IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-002638
[2012] NZHC 934

UNDER	the Defamation Act 1992, s 3(2) of the Crown Proceedings Act 1950 and s 16 of the Judicature Act 1908
BETWEEN	LYSETTE LILLIAN DU CLAIRE Plaintiff
AND	MATTHEW SIMON RUSSELL PALMER First Defendant
AND	CROWN LAW OFFICE Second Defendant

Hearing:	20-23 February 2012 and written submissions exchanged by 19 March 2012
Counsel:	Plaintiff in person M McClelland and U Jagose for Defendants
Judgment:	7 May 2012

JUDGMENT OF ASHER J

This judgment was delivered by me on Monday, 7 May 2012 at 4.30pm pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] In 2009 the plaintiff Lysette du Claire was employed as a solicitor in the Litigation Management Unit of the Inland Revenue Department. The first defendant, Matthew Palmer, was the Deputy Solicitor-General at the Crown Law Office. On three occasions between 13 May 2009 and 25 August 2009, Dr Palmer communicated to the Inland Revenue Department concerns that he had about Miss du Claire's actions as solicitor in an Inland Revenue Department proceeding in which Crown Law was involved. He was critical of her, and set out proposed steps that would be taken by Crown Law in dealing with her in future.

[2] Miss du Claire now sues Dr Palmer and the Crown Law Office claiming that Dr Palmer's communications were defamatory and that his actions constituted misfeasance in a public office.

Background

[3] The events that led to the communications that are the subject of this proceeding began in 2002, when the Serious Fraud Office ("the SFO") issued two mutual legal assistance requests to the Attorney-General for the Bailiwick of Jersey. The requests concerned documents that could help the SFO in an investigation and prosecution. The SFO, through its director in formal written requests for assistance, provided an undertaking to the Attorney-General for the Bailiwick not to use the documents for any use other than the matter the SFO was pursuing, and that after the SFO criminal investigation and any prosecution was completed, the documents would be returned. A confirmation was given that the purpose of the investigation for which the documents were sought was not the collection of tax.

First cause of action

[4] The SFO in due course received a number of documents from Jersey ("the Jersey documents"). It proceeded to use the documents in its prosecution which, for confidentiality reasons, will be called "the *R v D* proceedings".

[5] On 30 January 2004 in an unwitting breach of the undertakings the SFO disclosed the Jersey documents to the Inland Revenue Department ("the IRD"). The material was then used by the IRD in civil litigation relating to the tax affairs of a number of taxpayers. In all the material before me it is stated and not contested that the IRD received and used the documents in good faith and was not aware of the terms of the undertaking or confirmation.

[6] On 14 March 2008 the IRD was granted leave to search and copy documents in the court file of the *R v D* prosecution in which documents covered by the undertaking had been used. It wished to use the Jersey material in a tax proceeding which, for confidentiality reasons, will be called *X v C*. However, shortly after leave to search the file was granted, the IRD was informed by the SFO of the existence of the Jersey undertaking for the first time.

[7] Following the realisation that such an undertaking existed, the SFO and the IRD differed as to how the Jersey documents should be dealt with in relation to the *X v C* proceedings. The SFO considered that the IRD had received the documents on the same conditions as the SFO and should stop using the Jersey documents. The IRD on the other hand took the view that, given that the documents had already been used, the discovery obligation that now arose to disclose them, and the IRD's obligation to collect revenue, it was entitled and indeed obliged to continue using the Jersey documents in the tax proceedings.

[8] Mr Harry Ebersohn was the lead counsel at Crown Law, representing the Commissioner of Inland Revenue ("the Commissioner") in the *X v C* proceedings. Miss du Claire was working as an IRD solicitor on the case. Mr Ebersohn explained in his evidence that Crown Law relies heavily on the assistance of the IRD's Litigation Management Unit ("LMU") solicitors in discovery. He dealt extensively with Miss du Claire in relation to the proceeding and to the issue of discovery. Miss du Claire was strongly of the view that the documents should be used by the IRD and discovered without claiming privilege, as the horse had well and truly bolted. She took the view that the IRD was the client and had the ultimate say in what should happen in the proceedings. She saw the Crown Law Office as being in the position of a private law firm that is duty bound to follow a client's instructions.

[9] Miss du Claire had initially taken the view that Mr Ebersohn should not express an opinion on the discoverability of the Jersey documents. Mr Ebersohn indicated in his evidence that he found it difficult to deal with Miss du Claire on the issue as she had a very fixed view and disliked the idea of Crown Law dictating to her.

[10] Mr Ebersohn formed the view that the IRD's prospects of success in the *X v C* proceedings were strong, irrespective of whether the Jersey documents were used. The SFO maintained its strong view that the Jersey documents should not be used. In the end, to resolve the impasse, on 5 December 2008 the IRD and the SFO agreed jointly to seek formal advice from the Crown Law Office as to how the Jersey documents should be treated. The request for advice made it clear that the advice would be relevant to litigation against a taxpayer (in the *X v C* proceedings).

[11] The draft advice in response of Crown Law was initially prepared by the team leader of the tax and commercial team at Crown Law, with assistance from an associate Crown counsel. A first draft was prepared on 24 December 2008. It was provided to Dr Palmer for review, as he was to sign the advice.

