IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2012] NZHRRT 27**

	Reference No. HRRT 058/2007
IN THE MATTER OF	**A CLAIM UNDER THE PRIVACY ACT 1993**
BETWEEN	**JAMES ROBERT REID**
	PLAINTIFF
AND	**NEW ZEALAND FIRE SERVICE COMMISSION**
	FIRST DEFENDANT
AND	**CROWN LAW OFFICE**
	SECOND DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Hon KL Shirley, Member
Dr SJ Hickey, Member

REPRESENTATION:
JR Reid in person
PA McBride for First Defendant
D Consedine for Second Defendant

DATE OF HEARING: 19 October 2012

DATE OF DECISION: 29 November 2012

DECISION OF TRIBUNAL ON RECALL APPLICATION

Introduction

[1] The issue in this case is whether the Tribunal has power to recall one of its own decisions and thereafter to re-hear a case following a final decision of the High Court dismissing an appeal and when, after the plaintiff has obtained from the Court of Appeal special leave to appeal, he or she has elected not to file in that Court a notice of appeal.

[2] Our conclusion is that the Tribunal does not have such power.

Background

[3] At the heart of these proceedings lies Mr Reid's challenge to a claim made by both defendants that they can properly resist disclosure of the personal information sought by Mr Reid on the grounds that the information is protected by legal professional privilege in terms of s 29(1)(f) of the Privacy Act 1993.

[4] The summary of facts which follows in part draws on *Reid v Crown Law Office* HC Wellington CIV-2008-485-1203, 21 April 2009, Dobson J.

[5] In late 1998 the Crown Law Office initiated proceedings in the name of the Attorney-General seeking to have Mr Reid declared a vexatious litigant on the basis of his pursuit of 18 sets of proceedings bearing in some way on his employment by the New Zealand Fire Service and 8 sets of family-related proceedings. These vexatious litigant proceedings were subsequently discontinued in May 2002 after on-going dialogue between Mr Reid and various solicitors at the Crown Law Office, intended to clarify Mr Reid's intentions regarding various proceedings then extant. The outcome of that dialogue was that it was no longer considered necessary in the public interest to pursue a finding that Mr Reid be declared a vexatious litigant.

[6] On 11 February 2006, Mr Reid wrote to the Crown Law Office requesting a copy of any records indicating that the New Zealand Fire Service had referred the prospect of vexatious litigant proceedings to the Crown Law Office for consideration.

[7] On 18 February 2006, Mr Reid wrote to the New Zealand Fire Service requesting copies of all documents pertaining to its referral of the prospect of vexatious litigant proceedings to the Crown Law Office.

[8] Both requests were treated as an information access request to which Principle 6 of the Privacy Act 1993 would apply and both the Crown Law Office and the New Zealand Fire Service resisted the requests, at least in respect of the vast majority of the documents held by each of them, in reliance on s 29(1)(f) of the Act. That section recognises, as a reason for refusing such requests, that disclosure of the information would breach legal professional privilege. Mr Reid did not accept that this ground for refusing the request should apply and pursued the matter, first before the Privacy Commissioner and subsequently, on appeal, before this Tribunal.

[9] The Tribunal (differently constituted) conducted hearings on 29 February 2008 and 8 April 2008. In a decision published on 7 May 2008 it upheld the claims that the documents were privileged under s 29(1)(f).

[10] Mr Reid then filed separate High Court proceedings comprising:

> **[10.1]** An application for judicial review as against both the New Zealand Fire Service and the Tribunal.
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> **[10.2]** An appeal against the substantive Tribunal decision in respect of the New Zealand Fire Service.
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> **[10.3]** An appeal against the Tribunal's costs decision in respect of the New Zealand Fire Service.
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> **[10.4]** An appeal against the Tribunal's substantive decision in respect of the Crown Law Office.

[11] The first two High Court proceedings did not proceed to trial, having been withdrawn or struck out. The latter two High Court proceedings were dismissed in separate judgments given by Dobson J on 21 April 2009. In a subsequent judgment given in *Reid v New Zealand Fire Service Commission and Crown Law Office* HC Wellington CIV-2008-485-1203, 19 November 2009 Dobson J refused leave to appeal.

