ORDER PROHIBITING PUBLICATION OF ANY INFORMATION IDENTIFYING THE PERSONS REFERRED TO AT [7] AND ELSEWHERE IN THE JUDGMENT AND NOT NAMED BEYOND THE INFORMATION IN THE JUDGMENT WHICH IS MADE PUBLICLY AVAILABLE

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2014-485-011211
[2024] NZHC 940

IN THE MATTER OF	An application to access court documents under the Senior Courts (Access to Court documents) Rules 2017 in relation to the Court's file in Osborne v Ministry of Business, Innovation and Employment
BETWEEN	CHRISTOPHER HARDER Applicant
AND	WORKSAFE NEW ZEALAND Respondent

Hearing:	22 April 2024
Appearances:	C Harder self-represented for Applicant A L Martin for Respondent
Judgment:	26 April 2024

JUDGMENT OF GRICE J

Introduction

[1] In 2017 the Supreme Court declared that an arrangement reached by WorkSafe New Zealand (WorkSafe) to offer no evidence on charges against Mr Peter Whittall, a director and chief executive officer of Pike River Coal Ltd, was unlawful.[1] The

[1] *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 [judicial review decision].

present application concerns court and other documents which relate to that prosecution.

[2] Mr Whittall had been prosecuted following the Pike River mine disaster, which was described by the Supreme Court as follows:[2]

> [2] Twenty-nine men died following explosions at the Pike River coal mine on 19 November 2010. Two others were injured but survived. WorkSafe described what happened as "the employment related disaster of a generation." At the sentencing of the mine owner, Pike River Coal Ltd, for breaches of the Health and Safety in Employment Act, WorkSafe submitted that the case was "as serious as one can contemplate … not only with regard to the breath taking omissions and failures at the mine but also in terms of the number of men killed". The view that the omissions and failures in safety at the mine were "breath taking" is also substantiated by the 2012 report of the Royal Commission into the explosions.

[3] The Court found that a conditional payment of $3.41 million had been made by Mr Whittall into the court by way of reparation in return for WorkSafe withdrawing the charges against him.

[4] Mr Christopher Harder filed this interlocutory application to the High Court seeking discovery orders against WorkSafe for documents in respect of the voluntary reparation payment made in connection with the prosecution of charges against Mr Whittall. Mr Harder has indicated that he intends to use the discovered documents to prepare an application to recall a judgment of Mallon J,[3] delivered on 24 March 2023, which granted Mr Harder access to the court file regarding the judicial review of WorkSafe's decision not to provide evidence against Mr Whittall at trial.[4]

[5] Mr Bernie Monk and Ms Rose, each of whom lost a son in the Pike River tragedy, were seated next to Mr Harder at this hearing in demonstration of their support for his application.

---

2 Judicial review decision, above n 1 (footnotes omitted).

3 *Re Harder (No 2)* [2023] NZHC 620 [access to documents decision]. An earlier decision dated 22 December 2022 was issued by Mallon J seeking clarification of the application.

4 I note that the judicial review to which this application relates was in respect of the Ministry of Business, Innovation and Employment (MBIE), who are now WorkSafe for the purposes of this proceeding. For convenience, MBIE is referred to as WorkSafe throughout this judgment.

[6] WorkSafe opposes the application and seeks that it be struck out or otherwise dismissed under r 7.42A of the High Court Rules 2016 (HCR). This is on the basis that Mr Harder's access to court documents application has already been finally determined by Mallon J, Mr Harder does not have standing to reopen aspects of the substantive proceedings to which these documents relate, and the orders Mr Harder ultimately seeks are not available through the recall jurisdiction.

Ambit of present application

[7] The focus of Mr Harder's application is on letters sent from Mr Stuart Grieve KC, counsel for Mr Whittall, to Mr Brent Stanaway, counsel for the Crown, during prosecution discussions. There are a number of iterations of a letter making the proposal for settlement by Mr Grieve to Mr Stanaway. All versions of the letter are dated 16 October 2013, although the various iterations were sent on different dates. Mr Harder alleges that WorkSafe failed to disclose at least one other version of this letter containing two additional conditions to the offer of settlement in respect of the reparation payment. On one version, which was disclosed following the judgment of Mallon J, there is handwritten note agreed to have been made by Mr Stanaway, although what it says is not clear. Mr Harder says that in failing to provide the other version or a "clean copy" of the letter which Mr Stanaway has notated, WorkSafe has misled the Court, and so the relevant decision of Mallon J must be recalled.

