HIGH COURT APPEALS FROM TRIBUNAL DECISIONS

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There have been only two High Court decisions in Privacy Act cases since the last Privacy Issues Forum.

L v L

High Court, Auckland, AP95-SW01, 31 May 2002, Harrison J (39 pp)

Appeal from Complaints Review Tribunal Decision No 15/2001 -- Appellant unsuccessful plaintiff -- Appeal on grounds of errors of law and breaches of natural justice in terms of s 27 New Zealand Bill of Rights Act 1990 -- Tribunal failed to apply correct legal tests required by R 11(1)(b) and (e) of the Health Information Privacy Code 1994 -- Tribunal mistaken as to onus of proof -- Tribunal breached principles of natural justice -- Failure to hear all the parties' evidence and submissions -- Predetermination -- Tribunal decision quashed -- Rehearing by Court pursuant to s 123(6) Human Rights Act 1993 -- No need for panel members pursuant to s 126(1) Human Rights Act -- Issues of law only -- Rule 11(1)(b) exception applied to disclosures -- Alternatively, Rule 11(1)(e) applied -- Alternatively, no interference with appellant's privacy in terms of s 66(b)(i) or (iii) -- Alternatively, Court would have exercised discretion under s 85 Privacy Act not to grant remedy to appellant -- Appeal dismissed -- Costs to lie where they fell

This was an appeal from Complaints Review Tribunal Decision No 15/2001, 26 July 2001. The appellant was the unsuccessful plaintiff before the Tribunal. The appellant had sought damages against her former surgeon for disclosing her health information to the plaintiff's then husband.

The respondent surgeon performed a hysterectomy on the appellant and telephoned the appellant's husband three times after the operation: first, to confirm the completion of the operation; second, to advise that the appellant was very ill and required emergency surgery; and third, to advise that the appellant's condition had stabilised. The appellant claimed that the telephone calls constituted a substantial reason for the eventual breakdown of the marriage three years later, as the husband failed to visit the appellant after being informed of her surgery. The Privacy Commissioner initially investigated the complaint and formed the view that the surgeon breached the Health Information Privacy Code ("the Code") in disclosing the fact that she had had a blood transfusion. However, the Privacy Commissioner, in the exercise of his statutory discretion, decided not to refer the complaint to the Proceedings Commissioner. Accordingly, the complainant herself brought proceedings before the Tribunal. The Tribunal found that the surgeon's disclosures did not breach the Code, and even if they did, they did not constitute an interference with the appellant's privacy in terms of s 66.

The appeal was brought on two grounds: first, that the Tribunal's decision was based on an error of law; and second, or alternatively, that the Tribunal committed procedural errors that amounted to a breach of s 27 of the New Zealand Bill of Rights Act. This latter ground was based on the Tribunal's failure to conduct the hearing in accordance with the principles of natural justice, and in particular, predetermining the issues.

Ground one: errors of law

The Court began its consideration of the first ground of the appeal by outlining the relevant steps that the Tribunal was required to take under the Code and the Privacy Act when approaching the particular legal issue that was before it:

> "[a]First, the Tribunal must decide whether health information (i.e. information about the patient's health) was disclosed by the doctor and, if so, the nature of the information (R 4 and R 11). The patient carries the burden of proving this threshold element on the balance of probabilities;
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> [b] Second, if the Tribunal is satisfied that health information was disclosed, the burden shifts to the doctor to establish to the same standard that disclosure fell within one of the exemptions provided by R 11(1) (s 87). For example, a doctor relying on R 11(1)(b) must prove:
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> [i] the existence of a belief that the disclosure was authorised by the patient (a subjective inquiry);
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> [ii] that the grounds for her belief are reasonable (an objective inquiry);
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> [c] Third, if the Tribunal is satisfied that the health information was disclosed and that the doctor has not discharged her burden of proving one of the exemptions in R 11, the Tribunal must then determine whether the disclosure constituted an interference with the patient's privacy (s 66). The burden of proof reverts to the patient at this stage. She must:
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> [i] prove that the action breached an information privacy principle; and
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> [ii] satisfy the Tribunal (in its 'opinion') that the breach has caused or may cause certain consequences or has resulted in or may result in other consequences;
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> [d] Fourth, if the Tribunal is satisfied to this stage, then its final task is to determine whether, in its discretion, it should grant any of the statutory remedies (s 85)." (para 20)

The Court found that the Tribunal had not followed the above approach, but had followed an erroneous approach (para 22). In particular:

1. The Tribunal wrongly identified the threshold issues under R 11 to be whether the complainant had made an express request or direction of the surgeon not to disclose her health information to her husband, and whether the information allegedly disclosed actually was disclosed. The Court, however, held that the Tribunal's initial inquiry should have been whether the

surgeon had in fact disclosed health information. Although the complainant had the burden of proving this element, it was discharged once the surgeon gave evidence at the hearing of the contents of the three telephone calls.

