Decision No. 35 /06

Reference No. **HRRT 8/04**

BETWEEN **JOHN LEHMANN**

Plaintiff

AND **CANWEST RADIOWORKS LIMITED**

Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle - Chairperson
Mr A A Hall - Member
Dr I Vodanovich - Member

HEARING: 25 & 26 May and 11 July 2006 (Auckland)

APPEARANCES:

Mr J Harder as representative of the plaintiff
Ms M Peters (with Ms C Bradley on 25 & 26 May 2006) for defendant
Mr R Stevens for Privacy Commissioner on 25 & 26 May 2006
Ms K Evans for Privacy Commissioner on 11 July 2006

DATE OF DECISION: 21 September 2006

DECISION

Preliminary

[1] During 2001 the defendant had reason to want to contact the plaintiff to discuss the payment of a debt that was owed to it. After various unsuccessful attempts to do so Ms Faulding (who was then the General Manager, Network Sales for the defendant) decided to have the following message broadcast over the various radio stations operated by the defendant around New Zealand:

> *"If you know the whereabouts of John Lehmann associated with the companies Thurco Ltd, Waco Coatings, or RB- 80, and believed to be in the Auckland area, please contact RadioWorks' reception during business hours on (09) 375 7171".*

[2] Another version of the message that went to air in the Northland/Whangarei area was as follows:

> *"If you know the whereabouts of John Lehmann associated with the companies, Thurco, Waco Coatings, or RB-80, and believed to be in the Whangarei/Northland area, please contact Janet Faulding during business hours on (09) 375 7171".*

[3] These messages were broadcast a total of 73 times on the 24th, 25th, 27th and 28th of November 2001.

[4] In its essentials, the plaintiff's case is that the steps that were taken by the defendant to collect personal information about him contravened Principles 1, 2 and/or 4 of the Privacy Act 1993 ('the Act'). He says that he suffered an interference with his privacy as a result. He asks us to award appropriate declaratory relief, and also damages to compensate him for the humiliation, loss of dignity and injury to feelings that he says he suffered as a consequence.

[5] The defendant says that the Act does not apply to the messages that were broadcast about the plaintiff at all. In addition or in the alternative, it argues that in the circumstances there was no breach of any of the Privacy Principles and/or that there is in any event no satisfactory evidential foundation for a finding that what occurred amounted to an interference with the plaintiff's privacy.

[6] This decision is organised under the following headings.

Preliminary

Conduct of the Proceedings

Facts

The purpose of the collection of information about the plaintiff

The source of the information about the plaintiff

The manner of the collection of information about the plaintiff

Principle 4: Interference with privacy?

Costs

Formal orders

Conduct of the proceedings

[7] There have already been two decisions issued in respect of these proceedings, namely *Lehmann v The RadioWorks Limited*, (HRRT Decision 31/04; 5 August 2004) and *Lehmann v The RadioWorks Limited* (HRRT Decision 20/05; 22 July 2005).

[8] At the time that the second of these decisions was issued the Privacy Commissioner had not completed her investigation of matters under Privacy Principle 4. As a result and by agreement time was allowed for that aspect of the investigation to be completed. Subsequently the matter was set down for hearing in March 2006. However that fixture was subsequently vacated on the plaintiff's application. The substantive hearing eventually commenced on 25 May 2006.

[9] By the time of the hearing Ms Faulding was living in Turkey. Her evidence was an essential ingredient of the defendant's case. It was clear that it would be impracticable to ask her to return to New Zealand for the hearing. Initially it was hoped that it might be possible to have her evidence given by way of a video link. However inquiries by

counsel indicated that it would likely be impractical to set up a video link with Turkey. In the end (and by consent) Ms Faulding's evidence was taken by telephone.

[10] Because of the time differences it was necessary to make the telephone connection with Ms Faulding late in the day on 26 May 2006. As a result there was no time for submissions to be heard after her evidence. In due course the submissions were heard on 11 July 2006. By the end of that day Mr Harder had not had an opportunity to reply to the submissions that had been presented on behalf of the defendant and for the Privacy Commissioner. In addition, Ms Peters indicated that she wished to present some further argument to deal with a particular aspect of the case. As a result it was agreed that further submissions would be filed in writing, but if it was considered desirable to have further oral argument, then yet another day could be allocated for that purpose. Ms Peters filed further submissions, but as events have transpired Mr Harder has elected not to file any further submissions. By early September 2006 it had become clear that none of the parties wished to appear to present any further argument either.

Facts

[11] Much of the background to this dispute is not controversial. However there were very different perspectives as to why certain steps were taken. In addition there is a disagreement, and an issue of credibility, relating to the plaintiff's assertion that he suffered significant humiliation, injury to feelings or loss of dignity as a result of the defendant's conduct.

[12] In 2001 the plaintiff was associated with a company called Chemical Enterprises Limited ('CEL'), at least to the extent that it was he who filled out the defendant's standard form of credit application on behalf of CEL when CEL wanted to embark on a radio advertising campaign. The credit application form is dated 14 January 2001 and was signed by the plaintiff on the basis that he was responsible for 'business development' for CEL. The plaintiff's evidence was that, at that time, he was engaged by CEL to assist with its public relations, and that it was in the course of providing those services that he became involved with the radio advertising campaign that was undertaken by CEL.

[13] The advertisements that had been purchased by CEL went to air in April and May 2001. Invoices for the advertising were sent to the plaintiff on or about 17 May 2001. But the cheque that was sent to the defendant was not honoured when it was presented to the bank. As a result there were some telephone discussions between Ms Faulding and the plaintiff in an effort to secure payment. Ultimately the May 2001 invoices were paid in full.

[14] Because of this experience, when a second round of advertising was proposed for later that year Ms Faulding insisted that, before anything was broadcast, post-dated cheques would have to be supplied to cover the cost of what was to go to air. The plaintiff therefore provided the defendant with two cheques. Both were dated 31 August 2001, and were made out to 'the RadioWorks Network' or bearer. Both showed that they were drawn on the account of 'Waco Coatings and Chemicals Ltd' (Waco Coatings and Chemicals Limited had been the name of CEL prior to November 2000). The first cheque was for $5,625.00, and the second for $7,875.00. The plaintiff told us that he did not write either of the cheques out, but he did accept that it was he who had signed both of them.

