

Reference No. HRRT 030/2016

UNDER THE PRIVACY ACT 1993

BETWEEN JUDITH TAPIKI

FIRST PLAINTIFF

AND JOSEPHINE ERU

SECOND PLAINTIFF

AND NEW ZEALAND PAROLE BOARD

DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson

Ms GJ Goodwin, Member

Mr RK Musuku, Member

REPRESENTATION:

Ms JA Tapiki and Ms J Eru in person

Ms VJ Owen for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 31 October 2017

**DECISION OF TRIBUNAL DISMISSING APPLICATION TO
STRIKE OUT CLAIM¹**

INTRODUCTION

[1] On 29 January 2014 Mr Jesse Dolman was released from prison on parole to an address in Stratford at which his mother, Ms Tapiki, lived with Ms Eru. In May 2014, this address was disclosed to Mr Dolman's victim by the Parole Board pursuant to s 50 of the Parole Act 2002. On 13 June 2016 Ms Tapiki and Ms Eru filed these proceedings claiming that this disclosure breached their privacy. By application filed on 13 July 2017,

¹ [This decision is to be cited as *Tapiki and Eru v New Zealand Parole Board (Strike-Out Application)* [2017] NZHRRT 41.]

the New Zealand Parole Board (Parole Board) has applied to have the proceedings struck out.

[2] The central issues are first, whether s 50 of the Parole Act 2002 requires the disclosure of an offender's release address to the victim and therefore by virtue of s 7 of the Privacy Act overrides the information privacy principles in the Privacy Act 1993. Second, whether disclosure of the residential address of a person who is not named but who is nevertheless identifiable (for example, because they live at that address) is "personal information about an identifiable individual" in terms of the Privacy Act.

BACKGROUND

[3] The following summary of facts is taken from the claim and supporting material lodged by Ms Tapiki and Ms Eru. It is noted that on a strike-out application, facts pleaded are treated as true unless self-evidently speculative or false: *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1853 at [13].

[4] On 5 May 2014, a progress hearing was held by the Parole Board pursuant to s 29B(2)(b) of the Parole Act. The decision of the Board recorded a number of special conditions of Mr Dolman's parole, including a condition that Mr Dolman reside at the address where Ms Tapiki lived and not move from that address without the prior written approval of a Probation Officer. This address will be referred to as Ms Tapiki's address.

[5] The Parole Board subsequently released a redacted copy of the 5 May 2014 decision to the victim of Mr Dolman's offending pursuant to s 50 of the Parole Act 2002. Ms Tapiki's name was removed from this copy of the decision, however it did disclose that Mr Dolman was living with an unnamed support person in Stratford.

[6] While Ms Tapiki's name was redacted, her address was not. A high degree of acrimony existed between Mr Dolman and Ms Tapiki on the one hand and the victim who lived some three and a half miles from Ms Eru's residence, on the other. In the claim, Ms Tapiki states that threats were made "to us" during the court hearing. Prior to Mr Dolman and Ms Tapiki moving in with her, Ms Eru had taken steps to ensure the privacy of their household, for example having their phone connected with a confidential number.

[7] Subsequent to the release of the parole decision to the victim, the letter box at Ms Tapiki's address was attacked. A few days later, a fence at the property was damaged. On 30 May 2014, Mr Dolman was directed by his Probation Officer to move out of the area on the basis that he was no longer safe at Ms Tapiki's address.

[8] The incidents and the disclosure of their address to Mr Dolman's victim left Ms Tapiki and Ms Eru fearing for their safety and the safety of their home. They have complained to the Tribunal that by disclosing their address, the Parole Board interfered with their privacy.

[9] On 17 July 2017 the Parole Board made an application to strike-out Ms Tapiki and Ms Eru's claim on the basis that the claim did not disclose any tenable cause of action because:

[9.1] The clear wording of s 50 of the Parole Act requires disclosure of release conditions, including address conditions, to victims. Section 50 overrides information privacy principles.

[9.2] In any case, the edited version of the decision sent to the victim, did not contain any personal information about Ms Tapiki and Ms Eru, because Ms Tapiki's name and status were redacted in the decision and Ms Eru was not identified in the decision.

[10] In opposition, Ms Tapiki and Ms Eru raised a number of matters, in particular that s 50(2) of the Parole Act 2002 provides that:

When advising a victim under this section of any release conditions applying to an offender, the Board may withhold advice of a particular condition if disclosing the condition would unduly interfere with the privacy of any other person (other than the offender).

[11] It is the position of Ms Tapiki and Ms Eru, that in terms of s 50(2), they are person(s) other than the offender and the disclosure of their address unduly interfered with their privacy. The Parole Board could have protected their privacy and withheld their address pursuant to s 50(2) but did not.

[12] In reply, the Parole Board reiterated that s 50 required the release of Mr Dolman's release conditions (including his address) and reiterated that the redacted decision did not contain personal information about Ms Tapiki and Ms Eru. It submitted that neither of the plaintiffs were identified in the decision and that there is no direct link between the home address of Ms Tapiki and Ms Eru (the disclosed release address) and Ms Tapiki and Ms Eru in the decision.

