IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-001122
[2020] NZHC 761

BETWEEN	WINSTON RAYMOND PETERS Plaintiff
AND	PAULA BENNETT First Defendant

…/2

Hearing: 4-8, 11-13 November 2019

Appearances: B P Henry and A R Kenwright for Plaintiff
B D Gray QC, P T Kiely and H M Z Ford for First and Third Defendants
V E Casey QC, N J Wills, S P R Conway and R J Warren for Second and Fourth Defendants

Judgment: 20 April 2020

JUDGMENT OF VENNING J

This judgment was delivered by me on 20 April 2020 at 2.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Clifton Killip Lyon, Auckland
Kiely Thompson Caisley, Auckland
Crown Law, Wellington
Counsel: B Henry/S Singh Auckland
B Gray QC, Auckland
V Casey QC, Wellington

AND PETER HUGHES
Second Defendant

ANNE MERRILYN TOLLEY
Third Defendant

THE ATTORNEY GENERAL sued on behalf of the MINISTRY OF SOCIAL DEVELOPMENT
Fourth Defendant

BRENDAN BOYLE
Fifth Defendant

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Introduction

[1] The Right Honourable Winston Peters claims the defendants have breached his privacy.

[2] In April 2010, Mr Peters applied for and was granted New Zealand Superannuation (NZS) by the Ministry of Social Development (MSD).[1] Mr Peters was paid NZS at the single rate. In May 2017, Mr Peters' partner, Ms Trotman, applied for NZS. In the course of processing her application, MSD reviewed Mr Peters' file. The review raised the question of why he was being paid NZS at the single rate when he had a partner. An MSD officer met with Mr Peters in July 2017. It was agreed Mr Peters had been overpaid NZS as he was not single and had a partner, Ms Trotman, at the time he was granted NZS. Mr Peters immediately arranged for the overpayment to be repaid.

[3] In the meantime, in June 2017, Mr Boyle, the chief executive of the MSD, had disclosed the overpayment and the MSD investigation into it (the payment irregularity) to the State Services Commission (SSC).[2]

[4] On 31 July 2017, Mr Boyle also briefed Ms Tolley, the Minister of Social Welfare at the time, about the payment irregularity. On 1 August 2017, Mr Hughes, the State Services Commissioner, briefed Ms Bennett, the Minister for State Services at the time.

[5] An unknown source disclosed the payment irregularity to the media by anonymous calls to reporters between 23 and 25 August 2017. On one occasion the source alleged Mr Peters had lied when applying for NZS.

[6] On 26 August 2017, Lloyd Burr, a journalist approached Mr Peters. Mr Burr made it clear he had knowledge of the payment irregularity. To mitigate the damage

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1 The Attorney-General is sued as the fourth defendant on behalf of the Ministry of Social Development (MSD).

2 In the statement of claim, Mr Peters defines the payment irregularity as: (a) the fact there had been an investigation into the payment of New Zealand Superannuation (NZS) to him; (b) the fact there was an issue between the MSD and Mr Peters regarding the overpayment of NZS; and (c) the details of the issue as to the overpayment of NZS. In this judgment, I use the term payment irregularity to refer to the overpayment of NZS and the subsequent MSD investigation.

to him personally and politically, particularly in the context of a general election due to be held on 23 September 2017, Mr Peters issued a press statement the next day. Over the next weeks and even months, a number of news items followed in which the payment irregularity and Mr Peters' situation were discussed further.

The claim

[7] Mr Peters says that the public disclosure of the payment irregularity was a breach of his right to privacy. He says the defendants had a duty to keep the details of the payment irregularity confidential. In disclosing the payment irregularity to others Mr Peters says the defendants breached that duty.[3] He seeks declaratory relief and damages.

Witnesses

[8] Mr Peters and Ms Trotman gave evidence. Mr Peters also called journalists, Barry Soper, Melanie Reid and Jenna Lynch, under subpoena. In addition, Mr Peters called other witnesses under subpoena: Mr Harvey and Ms Murchison, public servants who worked in Minister Tolley's office.

[9] Ms Bennett and Ms Tolley gave evidence, as did Mr Hughes and Mr Boyle. In addition to the evidence of Mr Hughes and Mr Boyle, the second, fourth and fifth defendants (the Crown defendants) called evidence from a number of MSD staff and also expert evidence from Sir Maarten Wevers.

Mr Peters' application for NZS

[10] A significant amount of evidence during the hearing related to Mr Peters' completion of the application form for NZS. The payment irregularity arose because Mr Peters' application was processed and payments of NZS were made to him on the basis he was single at the time he applied for NZS. That was an error as, at the time, he had a partner, Ms Trotman. Mr Peters considered the MSD and its form were responsible for the error. The MSD and the Crown defendants considered Mr Peters

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[3] Although in opening, Mr Henry, counsel for Mr Peters' accepted Mr Peters had no issue with the MSD raising the issue with the State Services Commission (SSC).

was responsible for it. I have come to the view that the error arose through a combination of circumstances. The ambiguous nature of the form, the MSD officer who processed Mr Peters' application and Mr Peters himself all bear some responsibility for the error which led to the payment irregularity.

[11] Mr Peters attended a MSD service centre in Auckland on 12 April 2010 to apply for NZS. At the time, applicants for NZS were required to complete a hard copy application form and to undergo an appointment with a case officer. It was customary for the application form to be completed by the applicant before the appointment. At the appointment, the case officer's role was to ensure the form was completed, that the applicant was of the qualifying age and that the criteria for eligibility had been established. Interviews normally took about an hour.

[12] The first factual issue in dispute is whether Ms Trotman was with Mr Peters when he attended the MSD service centre. Mr Peters relies on the fact Ms Trotman was with him to support his argument the fault lay with the MSD. The evidence of Ms S, the case officer who attended Mr Peters on the day, is that he came to the service centre around 3.30 pm on 12 April 2010. He did not have a prior appointment. The receptionist brought him straight through to her and she made time to process the application for him. Ms S said she did not see anyone with Mr Peters during the time he was at the service centre. Ms S's evidence is supported by the evidence of the receptionist on the day and by Ms H, the service centre manager at the time. The receptionist said that Mr Peters was alone as he entered the reception area. Ms H said that when Ms S brought Mr Peters over to her office to introduce him to her after the interview there was no-one else with him.

[13] Mr Peters and Ms Trotman both said that Ms Trotman was with Mr Peters at the time of the interview.

[14] I prefer the evidence of Mr Peters and Ms Trotman on the issue of whether Ms Trotman was with Mr Peters when he attended the service centre on 12 April 2010. Ms Trotman impressed as a straightforward witness. She and Mr Peters had reason to remember the attendance at the office, it being a one-off occasion for them, whereas, while the service centre staff might remember Mr Peters, they did not have the same

reason to remember the surrounding details of his visit (such as Ms Trotman's presence) some seven years after the event when Mr Peters' entitlement to NZS was first reviewed.

[15] There are a number of further reasons why the MSD staff at the service centre may not have noticed Ms Trotman. The receptionist had no reason to observe and note Ms Trotman's presence. Mr Peters would have approached the receptionist himself. Next, Ms S was not expecting to see Mr Peters. I accept that, in giving her evidence, Ms S was trying to recollect the events as best she could. But it was apparent Ms S was extremely nervous when giving her evidence. She was overawed by the Court process and the focus on her actions in April 2010. It would have been a significant event for her to have been asked to deal with a person of Mr Peters' profile and standing when she met him in 2010. She was not expecting to see him. He had no appointment. She would have been distracted by the fact she was dealing with Mr Peters, as is apparent from the way she allowed the form to be completed and processed. Also, as explained below, Ms Trotman was not present for the entire interview so Ms S's recollection that Ms Trotman was not with Mr Peters is correct, at least in part.

[16] Next, as Ms Trotman said, she makes it a practice of attending functions with Mr Peters, but she always remains in the background. That is another reason why the MSD staff may not have noticed her. Further, at meetings, she often left earlier to collect the car so that Mr Peters could leave when he wished to. She said she followed that practice on 12 April 2010 and went to get the car before the interview with Ms S was completed and before Mr Peters was taken to meet the manager and other MSD staff. I accept Ms Trotman's evidence that she did that in the present case so that, when Ms S took Mr Peters across to meet Ms H, Ms Trotman would not have been present. That explains why Ms H did not see Ms Trotman.

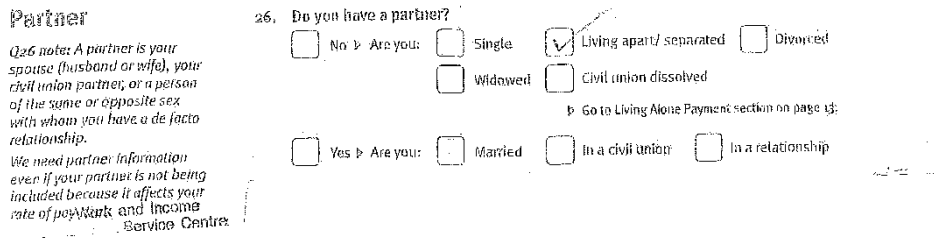
[17] I do, however, consider that Mr Peters and Ms Trotman are mistaken when they say that Mr Peters introduced Ms Trotman to Ms S as his partner or if he did, that he did so in a way that made it clear to Ms S that Ms Trotman was his partner. Mr Peters can at times speak brusquely and quickly. If Mr Peters did introduce Ms Trotman to Ms S as his partner, it may be he did so at a time and in a manner that it did not register

with Ms S. If Ms S was alerted to the fact that Ms Trotman was his partner, I am sure that she would have sought to clarify the ambiguous answer to question 26 on the application form with Mr Peters. While no doubt nervous, and somewhat overawed by Mr Peters, Ms S struck me as a conscientious employee.

Interpretation of the form

[18] A number of issues arose in connection with the completion of the application form. The form was apparently signed and dated 11 April 2010 but was processed on 12 April 2010. That is readily explainable. 11 April 2010 was a Sunday. The fact the form is dated 11 April 2010 is consistent with Mr Peters completing the form at home the day before he attended the service centre the next day, Monday, 12 April 2010. It is apparent from the date stamp on the form that it was processed by Ms S at the service centre on Monday, 12 April 2010.

[19] Next, there is the question in issue on the form, question 26:


Partner

Q26 note: A partner is your spouse (husband or wife), your civil union partner, or a person of the same or opposite sex with whom you have a de facto relationship.

We need partner information even if your partner is not being included because it affects your rate of pay.

Work and Income Service Centre

26. Do you have a partner?

No ▷ Are you: ☐ Single ☑ Living apart/ separated ☐ Divorced ☐ Widowed ☐ Civil union dissolved

▷ Go to Living Alone Payment section on page 13

Yes ▷ Are you: ☐ Married ☐ In a civil union ☐ In a relationship

[20] Considerable time was spent during the hearing on questions relating to this particular question. The evidence of the MSD staff and Mr Boyle was to the effect that, as one of the subsidiary boxes (in this case the living apart/separated one) had been ticked, there was no need for the answer to the primary question in question 26 "Do you have a partner?" to be completed.

[21] I am unable to accept that proposition. The form contemplates that there will be an answer to the primary question. Question 26 contemplated a direct answer, either 'No" or "Yes" to the primary question "Do you have a partner?". If Mr Peters had been required to complete that question, that would have resolved the issue that has given rise to these proceedings. I am sure Mr Peters would have truthfully answered the question and ticked "Yes".

[22] The boxes to the right-hand side of the No/Yes response are clearly subsidiary. They do not directly answer the primary question. While I accept they were intended to be dependent on the earlier answer, they can lead to error as this case has shown. At the time, Mr Peters was living separate and apart from his former wife (they were not divorced). His answer to the subsidiary question was therefore literally correct. He was living apart/separated from his wife. But he had a partner, Ms Trotman. The form, as completed, was actually incomplete as the primary No/Yes response was not completed. The form should not have been processed as it stood. Mr Peters should have completed the primary question, and Ms S should have asked him to complete the answer to the primary question, rather than leaving it incomplete.

[23] It is clear enough from the answers given by Mr Peters to other questions he was not suggesting he did not have a partner. When the form took Mr Peters to the living alone payment section, on page 13 of the form, he answered "No" to the question "Do you want to apply for the living alone payment?" The question is directed at a different issue, but Mr Peter's answer is consistent with his explanation of what he understood he was being asked when completing the subsidiary section in question 26.

[24] While Ms S should have picked up that question 26 had not been properly or adequately answered and the form was incomplete, Mr Peters must also bear some responsibility for the resultant ambiguity in the form as completed and the consequent issues that arose. To the left-hand side of question 26 is the definition of partner. If Mr Peters had read that definition, it would have been clear, given that Ms Trotman was his partner, that he should have completed the primary question in question 26 and answered it by ticking "Yes".

[25] Another issue with the completion of the application form arose at questions 33 and 34:

> 33. Do you want to include your partner in your New Zealand Superannuation?

And:

> 34. Is your partner receiving a current benefit?

Mr Peters had ticked "No" in response to both questions but then the tick has been crossed out and "Yes" has been ticked.

[26] I accept the evidence of Ms S that Mr Peters must have crossed them out. I do not place any weight on the fact they were not initialled as the other alterations to the form were initialled. Mr Peters' attempted reliance during cross-examination on the fact he had not initialled the alterations to suggest the form could have been filled in by Ms S, not him, was a clear case of post fact reasoning and contrary to his earlier evidence-in-chief when he said he had completed the questions in issue.

[27] However, the fact that Mr Peters engaged with the questions that are premised on the basis he had a partner is further confirmation that there was no attempt on his behalf to mislead the MSD in any way about his relationship with Ms Trotman.

[28] In summary, an error was made in the completion of the application form. The error arose because Mr Peters did not fully complete question 26 and Ms S did not require Mr Peters to complete the answer to the primary question in question 26. Mr Peters' apparent failure to read the explanatory note to question 26 which set out the definition of partner contributed to the error. The combination of errors led to Mr Peters receiving NZS at a higher rate than he was otherwise entitled to.

