

Reference No. HRRT 008/2016

UNDER THE PRIVACY ACT 1993

BETWEEN KATHY APOSTOLAKIS

PLAINTIFF

AND PETER GILBERT

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Ms WV Gilchrist, Member

Hon KL Shirley, Member

REPRESENTATION:

Mrs K Apostolakis in person

Mr PC Gilbert in person

DATE OF HEARING: 29 November 2017

DATE OF DECISION: 29 November 2017

DATE OF REASONS FOR DECISION: 6 December 2017

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**DECISION OF TRIBUNAL DISMISSING LATE INTERLOCUTORY APPLICATIONS<sup>1</sup>**

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**INTRODUCTION**

[1] At the commencement of the hearing on 29 November 2017 the Tribunal was called on to consider two interlocutory applications as well as a notice to admit facts filed by Mrs Apostolakis. After hearing the parties we dismissed all the applications, stating that our reasons would be given at a later date. The substantive hearing then commenced but as it could not be completed in the two days which had been set aside, a further hearing in 2018 will now be required.

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<sup>1</sup> [This decision is to be cited as: *Apostolakis v Gilbert (Late Interlocutory Applications)* [2017] NZHRRT 54.]

[2] In this decision we set out our reasons for declining the two applications and for setting aside the notice to admit facts. For convenience we will refer to all three documents as “applications”.

### **Brief outline of case**

[3] For a brief period of time commencing in January 2011 Mr Gilbert, a lawyer practising in Wellington, acted for Mrs Apostolakis. Specifically, he prepared and lodged a Notice of Claim of Interest under the Property (Relationships) Act 1976. According to Mr Gilbert, this was on the strict understanding that if the claim proved to have no foundation Mrs Apostolakis would withdraw the claim. However, when she could not support her claim or provide any evidence to support it, she refused to comply with Mr Gilbert’s request that she withdraw the claim. Mr Gilbert thereupon ceased acting for her.

[4] In August 2011 Mrs Apostolakis requested and was given Mr Gilbert’s file.

[5] In these proceedings Mrs Apostolakis alleges Mr Gilbert failed to comply fully with her request for his file and further complains that he failed to comply with a request that information on the Notice of Claim to Interest be amended.

### **THE THREE INTERLOCUTORY APPLICATIONS**

[6] Just before 3pm on the afternoon which preceded the commencement of the hearing Mrs Apostolakis filed:

[6.1] An application that the proceedings be removed into the High Court.

[6.2] An application that Mr Gilbert be barred from defending the claim.

Minutes before the hearing commenced on 29 November 2017 she filed a Notice to Admit Facts.

[7] Mr Gilbert opposed all three applications on the grounds they had been filed very late and he had had no opportunity to respond to them.

### **DISCUSSION**

#### **The question of delay**

[8] Before the separate applications are addressed it is necessary we make a general point applicable to all three.

[9] These proceedings were filed on 10 February 2016. On 22 September 2016 Mrs Apostolakis was given notice that the hearing would take place on 9 and 10 March 2017. She had ample time to make the three applications in question. She took no steps to do so. When the 9 March 2017 hearing was adjourned at the request of Mrs Apostolakis to 29 and 30 November 2017 she had a further eight months within which to prepare her case yet none of the present applications were filed until two were presented at about 2.45pm on the afternoon before the hearing and the third was presented just moments before the hearing commenced on 29 November 2017. In these circumstances Mr Gilbert has had no opportunity to prepare a response to the applications. On that ground alone the applications must be dismissed.

## **Applications unsupported by evidence**

[10] A second ground for dismissing the applications (and which applies to all three matters) is that there is no supporting affidavit in support with the result the many assertions made by Mrs Apostolakis (including that of criminal offending by Mr Gilbert and of fraud on his part) are entirely unsupported.

[11] We now briefly address each application in turn.

### **Application to remove into the High Court**

[12] In this application Mrs Apostolakis has applied for an order removing the proceedings into the High Court and at the same time she has protested the jurisdiction of the Tribunal to hear her proceedings. The grounds of the application are:

[12.1] “[S]everal complex questions of law” are likely to arise.

[12.2] The claim for damages exceeds the Tribunal’s statutory limit of \$350,000.