[8] The present hearing was set down to determine the following three preliminary issues identified by Cull J in her minute dated 16 February 2024:[5]

(a) Whether the High Court has jurisdiction to determine Mr Harder's application for discovery, given the substantive judicial review proceedings and Mr Harder's prior access to court documents application have both be finally determined?

(b) Does Mr Harder have standing to bring this interlocutory application?

(c) Is this application an abuse of process?

---

5 *Harder v WorkSafe New Zealand* HC Wellington CIV-2014-485-11211, 16 February 2024 (Minute of Cull J) at [13].

[9] Mr Harder had formulated his application prior to the case management conference before Cull J as follows:[6]

> (i) whether [any documents relating to the 'two other conditions' or the 'clean copy'] of any documents, are or have been in Mr Stanaway's control; and
>
> (ii) if the documents have been but are no longer in Mr Stanaway's control, to the best of his knowledge and belief as to when the documents ceased to be in his control and who now has control of them, that he be required to supply an affidavit to the Registrar in regard to existence or otherwise of the 'clean copy' of the 'further version' of the 16 October 2013 letter, he allegedly received by email from Stuart Grieve KC on 6 December 2013, which letter contained condition 6(e), and further he supply any related documents that he possesses or knows the whereabouts of relating to the 'other two conditions' referred to in para 4 of his 20 August 2023 'without prejudice' letter to Stuart Grieve KC; and
>
> …
>
> (iii) [a]n affidavit from Mr Stanaway to confirm the 'material admission' made by him in an email sent to Mr John Campbell of TVNZ in late December 2023, published online in Saturday 10 February 2024.

[10] Mr Harder sought to extend those applications in his further undated submissions received for filing on 22 April just before the hearing. In those submissions, which he addressed at the hearing, he added that the discovery sought should extend to not only the solicitor who was acting on the prosecution of Mr Whittall, but also counsel acting for Mr Whittall, as well as in-house legal advisors at WorkSafe and Mr Whittall's liability insurers at the time of the prosecution, who Mr Harder alleges provided the funds for the payment of the reparation.

[11] Mr Harder submitted that the discovery sought was pre-proceedings discovery, the proceedings being the recall application. He said there was no contemplated proceedings against the insurers or any third party at present.

[12] Mr Harder further submitted that if the application under the HCR was not successful then he relied on the court's inherent jurisdiction. He submitted that r 1.6 allows the court to deal with a case for which no form of procedure is prescribed by

---

6 Minute of Cull J, above n 5, at [4][5].

the HCR. Further he said that procedural requirements should not stand in the way of justice.

[13] In his memorandum filed 17 April 2024, Mr Harder invites "the presiding Judge on 22 April 2024 to refer this application to Mallon J to consider and determine the application for disclosure orders". He submits that in arguing that the application could no longer by heard by Mallon J given her appointment to the Court of Appeal, counsel for WorkSafe overlooked s 103 of the Senior Courts Act 2016, which provides that a judge of the Court of Appeal may sit as, or exercise powers of, a Judge of the High Court.

[14] That matter was not pursued at the hearing. These applications have been set down for some time and been the subject of a pre-hearing conference. Essentially the application is for a pre-proceeding discovery and there was no reason that it should be heard other than by the scheduled judge.

[15] I briefly set out some further background to the application, before addressing each of the issues for which this was set down and arising from the new applications.

Background

[16] The court file in relation to the proceedings included privileged documents detailing the "without prejudice" plea negotiations between counsel for WorkSafe and counsel for Mr Whittall. These documents included several letters and emails. Given the significant public interest in the proceeding, the privileged documents were disclosed in the judicial review proceeding on a limited waiver basis so they could be examined to determine the matters in the judicial review.