[29] I understand that the application form for NZS has been amended and is no longer in the form it was in 2010. The issue which has given rise to this case should not arise again.

Events in 2017

[30] There was one further relevant event that occurred before Ms Trotman made her application for superannuation in May 2017. On 18 March 2014, the MSD sent a standard letter to Mr Peters which included a request that asked him to check the following details:

Relationship Status:	You are single.
Your living situation:	You are not living alone.

[31] Mr Peters did not respond to the letter. He has no recollection of it but accepts he would have received it. He says he understood the letter was asking if there was any change in his circumstances. He took the view that there had been no change in his circumstances since the 2010 interview. While Mr Peters' details had not changed, the letter expressly set out that the MSD's records of Mr Peters' relationship status was that he was single. That was incorrect. If Mr Peters had paid more attention to the letter, he would have realised there was an issue with the MSD's records regarding his initial application.

The MSD investigation

[32] The potential overpayment issue was initially drawn to the attention of Ms Nugent, the acting regional director for the north-west area at the time.

[33] On 14 June 2017, Ms Nugent was notified that there was an irregularity in relation to the information provided in Ms Trotman's and Mr Peters' applications for NZS. The case manager dealing with Ms Trotman had notified her manager who elevated the matter to Ms Nugent because of the sensitivity around Mr Peters' profile. Ms Nugent advised her manager, who was the regional director for Auckland at the time, who suggested she go directly to the general manager, adviser in the service delivery team at National Office.

[34] Ms Nugent emailed the information to the general manager, adviser on 16 June 2017. From then on, Mr Te Awhe, the deputy chief executive adviser at the time, became primary contact for Ms Nugent. Once Mr Peters' file and application form was located and reviewed, a decision was made to meet with Mr Peters to clarify the information. That decision was made on 26 June 2017. On the same day, Mr Peters' client notes were sent to Mr Boyle as he was to meet the SSC that afternoon to discuss the issue.

[35] Ultimately, a letter was sent to Mr Peters on 14 July 2017 inviting him to a meeting. Mr Peters said he received it on 24 July 2017. He immediately rang to speak to Ms Nugent but his call went to voice mail. On 25 July 2017, Ms Nugent rang him back. Ms Nugent's notes record that, during the course of that telephone conversation, Mr Peters advised her that question 26 referred to his first wife, not his partner, Ms

Trotman, who was with him at the interview. Following the telephone contact on 25 July 2017, they arranged to meet at 9.30 am the next day, 26 July 2017.

[36] Ms Nugent said Mr Peters seemed surprised at the meeting when shown the answers on his application form. Mr Peters agreed that what Ms Trotman had advised about their relationship was correct. Ms Nugent made notes of their discussion. She noted they had a discussion around Mr Peters' first wife and that he had defaulted to his legal status when looking at question 26.

[37] Ms Nugent formed the view that Mr Peters had ticked the subsidiary box to question 26 by mistake. She was satisfied there had not been any intention to mislead or defraud the MSD.

[38] Mr Peters had a slightly different view of how the meeting went. He said it was accepted that an error had been made when the form was completed and that the MSD acknowledged there was an error/conflict between the conversation and the form.

[39] In any event, the important point was that both agree on the outcome of the meeting. Ms Nugent accepted Mr Peters had not attempted to mislead the MSD. Mr Peters agreed to repay the overpayment immediately. Ms Nugent was to clarify the final figure.

[40] Mr Peters was subsequently advised of the overpayment figure of $17,936.43 by telephone. It was paid immediately. Ms Trotman confirmed payment by email on 27 July 2017. On 3 August 2017, a formal letter was sent to Mr Peters confirming the overpayment had been repaid in full and the MSD considered the matter closed.

Mr Boyle's involvement

[41] In the meantime, Mr Boyle had been alerted to the issue of the payment irregularity, initially at a team meeting on 19 June 2017. Recognising the sensitivity of the matter, Mr Boyle directed the file and investigation be locked down and access restricted.

[42] Mr Boyle also contacted Ms Power, the Associate State Services Commissioner. Ms Power's file note of the contact on 22 June 2017 records, inter alia:

> Brendan and we agreed was not going to tell his Minister as it would be inappropriate to do – operational matter but that under the no surprises convention he should once a decision was made.

[43] Mr Boyle then received an updating memo on 28 June 2017, outlining the standard response for similar situations and setting out recommendations for an appropriate approach in Mr Peters' case. Once Mr Boyle had reviewed Mr Peters' file and the application form, he approved a process memo on 3 July 2017 which recommended that the matter be given priority, and that Mr Peters be interviewed by a regional director or area manager. It was also proposed that the interview be offsite (but ultimately, Mr Peters did not request that).

[44] The outcome of Ms Nugent's meeting with Mr Peters on 26 July 2017 was reported back to Mr Boyle the same day. He advised Ms Power of the decision.

[45] Mr Boyle then decided to brief his Minister, Ms Tolley. He considered that, while the information involved information personal to Mr Peters, under the 'no surprises' principle he should brief the Minister.

[46] Mr Boyle briefed Minister Tolley (alone) on 31 July 2017, after their regular weekly meeting. Mr Boyle made two notes following that meeting. First, a brief handwritten note confirming he had:

- advised of issue, background, followed sequence
- advised 18 k
- advised $ repaid
- 'no surprises' advice following advice from SSC [privilege claimed].

[47] Mr Boyle then made a handwritten file note that he typed up later that day, which concluded a note that he undertook to follow up with Minister Tolley with a brief memo outlining resolution of the issue. Mr Boyle accepted in evidence that the note was not entirely accurate. He said that, in preparing his evidence and after having

seen Ms Tolley's answers to the interrogatories, he had thought more closely about it. He said he believed the correct position was that he had offered to follow the oral briefing with a written briefing but the Minister had indicated she wanted to think about whether that was necessary.

[48] Later on 31 July 2017, Mr Boyle contacted Ms Power and advised her he had briefed his Minister. Ms Power told him the SSC would brief their Minister.

[49] Ms Tolley subsequently advised she did want a written briefing. The written briefing was prepared and dated 15 August 2017. Mr Boyle delivered the briefing to the Minister that day.

Mr Hughes' involvement

[50] Mr Hughes gave evidence regarding his involvement in the matter and his briefing of Minister Bennett. Mr Hughes recognised the personal nature of the information and the potential political sensitivity. Mr Hughes and his deputy, Ms Power, ensured they were the only people to know about the issue within the SSC.

[51] Mr Hughes confirmed the sequence of events from the SSC's perspective was:

- 22 June 2017 – Mr Boyle contacted Ms Power. Ms Power confirmed that the MSD should ensure it controlled the information and that Mr Peters received the same treatment as any other person. It was agreed Mr Boyle's Minister would not be informed until a decision was made by the MSD about what to do about the overpayment.

- 29 June 2017 – Ms Power gave some feedback on a draft report. Mr Hughes was not involved.

- Mid-July 2017 – Ms Power spoke to the Solicitor-General.

- 26 July 2017 – Mr Boyle advised Ms Power that Mr Peters had been interviewed by MSD staff and had been very co-operative. Mr Boyle was expecting a report within the next week.[4]

- 31 July 2017 – Mr Boyle advised Ms Power that he had informed his Minister about the case. The MSD's decision had been to raise a debt and nothing more. Mr Boyle advised he was satisfied that was the correct course of action and consistent with other decisions. Ms Power informed Mr Boyle the SCC would now brief their Minister, which they did the next day.

The Ministers' involvement

[52] Both Ms Bennett and Ms Tolley gave evidence. Ms Bennett confirmed that she was briefed by Mr Hughes and Ms Power on 1 August 2017 regarding the payment irregularity.

[53] Ms Bennett said she agreed with Mr Hughes' advice it was not appropriate for the matter to be reported to Cabinet. She was advised by either Mr Hughes or Ms Power that the MSD was also briefing their Minister, Ms Tolley, on the matter. Ms Bennett saw Ms Tolley within a few days of the briefing. Her recollection was that the meeting was in a corridor around a lift in the Beehive. There was no-one else around at the time. They had a very short conversation in which they each confirmed they had been briefed by their officials. Ms Tolley also told her she had told the Prime Minister's chief of staff. They agreed there was nothing more that needed to be done about the matter.

[54] Ms Bennett said that she did not discuss the matter of Mr Peters' overpayment with anyone else until 26 August 2017. She confirmed she had no involvement with the phone call to Newshub on 23 August 2017 or to the other reporters.

[55] Ms Bennett explained her disclosure of Mr Peters' payment irregularity on 26 August 2017 in the following way. At around this time, in August 2017, Ms Bennett,

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[4] By the time Mr Boyle rang Ms Power on 26 July 2017, Ms Nugent had made her decision, although, that decision is not recorded as having been passed on at that time

was herself, the subject of untrue allegations about her personal life prior to becoming a Member of Parliament. She had advised her senior colleagues, including the Prime Minister at the time, Mr English, about the allegations so they were aware of them. On 26 August 2017, Mr Murphy, of Newsroom, published a series of tweets, including one that referred to a "mother of all scandals".

[56] Mr English and Ms Bennett spoke on 26 August 2017, after Mr Murphy's tweets. Mr English was concerned about Ms Bennett and the potential for the story Mr Murphy was referring to, to be about the untrue allegations concerning her. Ms Bennett said she told Mr English she thought the story was going to be about Mr Peters, not her. She then disclosed that she had been told Mr Peters had been overpaid NZS but had paid it back. She believes that discussion would have taken place either in the afternoon or the evening of 26 August 2017. The conversation was obviously after Mr Murphy had published his tweets and after both Newshub and Newsroom had received the phone calls alerting the media to Mr Peters' issue. She also had a conversation with Mr Joyce on 26 August 2017. The same issue was discussed.

[57] Ms Bennett's evidence that she had not disclosed Mr Peters' payment irregularity other than in the brief discussion with Ms Tolley (who had been advised of it previously) and then in her discussions with Mr English and Mr Joyce on 26 August 2017, was not challenged.

[58] Mr Henry, counsel for Mr Peters, put to Ms Bennett that the disclosure of Mr Peters' information may have been politically motivated. Ms Bennett did not necessarily agree that it was politically motivated because as she said, she just did not know. Ms Bennett accepted the obvious proposition that the greater the number of people who knew, the greater risk that confidential private information had of being leaked.

[59] Ms Tolley also gave evidence. She confirmed that, at the end of the weekly agency meeting with Mr Boyle and other senior Ministry officials on 31 July 2017, Mr Boyle told her that he had a matter he wanted to brief her on alone.

[60] Ms Tolley recalls Mr Boyle saying the briefing was necessary because of the unusual circumstances regarding the recent controversy over Metiria Turei. On 16 July 2017, the media had reported that Ms Turei, the co-leader of the Green Party of Aotearoa New Zealand (Green Party), had publicly announced that when she was a beneficiary she had lied to the MSD in order to receive a larger benefit payment than she was otherwise entitled to. Mr Boyle then briefed Ms Tolley on the substance of Mr Peters' matter. She cannot recall being told the quantum of the overpayment but accepted that, as Mr Boyle's file note refers to briefing her on the approximate amount, it was likely he did tell her the figure.

[61] Towards the end of the briefing, Mr Boyle asked her if she wanted a written briefing. She said she might take some advice about that and come back to him on the point. Following the briefing, Ms Tolley spoke to her senior adviser at the time, Mr Harvey, and advised him what Mr Boyle had told her. She told him the information was to be kept in absolute confidence. Ms Tolley explained that the main reason for discussing the matter with Mr Harvey was to get his advice on whether she should ask for a written briefing. They agreed that Ms Tolley should speak to the Prime Minister's chief of staff, Mr Eagleson, to seek his view on the point. Following the caucus meeting on 1 August 2017, Ms Tolley spoke to Mr Eagleson and asked for his advice. Mr Eagleson said he would think about it and get back to her. When he did, he said it was Ms Tolley's decision whether to get the briefing in writing or not.

[62] When Ms Tolley returned home to Ohope at the end of the week, she also mentioned the briefing to her husband in order to seek his advice on whether she should get a written briefing. Ms Tolley has absolute confidence in her husband's ability to keep such matters confidential. She does not remember how much detail she gave him as her focus was on whether she should request a written briefing. She also reviewed the Cabinet Manual 2017. Ultimately, she decided she would ask for a written briefing, which she did at the next agency meeting during the week of 7 August 2017. Mr Boyle subsequently provided the written briefing on 15 August 2017.

[63] Ms Tolley confirmed the brief discussion that Ms Bennett referred to. She recalls it occurred at a lift in the Beehive as Ms Bennett was getting out and Ms Tolley was getting in.

[64] Ms Tolley said that her sister was the only other person she mentioned the matter of Mr Peters' overpayments to. That was on 26 August 2017, following a lunch in Queenstown and while walking back to the car. It was a brief and off-the-cuff response to a glowing comment her sister had made about Mr Peters. Ms Tolley said he was not as great as her sister thought and had been receiving a single superannuation payment when living with his partner. It was a general statement without any detail. Ms Tolley said she regretted making that unguarded statement. Ms Tolley confirmed that she did not make the phone calls to the news outlets and did not have any involvement in them. She had no knowledge of who made them.

[65] Again, Ms Tolley was not directly challenged on her evidence that she had not disclosed the matter other than in the circumstances outlined.

[66] In closing, Mr Henry accepted that the Ministers' evidence they did not leak the information was unchallenged. He conceded on behalf of Mr Peters that, in relation to all causes of action insofar as they related to Ms Bennett and Ms Tolley, the claim for damages could not be pursued, although a declaration was still sought.

The evidence of the subpoenaed witnesses – disclosure to the media

[67] Ms Reid is a journalist working with Tim Murphy of Newsroom. She gave evidence under subpoena. Ms Reid confirmed that an anonymous person rang her during August 2017. The caller said there had been a substantial overpayment of NZS over a period of time in relation to Mr Peters and that it was to do with whether he was single or whether he was in a partnership with someone. Ms Reid was not clear if the source mentioned an amount. The source also told her that they had talked to TVNZ and to Newshub. Ms Reid confirmed she spoke to Mr Murphy the next day. Mr Murphy has sworn an affidavit in related proceedings confirming his discussion with Ms Reid occurred on 26 August 2017. On that basis, Ms Reid accepted she would have received the phone call on 25 August 2017.