[12] Dr Palmer considered and worked on the draft advice on 24 December 2008 and on 12 January 2009. On 13 January 2009 he sent a copy of a draft letter of advice to the Director of the SFO, Mr Grant Liddell, and the Director of the LMU, Ms Karen Whitiskie. A copy was also sent to Ms Carolyn Tremain, the Deputy Commissioner at the IRD.

[13] The draft advice was detailed. It stated in essence that the undertaking applied and the documents were "protected" and should not be used by the IRD in proceedings. Steps should be taken to seal the SFO prosecution file *R v D*, rescind the order allowing the IRD access to the court file, and return the documents to the SFO. Once that had happened, the position should be reported to the Jersey authority.

[14] Provision of the advice in draft was to allow for comments and feedback, in accordance with Crown Law practice. Dr Palmer requested a quick response as

discovery was due in the *X v C* proceedings on 30 January 2009. It would be necessary to categorise the Jersey documents as either privileged or non-privileged in the list of documents. Although this was not explicitly stated in the first draft, the consequence of Dr Palmer's advice, if accepted, was that the Jersey documents would be listed as privileged.

[15] The discovery deadline was then extended to 16 March 2009. On 23 February 2009 the IRD provided a detailed 11-page response to the Crown Law draft. This response dated 22 January 2009 was prepared and signed by Miss du Claire and another solicitor at the IRD. It set out in detail an argument that there was no proper basis not to use the documents in proceedings. In the conclusion it was observed that the fundamental premise of the draft opinion was flawed. Miss du Claire and her co-author did not consider that there was any "proper basis to conceal these documents".

[16] On 9 March 2009 two senior IRD officers, Ms Tremain and Mr Ross Vickery (the acting Director of the LMU), met with Dr Palmer and associate Crown counsel to discuss the first draft. Dr Palmer was under the impression that, as a consequence of that meeting, it was agreed that the Jersey documents would be treated as confidential and listed as privileged or subject to public interest immunity in the discovery list in the *X v C* proceeding, unless and until Crown Law's understanding of that position changed. However, on 11 March 2009, Mr Vickery sent an e-mail to Dr Palmer indicating that there was no agreement at that point about which documents would be disclosed or withheld in discovery. On the same day there was an exchange between Miss du Claire and Mr Ebersohn in which Mr Ebersohn indicated that privilege should be claimed for the Jersey documents.

[17] Dr Palmer considered the matter further with associate Crown counsel and the leader of the tax and commercial team. On Friday 13 March 2009 he sent an e-mail to Mr Vickery, copying Ms Tremain and other Crown Law staff, stating that Crown Law was revising its initial opinion and that the revised opinion would be provided on Monday 16 March 2009. It was stated that Crown Law had not changed its view as to how the documents would be categorised in the discovery list to be filed on 16 March 2009. Dr Palmer recorded that, given that Crown Law's view had

not changed, discovery in *X v C* would be managed in accordance with the Crown Law advice.

[18] It was for the IRD to prepare a draft list of documents. On 16 March 2009 a list of documents was sent in draft to Crown Law. It was finalised and sworn by the IRD and filed in the High Court on that day. The events surrounding the provision of the list of documents will be considered in detail later in this judgment. In accordance with the Crown Law advice, the Jersey documents were listed in Part 3 as "privileged". But there were also some documents that were not Jersey documents, and would not have been privileged for any other reason, listed in Part 3.

[19] On 16 March 2009 Dr Palmer sent his final advice to the IRD which, as he had indicated on 13 March 2009, had not changed in substance from the first draft. However, the advice was somewhat expanded, dealing with the points that had been made by the IRD and the issue of privilege. It recommended that privilege be claimed for the Jersey documents. It was received after the affidavit of documents was filed.

[20] On 30 April 2009 in accordance with the Crown Law opinion, the SFO filed a memorandum in the *R v D* proceeding advising the court and the parties of the Jersey undertaking, stating that steps were being taken to "prevent further use and disclosure". It was requested that the court file be sealed. In the meantime, little happened for several months on the *X v C* proceedings as the taxpayer prepared its list of documents.

[21] Then, by e-mail to Mr Ebersohn and Crown Law on 4 May 2009, Miss du Claire queried how the Jersey documents would be dealt with as a matter of practicality in relation to the plaintiff's discovery. This led to members of the legal team at Crown Law having a closer look at the list. It was at that point noted that there were documents listed in Part 3 that were not Jersey documents and not privileged.

[22] On 5 May 2009, Mr Ebersohn wrote to Miss du Claire pointing out that a number of the documents listed as privileged in Part 3 would not have been given to

the SFO by the Jersey authorities. He asked whether she was certain that the documents listed were provided under the Jersey undertaking or whether they should not have been listed in that part. Miss du Claire responded by an e-mail on the same day. These circumstances will be traversed in greater detail later in this judgment.

[23] On 6 May 2009 Mr Ebersohn wrote back to Miss du Claire recording that the inclusion of non-privileged documents in Part 3 had not been noted by Crown Law in the timeframe available, and that the list represented a "rather robotic attempt" to create a new list.