[12] Mr Reid then applied to the Court of Appeal for special leave to appeal. He was successful in obtaining such leave, but not on the basis of the arguments put forward by him. Rather leave was granted on a point raised by a member of the Court of Appeal. See *Reid v New Zealand Fire Service Commission* (2010) 19 PRNZ 923 (21 April 2010) at [19]:

> [19] On the basis of the arguments put forward by Mr Reid, the application for special leave should undoubtedly fail. But a member of the panel, Baragwanath J raised at the hearing an issue which is definitely arguable, though only with respect to documents said to be protected by litigation privilege as opposed to legal advice privilege. (We shall call these documents "the litigation privilege documents".) That issue is: does litigation privilege come to an end when the proceeding that gave rise to it and any related proceedings are complete?
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> [20] Baragwanath J referred counsel and Mr Reid to the Canadian Supreme Court's decision in *Minister of Justice v Blank*. The Supreme Court held that litigation privilege, unlike legal advice privilege, has a limited life span. Fish J (for the majority) said:
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> > Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification.
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> [21] If *Blank* were to be followed here, it is likely that the Attorney-General's privilege in the litigation privilege documents would be held to have been lost by February 2006 (the date of Mr Reid's request), the proceeding to which they related having been discontinued in May 2002. *Blank* was not cited to the Tribunal or the High Court. It is clear that Dobson J was proceeding on an assumption of "once privileged, ... always privileged", relying on the Privy Council's judgment in *B v Auckland District Law Society*. But in that case the Privy Council was concerned with legal advice privilege. Most of the documents Mr Reid wants will be (or will have been) protected by litigation privilege, not legal advice privilege. *Blank* has been considered (and followed) in the High Court of New Zealand, but has not yet been considered in this Court or the Supreme Court.
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> [22] We are satisfied this question does meet the statutory criteria for special leave. In accordance with our normal practice, we do not give reasons for granting leave other than the summary in the two previous paragraphs.
> …
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> [40] We have granted Mr Reid special leave with respect to one question of law. Special leave is otherwise declined. For the avoidance of doubt, we advise Mr Reid that he must now file and serve a notice of appeal, limited to that question, within the time specified in r 29 of the Rules. The two respondents will be the New Zealand Fire Service Commission and the Crown Law Office. He should seek by way of relief:
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> (a) that his appeal be allowed;
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> (b) that the Tribunal decision and the Crown Law decision be set aside;
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> (c) that Crown Law disclose the litigation privilege documents to him.
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> [footnotes omitted]

[13] In terms of the Court of Appeal (Civil) Rules 2005, r 29 Mr Reid was required to bring his appeal within 20 working days after the date of the decision giving leave.

[14] No notice of appeal was filed. In an email to the Secretariat of the Tribunal dated 23 April 2012 Mr Reid explained why:

> Also it may assist the Tribunal to know that the appeal for which the Court of Appeal granted leave was not pursued because of my limited resources and because, at best, the appeal would have confirmed the current legal position that the Tribunal was bound by the *Blank* and *Snorkel* decisions.

[15] We do not accept that "the current legal position" is as claimed by Mr Reid. We do not read the leave decision of the Court of Appeal as saying anything more than that the question whether *Blank* is to be followed in New Zealand is an issue capable of bonafide argument.

The recall application

[16] Instead of pursuing his appeal in the Court of Appeal Mr Reid filed with the Tribunal an application dated 11 May 2010 seeking the recall of the Tribunal's decision of 7 May 2008 (and implicitly, a rehearing of the original proceedings). The following grounds for the application are given:

> 2.1 the Tribunal failed to recognise and apply current law pertaining to litigation privilege as adopted by the High Court in *Snorkel Elevating Work Platforms Ltd v Thompson* [2007] NZAR 504 which adopted *Minister of Justice v Blank* [2006] 2 SCR 319.
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> 2.2 counsel for the defendants deliberately or negligently failed in their duty to put all relevant and significant law known to them before the Tribunal.
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> 2.3 recall is appropriate in circumstances where:
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> (a) since the hearing there has been a new judicial decision of relevance and higher authority;
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> (b) counsel have failed to direct the Tribunal's attention to a legislative provision or authoritative decision of plain relevance; or
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> (c) for some other very special reason justice requires that the decision be recalled.
>
> 3 If the law had been applied, the defendants' claim of litigation privilege would have been overruled.

