IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 4**

Reference No. HRRT 034/2013

UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**DIRECTOR OF HUMAN RIGHTS PROCEEDINGS**
	PLAINTIFF
AND	**JUERGEN SCHUBACH**
	DEFENDANT

AT CHRISTCHURCH

BEFORE:
Mr RPG Haines QC, Chairperson
Ms WV Gilchrist, Member
Ms ST Scott, Member

REPRESENTATION:
Mr D Peirse for plaintiff
Mr J Schubach in person (no appearance)

DATE OF HEARING: 10 and 11 November 2014

DATE OF DECISION: 19 February 2015

DECISION OF TRIBUNAL

Introduction

[1] These proceedings have been brought by the Director of Human Rights Proceedings pursuant to s 82(2) of the Privacy Act 1993. The aggrieved individual is Mr Bernd Heidenbluth who presently lives in Darfield with his partner and their three children.

[2] Mr Schubach is a German-trained lawyer. He is not a barrister and solicitor of the High Court of New Zealand. In the period from 1 April 2003 to 28 May 2013 Mr

Schubach lived in Christchurch and traded under the description “Schubach: The German Law Firm in New Zealand”. On 28 May 2013 he left New Zealand for Europe but his business in New Zealand lasted until the end of November 2013. From approximately April 2009 Mr Heidenbluth sought legal advice from Mr Schubach in relation to various matters, including proceedings filed in the Greymouth Family Court by the New Zealand Central Authority for the German Central Authority seeking the recovery of maintenance arrears.

[3] The relationship between Mr Heidenbluth and Mr Schubach was an unhappy one and in early April 2012 Mr Heidenbluth instructed Mr Nicholas Burley, a director of the law firm Johnston Lawrence of Wellington. When Mr Burley attempted to uplift Mr Heidenbluth’s files Mr Schubach required “a new retainer” to provide those files and further advised that “total costs would certainly be more than €800.00 plus GST”.

[4] When on 30 April 2012 Mr Burley responded by submitting on behalf of Mr Heidenbluth a request for access to all personal information (about Mr Heidenbluth) held by Mr Schubach, Mr Schubach required payment of NZ$800.00 for selecting and printing the relevant papers. Mr Heidenbluth refused to pay what he regarded as an unreasonable charge and in relation to the Family Court proceedings was forced to obtain from the lawyer representing the New Zealand Central Authority most, but not all of the documents relevant to Mr Heidenbluth’s defence.

[5] In these proceedings the Director submits the charge of NZ$800.00 was not reasonable and Mr Schubach not only breached Information Privacy Principle 6, he also interfered with Mr Heidenbluth’s privacy.

[6] Mr Schubach, on the other hand, challenges the jurisdiction of the Tribunal to hear the case. He relies on two documents signed by Mr Heidenbluth on 8 November 2010 in which (so it is claimed) Mr Heidenbluth agreed that the venue for all legal disputes between Mr Heidenbluth and Mr Schubach is to be Cologne, specifically the Regional Court of Cologne.

[7] Before addressing these competing claims reference must be made to the evidence.

THE EVIDENCE CALLED BY THE DIRECTOR

[8] The witnesses called by the Director were Mr Heidenbluth, Mr Heidenbluth’s partner (Ruth Jennings) and Mr Burley. Mr Heidenbluth and Ms Jennings hold strong views as to the quality of the advice given by Mr Schubach and as to the fees charged by him. Mr Heidenbluth said in late 2010 Mr Schubach told him that he (Mr Heidenbluth) was one of his biggest clients. In total Mr Heidenbluth paid over NZ$28,000 for Mr Schubach’s services even though Mr Heidenbluth and Ms Jennings were struggling to pay their other accounts. It should be said also that all Mr Schubach’s accounts have been paid by Mr Heidenbluth. No payments have been withheld. Mr Schubach does not suggest anything to the contrary.

[9] In these proceedings we are not called upon to determine whether the complaints made by Mr Heidenbluth and Ms Jennings against Mr Schubach are well made but some reference to them is necessary to explain the background to Mr Heidenbluth’s decision to ask Mr Burley to take over the conduct of the Family Court proceedings. The background is also relevant to the context in which Mr Schubach now relies on the two documents signed by Mr Heidenbluth to challenge the jurisdiction of the Tribunal to hear these proceedings.

The evidence of Mr Heidenbluth

[10] Mr Heidenbluth moved from Germany to New Zealand permanently in December 2002. His German-born son remains in Germany and lives with his (the son's) mother.

[11] In March 2009 Mr Heidenbluth and Ms Jennings were living in Greymouth. Mr Heidenbluth worked as a builder and was often away on various building sites. At that time he needed legal assistance in relation to a commercial matter in Germany for which a lawyer with German law skills was required. It was in these circumstances he visited Mr Schubach's office in Christchurch on 6 April 2009 and engaged him in relation to this commercial dispute.

[12] In May 2010 Mr Heidenbluth asked Mr Schubach to assist in relation to two further matters, being Mr Heidenbluth's divorce from his German wife and the obtaining of New Zealand citizenship.

[13] In September 2010 proceedings were filed in the Greymouth Family Court by the New Zealand Central Authority on behalf of the German Central Authority seeking child maintenance payments in relation to Mr Heidenbluth's German-born son. When Mr Heidenbluth contacted Mr Schubach to ask if he (Mr Schubach) could help, Mr Heidenbluth specifically asked whether Mr Schubach could represent Mr Heidenbluth in a New Zealand court. Mr Schubach responded he had represented people in New Zealand courts before and if there was any problem, the court could appoint a *McKenzie* friend. It was not explained to Mr Heidenbluth what a *McKenzie* friend is. At about this time Mr Heidenbluth also instructed Mr Schubach to put "on hold" work on keeping his (Mr Heidenbluth's) German citizenship because costs were getting out of control.

[14] In February 2011 Mr Heidenbluth asked Mr Schubach to focus only on the Family Court proceedings and to put everything else on hold. Mr Schubach responded in "a very rude manner". When in February 2011 Mr Heidenbluth became a New Zealand citizen by attending a ceremony in Greymouth, he did not tell Mr Schubach as he (Mr Schubach) had constantly advised him against taking New Zealand citizenship on the grounds it would jeopardise his German citizenship.

[15] Thereafter Mr Heidenbluth found Mr Schubach increasingly difficult to deal with.

[16] Mr Heidenbluth also mentioned Mr Schubach advised him to claim a work-related pension from the German government and initiated a claim on Mr Heidenbluth's behalf. Mr Heidenbluth was bewildered to find that as a result he was presented with a demand by the German government for $10,000 outstanding tax, a demand Mr Heidenbluth believes is based on incorrect information provided to the German government by Mr Schubach. Mr Heidenbluth also believes the divorce proceedings became unnecessarily drawn out (and expensive) because of the way in which Mr Schubach was handling the case.