[24] Dr Palmer was alerted to there being a problem with discovery in the *X v C* proceeding and met with members of his legal team on 6 May 2009. He formed the view that Miss du Claire had listed publicly available documents that were expressed to be "confidential on the Solicitor-General's advice" in the privileged section in the list of documents. He considered that this was a deliberate action on Miss du Claire's part and that her actions were an attempt to undermine the Crown Law advice.

[25] A letter to the IRD raising concerns about Miss du Claire's conduct was drafted by members of his legal team. Dr Palmer reviewed it and made some changes. Further work was done within Crown Law. On Monday 11 May 2009, Dr Palmer asked for and received comments on the letter as redrafted by him. Dr Palmer rang Mr Vickery on 12 May 2009 to mention that the letter was coming and indicated what it contained. The letter setting out the concerns about Miss du Claire's actions was then sent on 13 May 2009.

[26] It is this letter that is the subject of the first defamation cause of action. The letter and the background leading to it will be discussed in more detail in due course. Amongst the statements in it was a statement that Dr Palmer considered that Miss du Claire had deliberately sought to undermine advice with which she did not agree. Dr Palmer stated that he no longer had sufficient trust and confidence that Miss du Claire would act in the best interests of the Crown in her interactions with the Crown Law Office. He stated his expectation that neither he nor any other counsel in the tax and commercial team would be required to work with her again.

Second cause of action

[27] On 12 May 2009 following the 30 April 2009 memorandum in the SFO's *R v D* proceedings orders had been made by Priestley J sealing the court file. The Judge had also ordered that the IRD destroy the privileged documents. This had not been sought and the order disconcerted Crown Law and the IRD. Mr Vickery at the IRD asked Miss du Claire to obtain a copy of the minute recording the order.

[28] On 14 May 2009 Miss du Claire wrote to the High Court Registry in relation to *R v D* without reference to or advice from Crown Law, asking whether the Court would issue a formal minute. She advised that the documents were being used in existing civil proceedings and in the proposed criminal prosecution, and made certain statements. The e-mail is considered later in this judgment. On 15 May 2009 Priestley J issued a minute ordering counsel for the IRD and the SFO to appear before him, noting that it was a serious issue if the SFO had breached its undertaking and the IRD was using the documents that the undertaking had been designed to protect. He required personal appearances rather than a telephone conference.

[29] The minute of Priestley J was brought to the attention of Dr Palmer on Monday 18 May 2009. Dr Palmer was concerned about the Judge's reaction, and Miss du Claire's conduct in sending the letter. He regarded the situation as serious and consulted with the Solicitor-General as to what should be done.

[30] On 18 May 2009 Dr Palmer wrote to Ms Tremain and another IRD solicitor, Mr Michael Cook, who was Miss du Claire's manager at the IRD at the time. Dr Palmer's letter set out the sequence of events leading up to Miss du Claire sending the e-mail to the Court in relation to *R v D* as he understood it, and asked for immediate advice as to whether the statements in his letter were correct. He set out a proposed course of action. There was then a discussion between Dr Palmer, Ms Tremain and Mr Cook. Dr Palmer sent a separate e-mail on the same day insisting that his expectation that he and counsel in the tax and commercial team would not be required to work with Miss du Claire again be implemented that afternoon.

[31] The first of these e-mails of 18 May 2009 is the subject of the second cause of action and defamation.

Third cause of action

[32] Following the receipt of Dr Palmer's complaints the IRD appointed Mr Cook to investigate Miss du Claire's actions. Mr Cook investigated the complaints over the next two months. On 6 August 2009 Mr Cook sent to Dr Palmer a summary of his conclusions following his investigation of what he saw as four specific claims against Miss du Claire. The report was mildly critical of certain of Miss du Claire's actions, but found that none of Dr Palmer's allegations had been substantiated. Mr Cook concluded that, in relation to the unfounded claim of privilege in the *X v C* proceeding, Miss du Claire did not act deliberately in inaccurately recording the view of the Solicitor-General, or try to embarrass him or his office.

[33] In a letter of response of 25 August 2009 Dr Palmer stated that he continued to hold significant concerns about Miss du Claire's actions. However, he was willing to facilitate an opportunity for Miss du Claire to demonstrate that she was willing to work co-operatively and constructively with the Crown and its best interests. Dr Palmer indicated that if agreement could be reached on certain issues, he would be prepared to agree to Miss du Claire working directly with Crown counsel on specified cases on a trial basis. He proposed other conditions and concluded by stating that he was willing to discuss matters further and to agree on a constructive set of arrangements in the collective interests of Miss du Claire, the IRD and the Crown. This letter is the basis for the third cause of action.

Subsequent events

[34] The IRD, in a letter to Miss du Claire on 15 September 2009, set out certain requirements for Miss du Claire to improve and develop her relationship with Crown Law. In a letter dated 16 September 2009 to Mr Bill Acton, the Litigation Manager of the LMU, Miss du Claire agreed to those requirements, and noted various work arrangements that were to be made. However, by a letter of the same date she wrote to Mr Acton referring to Dr Palmer's "unreasonable demands" and addressing other

employment issues. There were then further exchanges between Miss du Claire and her superiors at the IRD concerning her employment.

