] And, even if a recording were required, this would not justify S making one absent permission. This introduces the next point.

[15] Third, courts have long restricted who may record their hearings. Rules reflect this. Consequently, lawyers may not make a video or sound recording of a hearing

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5 *Skelton v Family Court at Hamilton (No 2)* [2007] 3 NZLR 368 (HC) at [44]; Family Court Act, ss 11A and 11B; and Care of Children Act 2004, s 137.
6 Family Court Rules 2002, rr 424 and 427.
7 Rules 13–17.
8 Rule 16.
9 District Court Act 2016, s 110; and Care of Children Act, s 143(3).

without permission of the presiding Judge.[10] Similarly, no member of the media may film or record a hearing without permission of the Judge.[11] Members of the public typically require the Judge's permission to make notes during a hearing.[12]

[16] Case law is illustrative. In *Koyama v New Zealand Law Society*, Kós J commented on the "disgraceful" uploading of a covert recording of a chambers hearing:[13]

> On 11 and 18 October 2012 Mr Koyama filed what purported to be submissions in support of his application for leave to appeal. But in each case there is just a single page annexing certain documents relating to the judicial complaint process. One includes what purports to be a transcript of a telephone conference in chambers involving Mr Koyama, counsel for the Society and the Judge. This Mr Koyama had recorded covertly and placed on YouTube. Such conduct by Mr Koyama, bearing in mind his status as a barrister and solicitor of the High Court, is disgraceful. Telephone conferences are chambers hearings, to which the public are not admitted. Mr Koyama had no business subverting that protection, which exists for the benefit of litigants, by placing a copy of his recording on the internet. Rule 7.35 of the High Court Rules provides that particulars of a chambers hearing (including its outcome) may be published unless the Court orders otherwise. That does not however permit a covert recording of the occasion to be taken, and then posted on the internet. If Mr Koyama needed a record of the conference, the proper course would have been to have an associate, identified to the Court and other counsel, take a note.

[17] Mr Greendrake sought permission to film a High Court hearing. Nation J declined permission, observing:[14]

> Counsel for the parties or a self-represented litigant can also take notes of what is being said during the hearing but normally the courts will not allow any other person to make notes or to, in any other way, record what is being said during a court hearing. That is because the Court and presiding Judges need to control how a record of the court proceedings is compiled and, importantly, how it might be used, not just during the hearing but also afterwards.

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10 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.8; and *Orlov v Chief Executive of the Ministry of Social Development* CA280/2009, 4 February 2011 (Minute) at [11].

11 Ministry of Justice *Media guide for reporting the courts and tribunals* (September 2019) at Appendix A, pt 5 and sch 4.

12 Courts Security Act 1999, s 11A.

13 *Koyama v New Zealand Law Society* [2012] NZHC 2853 at [4].

14 *Greendrake v District Court* [2020] NZHC 2732 at [6].

[18] In *Orlov v National Standards Committee No 1*, the Court of Appeal declined to allow Mr Orlov to make a recording of a hearing.[15] It said:[16]

> [11] The Judges of all superior Courts have an inherent jurisdiction to control the conduct of hearings in the courtroom. We consider that the making of audio recordings is very much a matter within the control of the Judge or Judges hearing a case. We emphasise that a lawyer ought not to make an audio recording of the proceedings of the Court without first obtaining the permission of the Judge or Judges concerned. *The same principle would apply to a litigant in person.*

[19] The italicised sentence confirms the obvious: these rules apply equally to self-represented litigants.

[20] Fourth, the rules exist for good reason. Courts are obliged to keep their own records. Control over who make may make or access them is a concomitant, curial responsibility. What happens in court, including the identity of those involved, is sometimes suppressed, for example, to preserve a defendant's right to a fair trial; to guard against the identification of a complainant in a sexual violence case; or to protect the privacy of children. Moreover, what happens in court, including what is said in a courtroom, can easily be taken out of context, in turn causing potential harm to litigants, witnesses, court officials, and even the Judge. This explains, at least in part, the requirement on journalists to report court cases in an even-handed, fair manner. In short, unregulated recording could imperil the administration of justice.

[21] Fifth, these observations are not affected by ss 14 and 27 of the New Zealand Bill of Rights Act 1990, on which S relies. Freedom of expression, a right protected by s 14 of the Act, is, like other rights, subject to reasonable limitations (demonstrably justifiable in a free and democratic society).[17] Moreover, as observed, rights, including those protected by s 27 of the Act—"the right to the observance of the principles of natural justice"—could be imperilled if reporting went unregulated.

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15 *Orlov v National Standards Committee No 1* [2014] NZCA 242, [2014] 3 NZLR 302 at [55].

16 At [56], referring to *Orlov v Chief Executive of the Ministry of Social Development*, above n 10 (emphasis added).

17 New Zealand Bill of Rights Act 1990, s 5.

[22] S also relies on pt 7 of the Criminal Procedure Rules 2012. However, these rules do not apply to this case.[18] S refers to sch 1 pt A of the District Court Act 2016. He says this requires all Family Court cases to be recorded. These provisions do not have this effect: sch 1 pt A provides only a description of court information and does not prescribe the recording of all Family Court cases. S also refers to s 12 of the District Court (Access to Court Documents) Rules 2017. These rules do not apply to Family Court cases.[19]

[23] Consequently, I accept Ms Laurenson's submission admission of the recording, or associated transcript, would constitute an abuse of process. This remains true even if S did not know he was prohibited from recording the hearing (absent the Judge's permission). A conclusion of an abuse of process does not require a determination there has been bad faith or some species of sinister intent.[20]

[24] In *Marwood v Commissioner of Police*,[21] the Supreme Court held improperly obtained evidence may be excluded in a civil proceeding. It concluded the inherent power of a Court to prevent an abuse of process was not compromised by the Evidence Act.[22] That said, improperly obtained evidence is not necessarily inadmissible, something the Evidence Act makes clear in criminal proceedings,[23] and which *Marwood* makes clear in civil proceedings. The conventional inquiry is whether exclusion is proportionate to the impropriety.

[25] There are dangers in adopting this approach to covert recordings of court hearings. Litigants may be encouraged to record and argue the toss, in turn burdening courts with interlocutory hearings directed at something that should not have occurred in their own courtrooms. It bears repeating, admission of this recording would constitute an abuse of process. For these reasons, I decline to make a fact-sensitive assessment of whether exclusion is required. Similarly, to inquire into relevance (or probative value) could encourage covert recordings in the hope they reveal gold in the mind of a litigant.

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18 Criminal Procedure Rules 2012, rr 1.4 and 1.5.
19 District Court (Access to Court Documents) Rules 2017, r 3(4); and Family Court Rules, r 5.
20 *R v McColl* (1999) 17 CRNZ 136 (CA) at [33].
21 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260.
22 At [37], citing s 11 of that Act.
23 Evidence Act 2006, s 30.

Result

[26] The recording and associated transcript are inadmissible in S's judicial review claim.

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Downs J