[13] Addressing first the matter of the questions of law, it is correct that s 122A of the Human Rights Act 1993 (incorporated into proceedings under the Privacy Act 1993 by s 89 of the latter Act) does permit the Tribunal to remove into the High Court either the entire proceedings or “a matter at issue in them”:

#### **122A Removal to High Court of proceedings or issue**

- (1) The Tribunal may, with the leave of the High Court, order that proceedings before it under this Act, or a matter at issue in them, be removed to the High Court for determination.
- (2) The Tribunal may make an order under this section, with the leave of the High Court, before or during the hearing, and either on the application of a party to the proceedings or on its own initiative, but only if—
  - (a) an important question of law is likely to arise in the proceedings or matter other than incidentally; or
  - (b) the validity of any regulation is questioned in proceedings before the Tribunal (whether on the ground that it authorises or requires unjustifiable discrimination in circumstances where the statutory provision purportedly empowering the making of the regulation does not authorise the making of a regulation authorising or requiring unjustified discrimination, or otherwise); or
  - (c) the nature and the urgency of the proceedings or matter mean that it is in the public interest that they or it be removed immediately to the High Court; or
  - (d) the High Court already has before it other proceedings, or other matters, that are between the same parties and involve issues that are the same as, or similar or related to, those raised by the proceedings or matter; or
  - (e) the Tribunal is of the opinion that, in all the circumstances, the High Court should determine the proceedings or matter.
- (3) Despite subsection (2), if the validity of any regulation is questioned in proceedings before the Tribunal and the leave of the High Court is obtained for the making of an order under this section, the Tribunal must make an order under this section.
- (4) If the Tribunal declines to remove proceedings, or a matter at issue in them, to the High Court (whether as a result of the refusal of the High Court to grant leave or otherwise), the party applying for the removal may seek the special leave of the High Court for an order of the High Court that the proceedings or matter be removed to the High Court and, in determining whether to grant an order of that kind, the High Court must apply the criteria stated in subsection (2)(a) to (d).
- (5) An order for removal to the High Court under this section may be made subject to any conditions the Tribunal or the High Court, as the case may be, thinks fit.
- (6) Nothing in this section limits section 122.

[14] However, the Tribunal may make such order only with leave of the High Court and only if (inter alia) an important question of law is likely to arise in the proceedings or if

the Tribunal is of the opinion that, in all the circumstances, the High Court should determine the proceedings or matter.

**[15]** The application filed by Mrs Apostolakis fails on the following grounds:

**[15.1]** Leave of the High Court has not been obtained.

**[15.2]** The application does not identify the allegedly “important” question or questions of law likely to arise in the proceedings. Indeed no question of law at all is identified and the Tribunal itself can see no potential important question of law arising on the facts. The main challenge in this case will be determining the facts. In addition, determining questions of law are part of the routine function of the Tribunal. We can see no possible basis for taking the extraordinary step of removing all or part of these proceedings into the High Court.

**[15.3]** If Mrs Apostolakis is unsuccessful in her claim against Mr Gilbert, she has a right of appeal to the High Court. On such appeal she can raise any question of law which then genuinely arises for determination on the facts as ultimately found by the Tribunal. In the meantime the ordinary statutory process must be allowed to work without resort to the highly unusual step of removing the proceedings into the High Court.

**[16]** As to the assertion that the monetary claim made by Mrs Apostolakis exceeds the Tribunal’s jurisdiction, it is to be noted the quantum of damages sought by her is not specified in the statement of claim. However, the following claims were made by Mrs Apostolakis in the course of her submissions:

**[16.1]** She has a beneficial interest in the sum of \$129,000 payable upon the death of her mother.

**[16.2]** The amount of \$54,000 is “in the coffers of the Crown or in Jana De Polo’s estate”.

**[16.3]** The amount of \$278,293.03 represents the proceeds of an AMP life insurance policy which was assigned to her on the death of her husband. This sum did not appear in the Family Court judgment.

**[16.4]** Jana De Polo is pursuing Mrs Apostolakis for \$25,253.63.

**[16.5]** There has been a loss of equity in Mrs Apostolakis’ house of about \$300,000 and the house should not have been sold.

**[17]** Not explained is how any of these sums of money or forms of loss can be recovered in proceedings brought in relation to information privacy principles 6 and 7.

**[18]** Nevertheless, expanding on these allegations, Mrs Apostolakis said these sums exceeded the Tribunal’s monetary jurisdiction and raised the following questions of law:

**[18.1]** She is the true and rightful owner of the title to 12 Colville Street, Wellington WN817/71.

**[18.2]** Jana De Polo is not the rightful owner of the amount of \$129,049.

**[18.3]** The Property Law Act 2007, s 27A – writing required for discharge of debt by acceptance of part in satisfaction.

**[18.4]** There was an illegal contract.

**[19]** None of the foregoing are questions of law and we reiterate that it is impossible to see how any of the monetary claims made by Mrs Apostolakis or any of the claimed questions of law fall for determination by the Tribunal in these proceedings under the Privacy Act. Indeed the claims have every appearance of an attempt by Mrs Apostolakis to mount a collateral challenge to the decisions of the Family Court in respect of relationship property proceedings and the implementation of the orders made by that Court. At the very least the claims advanced by Mrs Apostolakis are more appropriate for determination by a civil court.

**[20]** More fundamentally, however, the question of referral to the High Court will only arise once the Tribunal has been satisfied on the balance of probabilities that Mr Gilbert has interfered with Mrs Apostolakis' privacy. See the Human Rights Act, s 92R and the Privacy Act, s 89. In addition to all its other faults, the application is premature.