[17] The grounds in para 2.3 are stated in the terms first expressed in *Horowhenua County v Nash (No. 2)* [1968] NZLR 632 (recently applied in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No. 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2]) where Wild CJ identified three circumstances in which the **High Court** has jurisdiction to recall a decision **before it has been perfected by sealing**. The application of this decision to Mr Reid's circumstances is problematical for at least two reasons. First, unlike the Tribunal, the High Court has express power to recall a decision. See High Court Rules, r 11.9. It also has inherent jurisdiction (see s 16 Judicature Act 1908). Second, the Tribunal's decision was sealed at the time of its original publication on 7 May 2008, some two years prior to Mr Reid's recall application was filed.

[18] The recall application was opposed by both the New Zealand Fire Service Commission and by the Crown Law Office, the latter filing submissions dated 1 June 2010 arguing (inter alia) that as the decision of the Tribunal had been sealed and had been the subject of a concluded appeal to the High Court, the Tribunal did not have jurisdiction to recall its decision. The New Zealand Fire Service Commission adopted those submissions.

[19] By *Minute* apparently mistakenly dated "16 June **2009**" instead of "16 June **2010**", the then Chairperson of the Tribunal, Mr RDC Hindle Esq., recorded that he had seen Mr Reid's application and the submissions dated 1 June 2010 by the Crown Law Office.

He said that it was clear that it was for the Courts to resolve the issue in respect of which the Court of Appeal had granted special leave to appeal. Mr Reid's application to recall was accordingly to be dealt with after that Court had delivered its decision. The full text of the *Minute* follows:

> [1] I have seen Mr Reid's application dated 11 May 2010, and the memorandum dated 1 June 2010 by Ms Baltakmens.
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> [2] I regard it as clear that the next step in this proceeding is for the Courts to resolve the issue in respect of which leave to appeal was given in *Reid v NZ Fire Service Commission, Crown Law Office and Privacy Commissioner* [2010] NZCA 133. If the outcome falls in favour of Mr Reid then the Court dealing with the matter will be able to make such orders as may be thought appropriate. If the outcome is against Mr Reid then, even putting aside the points made by Ms Baltakmens, it is difficult to see what substantive grounds there might be to recall the Tribunal's decision in any event.
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> [3] Out of an abundance of caution, however, I will simply reserve Mr Reid's application for recall to be dealt with – if it ever needs to be dealt with – after the Court has delivered its decision.
>
> [4] I leave it to the plaintiff to raise the matter at that time, if he still wishes to pursue his application. In that case he should file and serve a notice of his intention to pursue the matter.

[20] Mr Reid says that he did not receive a copy of this *Minute*.

[21] The next movement on this file was an email from Mr Reid dated 18 April 2012 to the Secretary of the Tribunal enquiring about the status of his recall application. By email dated 18 April 2012 the Secretary responded that she could find no record that, following the decision of the Court of Appeal, Mr Reid had filed a "notice of intention to pursue the matter" as directed by paragraph 4 of the *Minute* dated 16 June 2010.

Recall application to be pursued

[22] By notice dated 18 April 2012 Mr Reid advised that he intended pursuing the recall application on the following grounds:

> 2.1 The Court of Appeal confirmed that the *Blank* and *Snorkel* judgments were current law and therefore bound the Tribunal;
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> 2.2 A Full Court of the High Court has ruled that the type of documents at issue in these proceedings are not subject to litigation privilege (copy attached);
>
> 2.3 The Tribunal is not precluded from recalling its decisions where a miscarriage of justice has occurred as it has jurisdiction to regulate its own procedures.

The High Court ruling referred to by Mr Reid at para 2.2 is the *Minute* of Keane and Woodhouse JJ (Discovery and strike out application) issued in *Attorney-General of New Zealand v Reid* HC New Plymouth CIV-2011-454-254 on 17 April 2012.

[23] Following *Minutes* issued on 23 April 2012, 1 June 2012 and 18 July 2012 the recall application was heard by the Tribunal at Wellington on 19 October 2012.