[15] The second round of advertising went to air during September 2001. Some of the broadcasts were what were referred to as 'advertorials', the idea being that a

representative of CEL (specifically, the plaintiff) would go on air to take questions from callers. The sessions were promoted in advance. Here is a transcript of one of the 'promos':

> *'Owing to popular demand, business guru, John Lehmann, returns to Radio Pacific …*
>
> *Tune in from 2 to 2.30 Wednesday afternoon when John Lehmann explains how you can invest in your future and work for yourself with his unique product RB-80 …*
>
> *It's the fantastic roofing and siding product that colourises, waterproofs AND insulates … and it could be the key to your future …*
>
> *So listen Wednesday from 2 pm for John Lehmann … You supply the will, and they'll supply the skill …For more information call 0800 RB-80 4 US.'*

[16] Aside from those 'promos', advertising of the following kind also went to air:

> *"The following phone number could change your life for the better. If you've ever thought of being in business, controlling your own future, wealth and income, RB-80 urgently requires branch agencies throughout New Zealand, to market a proven winner. A roofing and siding product that colourises, waterproofs AND insulates. An initial investment of $130,000 is required.*
>
> *To make an application for this unique opportunity, call* [a Wellington telephone number was given]."

[17] This advertising was to have been paid for by the cheques that had been delivered to the defendant presumably on or about 31 August 2001. For reasons that were not explained to us, however, it seems that the cheques were not actually presented to the bank for payment until about 17 September 2001. When they were presented, the bank returned them to the defendant saying that they could not be processed because payment had been stopped.

[18] When Ms Faulding discovered that the cheques had not been paid, she made numerous telephone calls to the plaintiff and left a number of messages for him to call her. She used the mobile telephone number that he had given the defendant when he filled out the credit application form. It was a number that Ms Faulding had successfully used to contact the plaintiff in the past. Ms Faulding was keen to contact him because she expected that he would be able to arrange to have the cheques paid, just as he had done in respect of the earlier round of advertising in May 2001.

[19] Despite her efforts, however, she was unable to speak to the plaintiff. He did not contact her to discuss matters.

[20] At some point in October 2001 Ms Faulding referred the matter to a debt collection agency. In her written brief of evidence Ms Faulding told us that she had referred the matter to the agency for collection. Her evidence at the hearing, however, was that her brief to to the agency was only to locate the defendant. In any event, Ms Faulding said that even while the matter was with the agency she and other members of the defendant's staff continued to try to contact the plaintiff as well.

[21] The evidence as to exactly what it was the collection agency did in its effort to find the plaintiff was not clear, but Ms Faulding told us that at some point she learned

from the collection agency that a farm at which the plaintiff had been contacted in the past had been sold. There came a point at which it seemed to her that all of her efforts to contact the plaintiff, as well as those of the collection agency, had clearly failed. She decided that the best way to contact him would be to broadcast the messages that we have set out in full at paragraphs [1] and [2] above. She then arranged for the messages to be broadcast.

[22] On 24, 25, 27 and 28 November 2001 the messages went to air across the whole country, via three or four of the different radio stations that were then being operated by the defendant. The messages were broadcast a total of 73 times. Ms Faulding told us that the broadcasts were weighted towards day-time slots rather than night-time slots; in practical terms, that meant that the messages were going to air several times a day on each of the stations.

[23] Despite the extensive broadcasting of these messages the response was limited. In the case of some of those who did respond, only very brief notes of what was said were kept. Nonetheless the question of exactly what it was that the defendant learned about the plaintiff as a result of the broadcasts is one that is of considerable importance to the application of the Act. We therefore set out the evidence of different responses in some detail:

[a] We were shown three notes that had been jotted down on small squares of paper, such as might have been used by a receptionist or telephonist;

[b] Two of these jottings record the name of a caller, the caller's telephone number, and the name of the organisation that the caller was representing. But neither of these callers spoke to Ms Faulding directly, and no one else was called to give evidence about the notes. It is of course possible that these callers might have given the defendant's receptionist or telephonist some other information about the plaintiff, but that is not certain. The notes themselves do not contain any information about the plaintiff. In the end, there is no sufficient evidence for any finding that either of these two callers gave the defendant any personal information about the plaintiff at all;

[c] The third of the notes had clearly been written by a telephonist for Ms Faulding. The note told Ms Faulding that a solicitor representing the plaintiff had telephoned, and asked Ms Faulding to call the solicitor on either one of two phone numbers that were given in the note. The note has no other information about the plaintiff;

[d] Ms Faulding told us that she also received a telephone call from a lawyer in Wellington. That lawyer told her that he had some clients who had had unsatisfactory business dealings with the plaintiff. Ms Faulding did not take any notes of the conversation because, she said, she was not looking to collect information of that kind; all she was interested in was information which might allow her to make contact with the plaintiff. Nonetheless the defendant accepted that this conversation between Ms Faulding and the lawyer resulted in the receipt by the defendant of information that an elderly couple for whom the lawyer had acted had lost money in their business dealings with the plaintiff.

[24] Ms Faulding spoke to the plaintiff's solicitor by telephone, as she had been asked. He wanted her to take the messages off the air, and she said that she would do so but that it was not possible to stop broadcasts that were in the system to go to air on that day (i.e., before midnight). Ms Faulding recalled having to explain the way in

which the internal processes of the defendant worked, and why it was not possible to take the messages off air any earlier. She also told the solicitor that she wanted to make contact with the plaintiff. The solicitor gave Ms Faulding the plaintiff's telephone number. Ms Faulding remembered that, because she was surprised to find it was exactly the same telephone number that she had been trying to use to contact the plaintiff over the past months. It was also the same number that she had given to the debt collection agency. As a result she told the solicitor that he must have given her a wrong number. He assured her it was the correct number. He told her that he (the solicitor) had just been speaking to the plaintiff on the number, and suggested that if Ms Faulding would just call the number she would be able to get hold of the plaintiff.

[25] We agree with Ms Evans' submission that this conversation involved communication to the defendant of the information that the plaintiff could be contacted at that time on the given telephone number. We also agree with Ms Evans that that information was 'personal information' about the plaintiff, within the definition in s.2 of the Act.

[26] Ms Faulding and the plaintiff spoke to each other on 28 November 2001. Ms Faulding told us that the plaintiff's tone was aggressive. The plaintiff denied that, but did say that at the time he was very upset about what had happened.