[17] In relation to the child maintenance proceedings Mr Heidenbluth had from the outset made it clear to Mr Schubach that he (Mr Heidenbluth) accepted he was the father of the child. Mr Heidenbluth was therefore shocked and unnerved when he discovered in mid-2011 that because of the way Mr Schubach was conducting the case a DNA test had been ordered with a view to establishing whether Mr Heidenbluth was the father of the child. When Mr Heidenbluth challenged Mr Schubach, Mr Schubach's reply was in Mr Heidenbluth's opinion unprofessional, threatening and extremely upsetting.

[18] Having reached the conclusion that he would need to change to another lawyer Mr Heidenbluth contacted Mr Burley who initially advised Mr Heidenbluth to continue to retain Mr Schubach for the maintenance proceedings. However, when Mr Schubach consequently discovered that Mr Burley had contacted the Greymouth Family Court for information about the case, his response to Mr Heidenbluth was again upsetting and belittling.

[19] Mr Heidenbluth said that by March 2012 he had finally had enough of Mr Schubach. The child maintenance proceedings were dragging on (as was the divorce) and he had received a tax bill rather than a pension payment from the German government because Mr Schubach had provided incorrect information. The accounts from Mr Schubach kept coming in and Mr Heidenbluth's business was struggling financially, partly due to the large amounts being charged by Mr Schubach. Mr Heidenbluth contacted Mr Burley again and pressed his request for Mr Burley to take over as his lawyer. Mr Burley agreed and Mr Heidenbluth terminated his instructions to Mr Schubach in that month (March 2012).

[20] It was first reported to Mr Heidenbluth by Mr Burley that Mr Schubach required payment of more than €800 to release the files, an amount subsequently reduced to approximately NZ$800. Mr Heidenbluth believed both charges were too high.

[21] In late 2012 Mr Heidenbluth was informed by Johnston Lawrence that Mr Schubach was willing to release the files if Mr Heidenbluth called personally to uplift them. Mr Heidenbluth arranged with Mr Schubach to collect the documents on Saturday 23 February 2013. On arrival Mr Heidenbluth parked his vehicle in a place where he could see and hear his children. Mr Schubach asked Mr Heidenbluth to come inside but Mr Heidenbluth declined as he needed to keep watch on his children and told Mr Schubach so. Mr Schubach then told Mr Heidenbluth that he (Mr Heidenbluth) had to sign a few papers and pay NZ$250 before the documents could be released. Mr Schubach's manner was rude and harsh, an attitude which Mr Heidenbluth had anticipated (for a week prior to the appointment he had had to prepare himself for the encounter). Mr Heidenbluth declined to sign the papers as he believed they would suit only Mr Schubach and he did not trust Mr Schubach. Mr Schubach did not say what the papers were. Shocked at the demand for NZ$250 and for papers to be signed, Mr Heidenbluth decided to walk away.

[22] At this time Mr Heidenbluth was under considerable financial pressure and emotional strain. He and his partner separated temporarily in 2012. Mr Heidenbluth's inability to access his personal information held by Mr Schubach made the conduct of the Family Court proceedings far more stressful than they ought to have been. Mr Heidenbluth's annoyance and anger was exacerbated by Mr Schubach's rude and arrogant responses to the request for the relevant papers. He said it was particularly upsetting he could not access a letter from the child's mother which he had given to Mr Schubach. In this letter the mother said she did not want any contact with Mr Heidenbluth or any support from him for the child. Mr Heidenbluth believes this letter was among the papers withheld by Mr Schubach. As a consequence Mr Heidenbluth had to prepare his case without access to what was potentially an important document favourable to his case.

[23] Mr Heidenbluth's evidence relating to the two documents on which Mr Schubach bases the jurisdiction objection will be narrated separately when we come to address the question of jurisdiction.

The evidence of Ruth Jennings

[24] Ms Jennings confirmed that both she and Mr Heidenbluth found dealing with Mr Schubach extremely stressful and that this had contributed to stress in their personal relationship.

The evidence of Nicholas Burley

[25] Mr Burley is a barrister and solicitor practising as a Director of the incorporated law firm Johnston Lawrence Ltd in Wellington. He is a general litigator practising inter alia in relationship property, leaky building and commercial disputes. He was admitted to the Bar on 14 May 1993 and has been in full time practice from that date. He holds a bachelor's degree with first class honours in German language and literature from the University of Otago. He is not qualified in German law but reads and speaks German.

[26] Mr Heidenbluth first contacted Mr Burley in June 2011 in relation to the maintenance proceedings filed in the Greymouth Family Court. After examining emails sent by Mr Heidenbluth as well as Mr Heidenbluth's personal case files Mr Burley decided that as the case was well under way, Mr Heidenbluth was best advised to stay with Mr Schubach.

[27] However, in March 2012 and again on 3 April 2012 Mr Heidenbluth contacted Mr Burley because Mr Heidenbluth's relationship with Mr Schubach had by then become untenable. This time Mr Burley agreed to represent Mr Heidenbluth in the maintenance proceedings.

[28] Mr Burley decided he needed to see the papers held by Mr Schubach because Mr Heidenbluth had mentioned a letter from the child's mother in which she had said she did not want any contact with Mr Heidenbluth or support for the child. Mr Heidenbluth had said he believed Mr Schubach held a copy of this letter. Mr Burley's view was that while the letter would not extinguish Mr Heidenbluth's liability, it explained why he had ceased payments and would have been useful in settlement negotiations, if not in court.

[29] On 19 April 2012 Mr Burley sent an email to Mr Schubach advising that Johnston Lawrence now acted for Mr Heidenbluth and had been asked to uplift all files from Mr Schubach. Mr Burley specifically mentioned he had been instructed to appear in the Greymouth Family Court on 23 April 2012 regarding the maintenance recovery proceedings.

[30] In a belated response dated 26 April 2012 (received by Mr Burley on 27 April 2012) Mr Schubach claimed there was an agreement between him and Mr Heidenbluth that the venue of any legal action for any kind of dispute was the Regional Court of Cologne. Mr Heidenbluth was therefore not in a position to request the uplift of the files as Mr Schubach was required by the Hanseatic Law Society and Bar Association to keep any file for five years after the end of the retainer. Mr Schubach went on to say, however, that if Mr Heidenbluth wanted a copy of the file a new retainer would have to be concluded and the total costs would be more than €800.00 plus GST:

> In spite of that, Mr Heidenbluth has been informed that copying all files (again: most of them in German, closed and irrelevant) would entail a new retainer to be concluded by Mr Heidenbluth and this office in writing (Agreement on Choice of Law/Agreement on the Venue of Action/Fee Agreement). The total costs would certainly be more than €800.00 plus GST, and unless and until the three documents signed by Mr Heidenbluth would be in our office and the total amount in our business account, no paper will be sent out.