[17] In 2022 Mr Harder, although not a party to the judicial review proceedings, applied for access to all of the documents on the court file, including the privileged documents detailing plea discussions. He made this application to access the court file individually but as Mallon J noted with the support of Mr Monk and Mr Dunbar, who are family members of two of the victims. WorkSafe opposed Mr Harder's application with respect to the privileged documents relating to the without prejudice discussions, but did not object to him accessing any other part of the Court file.

[18] In a memorandum dated 18 October 2022 WorkSafe indicated that it had further information which led to it to withdrawing its objection to the disclosure of certain documents which had either been redacted or not supplied at all. The reason given was that in working through the privilege claims it had found that some of the documents had already been disclosed in response to an Official Information Act 1982 request made by Mr Harder. WorkSafe noted:

> On 11 March 2022, two of the Privileged Documents, being the letter dated 7 August 2013 (one of the documents in tab 35 of the Agreed Bundle of Documents at pp308-309 inclusive) and the without prejudice version of the 16 October 2013 letter (at tab 19 – being KAS-2, and in tab 35 at pp315-318 inclusive) were provided in full by WorkSafe to Mr Harder, in response to a request made under the Official Information Act 1982. There is a further version of the 16 October 2013 letter which has not been released, but which only differs in a minor respect from the version which has been released (in tab 35 at pp322-325 inclusive). That additional version has therefore, in all material respects, been made publicly available.

[19] The memorandum went on to make the following concession in relation to those letters, as well as other redactions and documents for which privilege had initially been claimed:

> WorkSafe does not object to the release of the documents which have been made publicly available since the conclusion of this appeal, outlined above. However, WorkSafe otherwise objects to the release of the remainder of the Privileged Documents

[20] In her judgment of 24 March 2023, in addition to those documents agreed to be released by WorkSafe, Mallon J ordered full disclosure of the file including all privileged documents detailing the plea discussions.[7] Her Honour said:[8]

> [15] On a broad view, the communications over which privilege is claimed are "plea discussions" in that they concerned a possible resolution of the charges. The law is not clear whether the privilege ends with the resolution of charges or whether "once privileged, always privileged" is the correct approach. I adopt the latter approach as that preserves the privilege in situations where it may be appropriate to do so beyond the case in which the discussions occurred and s 57 provides grounds on which disclosure can be authorised in an appropriate case. In this case, the relevant ground is whether it would be contrary to justice not to disclose the communications or part of it.

---

7 *Re Harder (No 2)*, above n 3. This judgment followed on from and is to be read in connection with Mallon J's initial judgment, *Re Harder* [2022] NZHC 3615, delivered 22 December 2022.

8 Footnotes omitted.

[16] I note that Mr Harder suggests that the Court should disallow the claimed privilege under s 67(1) of the Evidence Act on the basis of there being a "prima facie case that the communication was made or received, or the information was compiled or prepared" for a dishonest purpose or to enable anyone to commit, what the person claiming privilege knew or reasonably ought to have known, was an offence. I do not accept that this ground is made out. Similarly, Mr Harder claims that WorkSafe has committed "a further offence" by claiming privilege over the relevant documents. I do not accept this either.

[17] WorkSafe acknowledges the Court may find that s 57(2B) applies and leaves the question of whether the "contrary to justice" exception is made out for the privileged documents in the Court's hands. As to this, Mr Harder says it is in the interests of justice that he be given full access to all documents on the Court file so that he can be "fully informed" and in the best position to make submissions to the Ombudsman.

[18] In determining when it would be contrary to justice not to disclose the documents, it is appropriate to balance the public interest in upholding the privilege with the competing public interest in revealing it. As one commentator puts it, upholding privilege in the criminal context has significant value for the administration of the justice. This may lie in relieving victims or complainants from the burden of the trial process; releasing court and judicial time, prosecution costs, and legal aid resources; and providing a structured environment in which the defendant may accept any appropriate responsibility for offending that may be reflected in any sentence.

[19] In this case, allowing Mr Harder to access court records that include documents over which privilege is claimed, will amount to authorising the disclosure under s 57 of the Evidence Act. While some of Mr Harder's claims appear to be extravagant, the fact is that he already has access to some of the documents over which privilege is claimed both through legitimate sources and unclear ones. The problem with a partial disclosure is that it can potentially give a wrong or misleading impression about what has not been disclosed. Having reviewed the documents, there is no particular reason to maintain the privilege over the remaining documents in light of those that Mr Harder (and through him, Mr Dunbar and Mr Monk) already has. They raise no new or independent issues that require a different balancing of the competing public interests. That is confirmed by counsel for WorkSafe who confirmed that the opposition was based on principle rather than anything in particular about the remaining documents.