Recall application not affected by order made under s 88B Judicature Act 1908

[24] On 21 August 2012 Keane and Woodhouse JJ found that Mr Reid "displays all the classic attributes of a vexatious litigant" and saw no alternative but to accede to an application by the Attorney-General under s 88B of the Judicature Act 1908 for a general

order under that provision. See *Attorney-General v Reid* [2012] NZHC 2119, [2012] 3 NZLR 630. The formal order is recorded at [98] and [99]:

> [98] We make an order prohibiting Mr Reid from instituting any civil proceeding in this Court, or in any Court or Tribunal that we have accepted to be an "inferior Court", whether himself in his personal capacity, or in any representative capacity, or by any agent, without the leave of this Court. He will remain entitled, however, to pursue any appeal to the Court of Appeal or the Supreme Court.
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> [99] We decline to make the further order the Attorney-General applies for, prohibiting Mr Reid from continuing, either personally or in any representative capacity, or by any agent, any civil proceedings he has already instituted. Those instituted in this Court or any "inferior Court" are now better seen to their own natural conclusions.

[25] Previously in their judgment at [43], Keane and Woodhouse JJ accepted that this Tribunal is included in the definition of "inferior Court" for the purposes of s 88B of the Judicature Act 1908. In these circumstances Mr Reid is not prohibited from continuing with the present recall application. In fairness, neither Mr McBride nor Ms Consedine suggested to the contrary.

[26] At the heart of Mr Reid's recall application is his contention that this Tribunal, in its decision of 7 May 2008, failed to distinguish between litigation privilege on the one hand, and legal advice privilege on the other. Had it done so, he submits, it would have recognised that the privilege asserted by both the New Zealand Fire Service and the Crown Law Office was litigation privilege and that that privilege came to an end when the Attorney-General discontinued the first vexatious litigant proceedings in May 2002. The withholding ground in s 29(1)(f) having no application, Mr Reid claims he has been unlawfully denied access to personal information with the result that both defendants have interfered with his privacy and the Tribunal has jurisdiction under ss 84 and 85 of the Privacy Act 1993 to grant one or more of the statutory remedies prescribed in s 85.

[27] We accordingly address now the question (left open in *EF v Toon* [2005] NZHRRT 26 (25 August 2005)) whether the Tribunal has jurisdiction to recall a decision and to rehear a case. Account has been taken of the further submissions filed in response to the Chairperson's *Minutes* of 29 October 2012 and 16 November 2012 which offered the parties an opportunity to be heard in relation to case law discovered by the Tribunal's own researches. In his response Mr Reid sought a deferral of the Tribunal's decision pending the determination in the Court of Appeal of *Reid v Attorney-General* CA236/2012. But as best we can tell on the limited information provided by Mr Reid the relevance of those proceedings to the present recall application is speculative, the proceedings have not yet been set down for hearing and the question of security for costs is unresolved. In these circumstances we do not intend delaying further.

WHETHER JURISDICTION TO RECALL DECISION

[28] There are three overarching reasons why the Tribunal does not have jurisdiction to recall a decision and to order rehearing in the circumstances outlined:

> **[28.1]** The Tribunal does not have express power to recall a decision. Nor does it have inherent power to do so.
>
> **[28.2]** The remedies of appeal and judicial review protect against error by the Tribunal.

[28.3] The finality principle and the prohibition on collateral challenge to decisions of superior Courts prohibit the Tribunal from recalling a decision which has been sealed, published and upheld on appeal.

No express statutory power and no inherent power to recall

[29] The Tribunal is an administrative tribunal with a statutory existence and with statutory powers. It is trite law that, as a statutory tribunal, the Tribunal has no inherent jurisdiction: *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 (CA) at [16]; *Transport Accident Commission v Wellington District Court* [2008] NZAR 595 at [16] (Dobson J); *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 (Wylie J) and *Watson v Clarke* [1990] 1 NZLR 715 (Robertson J).

[30] None of the statutes under which the Tribunal operates (the Human Rights Act 1993, the Privacy Act and the Health and Disability Commissioner Act 1994) confer a power to recall or to rehear. Nor do the Human Rights Review Tribunal Regulations 2002 (SR2002/19). This is significant because such power, if it is to be possessed by a Court or tribunal, is invariably conferred by express statutory provision. Even the High Court, possessed as it is of inherent jurisdiction, has an express and highly circumscribed jurisdiction to recall a judgment. See the High Court Rules, r 11.9:

> **11.9 Recalling judgment**
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> A Judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed.