JURISDICTION TO STRIKE OUT - PRINCIPLES

[13] In *Mackrell v Universal College of Learning* (HC Palmerston North, CIV-2005-485-802, 17 August 2005) at [48], Wild J held that the Tribunal has a wide discretionary power to strike out or to dismiss a proceeding brought before it and the exercise of this power will be appropriate in situations similar to those contemplated by High Court Rules, r 15.1 which provides:

15.1 Dismissing or staying all or part of proceeding

- (1) The court may strike out all or part of a pleading if it—
 - (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
 - (b) is likely to cause prejudice or delay; or
 - (c) is frivolous or vexatious; or
 - (d) is otherwise an abuse of the process of the court.
- (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
- (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
- (4) This rule does not affect the court's inherent jurisdiction.

[14] Section 115 of the Human Rights Act additionally provides:

115 Tribunal may dismiss trivial, etc, proceedings

The Tribunal may at any time dismiss any proceedings brought under section 92B or section 92E if it is satisfied that they are trivial, frivolous, or vexatious or are not brought in good faith.

[15] The principles to be applied are clear and well established. They are set out by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267. More recently in *Couch v Attorney-General* [2008] NZSC 45, Elias C J stated at [33] that it is inappropriate to strike out a claim summarily unless the court can be certain it cannot succeed and that particular care is required in areas where the law is confused or developing.

DISCUSSION

[16] The submissions by Ms Tapiki and Ms Eru are somewhat discursive, a fact which is understandable given that they are self-represented. To the extent that their submissions address matters beyond the narrow scope of the strike-out application, they have been put to one side.

The section 7 point

[17] It is necessary to consider whether, as submitted by the Parole Board, the “clear wording” of s 50 of the Parole Act required the disclosure of Mr Dolman’s release conditions (including the address he was required to reside at) to the victim and therefore overrode the information privacy principles pursuant to s 7(1) of the Privacy Act which provides:

7 Savings

- (1) Nothing in principle 6 or principle 11 derogates from any provision that is contained in an enactment and that authorises or requires personal information to be made available.

[18] The Board’s submission about s 50 does not address the qualification provided in s 50(2) that “the Board may withhold advice of a particular condition if disclosing the condition would unduly interfere with the privacy of any other person (other than the offender)”. Ms Tapiki and Ms Eru fall into the category of “any other person (other than the offender)”. The question is whether the disclosure of the condition (that Mr Dolman reside at Ms Tapiki’s address) unduly interfered with the privacy of Ms Tapiki and Ms Eru. Their position is that it did. They seek a declaration that the action of the Parole Board breached their privacy.

[19] There is nothing before the Tribunal to suggest that any consideration was given, pursuant to s 50(2), to whether the disclosure of the address would unduly interfere with the privacy of Ms Tapiki and Ms Eru. In these circumstances, it is at least arguable that the release of their address under s 50(1), which authorised the disclosure, is not covered by the savings provision set out in s 7(1) of the Privacy Act. Given that s 50(2) mandates the consideration of the privacy interests of people other than the offender when releasing parole decisions, a claim based on a breach of privacy consequent upon the release of such a decision seems at least tenable.

[20] In our view the consequential application of s 50 of the Parole Act and its interrelation with s 7 of the Privacy Act raises points which are arguable in law. That argument should take place in the context of a substantive hearing when the Tribunal has the advantage of the entire factual context. The issues are unsuitable to be dealt with on a strike out application.

The personal information point

[21] The Parole Board has submitted in the alternative that, as neither Ms Tapiki nor Ms Eru were identified in the decision sent to the victim, there was no direct link between them and their address in the version of the decision sent to the victim. It follows that their personal information was not disclosed to the victim.

[22] Ms Tapiki and Ms Eru may not have been identified in the redacted Parole Board decision. However, it is clear from the redacted version at paragraphs [4] and [5] that Mr Dolman was living at Ms Tapiki’s residence with a person with whom he has a

supportive relationship, who attended the Parole Board hearing with him. In the context of a small community such as Stratford, the disclosure of this information is important as it is undoubtedly arguable that the victim, also living in Stratford, would immediately identify who was living at the address and the redaction of Ms Tapiki's name from the document would not have the effect of concealing her identity or address.

[23] We do not consider that strike out is appropriate. We are not satisfied that the claim brought by Ms Tapiki and Ms Eru is so clearly untenable they cannot possibly succeed. It is at least arguable that the release of their address in the redacted Parole Board decision breached the privacy of Ms Tapiki and Ms Eru. In addition, the case before the Tribunal raises some arguable issues of statutory interpretation. In particular, the interrelation between s 7 of the Privacy Act, s 50(2) of the Parole Act and the information privacy principles. These issues require full inquiry.

DECISION

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

[24.1] The application by the Parole Board to strike out the claims of Ms Tapiki and Ms Eru is dismissed.

[24.2] The Secretary is directed to convene a further teleconference so that the Chairperson can give such directions as may be necessary to allow the unaffected balance of the case to be set down for hearing.

Ms MA Roche Co-Chairperson	Ms GJ Goodwin Member	Mr RK Musuku Member
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