[20] In all the circumstances, therefore, I consider that transparency through open justice outweighs the factors that point against disclosure of the documents over which privilege is claimed. I take this view even though Mr Harder is a third party with no direct interest in the Pike River tragedy or the judicial review of the decision not to proceed with charges against Mr Whittall. I do so because Mr Dunbar and Mr Monk support Mr Harder's access. Transparency is in the interests of justice as, without it, there is scope for false speculation and misunderstanding. Such speculation and misunderstanding can undermine confidence in the administration of justice.

[21] The result recorded in the judgment is as follows: "[t]he application for access to the court file is granted as set out in this judgment".[9]

[22] Mr Harder now seeks orders allowing him to investigate the events documented in the court file to which he was granted access, in order to support various allegations in relation to the individuals involved in the plea discussions involving WorkSafe, relevant lawyers and the Solicitor-General.

The documents sought

[23] As noted above, a letter on the court file dated 16 October 2013 between counsel for WorkSafe and counsel for Mr Whittall contained details of the payment and the circumstances in which it would be made. There were a number of versions of this letter exchanged between counsel. They were created on different dates but all bore the same date on their face, being 16 October 2013. The original version of this letter was marked without prejudice, however there were also two other versions of the letter – the first draft of an "open" version which was rejected by counsel for WorkSafe, and an "open" non confidential version. The first two versions of the letter were covered by privilege in plea discussions and provided to the Court under the limited waiver. The open version was never subject to a claim of privilege.

[24] The first draft of the "open" version that was rejected by counsel for WorkSafe had a condition inserted in it at 6(e) which required that the reparation be acknowledged as being made on behalf of the directors and officers of Pike River Coal Ltd in recognition of the harm arising from the explosions or any subsequent events arising from those explosions. Beside that condition was a handwritten note which is difficult to make out on the photocopy version disclosed from the court file, but appears to include the words "no bar … to a civil claim". Other marks are apparent on the photocopy close to those words which may be a line and a colon. Mr Harder says this notation gives rise to the need to further investigate the circumstances surrounding that correspondence, particularly as the prosecutor who made the notation has made recent comments to reporters about its meaning.

---

9 *Re Harder (No 2)*, above n 3, at [26].

[25] Condition 6(e) was removed from the final iteration of the "open" version of the letter which was presented to Judge Farish, who dealt with the dismissal of the prosecution and payment of the reparation. The Judge recorded agreement that the reparation was to be paid into court and then transferred as quickly as possible to the families and two survivors.[10]

[26] Mr Harder says that there is another version of the 16 October letter which he refers to as the "clean copy" — that is, one which does not have a handwritten notation on it. He says there is a fourth version of the letter and points to various comments of counsel in the correspondence which he suggests support that contention. Mr Harder says that in it counsel for Mr Whittall had suggested two conditions which were properly rejected by prosecuting counsel. However, he says the conditions have not been disclosed and he now seeks to find out what they are. Mr Harder contends that a version or versions of the letter exist, but are not in the court records or the material that Mr Martin or Crown Law holds.[11] It is this copy or copies that he seeks to obtain on discovery from the counsel between whom the letters were exchanged, and seeks to question WorkSafe staff or former staff about it.

[27] Mr Harder also referred to an extant Official Information Act request that he has made seeking disclosure of records of the prosecution and WorkSafe.

Respondent's clarification of substantive matters raised by Mr Harder

[28] WorkSafe submits that the materials filed by Mr Harder in support of his application contain significant speculation about the plea discussions and make serious allegations about people who are not party to the application. While acknowledging that the scope of this hearing is limited to the issues set out by Cull J, WorkSafe considers it necessary to clarify certain matters in light of these circumstances.

---

10 *Department of Labour v Whittall* DC Christchurch CRI-2012-018-821, 12 December 2013 at [13].

