



the personal information held by the company about her. In particular, she requested the share transfer form, the notice of resignation as director and corresponding Board resolutions. The company made no response. Extraordinarily, the day prior to the hearing before the Tribunal, she reappeared on the New Zealand Companies Register (kept pursuant to s 360(1)(a) of the Companies Act 1993) as sole shareholder and director.

[2] If it is true that both sets of transactions took place without the knowledge and consent of the complainant, a fraud appears to have been committed not only against her, but also against the New Zealand Companies Register.

### **The parties**

[3] The complainant was born in the Philippines but moved to New Zealand in 1991. She holds New Zealand citizenship.

[4] In the period between the filing of these proceedings on 4 November 2011 and 18 July 2012 (the day before the Tribunal hearing), INS Restorations Ltd was represented by a Mr Anthony Ballantyne of 428D Tristram Street, Hamilton Central. He told the Tribunal that he is an Australian citizen and that he is in receipt of a sickness benefit.

[5] On 6 September 2004, on a Creditor's Petition, Mr Ballantyne was adjudicated bankrupt by the High Court at Hamilton. His discharge date was 6 September 2007. The significance of this date will emerge shortly.

### **Preliminary matters**

[6] There are three preliminary matters.

[7] First, Regulation 15(1) of the Human Rights Review Tribunal Regulations 2002 (SR2002/19) provides that a defendant who intends to defend the proceedings must file a statement of reply within 30 days after the day on which the statement of claim is served. A defendant who is out of time may file a statement of reply only with the leave of the Tribunal.

[8] By letter dated 20 December 2011 Mr Ballantyne sought an extension of time for the filing of a statement of reply by the defendant company on the grounds that he had just returned from an overseas trip to Fiji and had had no prior notice of these proceedings before receipt of the statement of claim. Ms Ryan had no objection to the granting of an extension. In a *Minute* issued on 22 December 2011 the Chairperson stated:

[3] Given that the plaintiff does not object to the request it is suggested that the defendant file and serve the statement of reply on or before 5pm on Thursday 19 January 2012. When the Tribunal convenes to hear the case application can be made for the Tribunal to make a formal order granting the extension of time. In the circumstances such application will be a mere formality.

[9] At the hearing on 19 July 2012, notwithstanding that the defendant company was then not represented, Ms Ryan maintained her non-objection to the extension earlier sought on 20 December 2011.

[10] The Tribunal accordingly determined that a formal order would be made granting the extension.

[11] The second preliminary matter is that by Memorandum dated 27 June 2012 Ms Ryan sought an amendment to the statement of claim which in two places refers to s

66(2)(a)(i) of the Privacy Act. She explained that it was intended that the reference to this provision be enlarged to include also a reference to s 66(2)(b).

[12] In the view of the Tribunal the amendment is unnecessary as the definition of “an interference with the privacy of an individual” is clearly set out in s 66(1) and (2) of the Act and does not need to be pleaded. Nevertheless, the application having been made on notice to the defendant company through Mr Ballantyne and no objection having been raised, the application is granted.

[13] The third preliminary matter is that although Mr Ballantyne filed the statement of reply (and attachments), represented the defendant company at the two telephone conferences convened on 13 March 2012 and on 14 June 2012 and filed a brief of evidence, he did not ultimately appear at the hearing on 19 July 2012 and the defendant company was not represented at that hearing. The circumstances in which this came about are addressed in greater detail later in this decision. It is sufficient to note at this stage that notice of the date and place of hearing having been given by the Chairperson at the teleconference attended by Mr Ballantyne on 13 March 2012 followed by a formal notice by the Secretariat in terms of Regulation 18(2) of the Regulations, the Tribunal was entitled to proceed with the hearing in the absence of Mr Ballantyne and of the company. See Regulation 19(3).

(3) If the plaintiff or the defendant or both fail to appear before the Tribunal at the time and place fixed, the Tribunal may nevertheless, on proof of service of notice of the hearing, proceed to determine the proceedings.

[14] It is now possible to address the evidence.

### **The evidence for the plaintiff**

[15] The Director called only one witness, being the complainant, Ms Andrew.

[16] Ms Andrew said that in 2007 she was living with Mr Ballantyne. The relationship ended in late 2009.