[27] After the broadcasts concerning the plaintiff had been taken off the air there was an exchange of correspondence between solicitors acting for the plaintiff and the defendant. One of the letters was written by the chief executive of the defendant, Mr Impey. Mr Impey had not been involved personally at the time Ms Faulding decided to carry out the broadcasting of messages about the plaintiff, but he told us that his letter had been written after he had made due enquiries about what had happened. Mr Impey's letter is dated 20 December 2001 and, apart from the notes we have already referred to, it is one of the few written records that we have to refer to that is somewhat contemporaneous with the events at issue.

[28] Mr Impey's letter says that the defendant received three 'other' telephone calls from people who were trying to track the plaintiff down for money. It is not clear from the context what the the word 'other' was indicating, but it suggests that there were a minimum of three calls, and quite possibly more. The letter also stated:

> *"You ask as to the number of calls that were received from people responding to the missing person's report. Given your threat of legal action this information will not be disclosed at this time. However, you should be advised that the company has received advice as to other creditors of your client or his various businesses".*

[29] Mr Harder argued that it must follow from this letter that there were callers other than those we have listed, and that information besides that which has been identified to this point in this decision was received by the defendant. By the time of the hearing, however, neither Mr Impey nor Ms Faulding could shed any light on who the callers might have been, or what they might have said. Thus while we have some sympathy for Mr Harder's concerns, the reality is that there is now no sufficient evidential foundation for a finding that the defendant obtained any personal information about the plaintiff as a result of the broadcasts, other than the information that:

[a] an elderly couple for whom a lawyer in Wellington had acted in the past had lost money in their business dealings with the plaintiff;

[b] a particular solicitor was representing the plaintiff in connection with the matter and the plaintiff could be contacted at a given telephone number.

[30] Both Mr Impey and Ms Faulding were asked why the defendant tried to track the plaintiff down in this rather unusual way. Both were adamant that the defendant had no thought of using the broadcasts as a way of trying to embarrass or pressure either the plaintiff or CEL into payment of the monies that were owed. Both said that Ms Faulding only wanted to make contact with the plaintiff because her experience earlier in the year had been that, when she was able to speak to him, the question of payment was resolved.

[31] Against that, it does seem reasonably clear that even before the broadcasts went to air the defendant had an appreciation that it was unlikely that the plaintiff was or could be made personally liable for the debt. The credit application form had been filled out in the name of CEL, and the advertising had all been booked in that name as well. As a result the first port of call for any formal debt collection processes was obviously the company, not the plaintiff. If the defendant had wanted to take legal steps towards recovering the debt due from CEL, all it had to do was to serve the necessary papers at the registered office of the company. It did not need to make contact with the plaintiff by telephone or at all before taking that step (we should add that Ms Peters argued that it was simplistic to say that the defendant could never have held the plaintiff liable for the debt. Perhaps there were claims that might conceivably have been formulated against the plaintiff personally, but given the amount at stake we think such possibilities would have been rather more theoretical or academic than pragmatic. Furthermore, the submission has to be weighed against the fact that CEL was subsequently wound up on the petition of the defendant for the debt that is at issue).

[32] Ms Faulding's evidence as to exactly when she was first advised that it was unlikely that the debt could be recovered from the plaintiff personally was a little uncertain. At one point she told us that it would have been conveyed to her some time after the debt collection agency had advised her that it had been unable to contact the plaintiff, but before the broadcasts went to air. Elsewhere she said that she did not have that information until after the broadcasts. However we think it must have been reasonably evident to the defendant even before the broadcasts that, realistically, the debtor in this case was CEL rather than the plaintiff. Certainly Mr Impey did not suggest otherwise when he was asked about the matter. Mr Impey also told us that the defendant had never before used this kind of technique for trying to locate someone who might be able to assist towards the repayment of a debt. He was asked if he knew of any other broadcaster that had used such an approach to try and make contact with someone to facilitate recovery of a debt. Mr Impey said that he had a vague recollection of one such episode, but he acknowledged if the technique had ever been used by any other broadcaster before, it would be very much the exception rather than the rule.

[33] We are willing to accept that Ms Faulding saw the need to make contact with the plaintiff as likely the most productive way of doing something about recovery of the debt, even if the debt was not owed by the plaintiff personally. But, despite the evidence that was given for the defendant, we struggle to accept that her decision to go about contacting him in this unusual and extraordinarily public way was altogether divorced from a hope that he might feel pressure not only to make contact with the defendant, but also to resolve the matter by arranging payment of the debt, perhaps even paying it himself. It is true that the broadcasts do not say in so many words that the plaintiff was liable to pay a debt, but equally we think the overall impression of the messages would have given any reasonably perceptive listener an impression that the plaintiff had some involvement in whatever it was that the defendant had to do with the company that was identified. In any event, and whatever the defendant's real hopes

for the broadcasting campaign might have been, it was clear that Ms Faulding gave no thought to what the impact of the campaign on the plaintiff's privacy might be before she put the broadcasts to air.

[34] We turn to consider the various privacy principles that the plaintiff relies on.

The purpose of the collection of information about the plaintiff

[35] Principle 1 provides:

> *"Personal information shall not be collected by any agency unless —*
>
> *(a) The information is collected for a lawful purpose connected with a function or activity of the agency; and*
>
> *(b) the collection of the information is necessary for that purpose."*

[36] The defendant did not suggest that it is not an agency to which the Act applies in the circumstances of this case.

[37] Whether the purpose of the broadcasts was simply to make contact with the plaintiff, or whether they should also be seen as including a purpose of trying to secure or facilitate payment of the debt, Mr Harder accepted that the defendant's purposes in putting the broadcasts to air were not unlawful. Nor did he seek to argue that they might not have been connected with a function or activity of the defendant agency. The real issue under Principle 1 was whether the collection of information as to the plaintiff's whereabouts was necessary.

[38] Mr Harder argued that the broadcasts were not necessary either for the purpose of making contact with the plaintiff, or for the purpose of trying to secure or facilitate payment of the debt. Even allowing for a possibility that Ms Faulding may have had some difficulty contacting the plaintiff on his cell phone (perhaps because the plaintiff was out of the area of cellphone coverage at the relevant times), Mr Harder submitted that she could have sent him a facsimile or written to the plaintiff. Alternatively, the defendant could have taken steps towards the recovery of the debt by sending the appropriate papers to CEL's registered office.