[31] This power is subject to two significant constraints:

[31.1] Once a judgment has been sealed, the Court is functus officio and recall is no longer possible. See *Hanmore v Ganley* (1995) 9 PRNZ 25 at 27 (Tompkins J) and *Thomson v Thomson* (1992) 6 PRNZ 591 at 594 (Greig J).

[31.2] Once an appeal has been lodged against a decision, the court is functus officio and unable to take any further action in relation to the matter unless there is clear statutory provision to the contrary. See *Russell v Klinac* HC Whangarei AP 18/01, 11 December 2001, O'Regan J at [15].

[32] The District Courts Rules 2009 (SR2009/257) at r 12.8.8 cross refer to the High Court Rules r 11.9. Even the amendment of defects and errors (r 1.14), the correction of accidental slips or omissions (r 1.15) and the power to order a retrial (r 12.15) are expressly provided for (these provisions largely mirror the High Court Rules).

[33] Other examples of the express conferral of the power to order rehearing are to be found in:

[33.1] The Disputes Tribunal Act 1988 s 49 (rehearings).

[33.2] The Employment Relations Act 2000, Schedule 2, clause 4 (reopening of investigation) and Schedule 3, clause 5 (rehearing).

[34] No precedent has been cited establishing that, in the absence of an express power, an administrative tribunal such as the Human Rights Review Tribunal has an inherent power to recall a decision and to order a rehearing once the decision has been sealed and published.

[35] Mr Reid relies on ss 104(5) and s 105 of the Human Rights Act which provide:

> **104 Sittings of Tribunal**
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> (5) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal may regulate its procedure in such manner as the Tribunal thinks fit and may prescribe or approve forms for the purposes of this Act.
>
> **105 Substantial merits**
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> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
> (2) In exercising its powers and functions, the Tribunal must act—
> (a) in accordance with the principles of natural justice; and
> (b) in a manner that is fair and reasonable; and
> (c) according to equity and good conscience.

[36] As to s 104(5) it has been held in relation to a materially indistinguishable provision ("the procedure of the Tribunal shall … be such as [it] thinks fit") that a re-hearing is not a matter of procedure. It is a significant aspect of jurisdiction and the power to regulate procedure cannot be used to increase jurisdiction. See *Browne v Minister of Immigration* [1990] NZAR 67, 69-70 (Eichelbaum CJ). To similar effect see *Akewushola v Secretary of State for the Home Department* [2000] 2 All ER 148 (CA) at 153j where Sedley LJ, delivering the judgment of the Court, stated:

> For my part I do not think that, slips apart, a statutory tribunal – in contrast to a superior court – ordinarily possesses any inherent power to rescind or review its own decisions. Except where the High Court's jurisdiction is unequivocally excluded by privative legislation, it is there that the power of correction resides.

[37] As to s 105 it is our view that the requirement in subs (1) that the Tribunal act according to the substantial merits of the case, without regard to technicalities, addresses the responsibilities of the Tribunal prior to the delivery of its decision. That is, the provision is directed to the Tribunal's actions while it is still seized of a matter. Similarly in relation to the requirements of subs (2). This is made clear by the opening words "In exercising its powers and functions". Those powers and functions are to be found in the legislation and it is not feasible, to borrow the words of Sedley LJ in *Akewushola*:

> … to deduce from them the interstitial existence of an internal power of recission or review. If something has gone procedurally wrong which is capable of having affected the outcome, it is to the High Court … that recourse must be had.

[38] The same point was made by Wylie J, albeit in different terms, in *Department of Social Welfare v Stewart* where the issue was whether the District Court (which has no inherent jurisdiction) has an implied power to prevent an abuse of its process. At 703 Wylie J stated:

> Such implied power [to prevent an abuse of process] is one which arises as a necessary implication as being ancillary to the performance of functions, powers and duties conferred by the statute. **There can be no implied power arising from the statute to do something ancillary to a power not conferred by the statute. The statutory function must exist for the necessary power to be implied**. [emphasis added]

[39] In summary, the question whether the Tribunal has an implied power to recall a decision and to order a rehearing is a question of statutory construction. For the reasons

given, we do not believe that the Human Rights Act and Privacy Act confer the power contended for by Mr Reid.