[17] In 2007 Mr Ballantyne was involved in insurance restoration work. This involved cleaning properties damaged by fire or by flood. In August 2007 Mr Ballantyne told Ms Andrew that he wanted to start his own insurance restoration business and asked Ms Andrew to be involved in that business. She was happy to accept the invitation as she thought that being part of the business was part of their ongoing life together. When Mr Ballantyne asked her to be the director and shareholder of the business, she agreed. On 13 August 2007 she signed Form 2 (“Consent and Certificate of Director or Directors of Proposed Company, Section 12(1)”) and Form 3 (“Consent of Shareholder or Shareholders, Section 12(1)”). In the first form she consented to act as director of INS Restorations Ltd and in the second she consented to being a shareholder holding all of the 1,000 shares in that company.

[18] Ms Andrew was not then aware that at this time Mr Ballantyne was an undischarged bankrupt.

[19] Ms Andrew did not really understand what it meant to be a director and shareholder of the business. She had never been a director or shareholder of a company before. Her understanding was that she would be helping Mr Ballantyne with some of the fire restoration jobs but that he would organise everything. She did in fact help Mr

Ballantyne with cleaning jobs but was never involved in any of the paperwork for the company and had nothing to do with the finances of the company.

**[20]** The New Zealand passport held by Ms Andrew shows that on 12 September 2007 she left New Zealand and arrived in the Philippines. The purpose of the trip was to visit relatives. The passport further shows that she departed the Philippines on 9 December 2007, returning to New Zealand on or about that date.

**[21]** The evidence provided by Mr Ballantyne prior to the hearing shows that two weeks after Ms Andrew left New Zealand, Mr Ballantyne himself went to the Philippines. He arrived there on 26 September 2007, departing that country for New Zealand on 16 October 2007.

**[22]** Shortly after the return by Ms Andrew to New Zealand, possibly around 23 December 2007, Mr Ballantyne told her that she was no longer a director of INS Restorations Ltd because he was no longer an undischarged bankrupt. This was the first time that Ms Andrew had heard of the bankruptcy. She described being angry and upset because she felt that she was being used. Following an argument she temporarily left the home and as mentioned, the relationship finally ended in about October or November 2009. On 11 August 2010 Mr Ballantyne was successful in obtaining an order from the Disputes Tribunal at Hamilton requiring Ms Andrew to repay what Mr Ballantyne claimed to be a loan. The repayment sum was \$15,000. Ms Andrew said that payment in full was consequently made by her to Mr Ballantyne.

**[23]** Ms Andrew took legal advice. By letter dated 20 August 2010 Kiwi Law Advocates Ltd, solicitors of Hamilton wrote to INS Restorations Ltd requesting all personal information held by the company about Ms Andrew. Particular request was made for information on her status and resignation as a director and her holding and transferring of shares in INS Restorations Ltd. The letter went on to state that it was expected that there would be, at least, a share transfer form, a notice of resignation as director and corresponding Board resolutions. INS Restorations Ltd was reminded that it was an agency as defined in the Privacy Act and that its prompt attention to the request was required. The evidence of Ms Andrew was that no response whatever was received from INS Restorations Ltd or from Mr Ballantyne and the correspondence from the Office of the Privacy Commissioner produced in evidence is to the same effect. The Assistant Commissioner (Investigations) from the Office of the Privacy Commissioner advised the solicitors for Ms Andrew by letter dated 17 March 2011 that:

INS Restorations Ltd has also not responded to our Office during our investigation of this complaint.

**[24]** It is to be recalled that Mr Ballantyne, representing INS Restorations Ltd, participated in the two telephone conferences convened by the Chairperson of the Tribunal on 13 March 2012 and 14 June 2012. In the first of these teleconferences timetable directions were given for informal discovery and inspection of documents, the filing by the parties of their written statements of evidence and finally, the preparation of the common bundle of documents. As to that bundle, it is apparent from what Ms Ryan told the Tribunal at the hearing that Mr Ballantyne cooperated in the preparation of the common bundle of documents in that he provided those documents he wished to have included. Mr Ballantyne also filed a witness statement together with three documents. Those documents are Forms 2 and 3 earlier referred to. The third document, however, is of the greater significance. It is a share transfer form purporting to show that on 20

October 2007 Ms Andrew transferred to Mr Ballantyne all the shares held by her in INS Restorations Ltd. It was received in evidence as Exhibit 3.

[25] Commenting on this document in her oral evidence, Ms Andrew said that the signature on Exhibit 3 is not hers and while it looks like her signature, she did not put it there. When she was first shown the document by Ms Ryan a few weeks earlier her first reaction had been that Mr Ballantyne or some other person had forged her signature.