[35] On 28 September 2009 Ms Whitiskie wrote to Miss du Claire noting an ongoing unwillingness to accept and take responsibility for identified performance issues. A number of critical comments were made and Miss du Claire was effectively given a warning. A further letter was sent by Ms Whitiskie on 28 October 2009 indicating serious concerns about Miss du Claire's performance in her job. A further letter was sent referring to the "rapid deterioration" of the employment relationship on 4 November 2009.

[36] On 13 November 2009 a letter was sent by Ms Whitiskie to Miss du Claire's lawyers advising that the IRD was terminating Miss du Claire's employment relationship on the grounds of incompatibility and irreparable loss of trust and confidence. There followed employment proceedings, which were settled. In due course Miss du Claire issued these proceedings against Dr Palmer and the Solicitor-General.

Approach to the issues

[37] Miss du Claire and the defendants have each filed submissions in excess of 100 pages. Miss du Claire appeared for herself. Mr McClelland and Ms Jagose appeared for both defendants. Many issues were raised. This judgment will focus on the pleaded causes of action and defences and those parts of the evidence and submissions that are relevant to them.

[38] Given that Dr Palmer's e-mails and actions were driven by his reaction to Miss du Claire's role in preparing the affidavit of documents, the events surrounding the preparation of that affidavit and Miss du Claire's role require particular attention.

First cause of action: the 13 May 2009 letter

[39] This first letter of complaint about Miss du Claire was sent by Crown Law and signed by Dr Palmer. It was addressed to Ms Tremain. It is necessary to set out the full letter:

> Dear Carolyn
>
> Implementation of advice on disclosure and use of information
> Our Ref: IRD035/2601
>
> 1. The purpose of this letter is to raise with you concerns that I have over actions of Inland Revenue ("IR") subsequent to my advice dated 16 March 2009 (given jointly to IR and the Serious Fraud Office) in relation to the above matter.
>
> 2. As detailed in the attached annex IR officials prepared and swore, on behalf of the Commissioner of Inland Revenue, an affidavit for filing in court that fails properly to implement my advice, could be seen to undermine that advice, and appears to have been designed to embarrass the Solicitor-General.
>
> 3. I consider that this is a serious matter. A new (replacement) affidavit will need to be prepared, at some cost to IR, and an explanation provided to opposing counsel. This will be managed by this Office with IR assistance where appropriate.
>
> 4. I do not believe this problem reflects the intentions of IR. Rather, it appears to be the result of the attitudes and actions of one IR official, Ms Lysette du Claire. It is unfortunate that her actions have caused unnecessary embarrassment to the Solicitor-General and unnecessary cost to IR. I consider that Ms du Claire has deliberately sought to undermine advice with which she did not agree. In so doing she has caused a formal court document, sworn (on oath) on behalf of the Commissioner and for which Crown Counsel are responsible, inaccurately to record the view of the Solicitor-General in such a way as to cause embarrassment to him and this Office.
>
> 5. I am aware that one Deputy Solicitor-General has already indicated that she is no longer prepared to work with Ms du Claire. Similarly, I no longer have sufficient trust and confidence that Ms du Claire will act in the best interests of the Crown in her interactions with this Office. I therefore record my expectation that neither I nor any counsel in the Tax and Commercial team will be required to work with her again.
>
> 6. You may wish to take my views of Ms du Claire's actions into account in any performance management process that may eventuate. If, contrary to my understanding, it transpires that her actions have been authorised at a higher level within IR, I would appreciate the opportunity to discuss this matter further.
>
> Yours sincerely

Dr Matthew S R Palmer
Deputy Solicitor-General (Public Law)

There is an appendix attached to the letter which mainly sets out the facts in detail. That appendix is attached as Annexure 1 to this judgment.

[40] The pleading focuses on the letter. Miss du Claire asserts that the following statements in particular were defamatory and untrue:

> 46.1 Paragraph 2 of the letter of 13 May 2009, including the "attached annex";
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> 46.2 Paragraph 4 of the letter of 13 May 2009 and in particular the words "I consider that Ms du Claire has deliberately sought to undermine advice with which she did not agree. In doing so she has caused a formal court document, sworn (on oath) on behalf of the Commissioner and for which Crown Counsel are responsible, inaccurately to record the view of the Solicitor-General in such a way as to cause embarrassment to him and this Office."; and
>
> 46.3 Paragraph 5 of the letter of 13 May 2009 and in particular the words "I no longer have trust and sufficient trust and confidence that Ms du Claire will act in the best interests of the Crown in her interactions with this Office."

[41] In her amended notice of particulars of defamatory meanings of 11 July 2011, Miss du Claire pleaded a number of defamatory meanings in relation to the letter and appendix.

[42] In a defamation claim the plaintiff must prove that the statements complained of have been published to someone other than the plaintiff or the defendant, identify the plaintiff, and are defamatory. If these three elements are proven the onus shifts to the defendant to raise any affirmative defence of honest opinion[1] or qualified privilege.[2]

[43] Unfortunately the plaintiff's pleadings, including the amended notice of particulars of defamatory meanings dated 11 July 2011, state assertions baldly without explanation and confuse the identifying of defamatory material with the identifying of those parts of the challenged communications which are alleged to be

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1 Defamation Act 1992, s 10.
2 *Brooks v Muldoon* [1973] 1 NZLR 1 (SC) at 7.

factually incorrect. Indeed, the particulars of defamatory meaning are, in fact, more a submission on the facts.