[68] Ms Lynch was also called by the plaintiff. Ms Lynch is a political reporter working for Newshub. She confirmed that on 23 August 2017, she received an anonymous phone call regarding Mr Peters. The caller outlined that Mr Peters had been overpaid NZS. The caller explained that it had been discovered when his partner

applied for superannuation and that there was a large repayment to the tune of $18,000. Ms Lynch's notes made at the time recorded the source said that Mr Peters was "lying applied as a single".

[69] Mr Harvey was also called by the plaintiff under subpoena. Mr Harvey confirmed that, the day after the discussion he had had with Minister Tolley about the payment, which was on 31 July 2017, he disclosed the details to Ms Murchison, the Minister's press secretary. He explained that he did so because there was a collaborative working style within the Minister's office.

[70] Mr Harvey confirmed that about three and a half to four weeks later, as part of a wider discussion in relation to superannuation, he informed another Ministerial adviser colleague, Mr Oldfield, about the information the Minister had disclosed to him in the briefing.

[71] Ms Murchison was also called by the plaintiff. She confirmed that Mr Harvey had told her about the issue. As the Minister's press secretary, she confirmed that if the Minister had been asked for comment on the matter, in her experience, the response would be "No comment, that it was an operational matter and should be referred to the Ministry".[5]

[72] Mr Soper was also called by the plaintiff. Mr Soper is an experienced political journalist. He said that the matter of Mr Peters' overpayment had been brought to his attention, in confidence, prior to Mr Peters' press statement. He attempted to establish the veracity of the claim but was unable to do so.

[73] Mr Soper was of the view the disclosure was politically motivated. In response to Mr Henry's question of whether it was someone involved in the political world, the New Zealand National Party (National Party), Mr Soper said he had been on record as saying in written columns where he believed the leak came from. He considered the information was deliberately made public to damage Mr Peters' election prospects. He considered it was an attempt by Mr Peters' political opponents to damage his

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5 I note that is actually how the Minister subsequently dealt with the matter when it was raised with her.

credibility and to do what the Prime Minister obviously wanted, which was to "cut out" the middleman, namely New Zealand First (NZ First).

[74] Mr Henry sought to qualify Mr Soper as an expert under s 26 of the Evidence Act 2006. Mr Soper confirmed that he had read and would comply with the applicable code of conduct for expert witnesses. I accept that Mr Soper is a very experienced political journalist and can give expert opinion evidence about certain aspects of journalism and how best to deal with the media. However, to be admissible, Mr Soper's opinion evidence must also be likely to provide substantial help to the Court in understanding other evidence or in ascertaining any fact of consequence to the proceeding.[6] It must also be his expert opinion based on established facts.[7]

[75] With respect to Mr Soper, his evidence that, in his opinion, the information was deliberately leaked as an attempt by Mr Peters' political opponents to damage his credibility and to do what the Prime Minister wanted, which was "to cut out the middleman", namely NZ First, is speculative. It is not the opinion of an expert based on established fact. Without direct evidence of the original source of the disclosure, Mr Soper's opinion is speculative. Mr Soper's opinion that it must have been a political opponent (and inferentially) someone from the National Party or a National Party supporter lacks a proven factual basis. It does not satisfy the requirement for admissibility as expert opinion evidence. Even if it was generally correct that the disclosure was politically motivated, it may not have been disclosed, for example, by a National Party member or supporter. It could also have been disclosed by a Green Party supporter aggrieved at the public backlash against Ms Turei following her disclosure of fraud.

[76] None of the journalists, including Mr Soper, were prepared to disclose their sources. They invoked the protection of s 68(1) Evidence Act. I was not asked to make an order under s 68(2) and was not in any event, provided with evidence to satisfy me that the criteria in that subsection were satisfied.

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6 Evidence Act 2006, s 25(1).
7 Section 25(3).

The defendants' expert

[77] The Crown defendants called Sir Maarten Wevers to give expert opinion evidence on a number of topics.

[78] Sir Maarten gave background evidence of the overview of the Westminster system of Government, and the relationship between Ministers and the Cabinet Manual, the public service, and chief executives before he discussed the issue of the briefings in this case.

[79] Sir Maarten considered the briefings of their Ministers by the SSC and MSD were justified in this case on the basis of the 'no surprises' policy.

[80] I return to the issue of the briefings and the 'no surprises' policy later.

Tort of privacy

[81] The Court of Appeal confirmed the tort of invasion of privacy as an actionable tort in New Zealand in *Hosking v Runting*.[8] In that case, Gault and Blanchard JJ described the elements required to make out the tort as:[9]

> (a) the existence of facts in respect of which there is a reasonable expectation of privacy; and
>
> (b) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

[82] There is some debate about the need for the publicity of the private facts to be considered highly offensive as a separate element. Gault J explained the rationale for that requirement on the basis that the tort should only protect:[10]

> … publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned.

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8 *Hosking v Runting* [2005] 1 NZLR 1 (CA).
9 At [117].
10 At [126].

[83] Tipping J approached the matter in a slightly different way. He preferred that the question of offensiveness be controlled within the need for there to be a reasonable expectation of privacy in the first place and that the qualifier should be a substantial level of offence.[11] In *Rogers v Television New Zealand Ltd*, Elias CJ (with whom Anderson J agreed) considered the Court should reserve its decision in relation to the structure of the tort, in particular in relation to the requirement for the publicity to be highly offensive.[12]

[84] It is interesting that in *Campbell v MGN Ltd*, the House of Lords unanimously rejected the proposition that it was necessary to consider whether the publicity would be highly offensive in an action for the wrongful disclosure of private information.[13] As Lord Hope put it:[14]

> If the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected. So there is normally no need to go on and ask whether it would be highly offensive for it to be published. …

[85] The basis of the right to privacy recognised in the United Kingdom is art 8 of the European Convention on Human Rights, as introduced into English law by the Human Rights Act 1998:[15]

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[86] The United Kingdom authorities recognise that the right to privacy under art 8 must be balanced against the right under art 10 which confirms that everyone has the

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11 At [256].
12 *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [26]–[27].
13 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.
14 At [96].
15 *Richard v British Broadcasting Corporation* [2018] EWHC 1837 (Ch), [2019] 2 All ER 105 at [227].

right to freedom of expression. Where the two rights potentially are in conflict the Court has to carry out a balancing exercise.[16]

[87] As the United Kingdom cases concern different criteria and involve this balancing exercise of competing rights, New Zealand authorities have recognised the need for caution when applying them.[17] But, the first issue in the United Kingdom is still whether the plaintiff had a reasonable expectation of privacy in relation to the information published. To that extent, the first issue involves consideration of the same matters relating to the first element of the tort in New Zealand as defined by the Court of Appeal.

[88] For present purposes, this Court must apply the two elements identified by the majority in *Hosking*. Before considering whether those elements of the tort are made out in this case, it is necessary to briefly consider the torts relationship with the Privacy Act 1993 and with the tort of defamation.

Privacy Act 1993

[89] The Privacy Act establishes certain principles with respect to the collection, use and disclosure by public and private sector agencies of information relating to individuals. In particular, principle 11 confirms the limits on disclosure of personal information.

[90] Information collected by the MSD concerning Mr Peters' application for NZS and the subsequent investigation into the overpayments is Mr Peter's personal information and would be protected by the provisions of the Privacy Act. The MSD and other agencies into whose hands that private information came into were bound by the provisions of the Privacy Act.[18]

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16 *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 at [11].
17 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC) at [37].
18 Agency is defined in the Privacy Act 1993, s 2.

[91] The Cabinet Manual has a specific section dealing with the Privacy Act. It confirms Ministers and their departments are responsible for compliance with the Privacy Act when they collect, use or disclose information concerning individuals.[19]

[92] Mr Gray QC, counsel for the first and third defendants, submitted personal information for the purposes of the Privacy Act is of a far broader ambit than the personal information protected by the tort of privacy. He argued that while the MSD and Ministers had obligations under the Privacy Act as to how to treat Mr Peters' personal information, that did not of itself automatically give rise to the corresponding duty at common law to keep the information private. I agree. The obligations on Ministers and others under the Privacy Act do not assist this Court when determining whether Mr Peters can make out his claim in this proceeding. The elements of the tort raise quite separate considerations which must be established if the tort is to be made out.

Defamation

[93] Next is the tort of privacy's relationship with the tort of defamation. It was obvious from Mr Peters' case that he (understandably) took particular objection to the note Ms Lynch had made of her informant's description of Mr Peters as "lying" in relation to his application for NZS. The unknown source who made the allegation Mr Peters was lying would, if identifiable, be open to a claim for defamation by Mr Peters. That, however, is not the basis of Mr Peters' claim in this case. Mr Peters argues that the tort of privacy applies because the defendants breached his reasonable expectation that details of the payment irregularity (which, as defined, is limited to the investigation into the overpayment and there is no suggestion he was lying) would be kept private and the publicity of those facts would be considered highly offensive to an objective reasonable person.

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19 Cabinet Manual 2017 at [8.71]–[8.74].

A reasonable expectation of privacy

[94] I return to consider the first requirement, namely, whether the payment irregularity involved private facts about which Mr Peters had a reasonable expectation of privacy.

[95] In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, Gleeson CJ described a private fact in the following way:[20]

> [42] … Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. …

[96] In *X v Persons Unknown*, Eady J expressed the test as whether the case involved:[21]

> … [t]he sort of information which most people would reasonably expect to be able to keep to themselves, …

[97] Mr Gray submitted that the information disclosed, namely of a payment irregularity as defined by Mr Peters, was not intensely personal information as in the cases of *P v D, Peck v United Kingdom,* or *Henderson v Walker*.[22] He sought to contrast the information in those cases with the disclosure of Mr Peters' payment irregularity.

[98] In *P v D*, the information in issue concerned P's mental health. *Peck v United Kingdom* concerned CCTV footage which captured Mr Peck walking down a road with a knife. He subsequently attempted to commit suicide by slitting his wrists with the knife. In *Henderson v Walker*, the information included emails between Mr Henderson and his wife, regarding issues in their marriage; emails with friends discussing relationships; and communications with health and legal advisers. There were also photographs. All three cases involved intensely private information.

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20 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199 at [42].

21 *X v Persons Unknown* [2006] EWHC 2783 (QB), [2007] 1 FLR 1567 at [23].

22 *P v D* [2000] 2 NZLR 591 (HC); *Peck v United Kingdom* (2003) 36 EHRR 719 (ECHR); and *Henderson v Walker* [2019] NZHC 2184.

[99] Mr Gray argued that information about the payment irregularity was not so intensely personal and nor did it involve personal financial information. It was information about Mr Peters' statutory entitlement to receive NZS. NZS is not income tested. No information relating to Mr Peters' personal finances was disclosed. The fact Mr Peters may have received more than the prescribed applicable rate could not reasonably be said to attract the same level of protection as information about a person's income or taxes.

[100] Ms Casey QC, counsel for the second and fourth defendants, also submitted that the facts at issue in the present case were not private facts. She referred to the factors identified in *Murray v Express Newspapers Plc* and applied them to Mr Peters' case:[23]

(a) the nature of the information – it was straightforward, concise, factual information. It was not truly humiliating and distressful or otherwise harmful;

(b) the attributes of the claimant – Mr Peters is a prominent politician who had received an overpayment of public funds, in Ms Casey's submission, following a provision of incorrect information;

(c) the nature of the activity – the context was Mr Peters' receipt of publicly funded NZS;

(d) whether consent should be inferred – Mr Peters consented to the use of his relevant personal information in the administration of his benefits under the New Zealand Superannuation and Retirement Income Act 2001;

(e) the effect on the complainant – there was no particular evidence of an effect on Mr Peters of the disclosure of the information to Ms Tolley or Ms Bennett;

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[23] *Murray v Express Newspapers Plc* [2008] EWCA Civ 446, [2009] Ch 481.

(f) circumstances and purposes for which the information came into defendants' hands – Mr Boyle received the information as chief executive of the MSD. Mr Henry conceded that there was no complaint about the MSD and Mr Boyle raising the issue with the SSC; and

(g) nature and purpose of disclosure – the disclosure by Mr Boyle and Mr Hughes to their Ministers was, in the exercise of their judgment, the appropriate thing to do.

[101] In Ms Casey's submission the first and particularly the last points were the key. She submitted Mr Peters could not have had a reasonable expectation that public agencies would not disclose the payment irregularity to the Ministers who held portfolio responsibilities. That submission, however, is more directly relevant to the issue of whether the disclosure in those circumstances would be considered highly offensive rather than to the first issue, whether the payment irregularity concerned facts in which Mr Peters had a reasonable expectation of privacy. In the *Murray* case itself, Sir Anthony Clarke MR made it clear that in the United Kingdom, it is only the first question that has to be asked in order to decide if art 8 is engaged.[24] The second is more relevant to the balancing exercise.[25]

[102] Mr Henry submitted the information that Mr Peters had been overpaid NZS and was the subject of a MSD investigation was a fact in which he had a reasonable expectation of privacy about. He referred to the case of *Richard v British Broadcasting Corporation.*[26] He submitted the Court should take a similar approach to the High Court of England and Wales in the way it dealt with the publicity about the police investigation into Sir Cliff Richard.

[103] In *Richard v British Broadcasting Corporation*, Sir Cliff's home was searched in connection with allegations of historic sex offending. The fact of the investigation had previously come to the attention of a BBC reporter, and before Sir Cliff knew about it. The BBC also received advance notice of the search and gave prominent

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24 *Murray v Express Newspapers Plc*, above n 23, at [48]–[49].
25 At [48]–[49].
26 *Richard v British Broadcasting Corporation*, above n 15.

coverage to it, both as it was happening and after. No charges were ultimately brought. The Court held that, as a starting point, Sir Cliff had a reasonable expectation of privacy in respect of the fact of a police investigation into historical sexual offending.[27] The expectation could be displaced for legitimate operational reasons.