[26] Shown an extract from the New Zealand Companies Register purporting to show that she had resigned as a director on 21 October 2007 Ms Andrew said that she knew nothing of the transaction. When shown Form 9 (“Consent and Certificate of Director – Section 152 of the Companies Act 1993”) signed by Mr Ballantyne on 21 October 2007 Ms Andrew said that she had been unaware that this transaction had occurred. She correctly pointed out that she was in the Philippines at this time and Mr Ballantyne was in New Zealand.

[27] Some of the company documents make reference to a Mr WRH West of 16 Azimuth Place, Flagstaff, Hamilton. In an unsigned statement dated 16 January 2012 and filed by Mr Ballantyne he (Mr West) described himself in the following terms:

I am a semi-retired and I operate as a Consultant to the Bloodstock Industry Internationally and to Exporters where I have had considerable experience. I was previously in practice as a Chartered Accountant for 39 years and although I have never acted for Tony Ballantyne I have known him for at least 30 years.

Ms Andrew said that she had only met Mr West one or two times.

[28] Ms Andrew was emphatic that she knew nothing about the purported transfer of shares and directorship from her to Mr Ballantyne in 2007 and equally emphatic that the signature on Exhibit 3 (the share transfer) is not hers. That signature purports to be witnessed by Mr West. In the same document he also purports to witness the signature of Mr Ballantyne. The additional point made by Ms Andrew is that she was not in New Zealand on 20 October 2007. Nor during the period that Mr Ballantyne was with her in the Philippines did he ask her to sign any document.

### **The evidence of INS Restorations Ltd**

[29] While Mr Ballantyne did not, in the end, attend the Tribunal hearing he did participate in the proceedings in the preliminary stages. It was through him that INS Restorations Ltd filed the statement of reply dated 16 January 2012 and on 21 June 2012 he filed an unsworn and undated brief of evidence to which was attached a copy of the document now known as Exhibit 3, being the purported share transfer form dated 20 October 2007.

[30] While Mr Ballantyne did not attend to give evidence on oath and to make himself available for cross-examination the Tribunal is of the view that the filed “evidence” ought to be taken into account under the “any evidence” provisions of s 106(1) of the Human Rights Act 1993 read with the duty to act according to the “substantial merits” of the case as required by s 107 of that Act.

[31] We address first the statement of reply to which Mr Ballantyne attached (inter alia) a document which has the heading *A Summary of events: Re: Mrs. A. Andrew holding a Directorship of INS Restorations Ltd.* We will thereafter address separately the document which has the heading *Brief of Evidence of Anthony Ballantyne, Director of Ins Restorations Ltd.*

## **The statement of reply**

[32] While the statement of reply dated 16 January 2012 is somewhat sparse, it nevertheless emphasises that the position taken by Mr Ballantyne and by INS Restorations Ltd is that Ms Andrew ceased to be a shareholder and director in late 2007:

Mrs A Andrew was a Share Holder and Director of INS Restorations from approx August to December 2007 only. She no longer has any shares in INS Ltd nor is she a director – “Summer of Events attached”.

Copies of signed Transfer Share Form give to Mr Bill West Accountant in late 2007 so he could complete the required paperwork transferring company into my name.

[33] The key elements in this extract are the insistence by Mr Ballantyne that Ms Andrew ceased to be a director in December 2007 and the assertion that a signed transfer share form was given to Mr West in late 2007 for him to complete the paperwork which would record the transfer of the company into Mr Ballantyne’s name.

[34] The statement of reply goes on to say that the company does not hold any documents or any correspondence “about Mrs Andrew either personal or such”.

## **The Summary of Events**

[35] It is not intended to recite the entire contents of this one and half page (typed) document. For present purposes it is necessary to note only that in it Mr Ballantyne asserts that Ms Andrew was aware of his bankruptcy, requested that as soon as Mr Ballantyne ceased to be a bankrupt that he was to take over as a director and this was done when Ms Andrew returned from her Philippines holiday in late 2007. Upon her return Mr Ballantyne went to see Mr West and was given a share transfer certificate which Ms Andrew “willingly signed”. The document was then given back to Mr West to complete the paperwork. Mr Ballantyne then went to the ANZ Bank to ensure that signing authority on the cheque account was changed to him:

... Mrs Andrew ... was kind enough to help me form a company and be a director of that company, INS Restorations for approx six weeks or so while I completed a fire restoration job for the ministry of Education at the Hamilton East Primary school Her only request was as soon as my Bankruptcy was finished I was to take over as Director as she was worried about my liabilities, this was done, when Mrs Andrew returned from a lengthy holiday in the Philippines in late 2007, I also joined her there in late September ...