11 Mr Harder in his submissions dated 22 April 2024 filed on the morning of the hearing says that the Solicitor General and Crown Law have advised him that they know nothing about the two conditions.

[29] First, WorkSafe notes that the "two conditions" discussed by Mr Harder were explicitly rejected by counsel in the plea discussions and did not form part of the arrangement that was eventually agreed to.

[30] Secondly, it indicates that while the final "open" version of the 16 October 2013 letter did not contain express confirmation that there was no bar to a civil claim, this did not create immunity from future civil liability.

[31] Thirdly, WorkSafe emphasises that the documents which Mr Harder refers to were examined and considered in detail by the High Court, Court of Appeal, and Supreme Court.

[32] Finally, while Mr Harder has stated in written submissions that he understands there to be a fourth version of the 16 October 2013 letter, no such version exists.

Jurisdiction

[33] WorkSafe submits that the High Court does not have jurisdiction to make the orders Mr Harder seeks. It opposes the application on the basis that Mr Harder's access to court documents application has been finally determined and the orders he seeks are not available through the court's recall jurisdiction.

[34] WorkSafe suggests that, in essence, Mr Harder seeks to convert his request to access the court's file into a substantive proceeding to pursue his personal complaints about the conduct of counsel for Mr Whittall and MBIE (the predecessor of WorkSafe), and advisors for MBIE involved in the prosecution of Mr Whittall, none of whom were involved in the substantive judicial review proceedings or this application. WorkSafe submits that by proposing that the Court further investigate particular documents on the file and require the lawyers in question to come before a judge, Mr Harder is attempting to reopen and relitigate the issues determined in the substantive judicial review proceedings and the prosecution.

[35] WorkSafe also submits that another High Court Judge would be required to deal with the recall application if it were to be made, given that Mallon J is now a Court of Appeal Judge. Mr Harder has stated that he intends to seek recall of

Mallon J's 24 March 2023 decision after obtaining the discovery orders sought. He submits that the application to recall Mallon J's decision must be determined by Mallon J, despite the fact that she is now a Court of Appeal Judge.

[36] WorkSafe submits that there is no basis for Mr Harder to suggest that Mallon J's judgment was incorrect, given that he was granted full access to all documents on the Court file. It contends that Mr Harder's indicated plan to seek a recall of the judgment so that the "ratio decidendii" of Mallon J's decision can be "extended or extrapolated" and he can "readvance his s 67 [Evidence Act] argument with the 'further' evidence he now possesses", amounts to an attempt to use a recall application to relitigate matters, which is not allowed by law. WorkSafe submits therefore that the application is "plainly outside the realm of a recall application".

[37] Under r 11.9 of the HCR, a Judge has absolute discretion to recall a judgment at any time before a formal record of it is drawn up and sealed. However a decision will only be recalled in exceptional circumstances, and is regarded as a serious step.[12] It cannot be used as a means of collateral attack on a decision or to relitigate matters already considered.[13]

[38] Mallon J granted the application for access to court documents. Mr Harder suggests his application to recall that decision is intended to allow him to reargue a matter on which he was successful. However, recall does not extend to:[14]

(a) a challenge to any substantive finding of fact and law in the judgment;

(b) a party recasting arguments previously given, and re-presenting them in a new form; or

(c) putting forward further arguments, that could have been raised at the earlier hearing but were not.

---

12 Andrew Beck and others *McGechan on Procedure* (online ed, Brookers) at [HR11.9.01].

13 *S v R* [2022] NZSC 7 at [3].

14 *Erwood v Maxted* [2010] NZCA 93 at [5], citing *Faloon v Commissioner of Inland Revenue* (2006) 22 NZTC 19,832 (HC). It is noted that this decision was appealed successfully to the Supreme Court, however the Court of Appeal guidance on relevant legal principles for recall applications was not the subject of the appeal.

[39] The leading statement of law relating to the recall of judgments remains that of Wild J, who noted three categories of cases in which a judgment may be recalled:[15]

(a) where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority;

(b) where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and

(c) where for some other very special reason justice requires that the judgment be recalled.