There is an express remedy by way of appeal or judicial review

[40] The remedies of appeal and judicial review protect against error by the Tribunal. On appeal the High Court may exercise any of the powers that could have been exercised by the Tribunal. See s 129(6)(b) of the Human Rights Act. In certain circumstances the Judge of the High Court is required to sit with additional members of the High Court appointed from the Panel maintained under s 101 of the Act. See s 126(1). A party dissatisfied with the decision of the High Court may, with leave of the High Court, appeal to the Court of Appeal on a question of law. If leave is refused, special leave can be sought directly from the Court of Appeal. See s 124(1) and (3). On any appeal the Court of Appeal has the same power to adjudicate on the proceedings as the High Court had and the same judgment must be entered in the High Court as if the decision of the Court of Appeal had been given in the High Court. See s 124(4) and (5).

[41] Part 4 of the Human Rights Act applies with such modifications as are necessary to proceedings under the Privacy Act by virtue of s 89 of that Act and to proceedings under the Health and Disability Commissioner Act 1994 by virtue of s 58 of that Act.

[42] These provisions typify the well established constitutional hierarchy which subjects inferior tribunals to the supervisory jurisdiction of the High Court and beyond that, to that of the Court of Appeal and Supreme Court. The ordinary rule is that once the decision of a tribunal has been made and communicated, the tribunal has exhausted its jurisdiction, or put another way, it is functus officio. The principle was stated in *Goulding v Chief Executive, Ministry of Fisheries* [2004] 3 NZLR 173 (CA) at [43]:

> **[43]** The common law principle applicable to the present case can accordingly be summarised in this way. A valid administrative decision in the exercise of a statutory power, which is the outcome of a completed process, but which has not been formally communicated to interested parties, has not been perfected. It may be revoked and a fresh decision substituted at any time prior to communication of it to affected persons in a manner which indicates intended finality. Once such a decision is so communicated to the persons to whom it relates, in a way that makes it clear the decision is not of a preliminary or provisional kind, it is final. A final decision which is made in the exercise of a power which affects legal rights, including those arising from the grant of a licence, is irrevocable. So is any other decision made under a statutory power where the Act explicitly or implicitly provides that once finally exercised the power of decision is spent. That is the position under the common law. We must, however, also consider the relevant provisions of the interpretation statutes.

[43] On the facts of the present case, and largely for the reasons given in *Goulding*, neither s 13 nor s 16 of the Interpretation Act 1999 have application. They provide:

> **13 Power to correct errors**
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> The power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is not generally capable of being exercised more than once.
>
> **16 Exercise of powers and duties more than once**
>
> (1) A power conferred by an enactment may be exercised from time to time.
>
> (2) A duty or function imposed by an enactment may be performed from time to time.

[44] First, s 13 does not give power to reverse a previous decision made in the exercise of a power which affects legal rights: *Goulding*. Section 13 was intended to have a narrow scope: *Ellipse Institute Ltd v New Zealand Qualifications Authority* [2012] NZHC 2083, [2012] NZAR 871 (Potter J) at [53] to [63]. In the present case the decision of the Tribunal given on 7 May 2008 unquestionably affected the legal rights of the parties in that Mr Reid's right of access to personal information under Principle 6, specifically recognised as a "legal right" by s 11(1) of the Privacy Act, was held to be defeated by s 29(1)(f) which confers on the defendants an explicit statutory ground for refusing the Principle 6 request. The circumstances demonstrate that the right of access to personal information can be qualified in certain circumstances by competing rights. The decision of the Tribunal determined which right prevailed.

[45] Second, it has been said of ss 13 and 16 of the Interpretation Act that they do not authorise the revocation of a perfected decision, but are premised on a decision being of a type that can be made from "time to time" or where the decision is unlawful: Taylor and Gorman *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at [14.67].

[46] Returning to *Goulding*, the decision of the Tribunal clearly affected the rights of Mr Reid, the New Zealand Fire Service and the Crown Law Office. It was sealed before being published and communicated to the parties. It was in every sense a final decision and, subject to successful challenge on appeal or by way of judicial review, irrevocable. The three circumstances in which the **High Court** has jurisdiction under High Court Rules, r. 11.9 to recall a decision before the decision has been perfected by sealing (*Horowhenua County v Nash (No. 2)*) simply have no application.