On Mrs Andrew return I went to see my friend a Mr Bill West an accountant, he gave me a share Transfer certificate which Mrs Andrew willingly signed, that certificate was then given back to Mr West and he completed the rest of the required work, I then went into the ANZ bank and after showing them the necessary paperwork they changed the signing authority on the company check account to myself....

[36] It is to be seen that in these paragraphs Mr Ballantyne twice asserts that the share transfer form was completed by Ms Andrew upon her return to New Zealand from the holiday in the Philippines.

[37] In his brief of evidence Mr Ballantyne gives a different account.

## **Mr Ballantyne’s brief of evidence**

[38] In his unsigned brief of evidence received by the Tribunal on 21 June 2012 Mr Ballantyne continues to assert that when he asked Ms Andrew to act as director he told her that the purpose was to tide him over for six weeks until he was discharged from bankruptcy. When Ms Andrew agreed the company was formed with the help of Mr Bill

West. In two key paragraphs he then asserts that the share transfer form was signed **before** Ms Andrew departed for her holiday in the Philippines on 12 September 2007:

8 Mrs Andrew then left for the Philippines from 12 September to 9<sup>th</sup> December 2007 funded by me.

9 **In mid September 2007** after my bankrupt ended on the 6<sup>th</sup> September **I recall Mrs Andrew signing some forms for the transfer** of Ins Restoration into my name. [Emphasis added].

10 On the 26<sup>th</sup> of September 2007 I travelled to the Philippines to spend time with Mrs Andrew and returned 16<sup>th</sup> October 2007...

11 **On the 29<sup>th</sup> of October 2007 I went to Mr West home and took a copy of the share transfer form to the ANZ** to change the signing authority to the company account, after comparing Mrs Andrew signature held on file the authority change over was completed by the ANZ. [Emphasis added].

[39] Read in context, Mr Ballantyne says that he knew that on 29 October 2007 Ms Andrew was still in the Philippines and that the share transfer form was signed by her prior to her departure from New Zealand on 12 September 2007.

[40] The brief of evidence goes on to say that Mr Ballantyne acknowledges receiving “written requests” from the solicitor acting for Ms Andrew requiring him to hand over all the information held about Ms Andrew. His brief goes on to say:

19 ... as Mr West had misplaced my file and was unable to find it, my response was to fax them a hand written note to that effect, that the file was lost and no information regarding Mrs Andrew remained at my apartment.

[41] The brief concludes by observing that Mr West:

... has now located a share transfer form personally signed by Mrs Andrew, copies attached, of which we are holding the original, so that Mrs Andrew can follow up with her complaint to the Police that they have been forged, at which time I am happy to provide those documents to the NZ Police for testing.

[42] The evidence of Ms Andrew is that no handwritten note was received by her or by her solicitors from Mr Ballantyne or the company.

### **The events of 18 July 2012**

[43] At about 3.15pm on 18 July 2012 Mr Ballantyne telephoned the Secretariat and indicated that he did not intend appearing at the hearing scheduled to commence at 10am the following morning. The case officer to whom Mr Ballantyne spoke advised him that she was not able to act as a messenger between him and the Tribunal as to his reasons. She emphasised that those reasons had to be given by him directly to the Tribunal. Following the telephone call she sent to Mr Ballantyne an email confirming her advice and also conveying (correctly) that in the case officer’s subsequent discussion with the Chairperson, a direction had been given that Mr Ballantyne attend the hearing in person so that he could explain his reasons for not participating. Mr Ballantyne was cautioned that the hearing could proceed in his absence:

Dear Mr Ballantyne, when you telephoned at 3:15pm this afternoon (Wednesday 18 July 2012), you indicated that you do not intend appearing at the hearing scheduled to commence at 10am tomorrow. I confirm my verbal advice that I am not able to act as a messenger between you and the Tribunal as to your reasons. Those reasons must be given by you directly to the Tribunal.

The Chairperson has directed that you are required to attend the hearing tomorrow. You can then explain in person your reasons for not participating.