[31] On 30 April 2012 Mr Burley sent an email to Mr Schubach making a request under the Privacy Act for access to Mr Heidenbluth's personal information held by Mr Schubach. Mr Burley pointed out it was not possible to contract out of the Act and while Mr Schubach was allowed to charge a reasonable photocopying and administration fee, a fee for legal services was not permissible.

[32] In describing these events to the Tribunal Mr Burley explained that since commencing practise he has routinely been asked to provide files where clients have sought a transfer. He has also sought transfer during that time. More often than not, the transfer of files is without cost and done quickly. Some solicitors, however, charge a photocopying fee if the original documents are not required. Mr Burley found Mr Schubach's approach to be creating unnecessary barriers to information access.

[33] By this time the Family Court proceedings had been adjourned to 21 May 2012. Doubting that Mr Schubach would provide the requested files, Mr Burley on 9 May 2012 sent an email to the solicitor representing the New Zealand Central Authority requesting a copy of the mother's claim together with her affidavits.

[34] By letter dated 15 May 2012 Mr Schubach claimed disclosure of the requested information would breach legal professional privilege and therefore s 29(1)(f) of the Privacy Act justified Mr Schubach's refusal to disclose the requested information. Mr Schubach further argued that by documents signed on 8 November 2010 Mr Heidenbluth had submitted himself to be governed by the law of the Federal Republic of Germany exclusively and had "explicitly opted against New Zealand Law in general but also the Privacy Act 1993 in particular". Mr Schubach nevertheless offered to photocopy all the files at a cost of NZ$800 on the basis it would take a minimum of two hours to sort and copy the relevant papers. It is not clear whether this sum was GST inclusive. It will be assumed in Mr Schubach's favour it was inclusive. Mr Schubach concluded his letter by advising that Mr Heidenbluth was at liberty to view his files at Mr Schubach's office whenever he chose to do so:

> However, we do not want to refuse access to the information requested but do not wish to breach German Law either. Therefore, we offered you to photocopy all the files. The costs of 800 NZD are reasonable as it takes not only at least over two hours to select and photocopy the relevant papers, but one should also take the costs of printing and of the courier into account.

[35] Mr Burley told the Tribunal that in his view a fee of NZ$800 was unreasonable because:

> **[35.1]** There could be no commercial justification for charging photocopying at an advocate rate.
>
> **[35.2]** In relation to matters such as the Family Court proceedings, as long as the file was not voluminous the only charge he would make would be photocopying at 13 cents per sheet. That is, secretarial time taken to sort the file and to copy the documents would not be charged for.
>
> **[35.3]** The offer of free access did not allow Mr Heidenbluth to remove the files.

[36] By letter dated 16 May 2012 Mr Burley lodged a complaint with the Privacy Commissioner.

[37] On 21 May 2012 Mr Burley sent an email to Mr Schubach pointing out that the only urgent matters for Mr Heidenbluth were those relating to the Family Court proceedings. In these circumstances Mr Schubach could either:

> **[37.1]** Revise his fee as Mr Burley now only wanted the files relating to the Family Court proceedings; or
>
> **[37.2]** Send the files to Mr Burley by courier. Mr Burley would personally undertake to respect their integrity and courier them back within (say) five working days after being photocopied by Johnston Lawrence. Mr Burley explained to Mr Schubach that in New Zealand undertakings given by a solicitor are binding and can be enforced by the High Court if breached.

[38] On 30 May 2012 Mr Burley received a short telephone call from Mr Schubach. After Mr Schubach had ascertained that Mr Burley had the court documents (through the solicitor representing the New Zealand Central Authority), Mr Schubach said he would look at the rest of his file to see how many documents there were that were not court documents and would get back to Mr Burley. Mr Burley told him that he (Mr Burley) could read the documents in German and Mr Schubach seemed happy to cooperate. Mr Burley said when Mr Schubach got back to him they could discuss a reasonable fee.

[39] Around 17 June 2012 Mr Schubach telephoned Mr Burley to advise he was prepared to hand over the Family Court related files (plus some related extras) for NZ$250. Although Mr Burley thought that this was too expensive, he told Mr Schubach he would consider it. On 17 June 2012 Mr Burley communicated this offer to Mr Heidenbluth and asked whether he wished to pay the new fee. Mr Burley advised that while Mr Schubach's position was ridiculous, it was for Mr Heidenbluth to decide whether to pay the money and be done with it. He told Mr Heidenbluth that he (Mr Burley) did not need the missing letter for an upcoming affidavit but still intended to produce it later.

[40] On 27 June 2012 Mr Burley notified Mr Schubach by letter that Mr Heidenbluth considered NZ$250 too expensive for what, in New Zealand, was usually a routine request for access.

[41] On 18 July 2012 Mr Burley wrote to Mr Schubach noting the Family Court in Greymouth had (in a decision given on 26 January 2012) held Mr Schubach could not represent Mr Heidenbluth as counsel in the proceedings. This meant that even if the asserted contract between Mr Schubach and Mr Heidenbluth was relevant, Mr Schubach was unable to perform his services in Greymouth for which he had been retained.

[42] By letter dated 25 July 2012 Mr Schubach sent to Mr Burley a copy of the Agreement on the Venue of Action signed on 8 November 2010 and asserted the document meant "no New Zealand court or tribunal has any jurisdiction over any legal matter that stems from the briefs having been terminated by Mr Heidenbluth".

[43] Mr Burley said that in the end, Mr Heidenbluth's case in the Family Court had to be conducted without the missing letter from the child's mother, a document which would have been useful at the hearing but, with the benefit of hindsight, would have made little difference to the settled outcome. Nevertheless, not having the letter caused Mr Heidenbluth anxiety as he knew he did not have all the documents he needed to assess the relative strengths and weaknesses of his case and to deploy if necessary in settlement negotiations or at the hearing itself, depending on how things stood at the relevant time. Mr Burley further pointed out Mr Heidenbluth was at this time already under significant stress:

> Mr Schubach's behaviour undoubtedly caused Mr Heidenbluth unnecessary stress. Mr Schubach seems to have accepted that he could not act in the Family Court, but insisted that

German Courts had sole jurisdiction. The effect on Mr Heidenbluth of that reasoning is that he had nowhere to go.

The evidence of Mr Schubach

[44] Mr Schubach did not attend the hearing and did not give evidence.

Credibility assessment

[45] We found Mr Heidenbluth, Ms Jennings and Mr Burley to be credible witnesses. Their accounts are supported by contemporary documents, their evidence was given without embellishment or exaggeration and their demeanour was at all times consistent with their testimony. We accept their evidence.

The protest to jurisdiction

[46] On 14 April 2014 Mr Schubach filed with the Tribunal a seven page document described as a protest to jurisdiction. The protest is based on two documents signed by Mr Heidenbluth and Mr Schubach at Christchurch on 8 November 2010. The first document is described as an Agreement on the Venue of Action while the second is described as an Agreement on Choice of Law and on Fees. Both documents are in German and English. We reproduce only the English text. The first document provides:

Agreement on the Venue of Action

between

Mr Bernd Heidenbluth, 302 Omoto Valley Road, Greymouth

hereinafter "client"

and

Juergen Schubach, German Lawyer, 10 Oakhurst Place, Christchurch, New Zealand

hereinafter "advocate"

We, the undersigned client and advocate herewith say that the venue of any legal action for all kind of legal disputes which may arise from the retainers concluded by us on the 6th day of April 2009 and thereafter shall be Cologne (Germany).