2. It was unnecessary for the Tribunal to "determine the precise nature of the information disclosed", as this was admitted by the surgeon to be health information in terms of R 4(1)(a). The Tribunal was therefore not entitled to dismiss the proceedings on the basis that the complainant had failed to establish "precise details" of the disclosures.

3. In order to succeed, the complainant did not have to prove that she had expressly forbidden the surgeon from contacting her husband. The Tribunal failed to understand that s 87 of the Privacy Act placed the burden of proving any exemption to R 11 on the surgeon. Instead, the Tribunal had reversed the onus. The existence or non-existence of an express request was only relevant to the surgeon's affirmative defence under R 11(1)(e), which deals only with the disclosure of health information in general terms so long as that is not contrary to the patient's express request otherwise.

4. The Tribunal also failed to consider whether the surgeon's beliefs in terms of any of the R 11 exemptions was based on "reasonable grounds", as required by the provision.

The Tribunal's failure to take the proper approach was reflected in its flawed finding that the surgeon's telephone calls came within the exemptions of Rule 11, whether because they were authorised by the plaintiff or because there was no express prohibition on disclosing general information. (para 26). The Court found as follows:

> "[26] This conclusion was the inevitably flawed result of the Tribunal's erroneous approach. It failed to undertake an inquiry of the type logically mandated by R 11(1)(b) or (e). It failed to give discrete consideration to each of the two disputed disclosures (second and third telephone calls). It failed to make specific findings about whether, in relation to each disclosure, the respondent had discharged her burden by proving, first, her belief that the disclosure was either authorised by the appellant (R 11(1)(b)) or her belief that the information was in general terms and the disclosure was not contrary to the appellant's express request (R 11(1)(e)) and, second, that her belief was formed on reasonable grounds.
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> [27] Furthermore:
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> [a] In terms of R 11(1)(b)(i), there was no evidence to support the Tribunal's finding that the appellant authorised the respondent to make either disclosure by providing contact details through the hospital staff. Her evidence was unequivocally that she did not provide these details; and
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> [b] In terms of R 11(1)(e), ... the appellant did not have to prove that she expressly prohibited the respondent from disclosing general information about her condition and progress to her husband. Rather, it was for the respondent to prove the existence of her belief to this effect."

The Court therefore upheld the appellant's first ground of appeal.

Ground two: breaches of natural justice

The Court noted that the Tribunal has a statutory obligation to comply with the principles of natural justice. This obligation arises from s 27(1) of the New Zealand Bill of Rights Act 1990, which provides that "Every person has the right to the observance of the principles of natural justice by any Tribunal ... which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognised by law." The Court adverted to s 85 of the Privacy Act, which gives the Tribunal the power to make determinations in respect of breaches of the Privacy Act.

The Court then proceeded to identify "two fundamental and interrelated prinicples that arise out of s 27(1). Firstly, that the parties to Tribunal proceedings have "an absolute right to be heard, both in evidence and through supporting submissions." (para 32). Secondly, that the Tribunal "must maintain an open mind on the issues for determination until the hearing is concluded" (para 33).

The Court found that in the case being appealed, the Tribunal had breached both of these principles. The Tribunal initiated a "peremptory conclusion of the hearing" without hearing all of the evidence or submissions the parties (para 49). It achieved this objective by "the threat of an added burden of costs for the appellant" if she did not accept that her case was already lost and insisted on the calling of the respondent's witnesses and he making of further submissions. The Court concluded that "In legal terms the Tribunal first, failed to afford the parties an opportunity to make submissions on the issues for determination and, second, manifested a concluded view on the issues before hearing from the parties (para 50).

Accordingly, the Court found that the Tribunal's decision could not stand, and it therefore quashed it.