If you do not attend the hearing the Tribunal has power to proceed in your absence.

**[44]** By fax transmission sent at 6:16pm on 18 July 2012 Mr Ballantyne replied to the effect that as he did not own any shares in INS Restorations Ltd and was no longer a director of the company, he would not be present at the hearing:

As I, Anthony Ballantyne legally do not own any shares in Ins Restorations Ltd, and also no longer a Company Director of that company, I will not be present in any legal proceedings against Ins Restorations Ltd.

Kind regards ...

PS All shares and Directorship have been legally transferred back to Mrs AP Andrew.

**[45]** On the following morning, when opening the Director's case, Ms Ryan drew attention to the fact that a search of the New Zealand Companies Register had revealed that on 18 July 2012 a number of transactions had been recorded. When called to give evidence Ms Andrew produced Exhibits 4 to 7. In essence these documents show that on 18 July 2012 at 11:57:13, at the request of Mr William West, 16 Azimuth Place, Flagstaff, Hamilton, Ms Andrew reappeared as the director of INS Restorations Ltd. On the same date at 12:25:25, again on the presentation of Mr West, Ms Andrew reappeared as the sole shareholder in the company. In the result, the Companies Office *Company Extract: INS Restorations Limited* shows Ms Andrew as the sole director and shareholder in the company as at 18 July 2012.

**[46]** Asked to comment on these documents Ms Andrew said that she was shocked, having seen them for the first time just before she gave evidence to the Tribunal. She knew nothing of the transactions until Ms Ryan had shown her the documents that morning and she had not given her consent to becoming a shareholder or director nor had she signed any documents which would facilitate either of the transactions taking place.

### **The evidence – discussion**

**[47]** It is clear from all of the material tendered by Mr Ballantyne that, at least until the day before the Tribunal hearing, it was his firm and fixed view that Ms Andrew had signed the share transfer form in 2007 and was fully aware that the shares and the directorship had passed from her to Mr Ballantyne. Within this account there are contradictions. In particular the *Summary of Events* places the execution of the share transfer certificate following the return of Ms Andrew from the Philippines on 9 December 2007 ("when Mrs Andrew returned from a lengthy holiday ... On Mrs Andrew return..."). The brief of evidence, on the other hand places execution of the document prior to the departure of Ms Andrew for the Philippines on 12 September 2007.

**[48]** As against this we have heard directly from Ms Andrew and have had opportunity to assess her credibility. Our assessment of her is that she has given an honest and truthful account and we accept her evidence in every respect. In particular we find:

**[48.1]** When she was first asked by Mr Ballantyne to become a director and shareholder in INS Restorations she was not then aware nor was she told that he was at that time an undischarged bankrupt.

**[48.2]** That she did not sign the share transfer form dated 20 October 2007 (Exhibit 3).



**[48.3]** That she did not give her consent to the transfer of the shares and of the directorship to Mr Ballantyne on or about 20 October 2007.

**[48.4]** She did not give her consent to the transfer of shares and directorship back to her on 18 July 2012.

### **Conclusion on the facts**

**[49]** The Tribunal is conscious of the fact that it does not have jurisdiction to determine such criminal or civil liability as may flow from the circumstances earlier described and from the findings that have been made. Those circumstances clearly warrant investigation by the Police, the Registrar of Companies and by the Official Assignee. The issue before the Tribunal, however, is whether the Director has established to the balance of probability standard that INS Restorations Ltd has interfered with the privacy of Ms Andrew in terms of s 66(2) of the Privacy Act. Nevertheless in determining that issue some view of the facts must be expressed because those facts are at the core of the issues the Tribunal must determine in the context of s 66(2). In particular those issues include:

**[49.1]** Whether there is any credibility to the assertion made by Mr Ballantyne in his brief of evidence that he did respond to the demand for personal information, that response being the sending by way of fax to the solicitors for Ms Andrew a handwritten note stating that “the file was lost and no information regarding Mrs Andrew remained at my apartment”.

**[49.2]** Whether, in the event of the Director establishing on the balance of probabilities that any action of the defendant was an interference with the privacy of Ms Andrew, the Tribunal has jurisdiction to grant one or more of the remedies in s 85 of the Privacy Act, including damages under s 88.