[39] In answer, Ms Peters began with a submission that none of the principles relied on by the plaintiff apply at all because the defendant did not 'collect' any personal information about the plaintiff as a result of the broadcasts at all. The submission relies on the definition of the word 'collect' in the Act:

> *"**collect** does not include receipt of unsolicited information."*

[40] Of the few items of personal information that were received by the defendant as a result of its broadcasts, the only information that arguably falls within the scope of what had been asked for in the broadcasts was the information given to the defendant by the solicitor who was instructed to act for the plaintiff, namely, his cell phone number. The other items of personal information do not, Ms Peters' submits, fall within the scope of what the defendant's broadcasts were soliciting. To that extent, she submits that the information that was received was not 'collected' within the meaning given to that word in the Act.

[41] Ms Evans supported the analysis advanced by Ms Peters, and we agree with them. If one looks at the wording of the broadcasts (at paras [1] and [2] above) it is

clear that they do not ask callers for any information about dealings that they may have had with the plaintiff. In this respect we think that the situation here is different from the circumstances considered by the Court of Appeal in *Harder v Proceedings Commissioner* [2000] 3 NZLR 80 and those considered more recently by the Tribunal in *Stevenson v Hastings District Council* (HRRT Decision 7/06; 14 March 2006 at para's [88] to [90].

[42] Some time was taken up during the hearing with a discussion about how the defendant's broadcasts concerning the plaintiff should be categorised. In some of the early correspondence it was suggested, on the plaintiff's side, that they were not unlike a Police 'Missing Persons' kind of announcement. Although no great emphasis was placed on that during the hearing, it was Mr Harder's position that the content and tone of the broadcasts were such as would have encouraged or invited responding callers to volunteer information about their own dealings with the plaintiff. Mr Harder also submitted that the number, frequency and the unusual nature of the broadcasts were in themselves likely to convey an impression that the defendant was looking to contact the plaintiff for business reasons and that the plaintiff either was or might not be likely to respond if approached through usual channels - thus creating an impression that the defendant was likely to be looking for the plaintiff to recover a debt.

[43] We have some sympathy for Mr Harder's concerns in this regard. We think it is unrealistic to suggest that this highly unusual step of broadcasting a 'can you tell us the whereabouts of …' message seventy-three times throughout the country, in the terms that were used, was not going to leave a number of listeners with an impression that the defendant was looking to get hold of the plaintiff to get something from him. But even so, save for the information given to the defendant by the plaintiff's solicitor, neither of the other items about the plaintiff that were received by the defendant as a result of the broadcasts were things that the defendant had solicited.

[44] It follows that they were not 'collected' by the defendant, and so Principle 1 has no application.

[45] We focus, then, on the personal information that was received by the defendant as a result of the broadcasts and which does somewhat match the request for information that was contained in the broadcasts. That was the plaintiff's cell phone number. The number was given to the defendant by the plaintiff's solicitor, and we think it can properly be inferred that that was done with the plaintiff's authority (the plaintiff did not suggest otherwise in his evidence).

[46] It is true that it was the same telephone number that the defendant already had for the plaintiff. But again we agree with Ms Evans' submission that the information can nevertheless be described as having been 'collected' by the defendant as a result of the broadcast. The only remaining question under Principle 1, therefore, is whether or not the collection of that information was necessary for the defendant's purpose (be that simply to make contact with the plaintiff, or to make some progress towards payment of the debt).

[47] The use of the word 'necessary' in Principle 1(b) is not qualified. Taken at face value, the word might convey a sense of that which is essential; something but for which the purpose cannot possibly be achieved. If interpreted in that way, Principle 1 imposes a very high standard indeed for agencies to have to achieve before it can be said that the collection of personal information is justified within Principle 1. Certainly if one approaches this matter on the basis that the defendant's purpose in going to air with the broadcasts was ultimately to ensure the debt was paid, then broadcasts were not necessary in that strict sense. The debt was owed by the company CEL.

Enforcement proceedings could have been served on the company without any need to make contact with the plaintiff at all.

[48] On the other hand, we do accept that when Ms Faulding looked at the situation which confronted her in November 2001, it would not have been unreasonable for her to suppose that the most practical way of proceeding was to start by getting hold of the plaintiff to talk to him about the problem. Her experience earlier that year would have told her that, if she could do so, the plaintiff might be able to do something positive towards payment of what the company owed. We also accept Ms Faulding's evidence that she had tried to contact Mr Lehmann on his cellphone on the number that he had given her, but that he had not responded to her telephone calls.

[49] The first step was to contact the plaintiff. We find that was at least a substantial purpose in what the defendant did, and that it should be taken as the relevant purpose against which the defendant's obligations under Principle 1 should be assessed in this case. It is properly conceded that the purpose was lawful, and that it was a purpose that was connected with a function or activity of the defendant agency. We find that in the circumstances which confronted Ms Faulding in November 2001 it was reasonably necessary for her to have information as to the defendant's whereabout to achieve the purpose of contacting him.

[50] We have no doubt that Principle 1 is intended to set a standard that is workable and achieveable, having regard to the circumstances of each case. We therefore agree with Ms Evans' argument that Principle 1 should be approached as setting a standard of reasonable rather than absolute necessity.

[51] In our assessment the collection of personal information about the plaintiff (namely information as to his whereabouts or, by implication, how he might be contacted) was reasonably necessary for the defendant's purpose of making contact with him.

[52] It follows that in our view there was no contravention of Principle 1 in what occurred.

[53] We add that, even if we had found that Principle 1 had been contravened in some way, it is clear that what occurred did not amount to an interference with the plaintiff's privacy in this respect. The question here is whether the collection caused any harm (we use that word to encompass all of the different kinds of adverse consequences listed in s.66(1)(b)(i) to (iii) of the Act) to the plaintiff. We deal with the separate question as to whether the *manner* of the collection caused any harm below, but there cannot possibly have been any harm to the plaintiff arising out of the fact that his own solicitor gave the defendant his cell phone number, when that is obviously what the plaintiff had asked his solictor to do.

[54] For these reasons the claim under Principle 1 is dismissed.

The source of the information about the plaintiff

[55] Principle 2 obliges agencies to which the Act applies to collect personal information directly from the individual concerned. The essence of the plaintiff's claim under this Principle was that the defendant ought not to have attempted to collect information about him from anyone other than him.