Therefore we hereby agree upon the exclusive jurisdiction of the

Regional Court of Cologne
Address: Luxemburger Str. 101,
50939 Köln,
Germany,

as the court of first instance.

Dated at Christchurch
this 8th day of November 2010

....

Client (Mr Schubach – Advocate)

[47] The second document provides:

Agreement on Choice of Law and on Fees

1. Subject to section 675 of the German Civil Code, a retainer has come into effect between us, the two undersigned, Mr Bernd Heidenbluth and Mr Rechtsanwalt Juergen Schubach, on or after the 8th day of October 2010. This contract shall be governed by the

Law of the Federal Republic of Germany

only.

2. It is understood by the parties that the client owes fees for the notice of defence and subsequent submissions filed (or to be filed) with the Family Court at Greymouth, i.e., to the amount of 2.5 of the table of fees as set out in the schedule of the [German] Act Governing Remuneration of Lawyers 2004, as updated; further it is understood that the value of the amount in dispute shall be between €13,000.01 and €16,000.00. In case of a hearing in Greymouth the client owes an amount of further 2.5 fees plus travel expenses by means of transport at the lawyer's choice.

NZ–Christchurch

Date: 8th November, 2010

....

(Bernd Heidenbluth) (Rechtsanwalt Juergen Schubach)

[48] On the basis of these two documents Mr Schubach argues the only court or tribunal with jurisdiction to determine disputes between him and Mr Heidenbluth is the Regional Court of Cologne.

Mr Heidenbluth's evidence regarding the documents on which the protest to jurisdiction is based

[49] With regard to these two documents Mr Heidenbluth said he was asked by Mr Schubach to sign many documents. All had been signed in a rush. Usually Mr Schubach would call and ask Mr Heidenbluth to travel to Christchurch to sign documents. Mr Heidenbluth would then travel from Greymouth or from the building site (one was in Golden Bay) to Christchurch. He would sign the documents and return immediately to work. When these two particular documents were signed in early November 2010 Mr Heidenbluth still trusted Mr Schubach and signed the documents without reading them. More particularly, Mr Schubach did not explain the documents. With specific reference to the Agreement on the Venue of Action Mr Heidenbluth recalls no discussion in which Mr Schubach told him that any dispute arising between the two of them was exclusively an issue for the Regional Court of Cologne. Had Mr Schubach made it clear to Mr Heidenbluth that that was what the Agreement on the Venue of Action provided, Mr Heidenbluth would not have instructed Mr Schubach. The effect of the two documents was never explained to Mr Heidenbluth.

[50] Accepting as we do that Mr Heidenbluth is a credible witness, we believe and accept this evidence. Indeed, it would be bizarre to say the least that Mr Heidenbluth knowingly entered into an agreement with Mr Schubach that any dispute or issue arising from Mr Schubach's conduct of the New Zealand citizenship application or of a case in the Family Court in Greymouth fell within the exclusive jurisdiction of the Regional Court of Cologne.

Tribunal response to the protest to jurisdiction

[51] In a *Minute* issued by the Chairperson on 23 May 2014 the protest to jurisdiction by Mr Schubach was noted, as were the submissions for the Director that the protest could not be upheld. The Chairperson determined the protest would have to be determined on the evidence established at the substantive hearing:

> **[9]** In my view the potentially critical point is whether an agency can contract out of its obligations under the Privacy Act. The evidential basis on which the protest to jurisdiction is advanced will have to be established at the hearing and tested by cross-examination.

[52] When Mr Schubach subsequently applied to have the proceedings dismissed on the grounds that the Tribunal had no jurisdiction the Tribunal delivered a formal decision on 5 August 2014. See *Director of Human Rights Proceedings v Schubach (Strike-Out Application)* [2014] NZHRRT 32. In dismissing the application the Tribunal reiterated that the question whether an agency can contract out of its obligations under the Privacy Act was an issue to be determined at the substantive hearing on the evidence then put forward by the parties:

> **[4]** It is clear from the witness statements filed by the Director that the relevant events occurred in New Zealand while Mr Schubach was living in this country and in his application Mr Schubach admits he had a business in New Zealand up until 30 November 2013. The Director has a strong argument that in Mr Schubach's dealings with the aggrieved individual Mr Schubach was an "agency" as that term is defined in the Privacy Act 1993, s 2 and therefore bound by the information privacy principles. **The question whether an agency can contract out of those obligations is to be determined at the hearing itself on the evidence then put forward by the parties**. [Emphasis added]

[53] The hearing date of 10 and 11 November 2014 was fixed by the Chairperson in his *Minute* dated 23 May 2014 and confirmed by the Tribunal itself in the decision given on 5 August 2014. Mr Schubach therefore had ample notice of the fixture.

Mr Schubach's High Court proceedings

[54] On a date unknown to the Tribunal, Mr Schubach filed in the High Court at Auckland a without notice interlocutory application (dated 30 September 2014) in which he sought an order removing the panel of the Tribunal which had delivered the decision of 5 August 2014 dismissing the strike out application. The High Court proceedings were Schubach v Director of Human Rights Proceedings CIV-2014-404-002952. The application was put before Lang J who directed a statement of claim and notice of proceeding be filed before the Court could determine it.

[55] Mr Schubach subsequently filed a statement of claim dated 7 November 2014. He had not in the interim served either the Director of Human Rights Proceedings or the Tribunal with the without notice interlocutory application.

[56] In the documents filed in the High Court Mr Schubach made reference to the Tribunal decision dated 5 August 2014 but did not produce that decision to the Court. He did, however, quote from para [4] of the decision, but selectively so. In relation to the following passage:

> The Director has a strong argument that in Mr Schubach's dealings with the aggrieved individual Mr Schubach was an "agency" as that term is defined in the Privacy Act 1993, s 2 and therefore bound by the information privacy principles. **The question whether an agency can contract out of those obligations is to be determined at the hearing itself on the evidence then put forward by the parties**. [Emphasis added]

Mr Schubach quoted only the first sentence beginning "The Director" and advanced this sentence as evidence of bias by way of predetermination. He withheld from the court the sentence which followed and which we have emphasised in bold. In the result the passage relied on by Mr Schubach was taken out of context, divorced as it was from the immediately following sentence in which the Tribunal made it clear that the issue of jurisdiction was to be determined at the hearing on the evidence then put forward by the parties, a position which had been foreshadowed by the Chairperson in his *Minute* dated 23 May 2014 at [9].