[44] I accept the submission on the part of the defendants in their opening that the defamatory meanings the plaintiff alleges can be summarised as follows:

> 17.1 The allegedly defamatory statements identified (paragraph 46, amended statement of claim) "attribute base motives" to the plaintiff: paragraph 48a, amended statement of claim;
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> 17.2 That the plaintiff committed the criminal offence of procuring perjury: paragraph 48c, amended statement of claim, and paragraph 4.19, amended notice of defamatory meanings;
>
> 17.3 That the plaintiff acted unethically: paragraph 48d, amended statement of claim;
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> 17.4 That the plaintiff, a Crown servant, acted contrary to the Crown's interests, contrary to her obligations: paragraph 48e, amended statement of claim;
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> 17.5 That the plaintiff concealed relevant information from Crown Law: paragraph 4.10, amended notice of defamatory meanings;
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> 17.6 That the plaintiff knowingly improperly applied and implemented the advice: paragraph 4.11, 4.12, 4.15 and 4.16 amended notice of defamatory meanings;
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> 17.7 That the plaintiff intentionally limited the time available to Crown Law to review the affidavit to be filed by [the IRD] in the [*X v R*] proceeding: paragraph 4.13, amended notice of defamatory meanings.
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> 17.8 That the plaintiff, with improper motive, did not follow Dr Palmer's advice;
>
> 17.9 That the plaintiff was responsible for "everything that occurred" and "was up to malice or mischief": paragraph 4.20, amended notice of defamatory meanings.

[45] I did not receive from Miss du Claire a submission as to her view of this summary of actual defamatory meanings, or any analysis of the meanings in submissions. The defendants accept that the communications are capable of bearing a defamatory meaning. Some of Miss du Claire's alleged defamatory meanings were impossible to relate to the words used by Dr Palmer. The test to be applied when assessing the meaning of words and their ordinary natural meaning is objective.

Under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?[3]

[46] The defendants have not contested that the letter was about Miss du Claire and was published. Instead, they have focussed their submissions on two affirmative defences that are raised.

[47] These two affirmative defences are honest opinion and privilege. It is necessary to consider these affirmative defences.

Honest opinion

[48] The defence previously known as fair comment on a matter of public interest is now called the defence of honest opinion under s 9 of the Defamation Act 1992. Section 10(1) of the Defamation Act provides that a defence of honest opinion will fail unless the words are a genuine expression of opinion. The defendant must show that the defamatory words were an expression of opinion, not an imputation of fact.[4] The onus is on the defendant to show that any defamatory meaning was conveyed by the writer or speaker as a comment or opinion and not fact.[5] The opinion must be based on facts that are true or not materially different to the truth, and there must be some indication of the facts on which the comment is made.[6]

Are the statements of opinion and not fact?

[49] It is the overall presentation of the words that is crucial in determining whether or not a statement is an expression of opinion. As was observed by the Court of Appeal in *Mitchell v Sprott*:[7]

> … Sometimes it is not easy to distinguish fact from comment on fact. If that cannot be done, the words are not protected by the honest opinion defence. Sometimes words may in isolation appear to be stating a fact, but when read in context are properly understood to be drawing a conclusion from facts which have also been stated or indicated by the author or which would have

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3 *New Zealand Magazines Ltd v Hadley (No 2)* [2005] NZAR 621 (CA).
4 *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at [17].
5 Ibid; *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [92].
6 *Mitchell v Sprott*, above n 4, at [22]–[23]; *Kemsley v Foot* [1952] AC 345 (HL) at 357–358.
7 At [17].

> been known to the person to whom the words were addressed. They can then be seen to be in the nature of a comment or expression of opinion based on those facts. The person who hears or reads the words can recognise them as an opinion which he or she can evaluate on the basis of the stated or known facts.

[50] Dr Palmer's letter of 13 May 2009 begins by stating that its purpose was to raise "concerns that I have" over IRD's actions subsequent to the 16 March 2009 advice. This immediately sets the scene for what could be expected to be an expression of the writer's view, rather than a statement of fact.

[51] The language in the letter that follows is all consistent with the letter as a whole being an expression of opinion. It is juxtaposed to the appendix where the facts are set out. The introductory complaint at paragraph 2 states that the filing of the affidavit of documents in *X v C* "could be seen" as undermining the advice. Dr Palmer does "not believe" this reflected the intentions of the IRD, and Miss du Claire is identified as being the person whose actions are in question. Dr Palmer used the words "I consider" to qualify his statement that Miss du Claire deliberately sought to undermine advice with which she did not agree and, in doing so, caused embarrassment to the Solicitor-General. He states that "I am aware" that another Deputy Solicitor-General had indicated she was not prepared to work with Miss du Claire and that "similarly" he no longer had sufficient trust and confidence in her. He refers to his "expectation" that she will not work with him or his team, and concludes by stating that the IRD might "wish to take my views" of her actions into account. He adds that if it turned out that her actions had been authorised at a higher level, he would appreciate the opportunity to discuss the matter further. The use of personal pronouns, and the verbs and nouns which express a personal position, are all the language of opinion. His conclusion is effectively stated to be open to correction.