**[21]** We address next the application to strike out Mr Gilbert's defence.

### **The application to strike out Mr Gilbert's defence**

**[22]** In this application (conspicuously unsupported by affidavit evidence) Mrs Apostolakis has applied for an order striking out Mr Gilbert's defence. The grounds of the application are:

**[22.1]** Mr Gilbert has allegedly committed an offence under the Privacy Act, s 127.

**[22.2]** He has allegedly made unfounded allegations of fraud in relation to caveat 8545382.1 over title WN817/71.

**[22.3]** He allegedly knows that part of his statement of reply is untrue.

**[23]** The application is hopelessly misconceived and must fail because:

**[23.1]** There is no evidence whatever to support the allegation that Mr Gilbert has committed an offence against the Privacy Act, s 127 which provides:

#### **127 Offences**

Every person commits an offence against this Act and is liable on conviction to a fine not exceeding \$2,000 who,—

- (a) without reasonable excuse, obstructs, hinders, or resists the Commissioner or any other person in the exercise of their powers under this Act;
- (b) without reasonable excuse, refuses or fails to comply with any lawful requirement of the Commissioner or any other person under this Act;
- (c) makes any statement or gives any information to the Commissioner or any other person exercising powers under this Act, knowing that the statement or information is false or misleading;
- (d) represents directly or indirectly that he or she holds any authority under this Act when he or she does not hold that authority.

**[23.2]** There is a similar complete absence of evidence that Mr Gilbert has made unfounded allegations of fraud as alleged.

**[23.3]** There is no evidence whatever that any part of Mr Gilbert's statement of reply is untrue.

**[24]** Mr Gilbert can rightly claim to be disconcerted, to say the least, to find that on the afternoon before the hearing he has been served with an application in which entirely unfounded allegations of serious misconduct on his part are made, including the commission of a criminal offence.

**[25]** The Tribunal must ensure that its processes are not used as an engine of abuse.

### **The notice to admit facts**

**[26]** As mentioned, moments before the hearing commenced on 29 November 2017 Mrs Apostolakis filed with the Tribunal a document styled as “Notice to admit facts and authenticity of documents”. Mr Gilbert was “required” to admit 13 “facts” which have nothing to do with the claim by Mrs Apostolakis under the information privacy principles. The document reinforces the impression that these proceedings are being used as a vehicle for Mrs Apostolakis to put right the misfortunes she claims to have experienced as a consequence of proceedings taken in the Family Court. See particularly the following paragraphs:

6. The defendant made allegations of fraud about plaintiff.
7. The unfounded allegations of fraud by the defendant about the plaintiff caused reputational and financial harm.
8. The provisions of withdrawal of caveat over title NA126/214 Form 19, Schedule 2 of Land Transfer Regulations 2002 were breached.
9. The plaintiff suffered money damages exceeding \$350,000.
10. Three elements of breach of contract have been proved.
11. The money was earmarked for purchase by the plaintiff of title WN817/71.
12. An adhesion contract was formed due to duress and unlawful discrimination under ss 21 and 53 HR Act in relation to WN817/71.
13. An anticipatory breach of contract occurred due to actions by the Crown and others in relation to WN817/71.

**[27]** This extract highlights that although ostensibly brought under the Privacy Act, these proceedings are conceived by Mrs Apostolakis as having a reach and purpose well outside the Tribunal’s jurisdiction. The notice to admit facts must be set aside on this ground alone over and above its late service and the absence of evidence to support the serious accusations made by Mrs Apostolakis against Mr Gilbert.

**[28]** It follows the requirement that Mr Gilbert admit the authenticity of the stipulated documents must also be set aside:

**[29]** In any event the documents themselves are neither attached to the Notice nor provided in the form of an affidavit by Mrs Apostolakis. It cannot be assumed that Mr Gilbert is aware of the documents in question. He provided Mrs Apostolakis with his complete file in August 2011, some six years ago. In addition it cannot be assumed that these documents will be produced in evidence by Mrs Apostolakis during the course of the hearing. Finally, the relevance of these documents to the issues before the Tribunal is hard to see.

## **ORDER**

**[30]** The Tribunal orders that the following applications filed by Mrs Apostolakis be dismissed:

**[30.1]** Application dated 28 November 2017 that the proceedings be removed into the High Court.

**[30.2]** Application dated 28 November 2017 for an order striking out Mr Gilbert's defence.

**[31]** The Tribunal further orders that the notice to admit facts and authenticity of documents dated 29 November 2017 be set aside.

**[32]** Costs are reserved.

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**Mr RPG Haines QC**  
**Chairperson**

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**Ms WV Gilchrist**  
**Member**

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**Hon KL Shirley**  
**Member**