[104] Ultimately, Mann J concluded:[28]

> [248] It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation, and I so rule. As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached. It is, as a general rule, not necessary for anyone outside the investigating force to know, and the consequences of wider knowledge have been made apparent in many cases (see above). If the presumption of innocence were perfectly understood and given effect to, and if the general public was universally capable of adopting a completely open- and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not. This was acknowledged in *Khuja v Times Newspapers Ltd* [2017] UKSC 49 , [2017] 3 WLR 351 , [2018] 1 Cr App Rep 1 (the *PNM* case re-named in the Supreme Court). The trial judge had acknowledged that some members of the public would equate suspicion with guilt, but he considered that members of the public generally would know the difference between those two things (see para [32]). Lord Sumption was not so hopeful. He observed (at [34]):
>
> > 'Left to myself, I might have been less sanguine than he was about the reaction of the public to the way PNM featured in the trial.'

[105] While I accept the MSD inquiry and investigation into Mr Peters' entitlement to NZS is quite different to a police investigation into an alleged crime, the fact Mr Peter's had been overpaid NZS and that the MSD had carried out an investigation into the overpayment was a sufficiently private fact. It is the investigation in particular which carries the potential for stigma. Mr Peters had been overpaid a significant amount of public money which he was not entitled to. The investigation was to determine if the overpayment was as a result of a mistake or if there had been a deliberate attempt to mislead, which could have led to a prosecution. In my judgment, Mr Peters had a reasonable expectation that the fact of the payment irregularity would be kept private, to the extent it would not be disclosed other than for a proper purpose

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27 *Richard v British Broadcasting Corporation*, above n 15, at [248].
28 At 248.

and/or would not be disclosed to parties who did not have a genuine need to know about it.[29]

[106] The MSD staff and management dealing with the issue had a genuine need to know about it to deal with the review and investigation. The issue is how much further the information could properly be disclosed. Private facts may be known to some people, but not to the world at large.[30] In my judgment, Mr Peters had, and was entitled to have, a reasonable expectation the payment irregularity would not be disclosed to the media and through them, the public at large.

[107] There is a difference between the fact that Mr Peters, having reached the age of 65, had applied for NZS, which I agree would not have the necessary degree of privacy, and the fact that he had been overpaid and that his application for NZS was being investigated by the MSD, which does. Most reasonable New Zealanders would regard the fact the MSD was looking into their application for a benefit or NZS as a private matter and not one that could be disclosed to the media or made public.

[108] Mr Peter's reasonable expectation that the payment irregularity would be kept private must be contextual. It is not absolute. It must take into account that there are some parties who it was necessary or appropriate to disclose the information to. As noted, that includes a number of people within the MSD involved directly in the review and investigation. It also extends to disclosure to the chief executive of the MSD and from him to the chief executive of the SSC as Mr Henry conceded in opening.

[109] Both Mr Boyle and Mr Hughes accepted that the payment irregularity involved information personal to Mr Peters. Further, the steps taken by senior MSD staff to "lock down" the file and ensure limited disclosure of it and Mr Hughes' restriction of the information within SSC to Ms Power and himself confirms, and is supportive of, an acceptance by them that Mr Peters could reasonably expect that the payment irregularity would not become public knowledge.

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29 See the reference to a "genuine interest in knowing" in *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777 at [79], albeit in a different context.

30 *Hosking v Runting*, above n 8, at [119].

[110] This is not a case where it could be said that an expectation of privacy which otherwise might have been reasonable has been lost by reason of culpability on Mr Peters' part.[31] For the reasons given above, I do not accept Ms Casey's submission that he was solely responsible for the issue because he provided incorrect information. There were a number of reasons, not all attributable to Mr Peters, why the application form was processed on an incorrect basis.

[111] Further, while Mr Peters may have consented to the MSD "accessing his private information for the purpose of dealing with and investigating the matter", he did not consent to it being released more publicly and certainly not to the media.

[112] Mr Peters' situation can be contrasted with that of Ms Turei. Ms Turei voluntarily and deliberately disclosed her fraud. She sought publicity about it for her own political purposes. Mr Peters' actions were not fraudulent and he reasonably expected that details of the payment irregularity would be kept private.

[113] Mr Gray also submitted that it was relevant to consider Mr Peters' public status as a politician of many years' experience. He was first appointed as Cabinet Minister in 1990. He is the leader of a political party. Where a person is a public figure, the reasonable expectation of privacy will correspondingly be reduced as their public status increases.[32]

[114] Mr Gray referred to the case of *AAA v Associated Newspapers Limited*.[33] In that case, the claim for invasion of privacy was brought on behalf of a young girl after journalists had published articles and covertly taken photographs of her. The articles speculated her father was a prominent elected politician. While accepting the information as to the girl's paternity was private to her, the High Court of England and Wales considered there was a proper public interest in the professional and private life of the supposed father and the alleged recklessness of his behaviour in conducting extramarital affairs.[34] That behaviour was relevant to his professional and personal

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31 *Andrews v Television New Zealand Ltd*, above n 17, at [42] and [46]–[47].
32 *Hosking v Runting*, above n 8, at [121].
33 *AAA v Associated Newspapers Limited* [2012] EWHC 2103 (QB), [2013] EMLR 2.
34 At [118].

character and fitness for public office.[35] As such, the articles did not constitute an actionable breach of his privacy.[36] The Court of Appeal upheld the High Court judgment.[37] In relation to the publication of the involvement of the father, the Court noted:[38]

> … The core information in the story, namely that the father had an adulterous affair with the mother, deceiving both his wife and the mother's partner and that the claimant, born about 9 months later, was likely to be the father's child, was a public interest matter which the electorate was entitled to know when considering his fitness for high public office.

[115] There is, however, nothing of that element in the present case. The fact that Mr Peters contributed to a mistake in completing the application form and, at worst, did not pay sufficient attention to detail of the form and correspondence from the MSD, can have no realistic impact on his character or fitness for public office. Mr Peters' profile does not, of itself, support the disclosure of the payment irregularity to the media and importantly, nor do the circumstances which gave rise to the payment irregularity. It would be quite different if the investigation had revealed Mr Peters had set out to defraud the MSD but that is not the case.

[116] It is also relevant that Mr Peters, perhaps unusually for a politician with a high public profile, has always sought to protect his privacy and personal life.[39] I accept Mr Peters keeps his private life separate from his political life as much as he is able to. He is entitled to do so.

[117] In summary, on the first point, I accept that Mr Peters had a reasonable expectation that the details of the payment irregularity would not be disclosed to parties who did not have a genuine need to know about it or a proper interest in knowing about it, and certainly had a reasonable expectation that the payment irregularity would not be disclosed to the media.

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35 At [118].
36 At [119].
37 *AAA v Associated Newspapers Limited* [2013] EWCA Civ 554.
38 At [55].
39 *McKennitt v Ash*, above n 16, at [53].

Highly offensive

[118] The second requirement, which raises the issue of whether the publicity given to the private facts was highly offensive, is also contextual.

[119] As Ms Casey submitted, it would not be highly offensive for details of the payment irregularity to be disclosed within the MSD to staff who had a reason to be informed about it or for it to be disclosed to Mr Boyle. Nor, as Mr Henry conceded, could it be regarded as highly offensive for the details to be provided to the SSC or Mr Hughes. On the other hand, it would be highly offensive for the details of the payment irregularity to be disclosed publicly or to be disclosed to a journalist or news media with the intention that it be published further, which was obviously the intention of the person(s) who disclosed it to the media.

[120] In this case, the person(s) who provided the information to the media did so deliberately and it seems, at least in relation to dealing with Newshub, did so maliciously and with intent to damage Mr Peters' reputation by referring to him as "lying" when he applied for NZS as single.

Mr Peters' press release

[121] The defendants submit that Mr Peters publicised the payment irregularity himself by issuing his media statement. However, by the time Mr Peters issued his statement, the details of the payment irregularity had been disclosed to the media. Mr Peters' response in issuing a press statement was a reasonable step to mitigate the potential damage to his reputation and to his political career.

[122] By the time Mr Burr approached Mr Peters on the evening of 26 August 2017 for comment regarding the issue, disclosure had been made to major media outlets, Newsroom, Newshub and TVNZ. It was inevitable that one of the media outlets would investigate the matter further and that broad publication of the issue would follow. Mr Peters' hand was effectively forced to take the pre-emptive step of providing his own press release about the issue.

[123] Mr Soper confirmed that, in his opinion, Mr Peters' decision, in response to the threatened publication of the payment irregularity, to pre-empt the matter with a press statement was a reasonable and appropriate attempt to limit the damage that would otherwise have been done to Mr Peters by the later disclosure in the media. He is able to give that opinion based on his experience as a political journalist. It is based on the fact that news outlets knew about the story. I agree with and accept that assessment.

[124] While Mr Soper was cross-examined about articles where he had been quoted as saying it was "not serious at all" or that it was not ultimately politically damaging, those statements were made in the context that the overpayment was not serious and that Mr Peters had taken the initiative to issue his press release first.

[125] In summary, I remain of the view that it would be highly offensive to deliberately disclose details of the payment irregularity to the media.

[126] In some cases, the Court has considered whether intent is a necessary element of the tort. In this case, it is unnecessary to consider whether intent is a separate requirement. It can clearly be inferred that anyone passing information concerning the payment irregularity to the media did so with the intention it be published.

[127] Against this summary of the factual background and application of the law of privacy to the general circumstances of this case, I turn to consider whether Mr Peters can make out the particular claims he has brought against the defendants in this case.

The pleaded claim against the first and third defendants

[128] Mr Peters raises four causes of action. The first cause of action is pleaded against all defendants, including the first and third defendants. The fourth cause of action is solely directed at the first and third defendants.

[129] In the first cause of action, after pleading the general background facts, as discussed above, Mr Peters pleaded that all recipients of NZS have a reasonable expectation that the MSD and its staff would keep all personal information relating to NZS private. It is strictly unnecessary for the Court to resolve whether the basic information that a person has applied for NZS would be considered sufficiently private

as Mr Peters' case is based on the publicity of the payment irregularity. But as noted above, the mere fact a person has applied for NZS, without more, would not be considered sufficiently private. While the MSD may have obligations regarding personal information under the Privacy Act it does not follow that the information is sufficiently personal to satisfy the first limb of the tort of privacy.

[130] Next, Mr Peters pleads that Ms Bennett and Ms Tolley (with Mr Hughes and Mr Boyle) at all material times knew (or ought reasonably to have known) that he had a reasonable expectation the details of the payment irregularity would be kept private and that public disclosure of the payment irregularity in the circumstances would be considered highly offensive by a reasonable objective person.[40]

[131] For the reasons given above, I accept that disclosure to media outlets with the intention that information concerning the MSD investigation would be publicised would meet the test and would be considered offensive by a reasonable person, but that does not directly address the disclosure by the first and third defendants.

[132] Mr Peters then pleads that Ms Bennett and Ms Tolley breached the duty to keep the fact of, and details of, the payment irregularity private. The particulars of the breach alleged are:[41]

> 13. The Defendants (individually and collectively) breached the concomitant duty to keep the fact of, and details of, the "payment irregularity" private:
>
> Full particulars whereof are:
>
> 13.1 On the 23rd August 2017, an anonymous caller called the news media company known as "Newshub" disclosing to Newshub details of "payment irregularity".
>
> 13.2 The disclosure was combined with an allegation that the Plaintiff had acted improperly.
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> 13.3 On the 26th August 2017 a news media company known as "Newsroom.co.nz" received an anonymous telephone call disclosing the same information as pleaded in paragraphs 13.1 and 13.2.

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40 Second Amended Statement of claim dated 6 June 2019, at [12].
41 Second Amended Statement of claim, at [13].

> 13.4 On the 26th August 2017, Timothy Murphy a journalist with the said "newsroom.co.nz", published via his Twitter account a statement that he had the "mother of all scandals", referring to the Plaintiff.
>
> 13.5 A journalist with "Newshub" saw the twitter publication in 13.4 and assumed that his competition "newsroom.co.nz" had the same story as his organisation had received anonymously on the 23rd August 2017.

[133] As noted, both Ms Bennett and Ms Tolley gave evidence. Neither of them had anything to do with the disclosure pleaded in [13] of the amended statement of claim. Ms Bennett said that apart from the brief discussion with Ms Tolley, the first occasion she disclosed the information was to Mr English on 26 August 2017. The disclosures by Ms Bennett to Mr English and Mr Joyce were after the disclosures to the media.

[134] Ms Tolley confirmed that she had disclosed the information to Mr Harvey, Mr Eagleson and her husband. The only other disclosure was on 26 August 2017 to her sister. That disclosure could not have been a source of the disclosure to the media.

[135] Ms Bennett and Mr Tolley's evidence about their disclosures of the payment irregularity was not seriously challenged. It was not put to either Ms Bennett or Ms Tolley in cross-examination that they were the source of the disclosure of the payment irregularity to the media. Moreover, in closing Mr Henry accepted that Mr Peters could not say they were.

[136] I accept that Ms Bennett's disclosure of the information was for a proper purpose. It could not, on any view of it, be considered highly offensive to an objective reasonable person.

[137] The disclosures Ms Tolley made to Mr Harvey, Mr Eagleson and her husband were for the purposes of taking advice about the payment irregularity and particularly, whether she should request a written briefing. They were reasonable and not made for the purpose of embarrassing Mr Peters. The disclosures in those circumstances could not be said, on any basis, to have been highly offensive.

[138] The disclosure to Ms Tolley's sister was indiscrete but, on Ms Tolley's unchallenged evidence, it was in general terms and lacked the detail necessary to have

been the source of the disclosure to the media. Further, as noted, it came after the initial disclosures to the media so could not have been the source.

[139] Mr Harvey gave evidence. He was not asked if he was the source of the disclosure to the media. The subsequent investigation was satisfied he was not and nor were any of the other parties referred to in this case.

[140] The plaintiff is, therefore, left with his reliance on res ipsa loquitur to link the actions of the first and third defendants with the disclosure to the media.