[52] The appendix deals largely with matters of fact, although on occasions there are expressions of opinion. It is stated[8] that Crown Law does not accept the accuracy of Miss du Claire's statements of response and that her views are "simply not tenable". The appendix at the end reiterates the view that Miss du Claire had deliberately sought to undermine advice with which she did not agree and caused an

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[8] At [17].

inaccurate affidavit of documents to be filed in a way to cause embarrassment to the Solicitor-General and his office. Other phrases such as "however it has become apparent",[9] "it is arguable"[10] and "it is now apparent"[11] all indicate opinion, and reflect the opinions in the letter itself.

[53] I am entirely satisfied on any overview that the pleaded defamatory statements are statements of opinion.

Are the statements based on facts that are true or not materially different from the truth?

[54] If the words complained of are found to be an opinion, the defendant must next be able to point to the existence of facts upon which the opinion is based, and those facts must be proven to be true or not materially different from the truth.[12] The defendant does not need to prove the truth of all the facts which are asserted in support of the opinion.[13]

[55] Much of the background factual material that led to the expressions of opinion in the letter of 13 May 2009 is set out in the appendix. Dr Palmer consulted with Mr Ebersohn in relation to the preparation of that appendix. Mr Ebersohn gave evidence and was cross-examined by Miss du Claire. I found him to be a careful and convincing witness. He was moderate and fair in his assessment of her actions.

[56] The core issue is whether Dr Palmer had a proper factual basis for the opinion he reached and expressed: that Miss du Claire was deliberately seeking to undermine Crown Law's position as to discovery in the way she drafted the affidavit of documents. In order to assess this issue it is necessary to traverse the detail of the preparation of the affidavit.

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9 At [12].
10 At [13].
11 At [14].
12 *Mitchell v Sprott*, above n 4, at [22].
13 Defamation Act 1992, s 11; see also *Mitchell v Sprott*, above n 4, at [22]; *Kemsley v Foot*, above n 6, at 358.

[57] Mr Ebersohn, as the lead Crown Law practitioner dealing with Miss du Claire through 2008, had experienced difficulties in dealing with her in relation to the discoverability of the Jersey documents. She had expressed clear views to him that the "horse had bolted" and that the documents should be used by the IRD despite the undertaking. She had not wanted a Crown Law opinion on the topic. He considered that Miss du Claire's approach was that decisions should be made by the IRD as the client and not Crown Law. She saw the IRD as separate from the rest of the Crown. He thought there was an emotive element in her view. He personally managed his relationship with Miss du Claire and avoided confrontation by saying to her that it was up to the Commissioner and Solicitor-General to resolve the issue of the use of the Jersey documents.

[58] Dr Palmer's draft advice of 13 January 2009 was that the IRD should no longer use the Jersey documents and that the SFO should recover and return those documents to Jersey. Miss du Claire, in conjunction with another solicitor at the LMU, prepared the response dated 22 January 2009. This response was sent to her superiors at the IRD and in due course forwarded to Dr Palmer. That document was over 11 pages long and contained a full analysis of the legal position. Its tone was to express a strong disagreement with Dr Palmer's advice. It concluded by stating that the points made raised "... doubt as to whether the Crown Law draft memo ought to be issued in final form" and that "... the fundamental premise of the draft opinion, that the information is secret under the SFO Act and such that s 41 applies, is actually flawed". It observes that the authors would be happy to meet with Crown Law to discuss the issue further, but that as matters stood they did not consider that "we have any proper basis to conceal these documents in the discovery list". The use of the word "conceal" by Miss du Claire was not justified. The IRD had previously disclosed the documents to the parties, and their existence would still be disclosed, but as privileged documents.

[59] So Dr Palmer's consideration of Miss du Claire's actions in relation to the preparation and finalisation of the affidavit of documents must be seen against this background of her having already expressed extreme opposition to the IRD ceasing to use the Jersey documents, and Mr Ebersohn's difficulty in dealing with her on the topic.

The background to the affidavit of documents

[60] It followed from Dr Palmer's draft advice that the Jersey documents were privileged, and that the Jersey documents should be listed in the privileged section of the discovery affidavit of documents at Part 3.

[61] Miss du Claire in her evidence did not contest that it was the import of Dr Palmer's draft advice that the Jersey documents were privileged, and that she strongly disagreed with it. However, she had on Friday 13 March 2009, the working day before the affidavit had to be finalised, been asking for Dr Palmer's final advice. It was her position at the trial that it was open to interpret Dr Palmer's draft advice, and indeed his final advice, as warranting the placement in Part 3 of all the documents that ultimately were placed in that part.

[62] On 11 March 2009 Miss du Claire had sent a sample format of the affidavit of documents to Mr Ebersohn for his consideration.