The Court then turned to what it should do next: refer the case back to the Tribunal for a rehearing pursuant to s 123(7) of the Human Rights Act 1993, or exercise the Tribunal's power to rehear the case itself pursuant to s 123(6). The Court decided upon the latter course because of the amount of time that had passed since the complaint was first made (1997); the cost and stress already expended by the parties in relation to the matter; all of the evidence called by the parties was contained in the record of the hearing of the proceedings, so that the Court would be in just as good a position to make a decision in the case as the Tribunal; and the respondent, who would be the only party disadvantaged by not having the evidence of two witnesses included in the record, consented to the determination of the case by the Court rather than the Tribunal (para 54).

Given that the Court was disposed to rehearing the case itself, the next issue was whether it was precluded from doing so by reason of s 126(1) of the Human Rights Act, which provides that where there is an appeal involving a question of fact, "there shall be 2 additional members of the Court who shall be persons appointed by a Judge of the Court for the purposes of the hearing or appeal from the panel maintained by the Minister under s 101 of this Act." The Court found that this did not constitute an obstacle to the proposed rehearing in the present case. Although the parties had

originally requested the Court to appoint the two additional panel members, shortly before the hearing counsel advised that these were not necessary as the appeal would proceed on questions of law only. Accordingly, the two panel members had been released. The Court acknowledged counsel for the Privacy Commissioner's submission that the parties cannot waive compliance with the statute, but the Court stated that it was satisfied that the parties "were correct in confirming that this appeal only involved questions of law" (para 56).

The rehearing

1. The first telephone call

The Court noted that the appellant conceded that the Health Information Privacy Code was not breached in the first telephone conversation confirming performance of the surgery. According to the appellant's evidence, based on what she recalled hearing recorded on the family answer phone, the information disclosed was that her "surgery has gone well and she's in the recovery room now, and all is well" (para 58). The Court remarked that this concession was "material to the outcome of the appeal" (para 7), and it led to the appellant losing her case. The Court summed up the importance of the appellant's concession as follows:

> "The importance of Ms Duffy's acknowledgement is this. She accepts that the [first] communication does not constitute a breach of the Code. Yet the information was clearly information about the appellant's health within the meaning of R 4(1)(a); it was 'health information' which was the subject of a prohibition against disclosure in terms of R 11(1). Ms Duffy's acknowledgement can only be predicated on the basis that the appellant accepted the respondent believed on reasonable grounds either that (a) the disclosure of that information was authorised by the appellant (R 11(1)(b)) or (b) the information was in general terms about the appellant's condition and progress following the operation (which it clearly was) and, furthermore, the disclosure was not contrary to the appellant's express request. In other words, the appellant accepts that the respondent reasonably believed she was authorised to make this disclosure.
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> Once this stage is reached, there does not appear to be logical basis for arguing that the respondent did not reasonably believe she was acting within the scope of the same authority in terms of R 11(1)(b) when communicating subsequently with the appellant's husband. The appellant's case was that she had expressed an absolute prohibition to the respondent, both directly and through her receptionist, against any communications with the appellant's husband following the hysterectomy. Her concession about the first telephone call is inconsistent with this stance. An argument may still remain about whether the information actually disclosed in either discussion was '... in general terms concerning the presence, location, and condition and progress ..." of the appellant within the meaning of R 11(1)(e). But that question becomes academic if the respondent is able to obtain the protection granted by R 11(1)(b)." (paras 59-60)

2. The second telephone call

In relation to the second telephone call, the Court noted that only the respondent gave evidence concerning its contents. The appellant did not call her former husband, the

other party to that telephone call, as a witness (para 63). The Court found that "the inference is irresistible" that the husband knew beforehand that the appellant was going into the hospital to have a hysterectomy on the day in question (para 66).

The Court also noted that "remarkably", counsel for the Privacy Commissioner apparently bore the burden of cross-examining the respondent. The Court commented that "He might have been expected to play a neutral role" (para 64).

In relation to the R 11(1)(b) exception to the Code, the Court found that the respondent reasonably believed that she was authorised by the appellant to advise her husband that "an urgent clinical problem had developed" (para 76). The Court found that this belief had a reasonable basis for the following reasons:

- The respondent had performed a number of operations on the appellant previously, and the invariable practice was to telephone the appellant's husband after the operation. The appellant was aware of this practice and had never objected to it. The Court commented that "The appellant's acquiescence in this practice is illustrated by her acceptance of the propriety of the respondent's first telephone call" (para 76[a]).
- The evidence indicated that the appellant had instructed the respondent's nurse not to discuss the surgery with the appellant's husband only *before* the operation, so that he would not attempt to stop the operation. Once the operation took place, this instruction was "spent".
- The evidence indicated that there was no unequivocal direct instruction to the respondent not to communicate with the appellant's husband after the operation was completed.
- The respondent was informed on the appellant's admission form that the husband had been nominated as a contact person in respect of the operation. For present purposes, it was immaterial whether it was the appellant or a hospital staff member who indicated this. The issue here was whether the respondent had a reasonable belief that the husband was a contact person. This was indicated on the contact list given to her by hospital staff, and the nomination of the husband as a contact person was consistent with previous occasions when the appellant had undergone surgery.