[57] The legal position in New Zealand is clear. Because a defendant is not given opportunity to be heard on a without notice application the applicant must make full

disclosure of all material facts, regardless of whether they assist the application or not. This well understood duty is underlined by High Court Rules, r 7.23, a rule of which Mr Schubach is aware as it is cited by him in the without notice application dated 30 September 2014 on the last page.

[58] Be that as it may, by *Minute* dated 7 November 2014 the application was dismissed by Heath J who concluded the jurisdiction challenge had not been the subject of a final ruling by the Tribunal and that it remained open for the Tribunal to consider Mr Schubach's submissions in that regard. He said once the Tribunal ruled on the jurisdiction objection the decision could thereafter be challenged if it was thought the conclusion reached was wrong.

[59] We now turn to the legal issues, including the question of jurisdiction.

THE LEGAL ISSUES

1. JURISDICTION

[60] As mentioned Mr Schubach submits the effect of the two agreements signed by him and Mr Heidenbluth on 8 November 2010 is that any dispute over legal fees, including preparing files for collection is exclusively governed by German law. Put more directly, the agreements erased Mr Schubach's obligations under the Privacy Act. Whether viewed as a claim advanced in the context of private law or in the context of public law, the proposition cannot succeed.

[61] The proceedings before the Tribunal are not brought in the private law of contract. However, it is acknowledged that were this case about private law obligations only, authority can be found for the proposition that where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal, a court will stay proceedings instituted in (say) New Zealand in breach of such agreement, unless the plaintiff proves it is just and proper to allow them to continue. See *Carvalho v Hull Blyth (Angola) Ltd* [1979] 3 All ER 280 (CA) at 284 per Browne LJ citing Dicey and Morris *The Conflict of Laws* (9th ed, 1973) at 222. The Court followed and applied the following passage from *The Eleftheria* [1970] P 94 at 99, [1969] 2 All ER 641 at 645:

> The principles established by the authorities can, I think, be summarised as follows: (I) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (II) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion the court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for their claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

[62] In *Carvalho* at 286 Browne LJ said there was no real difference between the "just and proper" test put forward by Dicey and the "strong cause" formulation used in *The Eleftheria*.

[63] In the present case, were the Tribunal a court of civil jurisdiction (which it is not) having power to determine issues of private law, account would need to be taken of (inter alia):

> **[63.1]** The evidence given by Mr Heidenbluth that the two agreements were not explained to him and he signed them in haste and on trust.
>
> **[63.2]** Mr Heidenbluth would not have signed the agreements had it been explained he was agreeing that the Regional Court of Cologne was the only forum in which he could obtain a remedy against Mr Schubach in relation to any matter arising from Mr Schubach's conduct of Mr Heidenbluth's case in the Greymouth Family Court.
>
> **[63.3]** That in practical terms, acceptance of Mr Schubach's protest to jurisdiction would leave Mr Heidenbluth without any ability to obtain his legal papers held by Mr Schubach. Instituting proceedings in the Cologne Regional Court is a "remedy" which at a practical level is without utility given the difficulty, cost and delay involved. The more so when both parties, the files and the proceedings to which those files related were all situated in New Zealand at the relevant time. The prejudice to Mr Heidenbluth would be extreme and it is clear Mr Schubach has deployed the agreements not through any genuine desire for a trial in Germany, but to obtain a procedural if not financial advantage.

[64] We are of the view that in these circumstances Mr Heidenbluth would, by a clear margin, establish it would be just and proper to allow him to continue in a New Zealand forum or, in the alternative formulation approved in *Carvalho*, there would be strong cause for not staying his New Zealand proceedings.

[65] However, the proceedings before the Tribunal being under the Privacy Act, principles of public law come into play but with the same outcome, namely that the agreements do not have the claimed effect on the Tribunal's jurisdiction under the Privacy Act. Our reasons follow:

> **[65.1]** Parliamentary enactment is the highest source of law known in New Zealand. Statute prevails over all other sources of law including: judicial precedent and common law principles, subordinate legislation made under Parliament's delegated authority, prerogative instruments issued under the Crown's constituent power, international treaties entered into or ratified by the government, the comity of nations, and principles of customary public international law. See PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [15.4.3].
>
> **[65.2]** No person or body may override or set aside the legislation of Parliament. See PA Joseph *Constitutional and Administrative Law in New Zealand* at [15.4.3] citing AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co, London, 1959) at 39-40.
>
> **[65.3]** There is no express provision in the Privacy Act which permits contracting out and no such provision can be implied:
>
> > **[65.3.1]** The purpose of the Act (as set out in the Long Title reproduced below) is to promote and protect individual privacy in general accordance with the OECD *Guidelines*. Those *Guidelines* make no provision for individuals to contract out and also require Member countries to provide

adequate sanctions and remedies in case of failure to comply with measures implementing the basic principles contained in the *Guidelines*. Allowing contracting out would undermine the promotion and protection of individual privacy and deprive individuals of an effective remedy for any breach.

> An Act to promote and protect individual privacy … and, in particular,—
> (a) to establish certain principles with respect to—
> (i) the collection, use, and disclosure, by public and private sector agencies, of information relating to individuals; and
> (ii) access by each individual to information relating to that individual and held by public and private sector agencies; and

[65.3.2] As can be seen from the Long Title and from the definition of "agency" in s 2(1), the Privacy Act applies to both public and private sector agencies. The intended broad application of the Act would be frustrated were agencies able to "contract out" by requiring agreement that disputes be resolved in some other country.

[65.3.3] The broad reach of the Act is underlined by s 10 which makes it clear that the Act cannot be evaded by transferring information out of New Zealand. It logically follows that the Act cannot be evaded by transferring the resolution of conflicts and remedies to courts and tribunals of a third country.

[65.3.4] The "good reasons" for refusing access to personal information are exhaustively enumerated in ss 27 to 29 and no others are permitted. Acceptance of Mr Schubach's protest to jurisdiction would create a further exception, one which would potentially "drive a coach and four" through the Act. Section 30 provides:

> **30 Refusal not permitted for any other reason**
>
> Subject to sections 7, 31, and 32, no reasons other than 1 or more of the reasons set out in sections 27 to 29 justifies a refusal to disclose any information requested pursuant to principle 6.

[65.3.5] Codes of Practice under Part 6 of the Act would similarly be at risk of being circumvented. We refer by example to the Health Information Privacy Code, the Credit Reporting Privacy Code and the Telecommunications Information Privacy Code.

Conclusion on protest to jurisdiction

[66] For the reasons given we are of the clear and firm view that the text and purpose of the Privacy Act do not permit its terms to be circumvented by an agency contracting out of its statutory obligations. The protest to jurisdiction is dismissed.

2. CHARGES IN RESPECT OF AN INFORMATION PRIVACY REQUEST

[67] Before the Tribunal has jurisdiction to award a remedy under s 85 of the Act it must be satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual.