[63] Mr Ebersohn responded to Miss du Claire on that day saying that he was happy with the format. He stated that he had spoken to Dr Palmer who confirmed his understanding that agreement had been reached between Crown Law and the IRD. Crown Law was to update its advice, but it was agreed that the prudent approach was:

> … *to claim privilege over the documents* in the discovery list pending confirmation from the Jersey authority as to whether the undertaking is still desired. *All documents obtained from Jersey (whether from the SFO directly or through the search of the Court file in the SFO criminal proceeding) should be listed as privileged* on the grounds of public interest immunity (perhaps also referring to s 70 of the Evidence Act).
>
> (Emphasis added.)

[64] Mr Vickery had on that same day stated that there was no agreement as to what was to be disclosed at that point, and observed that Miss du Claire was in a position to list the documents in whichever part of the list was appropriate.

[65] On Friday 13 March 2009 Dr Palmer wrote stating that Crown Law had not changed its view as to how the information should be presented in the discovery list

to be filed on Monday 16 March 2009. He recorded that discovery would be managed in accordance with Crown Law advice.

[66] Dr Palmer's draft opinion of 13 January 2009, which was the document before Miss du Claire and the subject of her concerns, contained the following section that Miss du Claire relied on under the general heading of "Advice":

> ADVICE
>
> 8 Relevant statutory provisions are set out in an Appendix to this advice. Your letter of 5 December sets out the background to the disclosure of the documents, first to the SFO and then to the IRD.
>
> 9. It is understood that the documents at issue consist of:
>
> 9.1 Documents disclosed by the SFO to the IRD, being:
>
> 9.1.1 Transcripts of SFO interviews with [Mr D]; and
>
> 9.1.2 Documents obtained from [Mr D]; and
>
> 9.2 Documents obtained by the IRD under the Criminal Proceedings (Search of Court Records) Rules ("the CP Rules") being:
>
> 9.2.1 The transcript of the relevant SFO trial; and
>
> 9.2.2 Documents formally produced or referred to witnesses during that trial.
>
> Circumstances of acquisition and use by the SFO
>
> 10. For the purposes of this advice, *it is presumed that all of the documents referred to above were obtained originally by the SFO from the Jersey authorities*, some of which were provided to the IRD directly by the SFO and the rest of which were obtained by the IRD under the CP Rules.
>
> 11. The documents were obtained by the SFO following two requests to the Attorney General for the Bailiwick of Jersey.
>
> (Emphasis added.)

[67] The conclusion at paragraph 44 was consistent with the documents not being disclosed or used further.

[68] Miss du Claire argued that on the basis of paragraph 9 it was correct to list as privileged all the documents that were in fact listed in Part 3. Although paragraph 9 of the letter is rather general in its wording, and I was not informed of what

documents were formally produced or referred to witnesses during the *R v D* trial in terms of paragraph 9.2.2, paragraph 10 makes it quite clear that the documents at issue are those obtained originally by the "SFO from the Jersey authorities". This is also confirmed by other parts of the draft opinion. In the conclusion summarised at paragraph 4.1 it is stated:

> 4.1 The documents/information *obtained by the SFO from the Jersey authority* are confidential in terms of the provisions of the Serious Fraud Office Act 1990 and the terms of the undertaking and are protected from further disclosure by both the statutory provisions and the common law of public interest immunity and/or s 70 of the Evidence Act 2006;
>
> (Emphasis added.)

[69] The correct interpretation is clearly the interpretation placed on the opinion by Mr Ebersohn in his e-mail he sent to Miss du Claire of 11 March 2009 when he referred to the claiming of privilege in relation to "all documents obtained from Jersey". In the light of this and the words of the draft advice it would have been obvious to any reader of the opinion and the exchanges that it was only the Jersey documents for which privilege should be claimed, and not any other documents that might have been obtained from the SFO proceeding that were not originally obtained from Jersey.

[70] Miss du Claire in her submissions emphasised that the 16 March 2009 advice was not the same as the earlier advice. That is correct. The 16 March advice contained a whole further section which dealt with the arguments that had been raised by her and Mr Wallace in the 22 January 2009 memorandum, where it was explicitly stated that the IRD should list the documents as privileged in its discovery list on the basis of public interest immunity, s 70 of the Evidence Act 2006 and s 36 of the Serious Fraud Office Act 1990. Such an explicit statement had not been made in the draft that was available at the time Miss du Claire prepared the list of documents prior to the afternoon of 16 March 2009.

[71] Nevertheless, I do not accept that Miss du Claire did not appreciate that the advice was only to withhold the documents actually obtained from Jersey. This, as I have observed, is clear from the draft advice of 13 January 2009 and was made explicit by Mr Ebersohn in his e-mail of 11 March 2009. That she had an

appreciation that she was pushing Dr Palmer's advice further than its natural limits is confirmed by an analysis of her actions that followed.

The affidavit of documents – the events of 16 March 2009

[72] The initial draft of the list forwarded to Crown Law by the IRD on 16 March 2009 contained the following paragraph 8:

> *In Part 3 of the Schedule, I list documents that Inland Revenue obtained in variously 2003 and 2004 from the Serious Fraud Office which had been obtained by that Office from Her Majesty's Attorney-General for the Bailiwick of Jersey in 2000.* Copies of various of these same documents were obtained from the High Court pursuant to the consent of the accused, and subject to the conditions imposed by the Court, in Priestley J's judgment of [*R v D*]. *I am advised* by the Solicitor-General *that I must claim confidentiality* for those documents, *notwithstanding* that a set has been previously released under the Official Information Act 1982 to a taxpayer to whom they related.
>
> (Emphasis added.)