[56] Principle 2(2) lists a number of exceptions to the rule that agencies must collect personal information from the individual concerned. Ms Peters submitted that a

number of those exceptions apply in the present case, including Principles 2(2)(b), 2(2)(c), 2(2)(d)(iv) and 2(2)(f). In view of the conclusions that we have reached, it is not necessary to deal with each and every one of these, but we will set out and refer in particular to the exceptions that appear at Principle 2(2)(b) and 2(2)(f):

> '*It is not necessary for an agency to comply with subclause (1) of this principle if the agency believes, on reasonable grounds, -*
>
> *(b) That the individual concerned authorises collection of the information from someone else; or …*
>
> *(f) That compliance is not reasonably practicable in the circumstances of the particular case; …*

[57] The only item of personal information about the plaintiff which we have found to have been 'collected' by the defendant was his telephone number. That information was conveyed to the defendant by the plaintiff's solicitor. In the circumstances it is obvious that the plaintiff had approved the disclosure of the information by his solicitor to the defendant. Perhaps more importantly, we think it is clear in the circumstances that the defendant had reasonable grounds to believe that the plaintiff had authorised its collection of that information from his solicitor. Principle 2(2)(b) applies.

[58] That conclusion is sufficient to dispose of the claim under Principle 2. Given that some time was spent on the matter in argument, however, we think it appropriate to add that we did not accept Ms Peters' submission that there was sufficient evidence of authority for the defendant to collect the information in question in the terms of the credit application form that the plaintiff had signed in January 2001. In our view any authority that was given (or purportedly given) by the plaintiff when he signed that form was intended to relate to the defendant's evaluation of the application for credit, and did not extend to cover the situation which existed in November 2001.

[59] With respect to Principle 2(2)(f), the question is whether the defendant had reasonable grounds to believe that it was not practicable to collect the information as to the plaintiff's whereabouts, or how he might be contacted, from him. In our assessment that was exactly the situation that the defendant found itself in by late November 2001. It was Ms Faulding's understanding that a fax number that had been used earlier would no longer be effective, because the farm at which Ms Faulding evidently understood the fax machine to have been situated had apparently been sold. Ms Faulding believed that Mr Lehmann was not responding to the calls that were being made to him, and in the circumstances we consider she had reasonable grounds to believe that the plaintiff was not going to respond to such calls. We accept that the defendant had tried to go directly to him for the information it wanted, but it had been unable to do so – indeed, finding the plaintiff was the very problem the defendant was trying to solve.

[60] Whether or not the steps that the defendant took were unfair, or represented an unnecessary intrusion into the affirs of the plaintiff, are different questions. In our view, in the circumstances of this particular case the defendant did have reasonable grounds to believe that it was not reasonably practicable to collect the information it wanted from the plaintiff. It follows that the exception in Principle 2(2)(f) applies as well as that in Principle 2(2)(b).

[61] In our assessment there has been no contravention of Principle 2.

[62] As with the claim under Principle 1, there cannot in any event have been an interference with the plaintiff's privacy since the information was collected by the defendant from the plaintiff's solicitor, in circumstances in which it is clear that that is exactly what the plaintiff wanted to happen.

The manner of the collection of information about the plaintiff

[63] Principle 4 provides:

> *"Personal information shall not be collected by an agency —*
>
> *(a) By unlawful means; or*
>
> *(b) By means that, in the circumstances of the case, —*
>
> *(i) Are unfair; or*
>
> *(ii) Intrude to an unreasonable extent upon the personal affairs of the individual concerned."*

[64] Mr Harder appeared to accept that there was nothing unlawful about the broadcasts; certainly he offered no submissions to the contrary. In addition, Mr Harder made it clear that the plaintiff's case was not being advanced under Principle 4(b)(ii) either. For our own part, we wondered whether there might have been a case to answer to on the footing that the broadcasts had amounted to an unreasonable intrusion in the plaintiff's personal affairs. But the position taken by the plaintiff on the issue was quite clear, and both the defendant and the Privacy Commissioner had relied upon it in their preparation for the hearing. We need only record that we were not asked to analyse the facts under Principle 4(b)(ii). Furthermore in view of our conclusion on the issue as to whether there was an interference with privacy, the result of the case would not have been different in any event.

[65] That leaves only Principle 4(b)(i). The essence of the case for the plaintiff in this respect is that the defendant's broadcasts calling for information about him involved a collection of personal information by means that were, in the circumstances, unfair.

[66] We have already dealt with the first submission made by Ms Peters on behalf of the defence in answer to this part of the claim, namely that since no personal information was collected, the Principle cannot apply. However the debate on this issue gave rise to some discussion as to whether Principle 4 only applies where some personal information is actually collected, or whether it can apply when an agency does no more than attempt (unsuccessfully) to collect personal information. The subject was discussed in the Tribunal's decision in *Stevenson v Hastings District Council* (supra) at paras [64] to [72]. Ms Peters took issue with the Tribunal's observation in the *Stevenson* case that Principle 4 might have been intended to mean something like 'where an agency sets out to collect personal information ...'. Amongst other things she referred us to the wording of s.8(1) of the Act. She argued that to extend the burden of Principle 4 to unsuccessful attempts to collect personal information would be at odds with the purpose of the Act. We add that in this aspect of her submissions she was supported in argument by Ms Evans. The Privacy Commissioner shares the view that Principle 4 does not extend to unsuccessful attempts to collect personal information. Ms Evans drew attention to the decision of the Tribunal in *Smits v Santa Fe Gold* (1999) 5 HRNZ 586.

[67] Our finding that what happened here went beyond an unsuccessful attempt to collect personal information means that it is not necessary for us to determine this point. Given the significance of the matter, we think it would be wrong to do so unnecessarily. We recognise the force of the submissions made by Ms Peters and Ms Evans but even so we are not entirely persuaded that, on a true construction, Principle 4 never applies unless some item of personal information is actually collected by the agency in question.

[68] We remain concerned about the kind of situation suggested by the Tribunal in *Stevenson* (supra) at paragraph [70]. We do not regard the argument that in that kind of situation there is bound to be some other law or regulation which will control the situation and under which a remedy might be found, as being an altogether adequate response. In our view it is clear that the Legislature intended to impose the obligations expressed in Principle 4 on agencies who set out to collect personal information. We still have a concern that it would be an odd outcome if the effect of the Act were that any and all of those obligations should be treated as never having applied simply because, despite the efforts made, the agency does not in fact obtain any personal information.

[69] In this case, however, we have found that the agency did collect from the plaintiff's solicitor the personal information that he was available on his cell phone, and his cell phone number. That fell within the scope of the request for information in the defendant's broadcasts. We agree with Ms Evans that, at least at this stage of the analysis of Principle 4, it is immaterial that it was information which was given with the plaintiff's consent, and/or that it was information that the defendant already had. The defendant set out to collect that information, and it succeeded in doing so, at least in that very limited respect.