The finality principle and the prohibition on collateral challenge

[47] As observed by Venning J in *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2011] 1 NZLR 336 at [12] it is in the interests of the state and the parties that there be finality in litigation. Generally it is not appropriate for a trial court to recall its judgment or order a new trial once appeals have been taken because for the recall or order for new trial to have effect it will amount to a recall of the judgments of the superior courts:

> [12] The starting point is the principle of finality in litigation. It is in the interest of the State and parties that there be finality in litigation: *Lockyer v Ferryman*, as confirmed in *Shiels v Blakely*. Related to the principle of finality, is the principle that the trial Court is functus officio once its decision has been finally recorded or overtaken by the processes in superior courts: *R v Nakhla (No 2)*. Prima facie, it will generally not be appropriate for a trial court to recall its judgment or order a new trial, once appeals have been taken (and determined) because for the recall or order for new trial to have effect, it would have to amount to a recall of the judgments of the superior court(s): *Hikuwai v Sanford Limited*; *UDC Finance Ltd v Madden*; *Collier v Creighton*.
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> …
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> [59] … But more fundamentally, while the judgment may not have been sealed, it has been the subject of appeal to the Court of Appeal and Supreme Court. There is now no jurisdiction to recall the judgment of this Court on the basis suggested. To allow a recall on the alleged non application of a statutory provision would amount to a re-launching of the already concluded appellate process, which was specifically warned against in *Faloon v CIR*. To do so would be to completely undermine the hierarchical structure of the Courts.
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> …
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> [69] The start and end point is that there is no jurisdiction for this Court to declare its earlier decision a nullity as it is functus officio, given the appeals taken from that decision.

[48] The principle of finality in litigation was emphasised on appeal in *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94 (9 November 2012) at [28]. There the Supreme Court held at [39] that the fraud exception to the finality of judgments does not apply to legal errors allegedly made in the reasons for judgment, even if a party's conduct is said to have contributed to the making of the alleged error. In so holding the Court observed at [41] and [44] that it is "well established" that the High Court has no power to recall or to set aside judgments on questions of law which have been the subject of appellate decision. In our view the same must apply to decisions of the Tribunal.

[49] The circumstances in which Mr Reid has filed his recall application have already been rehearsed – an unsuccessful appeal to the High Court, the obtaining of special leave to appeal to the Court of Appeal followed by a deliberate election not to file a notice of appeal in that Court. The application by Mr Reid that the Tribunal recall its decision is an impermissible collateral attack on the judgments of Dobson J, and it is an attack which this Tribunal should not entertain. See the analogous decision in *Slavich v Police* HC Hamilton CIV-2006-419-89, 13 December 2011, Heath J at [13]:

> [13] The present application is, in reality, a collateral attack on the judgments of appellate courts which have considered my own decision. I do not consider that I have jurisdiction to entertain the application. For that reason, it is dismissed.

[50] The recall application can properly be described as an abuse of process. See *Ngahuia Reihana Whanau Trust v Flight* CA 23/03, 26 July 2004 at [3]:

> [3] It is becoming a matter of concern not just to this Court but to others in the western common law system that disaffected litigants, usually appearing in person, repeatedly make application for recall of judgments which they steadfastly refuse to accept. It is timely to characterise plainly unmeritorious applications of that sort as an abuse of the Court's process and to reaffirm the rarity of legal justification for recalling judgments.

Conclusion

[51] For the foregoing reasons we are of the view that the Tribunal does not have power to recall a decision once it has been sealed and published to the parties. The more so once the decision has been the subject of an appeal to the High Court (or beyond), save in respect of any remittal of the matter to the Tribunal by a superior Court.

[52] In view of this conclusion we do not intend addressing the question whether, had there been power to recall, this would have been a proper case in which that power was to be exercised.

Costs

[53] The first and second defendants seek costs. In general outline the following points were emphasised by them.