**[50]** Our conclusion is that the evidence establishes to the balance of probability standard that through Mr Ballantyne INS Restorations Ltd received the letter dated 20 August 2010 from Kiwi Law Advocates Ltd requesting access to the personal information held by the company about Ms Andrew. It is equally clear that that request was not responded to in any way whatsoever within the “as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received” timeline stipulated by s 40(1) of the Act. That failure is deemed for the purposes of s 66(2)(a)(i) of the Act to be a refusal to make available the information to which the request relates. The Tribunal must nevertheless also be satisfied in terms of s 66(2)(b) that there was no proper basis for that decision. As to this requirement we conclude without hesitation that there was indeed no proper basis for that decision. None of the withholding grounds in ss 27 to 29 have been established in terms of s 87. It is clear that information about Ms Andrew was held as required by the provisions of the Companies Act 1993 and by the constitution of INS Restorations Ltd itself. Indeed, some of that information emerged in piecemeal fashion during the preparatory stage of these proceedings after pressure was put on Mr Ballantyne and the defendant company.

**[51]** It follows that the Director has, in terms of s 66(2) established an interference with the privacy of Ms Andrew. We now address the issue of remedies.

### **Remedies**

**[52]** The Director seeks the following remedies:

[52.1] A declaration that the action of the defendant company is an interference with the privacy of Ms Andrew.

[52.2] An order that the defendant company make the personal information available to Ms Andrew.

[52.3] Damages.

[52.4] Costs.

### **Declaration of interference with privacy**

[53] In *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [107] and [108] it was held that while the grant of a declaration under s 85(1)(a) is discretionary, the grant of such declaratory relief should not ordinarily be denied and there is a “very high threshold for exception”. On the facts we see nothing that could possibly justify the withholding from the Director of the formal declaration requested.

### **An order to make the personal information available**

[54] As observed, the information from Mr Ballantyne and from the company has been provided on a piecemeal basis. The impression given is that Mr Ballantyne and Mr West are playing their cards in an opportunistic manner. There can be no confidence that the documents that they have provided to date comprise all the personal information held by the company and over which it retains control. Given the astonishing events of 18 July 2012 one must be reluctant to assume that those documents which have been provided by the company, Mr Ballantyne and Mr West, comprise all the personal information held by the company about Ms Andrew. In view of the evidence discussed earlier and the findings that we have made it is best that the company be directed by way of formal order to make all personal information available to Ms Andrew. This means not only personal information under its actual physical custody but also the information over which it retains control. See in this regard *Mitchell v The Police Commissioner* (1994) 1 HRNZ 398 (CRT).

### **Damages**

[55] Section 88(1) of the Privacy Act states that the Tribunal may award costs against the defendant for interference with the privacy of an individual in respect of any one or more of the following:

[55.1] Pecuniary loss.

[55.2] Loss of a benefit.

[55.3] Humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

[56] In the present proceedings the Director recognises that the evidence does not establish pecuniary loss or loss of a benefit. An award is, however, sought in relation to humiliation, loss of dignity and injury to the feelings of Ms Andrew.

[57] 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* HC Hamilton CIV-2003-419-854, 6 April 2004 at [33] and [34].

**[58]** It is also to be noted that 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 damages are to be read disjunctively and it is not to be assumed that because one head of damages is established, the others are as well. So in *Winter v Jans* at [36] the High Court, while accepting that the evidence established “injury to the feelings”, found that “humiliation” and “loss of dignity” had not been established. To similar effect see *Lothead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5 at [41.3].

**[59]** 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.

**[60]** In the present case Ms Andrew, having agreed to become the shareholder and director in the defendant company to assist the man with whom she was then in a relationship, returned from an overseas holiday to find that she was no longer a director. When, after taking legal advice she endeavoured to find out how this had come about she was met with complete silence and the assertion by Mr Ballantyne that he was now the only director and shareholder. The constitution of INS Restorations Ltd requires a share transfer form to be signed when a person transfers shares and further requires a director to resign by signing a written notice of resignation. Ms Andrew says that she signed no such forms, making her “dismissal” the more incomprehensible unless, of course, her signature was forged. The share transfer form (Exhibit 3) dated 20 October 2007, while containing a signature which appears to be hers, is not a document she admits to having signed. Yet the New Zealand Companies Register, at least in the period prior to 18 July 2012, showed Mr Ballantyne as the sole shareholder and director. This public register does not alert the public to the underlying fraud alleged to have taken place. Indeed the register appears to have been manipulated at will by Mr Ballantyne and Mr West when they caused the series of transactions on the 18<sup>th</sup> of July 2012 which purport to show that after an absence from the Register of four and a half years Ms Andrew reappeared on 18 July 2012.