[68] The expression "interference with the privacy of an individual" is defined in s 66 of the Act:

66 Interference with privacy

(1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
 (a) in relation to that individual,—
  (i) the action breaches an information privacy principle; or
  (ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or
  (iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or
  (iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or
  (iii) the provisions of Part 10 (which relates to information matching) have not been complied with; and
 (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
  (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
  (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
  (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

(2) Without limiting subsection (1), an action is an interference with the privacy of an individual if, in relation to an information privacy request made by the individual,—
 (a) the action consists of a decision made under Part 4 or Part 5 in relation to the request, including—
  (i) a refusal to make information available in response to the request; or
  (ii) a decision by which an agency decides, in accordance with section 42 or section 43, in what manner or, in accordance with section 40, for what charge the request is to be granted; or
  (iii) a decision by which an agency imposes conditions on the use, communication, or publication of information made available pursuant to the request; or
  (iv) a decision by which an agency gives a notice under section 32; or
  (v) a decision by which an agency extends any time limit under section 41; or
  (vi) a refusal to correct personal information; and
 (b) the Commissioner or, as the case may be, the Tribunal is of the opinion that there is no proper basis for that decision.

(3) If, in relation to any information privacy request, any agency fails within the time limit fixed by section 40(1) (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 40(1), that failure shall be deemed, for the purposes of subsection (2)(a)(i) of this section, to be a refusal to make available the information to which the request relates.

(4) Undue delay in making information available in response to an information privacy request for that information shall be deemed, for the purposes of subsection (2)(a)(i), to be a refusal to make that information available.

[69] In the present case it is the definition in s 66(2) which has application, specifically subs (2)(a)(ii) and (b).

[70] Section 40(1) and (2) provide, in essence, that not later than 20 working days after the day on which an information privacy request is received by an agency, the agency must decide whether the request is to be granted and for what reasonable charge (if any) and give to the individual who made the request notice of the decision on the request:

40 Decisions on requests

(1) Subject to this Act, the agency to which an information privacy request is made or transferred in accordance with this Act shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that agency,—
 (a) decide whether the request is to be granted and, if it is to be granted, in what manner and, subject to sections 35 and 36, for what charge (if any); and
 (b) give or post to the individual who made the request notice of the decision on the request.

(2) Where any charge is imposed, the agency may require the whole or part of the charge to be paid in advance.

[71] The case for the Director is that while such notice was given in time, it was unreasonable for Mr Schubach to require payment of NZ$800 before the personal information requested by Mr Heidenbluth was provided.

Charges

[72] The effect of s 35 of the Act is that an agency that is not a public sector agency cannot require in respect of a Principle 6 request payment for processing the request, including deciding whether or not the request is to be granted and, if so, in what manner. However the agency may require payment for making the information available. See s 35(2) and (3):

> (2) Subject to subsection (4), an agency that is not a public sector agency shall not require the payment, by or on behalf of any individual who wishes to make an information privacy request, of any charge in respect of—
> (a) the provision of assistance in accordance with section 38; or
> (b) the making of the request to that agency; or
> (c) the transfer of the request to any other agency; or
> (d) the processing of the request, including deciding whether or not the request is to be granted and, if so, in what manner.
>
> (3) An agency that is not a public sector agency may require the payment, by or on behalf of any individual who wishes to make a request pursuant to subclause (1)(a) or subclause (1)(b) of principle 6 or pursuant to principle 7, of a charge in respect of—
> (a) the making available of information in compliance, in whole or in part, with the request; or
> (b) in the case of a request made pursuant to subclause (1) of principle 7,—
> (i) the correction of any information in compliance, in whole or in part, with the request; or
> (ii) the attaching, to any information, of a statement of any correction sought but not made.

[73] Any charge so fixed must be "reasonable" and regard may be had to the cost of the labour and materials involved in making the information available. See s 35(5) which provides:

> (5) Any charge fixed by an agency pursuant to subsection (3) or subsection (4) or pursuant to an authority granted pursuant to section 36 in respect of an information privacy request shall be reasonable, and (in the case of a charge fixed in respect of the making available of information) regard may be had to the cost of the labour and materials involved in making information available in accordance with the request and to any costs incurred pursuant to a request of the applicant for the request to be treated as urgent.

[74] In this regard there is no material difference between s 35(5) of the Privacy Act and the comparable provisions in s 15(2) of the Official Information Act 1982 and s 13(3) of the Local Government Official Information and Meetings Act 1987:

> **Official Information Act 1982 – s 15(2)**
>
> (2) Any charge fixed shall be reasonable and regard may be had to the cost of the labour and materials involved in making the information available and to any costs incurred pursuant to a request of the applicant to make the information available urgently.
>
> **Local Government Official Information and Meetings Act 1987 – s 13(3)**
>
> (3) Where no such amount is prescribed, any charge fixed shall be reasonable, and regard may be had to the cost of the labour and materials involved in making the information available and to any costs incurred pursuant to a request of the applicant to make the information available urgently.

[75] As the three statutes address broadly similar circumstances (access to information) and as their charging provisions are indistinguishable they are to be interpreted and applied consistently if at all possible. As will be seen this has also been the approach taken by the Privacy Commissioner.

[76] The charging regime which presently applies under the Official Information Act and the Local Government Official Information and Meetings Act is that the first hour of staff time and 20 pages of photocopying should normally be free. After this, charges of $38 per half-hour and 20 cents per page are seen as reasonable (GST inclusive). See the description of the charging regime in Taylor & Roth *Access to Information* (LexisNexis, Wellington, 2011) at [2.9.2]:

> The Ombudsmen have given indications of what would constitute a "reasonable charge" in connection with the making available of official information under the OIA, and have referred to Cabinet guidelines on charging for official information, remarking that "as a general rule, charges fixed in accordance with those guidelines would be seen as reasonable by an Ombudsman". These guidelines were based, in turn, on Ministry of Justice guidelines. These guidelines in their current version provide that the first hour of staff time, and 20 pages of photocopying, should normally be free. After this, charges of $38 per half-hour and 20 cents per page are seen as reasonable (GST inclusive). Staff time may include time spent "searching for relevant material, abstracting and collating, copying, transcribing and supervising access". The rate of charge, however, should remain at $38 per half-hour or portion thereof after the first hour "irrespective of the seniority or grading of the officer who deals with the request, except where staff with specialist expertise who are not on salary are required to process the request, in which case a higher rate not above their actual rate of pay may be charged". The guidelines also state that "Where the free threshold is only exceeded by a small margin it is a matter of discretion whether any fee should be paid and if so, how much".
>
> The Ministry of Justice guidelines provide that the "charge should represent a reasonable fee for access given", and this may include time spent:
>
> - in searching an index to establish the location of the information;
> - in locating (physically) and extracting the information from the place where it is held;
> - in reading or reviewing the information; and
> - in supervising the access to the information.
>
> The charge should not include any allowance for:
>
> - extra time spent locating and retrieving information when it is not where it ought to be; or
> - time spent deciding whether or not access should be allowed and in what form.
>
> The Ministry of Justice guidelines on charging suggest that full cost recovery would be justified, with such costs being incurred, for example, in relation to the following:
>
> - the provision of documents on computer discs [now cds];
> - the retrieval of information off-site;
> - reproducing a film, video or audio recording;
> - arranging for the applicant to hear or view an audio or visual recording; and
> - providing a copy of any map, plan or other document larger than foolscap size.
>
> The Ombudsmen have remarked that it would not be reasonable to impose a charge for supplying information in order to recover costs due to administrative inefficiencies. [Footnote citations omitted]

[77] The Privacy Commissioner has used the Ministry of Justice guidelines as a measure of what constitutes a reasonable charge. See *Case Note 204595* [2009] NZPrivCmr 14, a case in which a binding determination was made by the Commissioner under s 78 of the Privacy Act. The facts related to a private sector agency (an accountant). The Commissioner ruled:

[77.1] The Ministry of Justice guidelines are a useful reference point or measure of what a reasonable charge will be.