> **[53.1]** The present application is the sixth time that this case has been before the Tribunal and the Courts. In addition to the substantive and costs hearings before the Tribunal there were the two hearings before Dobson J and the application for leave to appeal to the Court of Appeal.
>
> **[53.2]** When Mr Reid gave notice of his intention to pursue the present recall application both defendants asked that the application to be determined on the papers by way of written submissions. Mr Reid, however, pressed strongly for an oral hearing. In the *Minute* issued on 18 July 2012 the Chairperson, in granting Mr Reid's application, observed:

> **[6]** The earliest date on which the Tribunal can convene an oral hearing is Friday 19 October 2012. A decision on the papers would be made earlier than this date but it is to be presumed that Mr Reid is aware that his request for an oral hearing will occasion some delay. He is also to be presumed aware that should he be unsuccessful in his application the defendants will be seeking costs which reflect the fact that they have been put to the expense of an oral hearing.

[53.3] The recall application has no merit. It is clear that the Tribunal does not have power to grant it.

[53.4] The recall application is in truth an attempt by Mr Reid to have before this Tribunal the hearing he was offered in the Court of Appeal, an offer he unwisely discarded. He is the author of his own misfortune and the Tribunal cannot allow its processes to be abused by allowing a collateral attack on the decision of Dobson J in the High Court.

[54] The New Zealand Fire Service seeks indemnity costs of $6,048 plus $150 disbursements. Both figures are GST exclusive. Reliance is placed on the decision of Ronald Young J in *Reid v Attorney-General* HC Wellington CP 255/02, 2 April 2003 and in particular:

> [25] Having read decisions of the Employment Tribunal, Employment Court, High Court and Court of Appeal in relation to Mr Reid's dismissal from the Fire Service, the overwhelming impression is that these proceedings are no more than another attempt by Mr Reid to reargue that which has been exhaustively considered. Mr Reid has litigated his dismissal and peripheral issues now for almost eight years. These factors are highly relevant to costs. There was in my view no merit at all in Mr Reid's application for an interim injunction. There was no jurisdiction to even consider the merits of it. Mr Reid has previously been warned by Courts about repetitive litigation effectively attempting to reargue the same issue. These proceedings are in that category. In those circumstances therefore, in my view, indemnity costs is appropriate….

[55] In the alternative substantial costs were sought, calculated on a two thirds contribution ie about $4,000.

[56] The Crown Law Office did not seek indemnity costs but nevertheless asked for an award based on sixty percent of actual costs. Because Ms Consedine did not have the figure with her at the hearing she was given leave to file a memorandum by 2 November 2012. That memorandum has now been filed. The sum sought is $6,569.00.

[57] The difficulty faced by the application for indemnity costs is that in *Idea Services Ltd v Attorney-General (No. 3)* the jurisdiction of the Tribunal to make an award of indemnity costs was challenged. The hearing in the High Court at Wellington commenced on Monday 30 April 2012 and concluded on Friday 4 May 2012. We see no advantage in postponing the determination of the present costs application pending delivery of judgment in those proceedings.

[58] The case made by the defendants for costs is a strong one. But the view we have reached is that while an award of costs is certainly appropriate, we do not intend awarding indemnity costs. Mr Reid has been declared a vexatious litigant and it is hoped this will curb his enthusiasm for pointless proceedings. Indemnity costs are not necessary from a deterrence point of view. In any event the difference between what is sought by both defendants and our intended award is not significant.

[59] In the interests of finality we intend to approach the matter on the basis that each defendant is entitled to an award of $4,000 each. This sum is intended to be all inclusive and encompasses all disbursements and any GST as well as the costs of and incidental to the argument about costs. This award is marginally higher than the average award

made by the Tribunal on a reasonable contribution basis per day of hearing as outlined in *Orlov v Ministry of Justice and Attorney-General* [2009] NZHRRT 28 (14 October 2009).

Overall result

[60] In summary the decision of the Tribunal is that:

> **[60.1]** The application by Mr Reid dated 11 May 2010 for the recall of the Tribunal's decision given on 7 May 2008 is dismissed.
>
> **[60.2]** The New Zealand Fire Service Commission is awarded costs of $4,000.
>
> **[60.3]** The Crown Law Office is awarded costs of $4,000.

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Mr RPG Haines QC	**Hon KL Shirley**	**Dr SJ Hickey**
Chairperson	**Member**	**Member**