Res ipsa loquitur

[141] Mr Peters seeks to overcome his evidential difficulty in identifying who disclosed his private information concerning the payment irregularity to members of the media on 23 and 25 August 2017 by reliance on the doctrine of res ipsa loquitur.

[142] In support of the res ipsa loquitur pleading, Mr Peters alleges:

(a) disclosure was made in the context of the 2017 general election to be held on 23 September;

(b) the defendants knew that release of the details of the payment irregularity would damage Mr Peters' reputation. New Zealand's elections are presidential and the standing of the party leader is important;

(c) the National Party was at the time the government. The Government had a 'no surprises' policy;

(d) the 'no surprises' policy has no basis in law, was misused and did not authorise the disclosure of private information;

(e) the Government used the 'no surprises' policy to have departmental officials disclose to their Ministers, including the first and third defendants, salacious information regarding their political opponents

when disclosure of such information had no purpose other than useful political purposes;

(f) the first and third defendants were at all material times members of the National Party standing for re-election and the first defendant was part of the National Party re-election committee;

(g) the plaintiff was the leader of NZ First, dependent on winning the Northland electorate seat or obtaining greater than five per cent of the total vote;

(h) the first and third defendants were the plaintiff's political opponents in the general election; and

(i) the disclosure of the payment irregularity to the first and third defendants had no purpose other than to pass on salacious gossip to be used to the detriment of the plaintiff in the general election.

[143] Res ipsa loquitur, literally "the facts speak for themselves", is a rule of evidence. Res ipsa loquitur generally arises in the context of negligence but is not restricted to that. In the Canadian case of *Royal Bank of Canada v Boussoulas*, for example, the Ontario Superior Court of Justice accepted it could apply to fraud where fraud was the only consistent explanation for the facts proven.[42]

[144] The authors of *Cross on Evidence* suggest that the inference raised by res ipsa loquitur is one of common sense.[43] A tactical burden is cast upon the defendant. The defendant stands to lose unless it can produce some explanation for the events that does not involve their negligence. The authors cite the Privy Council case of *Ng Chun Pui v Lee Chuen Tat*, where Lord Griffiths explained the approach as:[44]

> So in an appropriate case the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be

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42 *Royal Bank of Canada v Boussoulas* 2014 ONSC 2367 at [10].
43 Mathew Downs (ed) *Cross on Evidence* (online ed, LexisNexis) at [2.3.2.4].
44 At [2.3.4.4], citing *Ng Chun Pui v Lee Chuen Tat* [1988] RT 298 (PC).

> evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case. Resort to the burden of proof is a poor way to decide a case; it is the duty of the Judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established. In so far as resort is had to the burden of proof the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants.

[145] In *Williams v Draganoff*, Tipping J confirmed that in a case where res ipsa loquitur applies there may be some evidentiary burden on the defendant but there is no ultimate legal burden, referring to *Ng Chun Pui v Lee Chuen Tat*, *Lloyde v West Midlands Gas Board* and an earlier decision of his own in *CB Norwood Distributors Ltd v Scandanvia Australia & New Zealand Carriers Ltd*.[45]

[146] In the appeal decision in the *CB Norwood* case, the Court of Appeal confirmed that:[46]

> … the fundamental rule that it is for the plaintiff alleging negligence to prove it, and that the maxim does no more than raise an inference of its existence in appropriate circumstances.

[147] Accepting, without deciding, that the doctrine could apply to a claim for breach of privacy, it does not assist the plaintiff in the present case. It is no more than a rule of evidence. As noted, Mr Peters' claim for breach of privacy is premised on details of the payment irregularity being leaked to the media by an anonymous person(s). Applying res ipsa loquitur to the present claim at most raises a burden on the defendants to provide some explanation, other than their own actions, which could have led to the disclosure of Mr Peters' payment irregularity to the media.

[148] There are a number of possible explanations as to how the details of the payment irregularity were disclosed to the media. While it is possible the disclosure was politically motivated, it could have been made by members of either of the other

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45 *Williams v Draganoff* HC Dunedin, AP113/90, 27 May 1991, citing *Ng Chuen Pui v Lee Chuen Tat*, above n 44; *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749 (CA); and *CB Norwood Distributors Ltd v Scandinavian Australia & New Zealand Carriers Ltd* HC Christchurch A27/84, 9 February 1989.

46 *CB Norwood Distributions Ltd v Burnetts Motors Ltd* CA86/89, 21 August 1991 at 9.

major parties, (at that time neither of them knew who Mr Peters and NZ First might support) or even a disaffected NZ First supporter disappointed in a perceived failing by Mr Peters. Further, a supporter of the Green Party or of Ms Turei who considered she had been treated harshly by the media could have been the source of disclosure to the media.

[149] That is the fundamental difficulty for Mr Peters' reliance on res ipsa loquitur. The doctrine is not applicable where the plaintiff cannot identify the defendant. In *David T Morrison & Co Ltd v ICL Plastics Ltd,* there was an explosion at ICL's Glasgow factory.[47] Morrison's shop, an adjoining property, was damaged. It sued ICL, alleging negligence, nuisance and breach of statutory duty. The claim was filed late and raised issues of limitation. In a twist, ICL sought to argue res ipsa loquitur applied against itself to establish Morrison knew that the explosion had been caused by ICL's breach of duty at a time which would have engaged limitation provisions. The United Kingdom Supreme Court, divided on its result and ultimately the issue of res ipsa loquitur, was not determinative. But in the course of the judgment, Lord Hodge considered its application and said:[48]

> 98. … *Res ipsa loquitur* is an evidential rule for finding facts. Where the facts give rise to an inference of negligence by the defender, the evidential burden shifts onto the defender to establish facts to negative that inference. But it is of no relevance if one does not know who the defender is. …
>
> 99. On the pleadings it appears that, when the explosion occurred, the source of the flammable material which caused it was not known. In an urban environment there might have been several possible causes involving the responsibility of different people or bodies. The fact of the explosion might cause a reasonable pursuer [plaintiff] to suspect that something done or omitted to be done by the owners or occupiers of the factory where it occurred had caused it. …

[150] As there were multiple potential causes of the explosion, suspicion alone was not sufficient, a point echoed by the majority of Lord Reed, Lord Neuberger and Lord Sumption.[49]

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47 *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48.
48 *David T Morrison & Co Ltd v ICL Plastics Ltd*, above n 47.
49 At [37].

[151] Similarly, in the present case, there are a number of possible sources of the disclosure to the media. The doctrine of res ipsa loquitur is of no assistance to the plaintiff in this case.

[152] In support of his claim against the first and third defendants, Mr Peters also alleged that the disclosure of the payment irregularity to the first and third defendants had no purpose other than to pass on salacious gossip which could be used to the detriment of the plaintiff in the forthcoming general election, by leaking the information to the media.[50] Ms Casey took strong exception to this. I return to this later when considering the position of the Crown defendants. In the context of the claim against the first and third defendants, it can have no application. As the allegation reads, it must be directed against the parties who made the disclosure to the Ministers, Messrs Hughes and Boyle, rather than to the Ministers as recipients of the information.

[153] In summary, there are a number of elements to Mr Peters' claim against Ms Bennett and Ms Tolley but they come down to the following key points. First, that he had a reasonable expectation of privacy that the details of the payment irregularity would be kept private. For the reasons given above, I accept that has been established to the extent that he had a reasonable expectation it would only be disclosed to those persons who had a proper interest or genuine need to know. I also accept that public disclosure would be considered highly offensive by a reasonable objective person. Again, for the reasons above, I agree that disclosure of the payment irregularity to the media with the intention it be made publicly available would be considered offensive to a reasonable objective person.

[154] Mr Peters' pleaded case against the first and third defendants is based on the reasoning that the first and third defendants were members of a political party opposed to Mr Peters so that the information must have been leaked by them to persons who disclosed it to the media.[51] But Mr Henry did not pursue that case directly in closing submission. He cannot rely on res ipsa loquitur to make it out.

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50 Second Amended Statement of claim, at [18.27] and [18.28].
51 And the first defendant was on the re-election committee.

[155] Returning to the pleaded elements of the first cause of action, the final element of the claim is that by disclosing it to others, the Ministers made it more likely that details of it would be disclosed to the media or interests adverse to Mr Peters. Ms Bennett accepted that as a general proposition. With respect, that is self-evident, but it does not advance the plaintiff's case. To succeed on his claim against the first and third defendants, Mr Peters must establish the second leg of the tort, namely that the Ms Bennett and Ms Tolley were responsible for the deliberate disclosure of the payment irregularity to the media. It is that deliberate disclosure to the media which would be highly offensive in this case. Mr Peters is unable to establish that on the evidence. None of the disclosures by the first and third defendants fall into that category and, for the reasons given above, the plaintiff cannot succeed by relying on res ipsa loquitur. The plaintiff cannot make out his pleaded claim under the first cause of action against the first and third defendants.

Fourth cause of action

[156] In the fourth cause of action, which is specifically directed at the first and third defendants, Mr Peters pleads:

(a) he had a reasonable expectation that the first and third defendants would keep the payment irregularity private;

(b) any disclosure of the payment irregularity would be considered by a reasonable objective person to be highly offensive;

(c) the first and third defendants breached the duty they owed the plaintiff when they induced the second, fourth and fifth defendants respectively to disclose the payment irregularity to them under the then Government's 'no surprises' policy;

(d) the disclosure was not justified or authorised under the 'no surprises' policy;

(e) the first and third defendants further breached the duty when they failed to ascertain from the head of department concerned if the head required

the assistance of the Minister or the assistance of Cabinet and information as to whether the matter was resolved to the satisfaction of the MSD;

(f) disclosure of the payment irregularity was for no proper purpose of State;

(g) it was foreseeable to the first and third defendants that the disclosure of the payment irregularity would increase the likelihood of the information being leaked to the media; and

(h) the plaintiff, again, relies on the doctrine of res ipsa loquitur.

[157] In addition to the elements of the claim already considered above, particularly the inability of the plaintiff to rely on res ipsa loquitur, the fourth cause of action is also dependent on the pleading that the first and third defendants breached the duty owed to the plaintiff by inducing the second, fourth and fifth defendants to disclose the payment irregularity to them under the 'no surprises' policy and further, by failing to ascertain from the second and fifth defendants if they required the assistance of the Minister or of Cabinet and information as to whether the issue was resolved to the satisfaction of MSD.

Cabinet Manual 2017

[158] There are a number of relevant provisions of the Cabinet Manual dealing with the issue of disclosure by chief executives to their Ministers. The Cabinet Manual provides:

> **Ministers and the public service**
>
> …
>
> **Roles and responsibilities**
>
> 3.7 Ministers decide both the direction of and the priorities for their departments. They are generally not involved in their departments' day-to-day operations. In general terms, Ministers are responsible for determining and promoting policy, defending policy decisions, and answering in the House on both policy and operational matters.

3.8 Ministers have a duty to give fair consideration and due weight to free and frank advice provided by the public service.

…

Ministers and officials

3.22 The style of the relationship and frequency of contact between Minister and department will develop according to the Minister's personal preference. The following guidance may be helpful:

(a) In their relationship with Ministers, officials should be guided by the "no surprises" principle. As a general rule, they should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.

(b) A chief executive should exercise judgment as to whether, when, and how to inform a Minister of any matter for which the chief executive has statutory responsibility. Generally a briefing of this kind is provided for the Minister's information only, although occasionally the Minister's views may be a relevant factor for the chief executive to take into account. In all cases, the chief executive should ensure that the Minister knows why the matter is being raised, and both the Minister and the chief executive should act to maintain the independence of the chief executive's decision-making process. The timing of any briefing may be critical in this regard. As a matter of best practice, briefings should be in writing or at least documented in writing.

[159] Paragraph 3.22 in particular makes it clear the decision to disclose is the official's decision, not the Minister's decision.

[160] The evidence is also clear that the Ministers did not induce Mr Hughes and Mr Boyle to disclose the information to them.

[161] Ms Bennett said she did not take any notes but was sure that there were only the three of them in her office when she was briefed on the issue. Her recollection is that either Mr Hughes or Ms Power said there was something they needed to disclose to her under the 'no surprises' principle. They said it was sensitive information that, on balance, they had decided they needed to let her know about. The issue was then disclosed. Ms Bennett recalls the briefing to be short. She thinks it would have been less than 10 minutes and perhaps closer to five minutes. She does not remember

asking any questions. It was not something she needed to take any action on and so there was no need for her to ask questions.

[162] Ms Tolley said that Mr Boyle said he had a matter to brief her on alone. Her staff and the remaining MSD officials left the room and a one-to-one briefing took place. She recalls Mr Boyle referred to the need to brief her on a 'no surprises' basis and that he had sought advice from the SSC on whether to brief her. She understood that either Mr Boyle or the SSC had sought advice from the Solicitor-General.

[163] Mr Boyle told Ms Tolley that:

(a) Mr Peters had applied for superannuation based on him living alone and had been receiving a higher superannuation entitlement that he should have been;

(b) Mr Peters' partner had applied for superannuation. As a result, it had come to light that Mr Peters was wrong in claiming the superannuation entitlement;

(c) Mr Peters had been contacted by the MSD and had met with them; and

(d) Mr Peters had accepted that he had been overpaid and arranged to make payment of the sum owed to the MSD.

[164] The decisions to disclose the information to the Ministers were made by Mr Hughes and Mr Boyle. The first and third defendants received, but did not seek out, the information.

[165] The disclosure in both cases was brief and effective immediately. There was no way for the Ministers to "unlearn" what they had been told.

[166] To the extent the pleading refers to an alternative ground of breach relating to the need to ascertain whether Mr Hughes and/or Mr Boyle required the assistance of the Minister or Cabinet, I reject it for the reasons set out later when considering the claim against the Crown defendants.

[167] While Mr Henry accepted that damages were no longer pursued against Ms Bennett and Ms Tolley, he still pursued a declaration that they had breached Mr Peters' privacy.