[40] Mr Harder advised in his memorandum dated 11 March 2024 that he intends to rely on a minute of Judge Farish dated 10 May 2022 as "a new judicial decision of relevance and high authority" to support his application for recall. WorkSafe argues that the application would not fall under any of the categories of exceptional circumstances justifying recall, as it is based on highly speculative inferences about what led Judge Farish to reach her decision. Furthermore, Judge Farish's minute was issued prior to Mallon J's decision regarding Mr Harder's access to court documents request, and therefore is not a "new judicial decision".

[41] Mr Harder also says there is evidence that Mallon J was deceived by counsel for WorkSafe in their memorandum of 18 October 2022, when they stated that there was a version of the 16 October 2013 letter which had not been released that only contained immaterial differences from the version released. However, I do not consider that WorkSafe misled Mallon J. Its memorandum was filed for the purpose of making a concession in relation the release of material on the court file, the relevant portions of which I have set out above. There does not appear to be anything deceptive in that memo. It is merely advising Her Honour that WorkSafe no longer objected to the release of the documents which had been made publicly available since the conclusion of the judicial review appeal. Therefore the focus of the determination by Mallon J would be the remainder of the privileged documents.

---

15 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

[42] I do not have the application for recall before me, therefore I make no determination on that matter.

Pre-proceeding discovery

[43] An application for access to court documents is a bare application by a non-party to obtain access to the file in question, rather than the commencement of a new civil proceeding or claim.

[44] Rule 11 of the Senior Courts (Access to Court Documents) Rules 2017 provides that any person may request access to court documents, and sets out the process for a non-party to do so. Rules 12 and 13 set out matters to be considered and the approach to weighing those matters. Rule 14 states that a Judge may determine a request for access and any objection in any manner the Judge considers just.

[45] WorkSafe notes that neither the Senior Courts (Access to Court Documents) Rules nor the HCR contain any procedure for someone who has requested access to court documents to seek (or for the court to grant) discovery orders after the determination of their application.

[46] Mr Harder points to r 8.20 of the HCR as the source of jurisdiction for his application, which provides the following:

> **8.20 Order for particular discovery before proceeding commenced**
>
> (1) This rule applies if it appears to a Judge that—
>
> (a) a person (the intending plaintiff) is or may be entitled to claim in the court relief against another person (the intended defendant) but that it is impossible or impracticable for the intending plaintiff to formulate the intending plaintiff's claim without reference to 1 or more documents or a group of documents; and
>
> (b) there are grounds to believe that the documents may be or may have been in the control of a person (the person) who may or may not be the intended defendant.
>
> (2) The Judge may, on the application of the intending plaintiff made before any proceeding is brought, order the person—
>
> (a) to file an affidavit stating—

(i) whether the documents are or have been in the person's control; and

(ii) if they have been but are no longer in the person's control, the person's best knowledge and belief as to when the documents ceased to be in the person's control and who now has control of them; and

(b) to serve the affidavit on the intending plaintiff; and

(c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the intending plaintiff.

(3) An application under subclause (2) must be by interlocutory application made on notice—

(a) to the person; and

(b) to the intended defendant.

(4) The Judge may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

[47] WorkSafe contends that r 8.20 does not provide a basis for the relief sought. It notes that r 8.20 provides a process for an "intending plaintiff" – which Mr Harder is not – to seek discovery orders prior to commencing a proceeding. Rather, WorkSafe submits that Mr Harder's orders are sought to prepare an application to recall Mallon J's judgment, which does not constitute the commencement of a new proceeding. Even assuming this initial bar were not in place, WorkSafe notes that Mr Harder's application would not meet the criteria under r 8.20, as he would not be an appropriate plaintiff, and he would need to demonstrate that his claim would be impossible or impracticable to formulate without the discovery orders sought.

Analysis

[48] Mr Harder ties his claim for pre-proceeding discovery to his application for recall of the judgment of Mallon J. I queried him on his submission that his ultimate object was to see the Pike River Mine reopened and that further funds for that might be forthcoming from an insurer. In response, Mr Harder expressly disclaimed any present intention to pursue litigation against an insurer. I note that would not be Mr Harder but the survivors and the families of the victims who would be the intended plaintiffs if such a claim were the basis of the pre-proceeding discovery application.

Mr Monk and Ms Rose indicated through Mr Harder at the hearing that they did not intend to make such a claim.