[77.2] The guidelines apply to public sector agencies and to providing information under the Official Information Act and are only indicative. However, as with s 35(5) of the Privacy Act, the guidelines are based on a reasonable cost-recovery figure. The policy reasons for allowing charging under the Official Information Act and the Privacy Act are closely enough aligned that the guidelines are a good starting point.

[77.3] A reasonable charge under the Privacy Act may in some cases be lower than the charges indicated under those guidelines. It is rare that a higher fee would be justifiable. For instance, the guidelines allow for generous labour charges that will not always be appropriate.

[78] While the Tribunal is not bound by any determination made by the Privacy Commissioner we are of the view that the Commissioner's approach is correct and one which we ourselves would in any event have independently reached.

Conclusion on charges

[79] It is not known how many pages comprised the personal information requested by Mr Heidenbluth. This information has never been revealed by Mr Schubach. Mr Heidenbluth's estimate of the quantity of the papers as sighted by him on occasion at Mr Schubach's address is between 500 and 1,000 pages. In his letter dated 15 May 2012 Mr Schubach asserted it would take at least 2 hours to select and copy the relevant papers. It has not been possible to test this assertion. We will for the purpose of assessing the reasonableness of the charge take the assertion at face value without necessarily accepting its accuracy.

[80] On this evidence the maximum permissible charge is to be calculated on the basis of one chargeable hour only (the first is free). The time element is accordingly $76. If allowance is then made for 1,000 pages at 20 cents per page the copying costs amount to $200. In the result, on a possibly over-generous view of the facts, the time and copying charges come to $276.00 (GST inclusive). Even if a courier cost is included, the outer boundary of a reasonable charge is $300.

Conclusions in respect of the $800 charge

[81] Viewed in this light the $800 demanded by Mr Schubach on 15 May 2012 was clearly an unreasonable charge. It was two and a half times more than that which could be justified as "reasonable" having regard to the cost of the labour and materials involved in making the information available in accordance with the request. If the $800 was not GST inclusive the additional 15% would increase the charge by $120. We assume in Mr Schubach's favour the $800 was GST inclusive.

[82] As the demand for $800 was Mr Schubach's formal decision given within the 20 working day period stipulated by s 40 of the Act, it is that charge which is relevant for our determination under s 66(2)(a)(ii) and (b) of the Act.

[83] For the reasons given we are of the view that there was no proper basis for Mr Schubach to demand that Mr Heidenbluth pay $800 for the personal information held by Mr Schubach.

Conclusion on interference with privacy

[84] In terms of s 66(2) we are satisfied on the balance of probabilities that there has been an interference with the privacy of Mr Heidenbluth because, in relation to an information privacy request made by him to Mr Schubach, Mr Schubach made a decision under s 40(1) that Mr Heidenbluth pay $800 and we are satisfied there was no proper basis for that decision.

[85] We turn now to the question of remedy.

REMEDY

[86] Where the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual it may grant one or more of the remedies allowed by s 85 of the Act:

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
> (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
> (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
> (c) damages in accordance with section 88:
> (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
> (e) such other relief as the Tribunal thinks fit.
>
> (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.
>
> (3) Where the Director of Human Rights Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Privacy Commissioner, and the Privacy Commissioner shall not be entitled to be indemnified by the aggrieved individual (if any).
>
> (4) It shall not be a defence to proceedings under section 82 or section 83 that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[87] Section 88(1) relevantly provides that damages may be awarded in relation to three specific heads of damage:

> **88 Damages**
>
> (1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:
> (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:
> (b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:
> (c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

Section 85(4) – the conduct of the defendant

[88] Addressing first s 85(4), it is no defence that the interference was unintentional or without negligence, but the Tribunal must nevertheless take the conduct of Mr Schubach into account in deciding what, if any, remedy to grant.

[89] In the present case we see few, if any mitigating circumstances for Mr Schubach. He demanded an unreasonable fee for the release of the personal information requested by Mr Heidenbluth knowing the information was required for the defence of proceedings then scheduled for hearing in the Family Court at Greymouth. We see nothing favourable in the fact that Mr Schubach one month later advised the charge had been reduced to $250. By then Mr Burley had secured most of the requested information by other means and we are not persuaded that by this stage Mr Schubach sincerely regretted his breach of obligation. This is underlined by the fact that when Mr Heidenbluth later went to Mr Schubach's home in Christchurch on 23 February 2013 believing he would be able to uplift his file without payment of a fee, Mr Schubach demanded he sign unspecified papers and also pay the $250. The entire pattern of conduct from the first demand for €800 plus GST on 26 April 2012 through to the final standoff on 23 February 2013 shows Mr Schubach was determined to take a hard line towards Mr Heidenbluth.

Declaration

[90] While the grant of a declaration is discretionary, declaratory relief should not ordinarily be denied. See *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, Ms SL Ineson and Ms PJ Davies) at [107] and [108].

[91] On the facts we see nothing that could possibly justify the withholding of a formal declaration that Mr Schubach interfered with the privacy of Mr Heidenbluth and such declaration is accordingly made.

An order requiring that the requested information be made available

[92] The information privacy request made by Mr Heidenbluth on 30 April 2012 has not yet been complied with by Mr Schubach. In these circumstances an order is made under s 85(1)(c) that Mr Schubach is to make available to Mr Heidenbluth all the personal information to which Mr Heidenbluth sought access in the request of 30 April 2012. Mr Schubach is to comply with this order within 20 working days after the date of this decision.

Damages for pecuniary loss

[93] The Director seeks an award under s 88(1)(a) in the sum of $1,374.25 for legal expenses incurred by Mr Heidenbluth in making and pursuing the Privacy Act request through Mr Burley. Having heard Mr Burley we are of the view that the amount sought is reasonable and proper and an award is to be made in the amount sought.

Damages for loss of benefit

[94] Under s 88(1)(b) of the Act the Tribunal has jurisdiction to award damages for the loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference.