[168] The declaratory relief sought is based on the same pleaded facts as the claim for damages. With the exception of Ms Tolley's unguarded comment to her sister, the disclosures made by the first and third defendants were either made for proper purposes or to persons who had a genuine need to know about the payment irregularity. Ms Tolley was not challenged on her evidence regarding her reason for discussing the matter with her husband and, given the brief and very general nature of the comment made to her sister, I decline to make any such declaration.[52]

[169] The plaintiff's claim against the first and third defendants on the first and fourth causes of action fails.

The pleaded claim against the second, fourth and fifth defendants

[170] As noted, the first cause of action is pleaded against all defendants, including the second, fourth and fifth defendants.

[171] The basis of the claim against the second, fourth and fifth defendants is:

(a) Mr Peters had a reasonable expectation that the MSD and its staff, including Mr Boyle, would keep details of the payment irregularity private;

(b) Mr Hughes and Mr Boyle, at all material times, knew Mr Peters had a reasonable expectation details of the payment irregularity would be kept private, and that disclosure would be considered highly offensive by a reasonable objective person; and

(c) the defendants individually and collectively breached the concomitant duty to keep the details of the payment irregularity private.

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[52] The comment was general and contained no details. It could not have been the source of the leak to the media.

[172] Again, the particulars pleaded to support the allegation that the defendants breached the concomitant duty are those alleged in [13] of the amended statement of claim, which detail the disclosure to the media. That pleading relies on the application of res ipsa loquitur.

[173] Mr Peters next pleads that the Crown defendants were aware, or were reckless if they were not aware, that the disclosure of the payment irregularity to the first and third defendants would increase the risk of disclosure of the payment irregularity to other persons, including to party political staff working in the first and third defendants' office. That is correct but it does not address the issue of whether the various disclosures were for a proper purpose or to persons who had a genuine need to know. In the case of the disclosure by the Ministers I have found they were, or at least in the case of the disclosure by Ms Tolley to her sister, could not have been the source of the disclosure to the media. I consider the issue of the disclosure by the second and fifth defendants to the Ministers below.

[174] The pleading against the fourth defendant goes on to allege that a MSD director (Jesse Nichols) revealed the payment irregularity to Matthew McLay, a seconded member of the third defendant's ministerial staff at the time. The pleading does not add anything to the plaintiff's case and no evidence was led from the plaintiff to support it. It featured in a rather obscure way in the cross-examination of Ms Tolley and the evidence of Ms Raines, the MSD internal investigator, but it went nowhere.

[175] Mr Peters also pleads it was foreseeable by each of the defendants that the more who knew of the details of the payment irregularity the greater the risk of it being leaked to the public, and that it was foreseeable by each of the defendants that breaches of their concomitant duty to protect the plaintiff's personal information would lead to further disclosure to other persons, namely:

- the plaintiff s political opponents;
- the media; and
- bloggers and public at large, including social media trolls

who would use the information to damage the plaintiff's reputation in the course of the forthcoming general election and diminish his chance of being returned by reducing the public vote for him.

[176] I accept Mr Peters had a reasonable expectation that details of the payment irregularity would be kept private, to the extent that it would not be disclosed except for a proper purpose or to parties who did not have a genuine need to know and that it would not be disclosed to the media. But that does not support Mr Peters' claim that the MSD and Mr Boyle should have kept it private if that is to be taken to mean to not disclose it at all. Apart from the internal disclosure for the purpose of the investigation into the payment irregularity, which was for a proper purpose and/or to persons with a genuine need to know, the disclosure by the MSD was to Minister Tolley. The disclosure by the SSC was to Minister Bennett.

[177] The pleading against the fourth defendant, sued on behalf of the MSD, is general. The focus of the pleading and Mr Henry's opening was on the actions of the individual defendants. But in closing, Mr Henry submitted that the MSD was the source of the leak and there were three possibilities as to how the information was communicated to the media:

(a) by an MSD team member, either directly or via others;

(b) from Mr Boyle via Mr Hughes to Ms Bennett then via an unknown chain of persons; or

(c) via Ms Tolley, via an unknown chain of persons.

[178] I deal with the disclosures to Ms Bennet and Ms Tolley shortly. In relation to the allegation of disclosure by an MSD team member, the evidence of Ms Raines is relevant.

[179] Ms Raines is the national manager, fraud for the MSD. Prior to that she was the manager, workplace integrity. In that capacity she ran the investigation into the MSD's handling of Mr Peter's information. Ms Raines identified all persons who had

worked on or accessed Mr Peter's file on the MSD internal processing systems. She concluded that only persons who had proper business reasons to do so had accessed the records. She then reviewed all communications, by email and phone, those persons had with the media. Nothing of concern was discovered. In cross-examination she did accept that her investigation could not discover oral communications or the use of 'burner' phones. But Ms Raines did seek declarations from 29 staff, who had contact with the file but would not have had sufficient information to have been the source of the leak, and interviewed 11 staff who had all the information. Ms Raines concluded that there was no evidence to support a finding that a MSD staff member was the source of the leak.

[180] A separate investigation by the Department of Internal Affairs (DIA) revealed that Mr McLay, a MSD employee on secondment to Ms Tolley's office had been told about the issue by Mr Nichols, the director of the Office of the Deputy Chief Executive, Service Delivery. Ms Raines also interviewed Mr Nichols. She was satisfied with his explanation that he had mentioned the issue to Mr McLay, the Minister's private secretary, as a confidential 'heads up'.

[181] Mr Peter's cannot identify the source of the leak to the media. He cannot say whether it originated from an MSD team member or one of the persons who later obtained the information through the Ministers' offices. He is left with his reliance on the doctrine of res ipsa loquitur in his case against the fourth defendant, sued on behalf of the MSD. But for the reasons expressed above, the doctrine does not assist the plaintiff. While it is clear enough the details of the payment irregularity must have been leaked to the media by someone who either had access to the information or was otherwise told about by someone who did, the MSD is not the sole source of the information. The information was disclosed to various people, including a number of people within Ms Tolley's office for example.[53]

[182] I turn to consider the reasons Mr Boyle and Mr Hughes gave for their decisions to brief the Ministers.

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[53] Quite apart from the fact that any MSD employee who disclosed the information would have been acting contrary to instructions and outside the scope of their employment. This is not a case of misfeasance in public office.

[183] From an early stage, Mr Boyle intended to brief his Minister. On 22 June 2017 he contacted the SSC. It was agreed not to advise Minister Tolley at that time, but that under the 'no surprises' policy, Mr Boyle would tell her once a decision was made.

[184] There was a further development of particular relevance to Mr Boyle's consideration of the issue. On 16 July 2017, the media reported that Ms Turei had publicly announced that when she was a beneficiary she had lied to the MSD in order to receive a greater benefit than she was entitled to. As Mr Boyle observed, this increased the sensitivity of the issue in relation to Mr Peters' situation.

[185] Mr Boyle considered the decision that no further action was required in Mr Peters' case created a complication for the MSD. In his words, it "put the issue of the integrity of [MSD's] processes front and centre, especially given the continuing events around Metiria Turei's benefit payments".

[186] Mr Boyle said he considered it important Ms Tolley be informed that the MSD had followed its proper processes and to provide assurance to her that the favourable outcome for Mr Peters was an appropriate outcome.

[187] In Mr Boyle's view, the payment irregularity was a significant matter that went to the integrity of the MSD's administration of the benefit system, which the Minister was accountable for. The MSD's response to the overpayment had the potential to be highly controversial and subject to public debate. He assessed that if Mr Peters' matter went public there was a real risk that comparisons between Mr Peters and Ms Turei would be made, and concerns raised about the integrity of the MSD's processes. He considered Ms Tolley should be briefed on a 'no surprises' basis.

[188] For his part, Mr Hughes considered that Mr Peters' issue raised two immediate flags for the SSC. The first was that a very senior and powerful politician had been overpaid a benefit for a number of years. That raised a potential concern about special treatment, bias or interference in the MSD's processes for dealing with the overpayment. The integrity of the public service was in issue. Mr Hughes considered it entirely appropriate for Mr Boyle to have contacted Ms Power to advise her of the issue. One of the core functions of the State Services Commissioner under s 4A of the

State Sector Act 1988 is to provide oversight of state services to ensure the maintenance of high standards of integrity.

[189] The second, and related matter that the issue raised, was whether the Ministers should be briefed, and if so, when. Mr Hughes recalled at least one conversation with Mr Boyle where they discussed whether and when the Ministers should be briefed. As to when, he was clear there should be no briefing until the MSD had completed its processes in order to ensure there could be no suggestion of political interference in the final decision.

[190] Mr Hughes considered the information was relevant to Ms Bennett as Minister for the SSC. Ms Bennett was accountable to the House of Representatives for the performance and integrity of the public service of New Zealand. In Mr Hughes' opinion, Mr Peters' profile and standing was such that allegations of unfairly favourable treatment had the potential to call the performance and integrity of the public service of New Zealand into question.

[191] Mr Hughes considered it was important that Ms Bennett be in a position to provide the assurance to the House and the New Zealand public that the issue had been handled appropriately and impartially by the MSD. It was also important that Ms Bennett could provide that assurance to the Minister for Social Development if she chose to raise the matter with her.

[192] Mr Hughes also noted that, by the time he and Mr Boyle had reached the point of briefing Ministers at the end of July, the issue of Ms Turei's disclosure of her fraud had also come into the mix. He considered that made it even more important that both Ministers were briefed. While he did not base his decision to brief Ms Bennett on whether the issue would get into the public domain, Mr Hughes accepted that was a factor in his thinking. He considered that, given the events with Ms Turei, Mr Peters might have decided to disclose the overpayment and how it had been resolved, or alternatively, it was possible that a member of the MSD staff might, out of a sense that Mr Peters had been treated more favourably than Ms Turei, be "vocal" about Mr Peters' treatment. While he did not consider them likely possibilities he considered they could not be ruled out.

[193] The Crown defendants called Sir Maarten Wevers to give expert evidence about the circumstance when a chief executive might brief a Minister, particularly in the context of a 'no surprises' briefing. Sir Maarten confirmed that, in general terms, the approach a particular chief executive might take to briefing the Minister would be influenced by the importance, the urgency and the sensitivity of the information but also by the relationship the chief executive had with their Minister. Briefings routinely include sensitive material. That sensitivity could relate to matters ranging from national security, commercially sensitive negotiations, budget sensitive decisions, diplomatically confidential disputes, and stakeholder relationships, all matters which could affect individuals or groups or be personal or confidential to them.

[194] In response to the suggestion it was wrong to disclose the payment irregularity to the Ministers who were Mr Peters' political opponents, Sir Maarten emphasised that it would be improper for a chief executive to attempt to filter information a Minister was entitled to receive on the basis of any assessment the Minister might act inappropriately by disclosing sensitive information further. Such would be a fundamental breach of the obligations of political neutrality and would place the chief executive into a gatekeeper role, making decisions based on his or her views of the likely political or personal attributes of the Minister.[54] If the chief executive had genuine concerns about the conduct of their Minister, that would be a matter for them to raise with the chief executive of the Department of the Prime Minister and Cabinet or the State Services Commissioner, who in turn might take the matter to the Prime Minister. Ultimately responsibility for the conduct and discipline of Ministers lies with the Prime Minister, rather than government officials.

[195] Sir Maarten confirmed the purpose of a 'no surprises' briefing was to inform a Minister promptly of matters of significance within their portfolio responsibilities, particularly where the matters may be controversial or may become the subject of public debate. The Minister may want to take action about the matter or be kept

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[54] There are a number of relevant provisions of the Cabinet Manual. Under "Integrity and conduct throughout the state sector: Principles of public service" the Cabinet Manual provides: 3.58 New Zealand's state sector is founded on the principle of political neutrality. Officials must perform their jobs professionally, without bias towards one political party or another. Officials are expected to act in such a way that their agency maintains the confidence of its current Minister and of future Ministers. This principle is a key element of impartial conduct. It provides the basis on which officials support the continuing process of government by successive administrations.

informed or take further advice. The Minister may also want to know about the matter in order to be prepared to answer questions from various sources – ministerial colleagues, members of the public, media or the House. The 'no surprises' principle supports individual ministerial responsibility. Ministers do not like there to be a perception they have been caught napping because a piece of information the chief executive knew in connection with a portfolio was held back from them.

[196] Sir Maarten said that chief executives need to make a judgment call in deciding whether and sometimes, more importantly, when and to what level of detail to give a 'no surprises' briefing. In his opinion, they could be judgment calls that reasonable and experienced chief executives could reach different decisions on without being wrong.

[197] Dealing with the specific briefings in issue in this case, in Sir Maarten's opinion, it was appropriate for both Mr Boyle and Mr Hughes to brief their Ministers on a 'no surprises' basis. In relation to Mr Boyle's decision to brief Minister Tolley he considered the following factors supported the briefing:

(a) a very powerful public figure had received money through the benefit system he was not entitled to, following an error he had made on the form, that he had confirmed was correct by way of declaration;

(b) the individual was a former Cabinet Minister and leader of a political party with a potential role in the formation of the next government;

(c) there were issues in play as to the integrity of the system, and the receipt of the payments were longstanding; and

(d) the disclosure by Ms Turei that she had made false claims to receive higher benefits, was receiving a high level of media attention.

[198] Sir Maarten also noted that there was a risk this was going to end up in the public domain and the Minister would be blindsided by it if she had not received a briefing. Ministers would expect to be forewarned and assured the MSD had handled

the matter appropriately so they could answer accurately and diffuse any suggestion there had been preferential treatment.

[199] Sir Maarten also considered Mr Hughes' briefing of Ms Bennett was justified. Again, he referred to his opinion that the matter might become known in the public domain. The issue raised standards of conduct in the public service and the integrity of the MSD systems and how they had dealt with the overpayment. In his opinion, they were core matters which the Commissioner and his Minister are custodians of. He said he would have taken the same course and briefed the Minister.

[200] The second and fifth defendants justify the briefing of their Ministers on the basis of the 'no surprises' policy. The policy is a well-established one. Previous editions of the Cabinet Manual provided for an "early warning system" to alert Ministers to potentially controversial matters.[55] That early warning system transitioned to a 'no surprises' principle in the Cabinet Manual 2008. The operative Cabinet Manual was adopted by the previous National led Government on 13 November 2017 and endorsed by the Cabinet of the current Government at its first Cabinet meeting on 26 October 2017.