[70] Ms Peters' second broad submission in respect of Principle 4 had to do with the meaning of the word 'means'. She argued that the broadcast of the messages was not part of the 'means' by which personal information about Mr Lehmann was collected. As we understood her argument, the word 'means' in this sense should be limited to an idea of the manner in which the information was recorded or received. Ms Peters gave as examples of the kinds of things she would accept as coming within the word the method and/or device by which information is collected (such as a finger printing device, a recording device, or searching a person's rubbish). Ms Peters drew support for her argument from the definition in the Act of the word 'collect', and the fact that unsolicited information is excluded. She invited us to see the processes of soliciting for personal information, and then collecting that kind of information, as being separate and distinct. It was her argument that the broadcasts here were at best part of the defendant's process of soliciting for personal information, not its collection. On that basis it was her submission that Principle 4 does not apply at all. Ms Peters also drew our attention to observations by the Court of Appeal in *Harder v The Proceedings* Commissioner (supra) at paragraph 32:

> *"Collection of personal information must not be achieved by unfair means. The primary purpose of this provision* [i.e., Principle 4] *is to prevent people from being induced by unfair means into supplying personal information which they would not otherwise have supplied. Ms C made no complaint about the contents of the recording. While the embargo is against collection by unfair means, the harm aimed at is to the person supplying the information. There was rightly no suggestion that Mr Harder was collecting the information by unlawful means. It is not unlawful for a participant to tape record a conversation without the knowledge of the other party: see R v A [1994] 1 NZLR 429. Nor is*

> *there necessarily anything unfair about doing so; it all depends on the circumstances: Talbot v Air New Zealand [1995] 2 ERNZ 356 (CA)."*

[71] Ms Peters submits that this passage is consistent with the argument that the focus in these kinds of cases should be on the devices used for collection and whether their use was unfair, not on what information was being asked for.

[72] We do not accept this argument. We see no reason to give the word 'means' in Principle 4 what we think would be a restricted and strained meaning. To do so would be contrary to all of the authorities that confirm the importance of giving legislation of this kind a fair, large and liberal interpretation to achieve its objectives. In our view the 'means' by which something is done includes all of the steps that can reasonably be said to have been taken by the agency to do that thing. Certainly we see no reason to interpret the word as excluding any such steps. In our view, even if the Act has excluded unsolicited information from the category of information that an agency 'collects', it does not follow that the steps taken by an agency to solicit personal information are not part of the means by which information is collected when an agency sets out to collect information of that kind. We see nothing in the definition of the word 'collect' or elsewhere in the Act that would justify a decision to limit the intepretation of the word 'means' in Principle 4 to the idea of the device used in the collection, or the method of recording that which is collected.

[73] Of course the steps taken to obtain information in any given case might include the surreptitious use of a listening or recording device, and the use of such a device might be what makes that act of obtaining information in that way unfair. But the unfairness might just as well lie in (say) an improper promise of a benefit in exchange for the information, or an assurance of confidentiality that cannot in fact be assured. The possibilities are as varied as human conduct itself. Nor do we regard the passage from the Court of Appeal's decision in *Harder* (supra) to suggest otherwise. To the contrary, if one looks at the passage in context we very much doubt that the Court was really considering the issue we have to decide here at all. Nor do we imagine that, when the Court referred to the idea of harm being related to the person supplying the information, it thereby intended to exclude any consideration of the harm that might be suffered by the subject of the information if that is not the person supplying the information.

[74] In any event, we respectfully agree with the Court of Appeal that in every case the question of whether what was done was, or was not, unfair will always depend on all of the circumstances. In the present case we think it would be unreal to hold that the broadcasts were not part of the 'means' by which the defendant collected such personal information about the plaintiff as it did. Indeed, but for the broadcasts there is little reason to suppose that the information would have been collected at all (we recognise that such information as was collected was innocuous, but that is not the point at this stage of the inquiry).

[75] If we are right to conclude that the broadcasts were part of the 'means' by which the personal information about the plaintiff was collected, then the remaining question is this: was it unfair for the defendant to have collected the information in that way?

[76] Ms Peters drew our attention to a number of aspects of the case and submitted that there was nothing 'unfair' about what was done. We have considered all the points that she made, but in the end we are left with no doubt that what the defendant did to collect personal information about the plaintiff was unfair. We note:

[a] Ultimately, what was at stake was a debt in the order of $14,000 or so. It was not even a debt that was owed by the plaintiff to the defendant;

[b] Nonetheless these broadcasts went to air throughout New Zealand on seventy-three occasions over four days, and were programmed so as to have been aired more often during the day time. There seems to us to have been a distinct lack of perspective or proportionality in that;

[c] While it is true that the content of the messages was not exactly like a Police 'Missing Persons' announcement, the fact of mentioning the plaintiff's name in connection with particular companies would in our view have given rise to an impression that the defendant wanted to contact the plaintiff for reasons having to do with its and his relationship with those companies (not, as was somewhat optimistically suggested at one point, that he might have been a prize winner who the defendant was trying to contact in order to deliver the bounty). We have listened to recordings of the messages. In our view the tone and content of the messages, and the repetitive broadcasting of them, convey a sense that the defendant wanted to get hold of the plaintiff urgently. In themselves the messages carry an implication that ordinary channels of communication with the plaintiff had failed. And in our assessment it is unlikely that listeners would have perceived messages such as these were as being neutral. Clearly the defendant wanted to get hold of the plaintiff, either for good or for adverse reasons. We regard it as very much more likely that listeners would have come to a conclusion that the reasons why the defendant wanted to contact the plaintiff reflected badly on the plaintiff in some way;

[d] The broadcasts went across the country, even though it seems reasonably clear that the defendant expected that the plaintiff was most likely somewhere in Auckland or North Auckland;

[e] There is no satisfactory evidence that this kind of broadcasting has ever been carried out for this kind of purpose before or since – certainly this was the one and only time that the defendant ever engaged in a campaign of this kind. For this reason alone we do not see it as appropriate to liken these broadcasts to the 'wanted to contact' kind of notices that appear in the printed media from time to time;

[f] Our best sense of what Ms Faulding told us is that she gave no thought at all to the possible privacy impacts of the broadcasting on the plaintiff before she authorised the broadcasts. It is of particular concern that the broadcasts were authorised in such a way that, apparently, they could not be stopped at will. Even when they had achieved their purpose, and the plaintiff's solicitor had made contact with the defendant, Ms Faulding was unable to stop the broadcasts for the remainder of that day. Ms Faulding appears not to have given these aspects of what she put in place any consideration at all before the broadcasts went to air.