[49] In my view, there is no jurisdictional basis for the Court to hear this application. Mr Harder's application for access to documents has been finally determined by Mallon J, and he was granted full access to the court file. There are no further documents which would be covered by the application held by the Court.

[50] Furthermore, the matters which Mr Harder seeks to investigate have already been comprehensively addressed by the Senior Courts, culminating in the Supreme Court's decision regarding the substantive judicial review proceedings in 2017.

[51] For the reasons advanced by WorkSafe set out above, I do not consider that the requirements of r 8.20 are met in the circumstances. There is no claim, nor is there an intending plaintiff or defendant.

[52] The pre-proceeding discovery application under r 8.20 cannot succeed.

Procedure for cases not provided for

[53] Mr Harder also submits that rr 1.2 and 1.6 of the HCR confer jurisdiction on the Court to grant this application. Those rules are set out as follows:

> **1.2 Objective**
>
> The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.
>
> **1.6 Cases not provided for**
>
> (1) If any case arises for which no form of procedure is prescribed by any Act or rules or regulations or by these rules, the court must dispose of the case as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case.
>
> (2) If there are no such rules, it must be disposed of in the manner that the court thinks is best calculated to promote the objective of these rules (see rule 1.2).

[54] Mr Harder submitted that there is merit in his application and that the Court should not allow technicalities to get in the way. He pointed to a decision of McQueen J on which he had a newspaper report only, support of that submission. It appears that the decision which he must be referring to is that of *The General Manager of Veterans' Affairs New Zealand v The Estate of Lieutenant Colonel Tā Harawira Gardner*.[16] This decision related to a judicial review of a Tribunal decision. The Judge noted that the legislation which governed the claims required veteran's claims to entitlements be determined in accordance with substantial justice and the merits of the claim.[17] The judge was referring to the specific words of the legislation under consideration in that case.

[55] WorkSafe submits that while the Court has inherent jurisdiction to take whatever steps are necessary to ensure justice is done between the parties, it may not do so by contravening the Rules. While the Senior Courts (Access to Court Documents) Rules set out a procedure for applying to access court files and provide a high level of discretion for the judge in determining such an application, those Rules do not provide a procedure for follow-up interlocutory applications for discovery after a request has been decided. Rules 1.2 and 1.6 of the HCR cannot be used to manufacture processes to do this.

[56] I accept that procedural rules are the servants of court proceedings and the Court should be flexible. However here, there is a procedure and rules governing an application for pre-proceeding discovery. The application fails because it does not meet the requirements of the rule. The rule does not confer jurisdiction to make an order or direction where the form of procedure is prescribed by the HCR but the requirements have not been met.[18]

[57] For completeness, I note that Mr Harder's application also seeks orders that if the persons against whom discovery is sought do not have the documents, they be required to answer questions and/or file an affidavit. Mr Harder did not elaborate on the legal basis for that requirement save to say that it was in the interests of justice. I

---

16 *The General Manager of Veterans' Affairs New Zealand v The Estate of Lieutenant Colonel Tā Harawira Gardner* [2023] NZHC 1897.

17 At [77].

18 *Ressels v Earthquake Response Earthquake Services Ltd* [2023] NZCA 614 at [26].

do not consider, in particular, absent an extant claim, that there is a legal basis for such an application.

Standing

[58] As noted in Cull J's minute, Mr Harder submits that he was found to have standing as a non-party applicant before Mallon J,[19] and should be given the same standing for this application for further disclosure.

[59] WorkSafe does not dispute that Mr Harder has standing to bring an application for recall of Mallon J's 24 March 2023 judgment, but submits that the application should be refused on the basis of the other issues — lack of jurisdiction and abuse of process.

[60] WorkSafe submits that Mr Harder has no standing in relation to the substantive judicial review proceeding, as he was not a party to those proceedings. He therefore does not have standing to the extent that he may be attempting to be secure discovery orders to allow the re-litigation and/or reopening of matters already conclusively determined by the Supreme Court.

[61] Given that Mr Harder's standing to bring the present application is not contested, I consider that it is sufficient to find that Mr Harder has standing at this stage in relation to the argument before me.