Accordingly, the Court found that the respondent had proved that her second telephone call to the husband was covered by the R 11(1)(b) exception to the Code (para 77).

Even if the R 11(1)(b) did not apply, then the R 11(1)(e) exception to the Code would. This was on the basis that "The information communicated that 'an urgent clinical problem had developed' was general and concerned the appellant's 'condition and progress' on the day of the operation. Moreover, the evidence did not indicate that appellant had expressly prohibited the communication of such information (as was also found in relation to applicability of the R 11(1)(b) exception).

2. The third telephone call

Counsel for the appellant acknowledged that that there was nothing objectionable about the respondent making the general statement to the husband that although the appellant's condition was stable, emergency surgery and treatment were necessary. The objection was limited to the respondent's specific disclosure that a "four unit blood

transfusion" had been necessary in order to stabilise the appellant (para 80). The Court, however, found that this disclosure fell within the ambit of R 11(1)(b), in that the respondent reasonably believed she had been authorised to make it in accordance with her usual practice in relation to the appellant.

Alternatively, it would also have been an exempted disclosure in terms of R 11(1)(e). The only issue here was whether the disclosure concerning the necessity for a blood transfusion constituted "information in general terms concerning the ... condition and progress of the patient". The Court held that it did on the following basis:

> "In my opinion, a brief reference to the means used to stabilise the appellant's condition falls within the meaning of 'general terms' about it, especially where the discussion was with the patient's husband who had already expressed his concern about her condition and where the respondent's usual practice, of which the appellant was aware, was to inform her husband of her 'condition and progress'. To exclude from the realm of lawful disclosure a brief reference to the means achieved to secure the result of stability seems artificial in this context. I do not read R 11(1)(e) in a literal or legalistic sense, but as designed to impose general and workable principles applicable to the circumstances of each case." (para 86)

Accordingly, the Court found that the exception in R 11(1)(e) of the Code applied in the alternative if it was mistaken in relation to the application of R 11(1)(b).

3. Causation

The Court then went on to deal with the issue of causation in terms of s 66 in case its conclusions on the applicability of the R 11(1)(b) and (e) exceptions to the disclosures were mistaken. The Court was not convinced that the appellant had suffered any interference with her privacy in terms of s 66(b)(i) (loss, detriment, damage, or injury) or s 66(b)(iii) (significant humiliation, significant loss of dignity, or significant injury to her feelings).

The appellant had blamed the respondent's disclosures for the breakdown of her marriage, but this was very much outside the respondent's control. The Court found the appellant's evidence on this point to be exaggerated, far-fetched, and in places contradictory.

Accordingly, the Court found that the appellant had not established an interference with her privacy in terms of s 66.

4. Remedy

The Court then went on to state that even if it was mistaken in finding that the respondent's disclosures did not breach the Code, and did not interfere with the appellant's privacy, it would have exercised its discretion under s 85 not to grant a remedy. While the Court adverted to s 85(4), which provides that the respondent could not raise the defence that "the interference was unintentional or without negligence", it stated that it was "entitled to take into account the respondent's conduct when deciding what, it any, remedy to grant"; thus, while "the respondent is strictly liable for any proven breaches ... her conduct is directly relevant to the question of remedy" (para 99). The Court found that the prior practice of the parties concerned in this case was that the

surgeon would disclose health information to the husband following surgery on the appellant. The appellant did not object to this practice, and so "had the appellant's apparent concurrence" (para 101). There was no suggestion that the respondent had acted in bad faith or with bad intentions. The Court observed that "All the evidence suggests that [the respondent] went out of her way to accommodate, to the best of her professional and ethical ability, the demands of a patient whom she described, perhaps with a degree of understatement, as presenting many challenges" (para 102). Accordingly, the Court found that if there were any breaches by the respondent, they did not warrant any remedy.