[77] We conclude that the personal information that the defendant collected about Mr Lehmann in November 2001 was collected by means that, in the circumstances of this case, were unfair.

[78] We are satisfied that a contravention of Principle 4 has been established.

Principle 4: Interference with privacy?

[79] The next question is whether what occcured amounted to an interference with the plaintiff's privacy. The effect of s.66(1) is that the plaintiff is obliged to show that he has suffered adverse consequences of one or more of the kinds set out at s.66(1)(i) to (iii) before any interference with his privacy is established. In this case there is no suggestion of any adverse consequences that might come under s.66(1)(i) or (ii); the issue is whether the plaintiff suffered significant humiliation, significant loss of dignity and/or significant injury to his feelings as a result of the unfair way in which the defendant collected personal information about him (see s.66(1)(iii)).

[80] It is not difficult to imagine that someone who had been the subject of such a public search might suffer humiliation, loss of dignity and/ or injury to feelings. The plaintiff's evidence was that he was informed of the broadcasts by friends and family on 25 November 2001. He said that those who reported the messages to him expressed anxiety about his well-being, and also as to what he might have done to prompt the broadcasts. He was obliged to defend himself against the inference that he must have done something wrong. He said that he was left feeling hugely embarrassed, and that his feeling of embarrassment, loss of dignity and hurt feelings were exacerbated when he began to think about the significant number of other people who knew him and who might have heard the messages, but who had decided not to call him (and in respect of whom he would not therefore have an opportunity to correct any innuendo taken from the messages). The plaintiff also spoke of the effect of the broadcasting on his parents, particularly his father who was very ill at the time. He said that having to defend to his parents his actions and reputation from the inferences to be drawn from the broadcasts involved the most significant loss of dignity and hurt feelings:

> *"The humiliation, loss of dignity and hurt feelings were at their most extreme when I had to convey to my father that I was an honest businessman and had done nothing wrong in my dealings. Due to his serious illness, I felt compelled to implore him not to expend any of his energy worrying about what the broadcasts inferred that I had done and to focus instead on his health and well-being. The humiliation, loss of dignity and pain of suffering that occurred to me from my father hearing broadcasts about me when my primary interest was ensuring his peace of mind are, in effect, indescribable."*

[81] The plaintiff went on to describe other aspects of his humiliation arising out of the broadcasts and their aftermath. He concluded by saying that he had suffered significant symptoms of depression, although he was unable to distinguish which of those were really caused by his father's illness and eventual death, and which were the result of the broadcasts and the way in which he says that the defendant subsequently dealt with his complaints about the broadcasts. But he repeated that his feelings towards the events were connected with a sense of guilt and humiliation that his father had become aware of the broadcasts in the 'final throes' of his illness.

[82] None of these assertions were supported by any independent evidence. With respect to the plaintiff's interactions with his father, such evidence was not available from the plaintiff's father by the time of the hearing, since the plaintiff's father passed

away in November 2003. But no evidence was called from any of the friends or family who had been mentioned by the plaintiff.

[83] The nature of any enquiry under s.66(1)(iii) is such that evidence as to a plaintiff's emotional response to a set of events will often start and end with the plaintiff. Sometimes independent evidence from others who may have observed the plaintiff can be given, in some cases by (for example) health care providers who may have been asked to assist the plaintiff to deal with responses of anger or depression and so on. But we make the point that the lack of any independent evidence is not in or of itself either surprising, or necessarily fatal, to a claim such as this.

[84] That said, any finding of adverse consequences under s.66(1)(iii) still depends on the production of satisfactory evidence to establish that there was significant humiliation, significant loss of dignity and/or significant injury to feelings of the plaintiff. In this part of the enquiry the evidential onus is on the plaintiff: see, in the context of cases in respect of allegedly improper disclosure of information, *L v L* (unreported, High Court, Auckland, AP 95-SW01, 31 May 2002 per Harrison, J) as applied in *Steele v Department of Work and Income*, HRRT Decision 12/02; 21 October 2002).

[85] If all other things had been equal, it would not have been difficult to persuade us that the plaintiff's evidence about his reaction to the broadcasts had established the requisite level of humiliation, loss of dignity and/or injury to feelings to cross the s.66 threshold and justify an enquiry as to what damages might be appropriate. But all things are not equal. That is because aspects of the evidence given by the plaintiff were most unsatisfactory. We regard some of his answers as having been deliberately evasive. We found him to be an altogether unreliable witness.

[86] In his written evidence the plaintiff described himself as having been engaged by the company CEL, the implication of that and his other evidence on the subject being that he was no more than some kind of public relations consultant to CEL. In general terms his statement of evidence made light of his connection with the company. But Ms Faulding's evidence was that in all of the defendant's dealings with the plaintiff he had been the contact person for CEL, and that it was the plaintiff and only the plaintiff who had been involved. Specifically, it was the plaintiff who signed the credit application form on behalf of CEL. It was the plaintiff who signed the cheques that were given to the defendant. It was the plaintiff who authorised the advertising, and it was the plaintiff who sorted out payment for the advertising that had gone to air in early 2001 when that became an issue. Ms Faulding said that the plaintiff 'voiced' the advertising (the plaintiff did not accept that, although after some questioning he did accept that it was he who had approved the texts of the advertisements). Certainly it was the plaintiff who went on air for CEL when the advertorial sessions were conducted. Ms Faulding said that the plaintiff had always seemed to her to be the owner/operator of CEL.

[87] The tension between these two perspectives was always going to be a subject of further examination at the hearing. For that reason, and at a very early stage of the hearing, the Chairperson of the Tribunal asked the plaintiff to say whether or not he (the plaintiff) had at any time been a shareholder in CEL, or a director of the company, or whether he had ever had any other connection with either CEL or Thurco (another company mentioned on the credit application form and the broadcasts) that the Tribunal ought to be aware of. The plaintiff answered that he 'might' have had a shareholding in Thurco Developments Limited many years earlier, but beyond that he said he had never been either a shareholder in CEL or a director of either CEL or Thurco, and that he had no other connection with either of those companies that the Tribunal ought to know of.