Abuse of process

[62] WorkSafe submits that Mr Harder's application is an abuse of process and should be struck out under r 7.42A of the HCR. Mr Harder argues that application is not an abuse of process, nor are the grounds presented "frivolous or vexatious".

[63] Rule 7.42A relevantly provides:

> **7.42A Judge's powers to make orders and give directions on interlocutory applications**

---

19 Access to documents decision, above n 3, at [3]–[4].

> (1) This rule applies if a Judge considering an interlocutory application is satisfied that the application is plainly an abuse of the process of the court.
>
> (2) The Judge may, on the Judge's own initiative, make an order or give directions to ensure that the interlocutory application is disposed of or, as the case may be, proceeds in a way that complies with these rules, including (without limitation) an order under rule 15.1 that the application be struck out, stayed, or stayed on conditions.
>
> …

[64] An abuse of process in this context has been described as "improper use of [the court's] machinery",[20] or use of a court process "for a purpose or in a way significantly different from its ordinary and proper use".[21]

[65] WorkSafe submits that this test is plainly met here. It contends that Mr Harder is seeking the orders in his application, and ultimately recall of Mallon J's judgment, in order to re-litigate, investigate, and expand matters considered in the substantive judicial review proceedings and pursue his own allegations about the lawyers involved in that case. The recall jurisdiction cannot be used for this purpose, nor can the jurisdiction to grant access to documents on a court file.

[66] WorkSafe submits that while Mr Harder describes the orders he seeks as "discovery orders", what he is proposing is something significantly different, more akin to an inquisitorial hearing or subpoena process. He cannot rely on r 8.20 of the HCR as he does not meet the preconditions for such orders, nor does he identify any other legal basis for this application.

[67] Mr Harder submitted in his oral submissions that his ultimate aim was to force a reopening of the Pike River Mine, and perhaps obtain funding for that from a source such as Mr Whittall's insurer. To do so he seeks to find evidence that there was wrongdoing in the settling of the reparation amount at the time of the withdrawal of the proceedings by way of a pre-proceeding discovery application, itself brought to support an intended recall application of a judgment granting access to court documents. In my view that is an abuse of the Court's process. It seeks to use the

---

[20] *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [87].

[21] *D v RMC* [2021] NZHC 1633 at [6].

court process for a purpose that is significantly different from its ordinary and proper purpose. The application for access to court documents is for accessing documents on the court file. The purposes for which Mr Harder brings the present applications is not related to that and is procedurally improper.

Conclusion

[68] On the issues identified by Cull J in her minute of 16 February 2024, I find:

(a) The HCR do not confer jurisdiction to hear the application, and the issue has already been finally determined by Mallon J in her judgment.

(b) Mr Harder has standing to bring the present application.

(c) The application is procedurally improper and amounts to an abuse of process.

[69] The order sought by Mr Harder as extended in the application made on the morning of the hearing is accordingly dismissed

Costs

[70] WorkSafe indicated it sought costs if it were successful in this application on a schedule 2 category B basis under the HCR. Mr Harder responded that his fares and accommodation had been paid for by Mr Monk and Ms Rose or third parties and he had donated his time free of charge. Mr Harder indicated that Ms Rose had been assisting in preparation for the hearing

[71] WorkSafe has successfully defended the applications and in the usual course would be entitled to costs. However I consider I should allow Mr Harder a further five days from the date of this judgment to file submissions elaborating on the basis of his opposition to costs. WorkSafe then have a further five days to file a response. I make those directions accordingly.

Non publication of identifying information of persons referred to in judgment

[72] Mr Harder sought a confidentiality order in relation to the name of Mr Whittall's insurer on the basis it had not been earlier identified. It and the persons that Mr Harder made allegations about in his submissions who are not named but referred to in [7] above have not featured in this application nor in the judicial review proceedings. They have not had an opportunity to respond to those allegations. Worksafe, or the Crown, sought no other confidentiality orders. Accordingly, I make limited interim non-publication orders in relation to those persons as follows:

> Prohibiting publication of any information identifying the persons referred to at [7] and elsewhere in the judgment and not named beyond the information in the judgment which is made publicly available.

_____

Grice J

Solicitors:
Crown Law, Wellington