**[61]** The Tribunal does not have power to compensate Ms Andrew for injury to feelings arising out of the possible fraud and the changes of 18 July 2012. Our focus is on the injury to feelings flowing from the deemed refusal by the company to comply with the information privacy request made by Ms Andrew on 20 August 2010.

**[62]** As to that refusal Ms Andrew says that she feels frustrated at being unable to investigate the possible fraud on her and on the public register. She feels upset and angry to think that there might be documents bearing her forged signature and she is stressed and worried about how to resolve the issue. She does not know what legal liabilities have been thrust on her by a series of unwanted events, events she cannot properly investigate without accessing her personal information. She has had difficulty eating, sleeping and concentrating. She feels manipulated and taken advantage of by Mr Ballantyne.

**[63]** We accept this evidence. It was given without exaggeration or embellishment. If the changes which occurred on 18 July 2012 have any relevance it is to underline the fact that the fears and concerns held by Ms Andrew are fully justified. The withholding of the information requested on 20 August 2010 and which would have allowed her to uncover what she believed to be a fraud on her and on the public register has allowed that fraud to continue. Timely compliance with her request for personal information would have allowed her and her legal advisers to bring an early end to the apparent manipulations by Mr Ballantyne and Mr West.

[64] In terms of s 85(4) it is plain that the interference with the privacy of Ms Andrew was anything but unintentional. On the evidence we have heard she has been treated by Mr Ballantyne as a convenient tool for him to circumvent the impediments caused by his status as undischarged bankrupt. He chose a naive and unsophisticated individual who he hoped would be easy to manipulate.

[65] As to quantum, this is another in the line of cases where the information requested under Principle 6 was required for the purpose of taking legal advice and for the purpose of taking or conducting legal proceedings.

[66] In the two most recent cases in which the Tribunal awarded damages for emotional harm in the context of information privacy principle 6 a figure of \$10,000 was considered appropriate. See *Lothead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5 (27 March 2012) and *Fehling v South Westland Area School* [2012] NZHRRT 15 (6 July 2012). In our view the facts of the present case are broadly comparable and we take \$10,000 as our starting point. To this must be added the fact that the request under Principle 6 for access to personal information was made on 20 August 2010 so that Ms Andrew could determine whether a fraud was being committed on her. By failing to respond to the request and by failing to respond to the subsequent investigation by the Privacy Commissioner the company, through Mr Ballantyne, has been able to thwart any meaningful investigation. The easier it became to manipulate the company records again on July 2012 by purporting to show that Ms Andrew was from that date once again the shareholder and director of the company. The injury to her feelings is plainly substantial.

[67] In our view the circumstances of fraud make the facts particularly serious and we have determined in this case that \$20,000 is the appropriate figure to reflect the unique facts. As mentioned, timely compliance with the request for personal information would have facilitated an early end to the apparent manipulations by Mr Ballantyne and Mr West. The levels of anxiety and stress have been high and prolonged.

### **Summary of findings regarding remedies**

[68] In summary the Director is entitled to a declaration under s 85(1)(a) that there has been an interference with the privacy of Ms Andrew and is further entitled to damages under s 85(1)(c) for injury to the feelings of Ms Andrew. An order is also made directing INS Restorations Ltd to give Ms Andrew access to all personal information held about her.

### **Formal orders**

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

[69.1] A declaration is made under s 85(1)(a) of the Privacy Act 1993 that INS Restorations Ltd interfered with the privacy of Ms Andrew by failing to respond to her personal information request of 20 August 2010.

[69.2] Damages of \$20,000 are awarded against INS Restorations Ltd under s 85(1)(c) and 88(1)(c) of the Act for injury to the feelings of Ms Andrew.

[69.3] An order is made under s 85(1)(b) and (d) of the Act requiring INS Restorations Ltd to provide Ms Andrew with access to all personal information held by INS Restorations Ltd or under its direction or control. Such access is to be given as soon as reasonably practicable and in any case not later than twenty

working days after the day on which this decision of the Tribunal is served on the company.

**Costs**

**[70]** The Director having been successful it is ordered that INS Restorations Ltd pay costs in the sum of \$3,750.00.

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

.....  
**Ms PJ Davies**  
**Member**

.....  
**Mr M Keefe JP**  
**Member**