[88] It was subsequently established during examination of the plaintiff that:

[a] The plaintiff was the owner of 99% of the shares in Thurco Developments Limited at the time it was struck off on 2 August 2000. Both the plaintiff and his wife had also been directors of that company for periods of several years in the 1990's. The plaintiff said that he had held the shares on behalf of a trust called the Northern Trust, but he declined to tell us who the trustees of that trust were (save to say that he was not himself a trustee of the trust);

[b] CEL (previously called Waco Coatings and Chemicals Limited) had been struck off the Register of Companies on 23 July 2003. At and prior to the time it was placed in liquidation on 12 September 2002 its shareholders were Thurco Developments Limited as to 999 shares, and one Emma Yolanda Monroy as to 1 share. The plaintiff was a director of the company at least from 6 to 7 September 1993 (one might have thought that being a director of a company for a day would have prompted some recall that such a thing had happened, and why). The search also shows that one 'John Lehman' was director from August 1988 to September 1993 (the plaintiff's evidence was that his name is John Christian Lehmann). It was not explained how the company was struck off while still a shareholder in CEL, but whatever the position (and having regard to the way in which the information all had to be extracted from an unwilling plaintiff) we find that the plaintiff's answers at the outset about his having no connection with these companies were misleading;

[c] The plaintiff had to be asked several questions about who Emma Yolanda Monroy was. It transpired that she is an half sister of the plaintiff's wife. We found the plaintiff's obvious efforts to avoid having to give that simple piece of information to have been evasive.

[89] Overall, it seemed to us clear that the plaintiff wanted to distance himself as far as he could from any suggestion that he might have been involved as an owner or manager of CEL in 2001. There was a similar (and similarly unsuccessful) attempt in his evidence to distance himself from the advertising campaign that was run by CEL, and for which the defendant was looking to be paid. We will not set out all the details, but again we found his answers to some of the questions he was asked on this topic to be vague, evasive and completely unconvincing. He was the only actor in the matter on the CEL side.

[90] Of course from the point of view of applying the Privacy Act neither of these two topics are of first importance. If the plaintiff had simply accepted that he was and had been involved in CEL, and that it was he who had been the driving force behind the advertising campaign that was carried by the defendant for CEL, then it seems unlikely that much could have been made by the defendant of those matters. So the question is raised: why was the plaintiff so reluctant to accept the reality of what his involvement in these matters had been? The answer to that may be that the product RB-80, and the way in which it had been marketed at earlier times, had already been the subject of a good deal of litigation. We were shown, for example, decisions of the High Court in *Whytock v Waco Coatings & Chemicals Limited* (Unreported, Auckland High Court, HC 159/97, 11 February 1998 per Potter, J) and *Jackson v Lehmann & Waco Coating & Chemicals Limited* (Unreported, Auckland High Court, CP 404-8M/99, 20 July 2001, per Rodney Hansen, J). The judgment in the latter case shows that the plaintiff had apparently given sworn evidence to the High Court that Waco (i.e., CEL) had not

traded since 1997. That evidence was given at a point in time between the two advertising campaigns that CEL put to air in April/May and September 2001.

[91] In any event, the content of the plaintiff's evidence on these subjects, and his elusive demeanour as a witness generally, served to dissolve our confidence in his credibility to a point at which we are not willing to accept any of the evidence he gave without support from contemporaneous records, or some other kind of corroboration.

[92] In contrast, although we have been critical of some of the things that were done by Ms Faulding, we were not left with any concerns about her credibility. Specifically, we accept her evidence that in the period leading up to the commencement of the broadcasts, she made repeated attempts to call the plaintiff on his cellphone. We find that the plaintiff chose not to answer or respond to her calls. We reject the plaintiff's evidence that he was not aware before the broadcasts that the defendant wanted to get in touch with him.

[93] These findings have a bearing on the evidence that was given as to the impact of the events on the plaintiff's concerns about his father. The plaintiff himself told us about an occasion on which a representative of the debt collection agency that had been retained by the defendant called at his father's home to ask where the plaintiff was. The plaintiff was aggrieved about the incident. He said that his father had given the person the same phone number that the defendant had for him (i.e., the plaintiff). The collector then rang the number and got hold of the plaintiff. The plaintiff told us that *" ... I gave him a real earful to bail up a terminally ill man over such a matter like that is just despicable."*

[94] Accepting Ms Faulding's evidence as we do, the very high probability is that this occurred before the broadcasts. If so, then at least the following conclusions emerge:

[a] If the plaintiff was able to answer or return a call from the debt collector on the number that Ms Faulding also had, then there is no reason to suppose that the plaintiff could not have made or returned a call to Ms Faulding if he had chosen to do so. This evidence thus gives further cause for concern about the reliability of the plaintiff's evidence and in particular his assertion that he was not aware of any attempt by the defendant to contact him before the broadcasts;

[b] In any event it seems the plaintiff's father had cause to be concerned about what was going on quite apart from anything he learned from the broadcasts. Perhaps he (the father) did hear the broadcasts and become concerned about them in such a way as to have imposed on his son's emotions, but it goes too far to suggest (as was the effect of the evidence given by the plaintiff) that it was the broadcasts that were the cause of whatever fears or concerns his father may have harboured about the plaintiff's business dealings. Certainly this evidence diminishes the force of the plaintiff's account of the effect of the broadcasts on his interactions with his father to a significant extent.

[95] All in all, we are not satisfied that the plaintiff's evidence provides a sufficiently reliable foundation for a finding that, as a result of the way in which the defendant set out to find out where he was or how he might be contacted in late November 2001, he suffered any sufficient humiliation, loss of dignity or injury to feelings to justify a finding that there was an interference with his privacy.

[96] It follows that the claim must be dismissed in its entirety.

Costs

[97] The parties agreed that the decision in respect of costs should be reserved to be dealt with after this decision had been issued. We therefore fix the following timetable for an exchange of submissions:

[a] Any application for costs (including any application that might be made by the Privacy Commissioner) to be filed and served within 28 days of the date of this decision;

[b] Any reply to be filed and served within a further 21 days;

[c] Unless any of the parties requests otherwise, the Tribunal will deal with the question of costs on the basis of those papers and without any further *viva voce* hearing.

[98] In case the foregoing timetable is incapable of achievement, we reserve leave to the parties to apply for a variation. We will leave it to the Chairperson of the Tribunal to make such alternative arrangements as may seem appropriate to ensure that the question of costs is disposed of in an expeditious way.

Formal Orders

[99] The claim is dismissed.

[100] The question of costs will be dealt with in accordance with the timetable set out above.

Mr R D C Hindle Chairperson	Dr I Vodanovich Member	Mr A A Hall Member