[201] For convenience, I repeat the particularly relevant section of the current Cabinet Manual:

> **Ministers and officials**
>
> 3.22 The style of the relationship and frequency of contact between Minister and department will develop according to the Minister's personal preference. The following guidance may be helpful:
>
> (a) In their relationship with Ministers, officials should be guided by the "no surprises" principle. As a general rule, they should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.
>
> (b) A chief executive should exercise judgment as to whether, when, and how to inform a Minister of any matter for which the chief executive has statutory responsibility. Generally a briefing of this kind is provided for the Minister's information only, although occasionally the Minister's views may be a

[55] Cabinet Manual 1991; Cabinet Manual 1996; and Cabinet Manual 2001.

> relevant factor for the chief executive to take into account. In all cases, the chief executive should ensure that the Minister knows why the matter is being raised, and both the Minister and the chief executive should act to maintain the independence of the chief executive's decision-making process. The timing of any briefing may be critical in this regard. As a matter of best practice, briefings should be in writing or at least documented in writing.

[202] The Solicitor-General has also developed guidance in relation to the application of the 'no surprises' principle. The introduction to that advice confirms that:

> In short, the principle is a convention by which Chief Executives keep their Ministers informed of significant or controversial matters, especially those that may arise in public, in the Minister's portfolio areas of responsibility.

[203] Importantly, the following guidance is provided:

> 8. Particular care is required in applying the 'no surprises' principle in relation to functions or powers that officials must exercise independently of the Minister. It is important to be clear, however, that advising a Minister of a matter in accordance with the 'no surprises' principle does not in itself indicate a lack of independence. The 'no surprises' principle applies to all matters within a Minister's portfolio responsibilities, including functions or powers that officials must exercise independently of the Minister.
>
> 9. As with constitutional conventions, the 'no surprises' principle is subject to law. There may be situations in which the lawfulness of informing the Minister will need to be considered prior to approaching the Minister.[56]

[204] The Solicitor-General's briefing paper makes it clear there is a distinction between a matter which relates to a function or power that officials are required to exercise independently of the Ministers and matters which do not relate to a function or power required to be exercised independently of the Minister. In the second case, the key factor will be the significance of the matter within the Minister's portfolio responsibility. As noted, the Cabinet Manual provides Ministers should be informed promptly of matters of significance within their portfolio responsibilities, particularly where they may be controversial or become the subject of public debate.

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[56] Reference is made to the secrecy obligations under s 81 Tax Administration Act 1994 and the inside trading regime under the Financial Markets Conduct Act 2013, which impose restrictions on officials holding inside information about a public issuer and would restrict the disclosure of such information to Ministers.

[205] Where the function or power that officials are required to exercise independently is at issue, care is required in applying the 'no surprises' principle to ensure that independence is maintained. Relevant considerations will be purpose, timing, manner and scope of the briefing.

[206] The Cabinet Manual, the Solicitor-General's briefing paper and the evidence confirm that to support a briefing on a 'no surprises' basis, the issue should be a matter of significance within the Minister's portfolio. The fact that a recipient of NZS had been overpaid, and that the MSD had investigated it and was satisfied there was no intent to mislead it, obviously, would not justify a briefing. Even the fact a senior Member of Parliament has been overpaid NZS and an investigation into the overpayment revealed it was the result of a mistake in the completion of the form would not, of itself, be a matter of significance that would justify a 'no surprises' briefing. The significance of the issue in the present case was, as explained by Mr Hughes (and also by Mr Boyle and Sir Maarten) the potential for the integrity of the public service to be questioned depending on the way the issue was dealt with. It was important to confirm that the MSD had treated this case no differently to any other case.

[207] Ms Casey noted that Sir Maarten's opinion that the decisions to brief their Ministers was correct was not challenged in cross-examination. However, it does not follow that the Court has to accept Sir Maarten's evidence in its entirety. It was based on certain assumptions and his understanding of the position. For instance, it was based in part on his understanding that Mr Peters was responsible for the error on the form. For the reasons given above, while Mr Peters contributed to the error, the form should not have been processed in the way it was. Mr Peters was not solely responsible for the error and the subsequent overpayment as the defendants assumed.

[208] Further, it is also relevant that the justification for the 'no surprises' briefings is said to be the importance of assuring both Ministers of the integrity of the public service.

[209] Neither of the Ministers referred in their evidence-in-chief to that consideration being expressly referred to or articulated by Mr Boyle or Mr Hughes at the time of the

briefings. While Mr Boyle said that he talked his Minister through what had been done in terms of process, Ms Tolley's recollection on the point was limited to being told that it had come to light Mr Peters was wrongly claiming the NZS entitlement, that he had been contacted by the MSD, and that he had accepted he had been overpaid and had arranged to pay it back.

[210] Mr Boyle's contemporaneous notes of his briefing do not refer to the process, nor did his subsequent written briefing note. If, as Mr Boyle emphasised, the reason for the briefing was to assure the Minister about the integrity of the system, one might have expected that either the Minister would have recalled that or that Mr Boyle would have expressly recorded that. The Cabinet Manual suggests that the Minister should be made aware of why the issue is being raised and that the best practice is to confirm the briefing in writing.

[211] The written note of Mr Boyle's briefing of Minister Tolley recorded:

> **Review of Winston Peters New Zealand superannuation**
>
> **Purpose**
>
> In the interest of 'no surprises' this memo informs you that we have reviewed the rate of NZ superannuation paid to Mr Peters and as a result, there was an overpayment.
>
> **Review of circumstances**
>
> The Ministry received information about the relationship and living arrangements for Mr Peters. We met with Mr Peters and confirmed with him that the information we held was incorrect and we have now updated our information and reviewed the rate of NZ Superannuation that he receives.
>
> As a result of the review, we determined that there was an overpayment, and Mr Peters has repaid this amount in full.
>
> The Ministry now consider this matter to be closed and no further action is required.

[212] The written briefing made no reference to the fact the process adopted was consistent with the usual process followed in such cases which was the justification for the briefing, to assure the Minister of the integrity of the MSD's processes. Mr Boyle did suggest in evidence he recollected outlining how the issue had been dealt

with. It would have been a simple matter to record that the MSD followed its usual practice in conducting its inquiry into the overpayment. But it was not mentioned.

[213] Mr Hughes said that his recollection was that Ms Power gave Ms Bennett a brief outline of the issue, the overpayment and how it had been dealt with by the MSD. He also said he spoke briefly about what had been done to assure the Minister that the matter had been dealt with appropriately. Again however, Ms Bennett did not refer to that advice in her evidence-in-chief. In cross-examination she suggested that was the reason but did not say that was expressly stated during the briefing.

[214] The overpayment and subsequent inquiry were MSD operational matters. Mr Henry submitted that chief executives should not brief Ministers about operational matters, such as the MSD inquiry into this case.

[215] In Sir Maarten's opinion, a suggestion that Ministers have no responsibility for operational matters is incorrect. Ministers are accountable for such matters to the House. He referred to his own experience as chief executive of the Department of Prime Minister and Cabinet. In that role he had received briefings regarding a number of operational matters.

[216] Mr Peters himself acknowledged there were circumstances where a Minister was accountable to the House for certain operational matters.[57] He also accepted that issues about the integrity of the MSD's systems were important considerations and of appropriate concern to the Minister.

[217] The issue is, of course, the nature of the operational matter. At its heart, the briefings in this case were about an operational matter, namely an inquiry by the MSD into the basis or reason for an overpayment of NZS. Normally, an operational matter of that kind would not have justified a briefing to the Minister. It would not be sufficiently significant. The only issue which raised the important matter of principle namely the integrity of the MSD and the public service, was that it involved a senior Member of Parliament and it was important to confirm he or she had not been treated any differently.

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[57] NOE at p 23, line 31 and following.

[218] Another relevant consideration referred to in the Cabinet Manual is whether the issue might become controversial. On one view of it, Mr Peters' payment irregularity could only become controversial if it became a matter of public debate, which could, in turn, only arise if the matter was leaked or somehow made public.

[219] Mr Boyle suggested it was also appropriate for the Minister to be assured the mistake was not caused by the MSD so there was not an issue of a system failure or wider problem. But as noted, I consider that the MSD at least contributed to the error and in any event, that consideration of itself would not have required the disclosure of Mr Peters' name or personal information.

[220] It is important there be a measure of restraint over information provided by chief executives to Ministers on a 'no surprises' basis and that briefings be restricted to matters of genuine significance to the Minister's portfolio. Otherwise, virtually anything could be considered relevant or potentially controversial and, thus, justify a 'no surprises' briefing. Ministers may be under pressure, particularly from the media, but not even all matters of potential controversy within a department will necessarily justify a briefing on a 'no surprises' basis.

[221] In this case, the briefings involved an operational matter within the MSD which would only become controversial if details of the payee became public. Neither Minister could do anything with the information. They did not need to take further advice. Any public comment about it was to be made by the MSD. At its heart, it concerned private information about Mr Peters' payment irregularity.

[222] Ms Tolley's response, when she was asked publicly about the matter, was to refer the media to the Ministry as it was an operational matter. She declined to make any further public statement herself. That was an entirely appropriate response, but it could have been her response even without the detailed briefing in this case.

[223] It was put to both Mr Boyle and Mr Hughes that if a briefing was required, the briefing could have been done in an anonymous manner, by referring to a senior Member of Parliament without identifying Mr Peters. Mr Boyle suggested that the briefing on that basis would have been too 'vanilla'.

[224] Mr Hughes did not consider it practical to describe the issue without disclosing Mr Peters' identity. The fact that the person involved was the leader of a political party was a significant detail in his view. Mr Peters was the only party leader entitled to receive superannuation at the time.

[225] If the significance which justified the briefing was that the MSD had treated the investigation into the overpayment and then resolved the issue no differently to any other case, it is difficult to see how the fact it related to Mr Peters, as opposed to any other Member of Parliament, added anything to the reason for the briefing.

[226] Were it not for one issue, I would have found that, even if the briefings were required, it was unnecessary for the 'no surprises' briefings to have identified Mr Peters. Accepting there is a proper interest in confirming that a Member of Parliament would be treated no differently than other members of the public, the Ministers could have been briefed in a general term that a Member of Parliament had been overpaid NZS, that the MSD had investigated the matter in accordance with its usual processes and were satisfied there was no need to take the matter further. The overpayment had been repaid and the matter was at an end. That would have been sufficient to reassure the Ministers about the integrity of the MSD's process.

[227] The one factor which, on balance, I accept changed the position in the present case is the Ms Turei situation. Ms Turei was a co-leader of a political party and during the course of the MSD investigation into Mr Peters had publicly disclosed her fraud on the MSD.

[228] Ms Tolley understood she was briefed, at least in part, because of the recent controversy over Ms Turei. She said that she believed she was:

> being advised in a pro-active way so that I could be ready to respond as Minister responsible for MSD promptly and in an informed way if the matter became public. I believe the decision to brief me was, in part because of the recent controversy over Ms Turei.

[229] In those circumstances, I accept the disclosure of Mr Peters' identity became relevant given the timing of her disclosure, the public debate about it and Mr Peters' position as leader of another party in Parliament.

[230] There are two remaining issues raised by Mr Peters in relation to the briefing. To support his claim against the second and fifth defendants, Mr Peters relies on the proposition, referred to in his claim against the first and third defendants and repeated in evidence, that a chief executive should only brief a Minister when the chief executive might require the assistance of the Minister or Cabinet.

[231] Sir Maarten confirmed that, contrary to Mr Peters' suggestion, in his experience, whether it was appropriate to brief a Minister did not depend on the Department requiring the assistance of the Minister or of Cabinet. Sir Maarten had not heard of or applied the criteria Mr Peters referred to. I note they are not referred to in the Cabinet Manual. As Ms Casey submitted, the process Mr Peters suggested was not a convention. None of the other Crown witnesses were aware of its application. Neither of the Ministers at the time were familiar with it. I accept the defence evidence on that point.

[232] Mr Peters also suggested:

(a) briefings should only be given following a written report;

(b) the briefing should only have been given once repayment was showing in the MSD's financial records; and

(c) the constraints that apply as a convention in a pre-election situation were applicable.

[233] I do not consider those issues to be at all relevant to the issue of the briefings in this case. There was no need for Mr Boyle and Mr Hughes to wait for the repayment to show in the MSD's records or for any written report. The matter had been resolved with Mr Peters on the 26 July 2017 and he had agreed to repay the overpayment immediately. The matter was at an end from the MSD's point of view. The 'caretaker provisions' relating to the upcoming election had no relevance at all.[58] At most, Mr Peters suggested that they required an alertness to the propriety of events.

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[58] Cabinet Manual at [6.21].

[234] There was a suggestion in Mr Peters' evidence the use of the 'no surprises' disclosure in this present case was a sham. That was not put to Mr Hughes or Mr Boyle. The disclosures were made for proper purposes.

[235] Mr Peters also submitted the briefing ought not to have been given because the overpayment was solely the result of a MSD error. As noted, for the reasons above, I consider both the MSD and Mr Peters contributed to the mistake in this case. As Ms Casey submitted, even in those circumstances, that does not change the understandings of the chief executives at the time they briefed their Ministers. They understood the overpayment was not as a result of the MSD error.

[236] In summary, for the above reasons and in the particular circumstances of this case, Mr Peter's general allegations against the fourth defendant sued on behalf of the MSD cannot succeed as the plaintiff cannot rely on the doctrine of res ipsa loquitur to overcome his inability to prove that the source of the leak was a MSD member. I also accept that the second and fifth defendants were justified in disclosing the payment irregularity and Mr Peters' identity to the Ministers when they briefed them on the 'no surprises' basis. In the particular circumstances of this case, the Ministers had a proper interest in knowing Mr Peters had been overpaid NZS, that the MSD had investigated it and that he had been treated the same as any other person would be in the circumstances. The plaintiff's claim under the first cause of action against the Crown defendants fails.