In the result, the Court quashed the Tribunal's decision on the alternative grounds that it erred in law or predetermined the proceeding or breached its duty under s 27 of the New Zealand Bill of Rights Act 1990 to comply with the principles of natural justice in hearing the appellant's complaint. On rehearing the case, the Court found that the respondent's disclosures to the appellant's husband fell within the R 11(1)(b) or (e) exceptions, and so did not constitute a breach of the Code; that if there was a breach of the Code, it did not in any case constitute an interference with the appellant's privacy in terms of s 66; and that even if it did, the Court would not have exercised its discretion to grant a remedy against the respondent pursuant to s 85.

The appeal was dismissed. However, "in view of the unusual circumstances" which led to that result, the Court declined to make any award of costs.

Comment: The point that this appeal only involved questions of law, and so no panel members needed to be appointed in terms of s 126(1), seemed dubious, as the Court clearly dealt with issues of fact in its judgment. Nevertheless, the conclusions arrived at by the Court appeared to be sound, with or without panel members.

This case stands as a reminder of the importance of natural justice in Tribunal hearings, and that fairness should not be sacrificed for the sake of efficiency and informality. In relation to privacy law, the case is most perhaps most significant in relation to the concept of "authorisation" under the Privacy Act, and in particular the concept of "implied" authorisation.

The issue concerning the nature of the role to be played by the Privacy Commissioner in Tribunal proceedings is obviously contentious. The point had already been indirectly raised by the Tribunal in its costs decision in *W v Christchurch Casinos Ltd*, Decision No 2/2002, 28 February 2002, where the Complaints Review Tribunal noted that the defendant objected to the Privacy Commissioner's submissions on costs in the matter, which was to actively oppose the defendant's application for costs "in a manner that might be expected of an advocate for the Plaintiff". The defendant in that case contended that this was "inconsistent with the neutral role" it thought the Commissioner should play in such proceedings. The Tribunal did not comment on this submission, though by mentioning it the Tribunal implied that there was some force to it.

As against Tribunal and Court disapproval of the Privacy Commissioner's active or partisan role in proceedings must be balanced the relevant provisions in the Privacy Act. Section 86(2) (which applies to the Privacy Commissioner via s 86(5)) provides that the Director of Human Rights Proceedings has the right:

> "(a) To call evidence on any matter (including evidence in rebuttal) that should be taken into account in the proceedings:
> (b) To examine, cross-examine, and re-examine witnesses, --
> but shall have no greater rights than parties to the proceedings in respect of the calling of evidence or evidence in rebuttal, or in respect of the examination, cross-examination, and re-examination of witnesses."

The Privacy Commissioner has the express right to cross-examine witnesses, which should answer the High Court's remarks in *L v L*.

In relation to the making of submissions, the Privacy Commissioner should undoubtedly be entitled to do so on matters of privacy law. Accordingly, it will be inevitable that the office will not be "neutral" if such submissions happen to favour the case of one party over the other.

The comments on lack of neutrality in both the *Christchurch Casinos* case and the present one concerned situations where the Privacy Commissioner's role was perceived to be more akin to that of a legal advocate than that of an *amicus curiae*. In many cases (not including the present case), however, where the complainant represents him- or herself, counsel for the Privacy Commissioner is placed in the position of advocate for the complainant simply because there is no counsel appearing for the complainant. Since these cases tend to be the ones that the Privacy Commissioner has not referred on to the Director of Human Rights Proceedings (formerly called the "Proceedings Commissioner") pursuant to s 77, perhaps the wisest course would be for more cases to be so referred.

Simpson v Accident Compensation Corporation

High Court, Wellington, AP 130/01, 21 October 2002, Durie J (4 pp)

Application by respondent to dismiss appeal -- Appeal filed out of time -- Section 123(4) Human Rights Act 1993 governing time within which to appeal -- Respondent not served with notice of appeal -- Appellant had not applied to appeal out of time -- No appearance by appellant in directions conference or hearing of present application -- Little prospect that appellant would have succeeded -- Appeal dismissed

This was an application by the respondent to dismiss the appellant's appeal on the ground that the appeal was lodged out of time. The Complaints Review Tribunal had struck out the appellant's case, and the appellant was appealing that decision.

The appellant had sought a declaration of breach and damages from the Accident Compensation Corporation on the basis that it had collected irrelevant and private information about her, and that it did not respond adequately to her request for personal information. The appellant had suffered a fall at work, and after some years of treatment, the Corporation sought a medical assessment in order to determine whether the appellant was entitled to an independence allowance. The Privacy Commissioner ceased his investigation on the basis that the Corporation had removed any irrelevant material from the appellant's file; the material in any case had not been collected, but the Corporation had been sent it; and the material requested by the appellant had been sent

to her. The appellant subsequently referred the matter to the Complaints Review Tribunal, which struck out the case on the basis that it had no prospect of success. The appellant filed an appeal to the High Court against that decision.