[95] In *Director of Human Rights Proceedings v Hamilton* [2012] NZHRRT 24 the Tribunal noted awards have been made both by the High Court and the Tribunal where

the requested personal information was either required for or could have been deployed in court or tribunal proceedings. See *Proceedings Commissioner v Health Waikato Ltd* (2000) 6 HRNZ 274, *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 and *MacMillan v Department of Corrections* (Decision No. 08/04, HRRT40/03, 16 April 2004). Loss of peace of mind is a provable damage under this heading. See *Winter v Jans* at [45] and [48].

[96] As to the quantum of damages, the awards made by the Tribunal in the period 2010 to 2012 were reviewed in *Director of Human Rights Proceedings v Hamilton* at [86]. Since then in both *Director of Human Rights Proceedings v Grupen* [2010] NZHRRT 22 (upheld on appeal in *Grupen v Director of Human Rights Proceedings* [2012] NZHC 580) and in *Director of Human Rights Proceedings v Hamilton* the awards were $5,000. Most recently $5,000 was awarded also in *Director of Human Rights Proceedings v Valli and Hughes* [2014] NZHRRT 58.

[97] In the present case the letter from the mother of the child could potentially have been deployed either in the Family Court proceedings or in settlement negotiations. We are of the view that an award under s 88(1)(b) in the present case is appropriately fixed at $5,000.

Damages for humiliation, loss of dignity and injury to feelings

[98] Section 88(1)(c) confers jurisdiction to award damages for humiliation, loss of dignity, and injury to the feelings of the aggrieved individual. The aggrieved individual is not required by s 88 to establish all three of the heads of damages referred to in s 88(1)(c). Those heads of damage are to be read disjunctively and it is not to be assumed that because one head of damage is established, the others are as well. So in *Winter v Jans* at [36] the High Court, while accepting the evidence established "injury to the feelings", found "humiliation" and "loss of dignity" had not also been established. To similar effect see *Lochead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5 at [41.3] and *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [148].

[99] There must be a causal connection between the action which is an interference with the privacy of an individual and the damages sought. In appropriate circumstances causation may be assumed or inferred. See *Winter v Jans* at [33] and [34].

[100] As observed by the Tribunal in previous cases, the very nature of the heads of damages in s 88(1)(c) means there is a substantial subjective element to their assessment. Not only are the circumstances of humiliation, loss of dignity and injury to feelings fact specific, they also turn on the personality of the aggrieved individual.

[101] As to loss of dignity, we refer to the description given in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53] where Iacobucci J delivering the judgment of the Supreme Court of Canada stated:

> 53 … Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits… Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued….

[102] As to what is included in "injury to the feelings", it was held in *Winter v Jans* at [36] that "injury to the feelings" can include conditions such as anxiety and stress. In *Director of Proceedings v O'Neil* [2001] NZAR 59 at [29] injury to feelings was described in the following terms:

> [29] The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

[103] Having seen and heard Mr Heidenbluth give evidence we are satisfied on the balance of probabilities that loss of dignity and injury to feelings were caused by Mr Schubach's demand that an unreasonable charge be paid as a condition to Mr Heidenbluth gaining access to his (Mr Heidenbluth's) personal information. Mr Heidenbluth felt ignored and devalued and the unreasonable charge demanded by Mr Schubach caused anxiety, stress, anger and despair. This is another case in which the withholding of documents was not only unjustified, it left the individual without the means of knowing whether, had the information been provided, it would have been possible to have used the information to advantage in dealings with others, here the New Zealand Central Authority representing the German Central Authority. In making this finding two points need to be made. First, we are in no doubt about the causal connection between the interference with privacy and the injury to Mr Heidenbluth's feelings. Second, we have entirely excluded from consideration the stress and anger which Mr Heidenbluth attributes to Mr Schubach's other dealings with Mr Heidenbluth unrelated to the Privacy Act request.

[104] We attach significance to the independent evidence of Mr Burley that not having the letter from the child's mother caused Mr Heidenbluth anxiety as he knew he did not have all the documents he needed to assess the relative strengths and weaknesses of his case and to deploy if necessary in settlement negotiations. We have already quoted Mr Burley's evidence that Mr Schubach's behaviour in relation to the request for information undoubtedly caused Mr Heidenbluth unnecessary stress.

[105] We turn now to the question of quantum. The Director seeks $15,000. We are of the view the facts of this case are comparable to those in *Grupen v Director of Human Rights Proceedings* where an award under s 88(1)(c) by the Tribunal of $3,500 was upheld by the High Court. The facts are not, however, as serious as those in *Director of Human Rights Proceedings v INS Restorations Ltd* [2012] NZHRRT 18 (23 August 2012) where $20,000 was awarded in circumstances where fraud exposed the aggrieved person to potentially serious legal liabilities. In *Director of Human Rights Proceedings v Hamilton* [2012] NZHRRT 24 (1 November 2012) an award of $15,000 was made where an accountant's breach of Principle 6 exposed his client to investigation by the Inland Revenue Department. There were other highly stressful consequences.

[106] We do not consider this case to be at the more serious end of the current damages spectrum. In the circumstances we are of the view that an appropriate award is $5,000. We have, as mentioned, excluded from consideration any injury to feelings caused by the way in which Mr Heidenbluth was treated by Mr Schubach outside of the request for access to personal information under Principle 6.

Costs

[107] The Director seeks costs from Mr Schubach at the rate of $3,750 per sitting day.

[108] The hearing spanned two days largely because of administrative difficulties unexpectedly encountered by the Tribunal. In total, the actual hearing time took one sitting day only. In these circumstances we award $3,750.

FORMAL ORDERS

[109] For the foregoing reasons the decision of the Tribunal is that:

> **[109.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that Mr Schubach interfered with the privacy of Mr Heidenbluth by fixing an unreasonable charge for making available personal information requested by Mr Heidenbluth.
>
> **[109.2]** Damages of $1,374.25 are awarded against Mr Schubach under ss 85(1)(c) and 88(1)(a) for pecuniary loss in the form of legal expenses.
>
> **[109.3]** Damages of $5,000 are awarded against Mr Schubach under ss 85(1)(c) and 88(1)(b) of the Privacy Act 1993 for the loss of a benefit.
>
> **[109.4]** Damages of $5,000 are awarded against Mr Schubach under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for injury to feelings.
>
> **[109.5]** An order is made under s 85(1)(c) and (d) of the Privacy Act 1993 requiring Mr Schubach to provide Mr Heidenbluth with access to the personal information requested by Mr Heidenbluth on 30 April 2012. Such access is to be given as soon as reasonably practical and in any case no later than 20 working days after the date of this decision.
>
> **[109.6]** Costs of $3,750 are awarded against Mr Schubach in favour of the Director of Human Rights Proceedings.

....	....	....
Mr RPG Haines QC **Chairperson**	**Ms WV Gilchrist** **Member**	**Ms ST Scott** **Member**