Second cause of action

[237] The second cause of action against the MSD and Mr Boyle pleads that they breached a duty to keep the payment irregularity private by disclosing the payment to Ms Bennett, Mr Hughes, Ms Tolley and Mr McLay.

[238] Mr Peters effectively restates his general pleading under the first cause of action. He pleads that the disclosure would be considered to be highly offensive because:

(a) the personal information held by the MSD is held under the expectation of strict confidentiality;

(b) personal information was capable of being misused in the public domain to discredit the plaintiff in a general election campaign;

(c) disclosure was for no purpose but salacious gossip in respect of the plaintiff; and

(d) disclosure had no purpose but to disclose the payment irregularity to a political opponent.

[239] Mr Peters then goes on to plead that it was foreseeable by the MSD and Mr Boyle that disclosure would increase the likelihood of the information being leaked to the media. The allegations in relation to res ipsa loquitur at [18] of the statement of claim are then repeated.

[240] I have accepted that the information about the payment irregularity had the necessary degree of privacy to support a reasonable expectation that private facts about Mr Peter's payment irregularity would be kept confidential and only disclosed to parties who had a proper interest in knowing about them. But disclosure for proper purposes or to persons with a genuine need to know within the MSD itself is not objectionable.

[241] The principal response of the Crown defendants to Mr Peters' claim is that the disclosures were justified in order to maintain confidence in the public sector. I have previously referred to the McLay matter in the discussion of Ms Raine's evidence.

[242] The information held within the MSD about the payment irregularity was appropriately disclosed to Mr Boyle and by him to the SSC. Both had a genuine and proper interest in knowing about it.

[243] I accept the argument for the second and fourth defendants that there was a proper public interest in the communication from Mr Boyle to Mr Hughes to ensure that Mr Hughes, in performance of his statutory functions and as Mr Boyle's employer, could advise Mr Boyle on the conduct of the proposed investigation in a manner that

maintained high standards of integrity and conduct in and maintained public confidence in the state services. Mr Henry conceded that in his opening.

[244] The allegation that the further disclosure to the Ministers was for the purposes of salacious gossip is unsubstantiated. Mr Peters' evidence about it was limited, suggesting:

> The convention does not enable the wholesale passage of trivia, gossip etc.

The defendants were not cross-examined on it. The allegation should not have been made.

[245] The allegation that the disclosure had no purpose but to disclose the payment irregularity to a political opponent is also not made out. The evidence is clear the disclosure within the MSD and to Mr Boyle, and by Mr Boyle to Mr Hughes, and then to the Ministers was not for that purpose. Further, there is the point Sir Maarten made that it would be quite improper for a chief executive to attempt to filter information to a minister out of a concern how the minister might use it.

[246] While the information was capable of being misused in the public domain that required deliberate disclosure to the media for that purpose. There is no evidence of deliberate disclosure by the MSD or by Mr Boyle.

[247] For the reasons given above, the plaintiff is unable to rely on res ipsa loquitur.

Third cause of action

[248] The third cause of action is a pleading directed at Mr Hughes in similar terms. The plaintiff pleads that Mr Hughes breached the duty to keep details of the payment irregularity private when he disclosed it to Ms Bennett. He then pleads that any disclosure as particularised in [13] of the amended statement of claim would be considered by a reasonable objective person to be highly offensive.

[249] Mr Peters then repeats the pleading, noted above at [238], in relation to the second defendant and pleads that it was foreseeable to Mr Hughes that disclosure of the payment irregularity would increase the likelihood of the information being leaked

to the media as pleaded in [13] of the statement of claim. The plaintiff again relies on res ipsa loquitur.

[250] For the reasons given above, the disclosure by Mr Hughes to his Minister was for a proper purpose and to a party who had a genuine interest in receiving it. It cannot be said the disclosure was highly offensive as it was a communication made in confidence to a Minister to whom Mr Hughes was responsible to, and the content was factual and objective.

[251] There is a further and final pleading point against the second and fifth defendants. The pleading does not allege any damage arising from the briefings to the Ministers by Mr Hughes and Mr Boyle. Rather, the damage is said to have arisen from the public disclosure of his information. But there is no suggestion that Mr Hughes or Mr Boyle disclosed the payment irregularity to the media.

[252] The plaintiff's claim against the second, fourth and fifth defendants cannot succeed.

The Crown defendants' positive defences

[253] In addition to denying the plaintiff's claim, the Crown defendants pleaded a number of positive defences. Most have already been considered in the context of discussing Mr Peters' claim.

Section 86 of the State Sector Act 1988

[254] For completeness, I deal briefly with the issue of s 86 of the State Sector Act. Mr Hughes and Mr Boyle plead as affirmative defences the statutory immunity in s 86 of the State Sector Act:

> (1) Public Service chief executives and employees are immune from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers.

[255] Mr Henry's response is that s 86 does not provide an immunity from primary tortious liability in their capacity of holding an office of the Crown. Citing *Couch v*

Attorney-General, he submits s 86 removes personal liability of the chief executive or employee on a secondary basis.[59]

[256] The section considered by the Supreme Court in *Couch* was:[60]

> **86 Protection from liability** — No chief executive, or … employee, shall be personally liable for any liability of the Department, or for any act done or omitted by the Department or by the chief executive or any … employee of the Department or of the chief executive in good faith in pursuance or intended pursuance of the functions or powers of the Department or of the chief executive.

The reasoning of the majority in *Couch* was that s 86 was intended to immunise chief executives and employees from indemnity being sought by the Department on account of good faith acts or omissions, but it did not give immunity from a plaintiff.[61]

[257] Following that decision, the State Sector Amendment Act 2013 replaced s 86 with the present section.

[258] The purpose of the amendment was to ensure that chief executives and employees could not be sued by members of the public for acts or omissions in the course of carrying out their duties, provided they acted in good faith. The public can still sue the Crown.

[259] The pleadings in relation to the bad faith are in the first cause of action:

> 14.4 The disclosure of the "payment irregularity" … was for no purpose but salacious gossip in respect of the Plaintiff in the days before voting commenced in the general election.
>
> 14.5 That when the disclosure was made it had no purpose but disclose the "payment irregularity" to a political opponent.

And:

> 18.27 The disclosure of the "payment irregularity" to the First [and Third Defendants] had no purpose other than to pass on salacious gossip which could be used to the detriment of the Plaintiff in the forthcoming General Election in particular by leaking information to the media.

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59 *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [174].
60 At [172].
61 At [174].

[260] As noted there was no probative evidence led to support that pleading. The proposition was not put to Mr Hughes or to Mr Boyle. The allegations of bad faith should not have been made. The plaintiff presented no evidence of any substance to support those claims or other comments that he had publicly made.

[261] The plaintiff does not claim, and the evidence does not support (putting aside res ipsa loquitur for the moment), vicarious liability on the part of the MSD for any staff member other than Mr Boyle.

[262] In the present case, there is no question but that the disclosure to the Ministers was made in good faith. The most relevant case in a privacy context is the case of *Ilich v Accident Rehabilitation and Compensation Insurance Corporation*.[62] In that case, Tompkins J held it would be necessary for a party claiming an absence of good faith to establish the information had been made available "dishonestly or with an ulterior motive".[63] Referring to *X v Attorney-General*, Tompkins J stated that:[64]

> … information is made available in good faith if it is made available honestly and with no ulterior motive, even though it may be made available negligently.

[263] Rather than bad faith, the evidence of Mr Boyle and Mr Hughes demonstrates their good faith. If necessary, Mr Boyle and Mr Hughes could rely on the statutory immunity in s 86.

Public concern defence

[264] The majority in *Hosking v Runting* accepted that there could be a defence justifying publication by a legitimate public concern in the information.[65] That depends on the nature of the information.

[265] A good example of the application of the defence is in *Henderson v Walker*. Thomas J held the defence was made out, in relation to the disclosure to the Police and the Official Assignee, that Mr Henderson might have breached conditions of his

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62 *Ilich v Accident Rehabilitation and Compensation Insurance Corporation* [2000] 1 NZLR 380 (HC).
63 At 383.
64 At 383, citing *X v Attorney-General* [1994] NZFLR 433 at 435.
65 *Hosking v Runting*, above n 8.

bankruptcy.[66] In that case, the Police and the Official Assignee had an official and proper interest in receiving information of that kind and the distributions were limited only to the information relevant to their respective official interests.

[266] The disclosure to the Ministers in the present case was of that nature. It was made for a proper purpose to parties who had a genuine interest in receiving it.

[267] As Ms Casey submitted, it was difficult to envisage a clearer example of legitimate concern than the briefing of Ministers with portfolio responsibilities for the matter to which the information related. The issue was whether it was necessary for the disclosure to be made under the 'no surprises' policy, which has been discussed above.

Damages

[268] Although Mr Peters' claim fails, I briefly refer to the issue of damages. In *Hosking v Runting*, the Court of Appeal discussed the approach to damages for a breach of privacy:[67]

> [138] To the extent that a remedy in damages is awarded arising from publicity given to private information it may be seen as constituting a remedy for damage to reputation which hitherto has been the almost exclusive realm of defamation. But the true focus is on hurt and distress rather than standing in the eyes of others. The objectionable disclosure may be entirely factually accurate.

[269] It is appropriate that the level of damages reflects non-pecuniary harm and a consistent approach be taken, insofar as possible. In *Taunoa v Attorney-General*, the Supreme Court discussed the assessment of damages necessary to vindicate breach of rights under the New Zealand Bill of Rights Act 1990 and also to provide compensation.[68] In that case, the Court awarded a range of damages from $35,000 to a person who spent 32 months on an unlawful behaviour modification regime down to $2,000 to a person who spent six and a half weeks on the regime.

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66 *Henderson v Walker*, above n 22, at [195].
67 *Hosking v Runting*, above n 8.
68 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429. See also the helpful review of New Zealand cases in *Henderson v Walker*, above n 22.

[270] Relevant consideration from overseas cases are *Mosley v News Group Newspapers Ltd*.[69] Mr Mosely was awarded £60,000 for breach of confidence (not privacy) involving a publication of two articles in the News of the World, concerning his participation in a sadomasochistic orgy. The articles included photographs and video footage obtained through surreptitious recording by one of the other participants. The articles inaccurately alleged the orgy involved an enactment of Nazi behaviour and mocked victims of the Holocaust.

[271] In *Gulati v MGN Ltd*, the Court of Appeal of England and Wales, upheld awards of between £72,500 and £260,250 for misuse of private information following the hacking of phones of several famous individuals by newspapers.[70] The information included that an actor intended to leave a long running television series; one of the individuals had taken legal advice on a possible divorce; one was having an affair; and the location of another's wedding venue which they had wanted kept secret. The scale of damages was justified by the length, degree and frequency of the hacking as well as the extent of the publication of the articles which followed. The Court of Appeal upheld the trial Judge's decision to award a component of damages for the invasion of privacy itself in addition to the damages for distress caused, explaining:[71]

> … Damages in consequence of a breach of a person's private rights are not the same as vindicatory damages to indicate some constitutional right. In the present context, the damages are an award to compensate for the loss or diminution of a right to control formerly private information and for the distress that the respondents could justifiably had felt because their private information had been exploited, and are assessed by reference to that loss.

[272] As the Court of Appeal emphasised, the focus is on the hurt and distress caused to the plaintiff.

[273] The defendants point to the fact Mr Peters initially publicised the matter himself and also refer to Mr Soper's cross-examination in which he accepted that when asked in a television interview "How serious is this?" Mr Soper had answered "Oh, not serious at all". For the reasons given above, I consider Mr Peter's hand was forced

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69 *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).
70 *Gulati v MGN Ltd* [2015] EWCA Civ 1291, [2017] QB 149.
71 At [48].

in the circumstances and his press release was an appropriate attempt to mitigate the potential harm that he faced from an uncontrolled release of the information.

[274] Mr Soper explained his answer on the basis that he was not saying it was not serious. Politically it was very serious, but what he was saying is that the oversight in payment was not that serious as the money had been repaid. Later in the same interview when asked "Where to from now, how politically damaging could this be?" Mr Soper answered "I don't think politically damaging at all". Again, Mr Soper sought to qualify that answer by noting that that statement had been made the day after Mr Peters' statement and the firestorm had not actually begun at that stage.

[275] Mr Peter's private information about the payment irregularity should not have been disclosed to the media. The deliberate disclosure of that private information to the media sources caused Mr Peters harm and distress, but ultimately it was mitigated by the actions he took. In the circumstances, if Mr Peters could have identified who disclosed his private information to the media then damages in the region of $75,000 to $100,000 in total might have been appropriate. This was a deliberate breach of his privacy with the intention of publicly embarrassing him and causing him harm.

Summary/result

[276] Mr Peters had a reasonable expectation that the details of the payment irregularity would be kept private and not disclosed to parties who did not have a genuine need to know about it or a proper interest in knowing about it. In particular, he had a reasonable expectation that the details of the payment irregularity would not be disclosed to the media.

[277] The deliberate disclosure of the details of the payment irregularity to the media would be regarded as highly offensive to an objective reasonable person.

[278] Mr Peter's claim against all defendants fails as he is not able to establish that they were responsible for the disclosure of the payment irregularity to the media. He has conceded that neither Ms Bennett nor Ms Tolley were directly responsible for the disclosure to the media. Further, with the exception of the very general, unguarded

comment by Ms Tolley to her sister, the disclosures by the first and third defendants were for a proper purpose or otherwise to persons with a genuine interest in knowing.

[279] The disclosure by the fifth defendant to the SSC and by both the second and fifth defendants to their Ministers were, in the particular circumstances of this case, for a proper purpose and the Ministers had a genuine interest in knowing the details of the payment irregularity.

[280] The plaintiff is unable to rely on the doctrine of res ipsa loquitur in this case to make out a claim against any of the defendants, including the fourth defendant.

[281] The plaintiff's claims for damages and declarations are dismissed.

Costs

[282] Costs are reserved. If counsel are unable to agree, costs will be dealt with on the papers. The defendants are to file memoranda by 22 May 2020, plaintiff to respond by 12 June 2020 and any reply to be by 19 June 2020.

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Venning J