Section 123(4) of the Human Rights Act 1993, which applies to appeals from decisions of the (then) Complaints Review Tribunal under the Privacy Act by virtue of s 89 of the Privacy Act, provides that such appeals be filed within 30 days of the date of the decision. In the present case, the appellant's appeal was filed just under one week out of time. This was apparently due to the appellant's lack of understanding as to where to file the appeal. She had attempted to file her appeal twice, within time, with the Tribunal itself. The Corporation subsequently applied to dismiss the appeal on the grounds that it was filed out of time, and because it had not been served with notice of the appeal; it had only found out about the appeal after it received notice from the High Court concerning a directions conference. The appellant, however, was not present at that directions conference, nor did she appear in the present hearing of the application to dismiss the matter, even though the Court made it clear that if she made no appearance, the appeal was liable to be dismissed for want of prosecution.

Despite the appellant's non-appearance, the Court proceeded to deal with the respondent's application. The respondent contended that s 123(4) did not make provision for an extension of time within which to appeal. Rule 705(1)(a) provides for an extension of time for filing appeals where the enactment conferring the right of appeal allows it, but s 123(4) of the Human Rights Act does not expressly provide for this. The respondent referred to *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404 (Thorp J); *Ta'ase v Victoria University of Wellington* (1999) 14 PRNZ 406 (Goddard J), and *Cullen v Police* (1999) 14 PRNZ 315 (Hansen J). The Court, however, remarked that "it remains open to argument that a statute may permit an extension of time if it does not expressly or implicitly prohibit it and that the statute in this case does not so prohibit an extension in an appropriate case" (para 9).

The Court went on to note, however, that this was not an issue that could be considered in the present case, as the appellant had not applied for an extension of time for filing her appeal. Moreover, the Court remarked that it would not allow such an application in any case, even though she was not legally represented. This was because she "has not filed submissions in terms of the Court's directions, she has not sought to be heard on the instant application, and the chances of success were the appeal to proceed seem somewhat forlorn" (para 10).

Accordingly, the Court dismissed the appellant's appeal. The Corporation did not seek costs.

Comment: The leading authority on the legal principles concerning appeals out of time is the Court of Appeal case *Avery v No 2 Public Service Appeal Board and Others* [1973] 2 NZLR 86, where Richmond J stated:

> "When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal." (p 91)

Richmond J went on to set out the relevant legal considerations as follows:

> "Mr O'Flynn pointed out that this was a case of a solicitor's error resulting in a short period of delay after the expiration of the ordinary time for appealing. That delay, he said, had not prejudiced anybody. No doubt there may be many cases where this type of argument might prevail upon the Court to grant leave. Clearly however the Court is not restricted to such considerations. The rules do not provide that the Court may grant leave if satisfied that no material prejudice has been caused by the failure to appeal in time. Everything is left to the discretion of the Court on the wide basis that leave may be granted in such cases as the justice of the case may require. In order to determine the justice of any particular case the Court should I think have regard to the whole history of the matter, including the conduct of the parties, the nature of the litigation and the need of the applicant on the one hand for leave to be granted together with the effect which the granting of leave would have on other persons involved." (p 92)

The interests of justice are the dominant concern in such cases. Important factors are the reason for the delay in filing the appeal; the length of the delay; any prejudice or hardship caused to other parties; and the applicant's prospects of success in an appeal.

The Privacy Commissioner, however, has gone so far as to comment that "It is now clear that the High Court has no discretion to extend the 30 day limit for filing an appeal": *Second Supplement to first periodic review of the operation of the Privacy Act 1993: Report by the Privacy Commissioner to the Minister of Justice supplementing Necessary and Desirable: Privacy Act 1993 (December 1998) and the first supplement to that report (April 2000)*, 20 January 2003, para 2.16.2. This was by no means clear from this decision. The High Court's decision in this case appears to have stemmed more from the conduct of the would-be appellant than any finding that it lacked the discretion to allow an appeal out of time. Indeed, the principled exercise of such discretions will normally involve consideration of the applicant's conduct. The Court, in fact, stated that "it remains open to argument that a statute may permit an extension of time if it does not expressly or implicitly prohibit it and that the statute in this case does not so prohibit an extension in an appropriate case" (para 9).