[73] It contained the following comment in a side box:

> Comment: We haven't actually got Matthew's advice yet, we assume this is what he will say (from his indication on Friday).
>
> He is aware we need this ASAP.

[74] Then Part 3 began with these words:

> These documents are listed as confidential on the advice of the Solicitor-General. They are also subject to tax secrecy obligations under section 81 of the Tax Administration Act 1994 (this will lead to third party taxpayer information not necessary for these proceedings being redacted out of the documents).

[75] At Part 4 it was stated:

> 1) I am aware that Inland Revenue has recently obtained documents from Her Majesty's Attorney-General for the Bailiwick of Jersey which may include information of relevance to this matter.

[76] Part 3 contained seven boxes listing transcripts of interviews with the SFO during 2001–2003, and the following documents:

21/01/1998	Accounting Records	Curtis McLean Ltd

29/09/2003	Company Search	NZ Companies Office
05/09/2003	Company Certificate	NZ Companies Office
05/09/2003	Annual return	
13/10/2004	Affidavit	Tracey Lloyd

These documents were patently not documents obtained from the Jersey authorities.

[77] Miss du Claire appeared to be reluctant to accept responsibility for this initial draft of the list of documents that was forwarded on that day. She put forward various possibilities. However, I have no doubt at all that she did draft that document. The wording relating to the Jersey documents, and in particular the comment that is in the box beside paragraph 8, are unmistakably in her style and expressive of her thinking about the Crown Law advice. If Miss du Claire was suggesting that in fact the controversial words in paragraph 8, Part 3 and Part 4 were prepared by persons other than herself, then I do not accept that evidence. She prepared them, and in particular she decided what should be listed in Part 3.

[78] The draft list of documents was provided by the IRD at 12.56pm. The accompanying e-mail is from Miss du Claire. In that e-mail Miss du Claire stated that she had not received Matthew's advice so that this was drafted on the assumption that:

> … he will be advising us to claim the SFO documents are confidential. Please do ask him about that – without his advice to that effect (at this point an e-mail is fine!) I would feel obliged to move them over to the "open" list and provide them.

She stated "ideally we want the final version of this with [the person swearing the affidavit for discovery for the Commissioner] by 1.30[pm]".

[79] The list was over 60 pages long. In the time that was left available only a quick review by Crown Law was possible. Mr Ebersohn interpreted this e-mail and the query about Dr Palmer's advice in the side box as an expression of irritation by Miss du Claire. Given the clear nature of Dr Palmer's advice, his conclusion was entirely warranted.

[80] Mr Ebersohn noted immediately the words of paragraph 8. He was concerned about them. He was concerned that the reference to the advice of the Solicitor-General could be treated as a waiver of privilege. Mr Ebersohn also interpreted paragraph 8 as containing the implicit statement by Miss du Claire (and therefore the person who signed the affidavit) that Dr Palmer's advice as to the documents obtained from Jersey was not accepted.

[81] Mr Ebersohn conferred with his colleagues. He had a telephone discussion with Miss du Claire during this process. She did not like versions of the Crown Law's attempted redrafts of paragraph 8 and participated in a redrafting of the final wording of the affidavit. Ultimately Crown Law redrafted this part of the list of documents so that the final version of paragraph 8 read:

> In Part 3 of the Schedule, I list relevant documents that are protected from disclosure by sections 36 and 41 of the Serious Fraud Office Act and/or public interest immunity.

[82] In her evidence Miss du Claire said that on the day the affidavit was completed she "shared her concerns with Mr Ebersohn over the phone and he confided that she should not worry as it was not her name on the affidavit". Mr Ebersohn has no recollection of this exchange and I find that there was no exchange to that effect.

[83] I found Mr Ebersohn's account of what happened on 16 March 2009 to be consistent with all the material before me and entirely convincing. In contrast, I found Miss du Claire's account of events confusing and at times contradictory. She was so irrationally passionate about how wrong Dr Palmer's advice was in relation to the Jersey documents, and remains so, that her recollection of events from that time is unreliable.

[84] At some stage during this process early on Monday afternoon, nine items that had been listed in Part 3 were moved. It is not clear from the evidence who actually moved them. It is possible that Mr Ebersohn asked Miss du Claire to move them, having noticed that they were obviously wrongly listed, or that Miss du Claire or someone else in the IRD had second thoughts about them. However, the important point is that the Curtis McLean Ltd accounting records, the company search, the

company certificate, the 2003 annual return, and the affidavit of Tracey Lloyd all remained in the list of documents and were obviously on their face not privileged and patently could not fall under the terms of the Jersey undertaking.

[85] I accept Mr Ebersohn's evidence that he did not turn his mind to the individual documents listed under the heading Part 3, and he also did not notice the wording stating that the documents were listed as confidential "on the advice of the Solicitor-General". I have no doubt that in the short timeframe available those involved at Crown Law did not notice the non-privileged documents that were listed in Part 3, or the reference to the advice of the Solicitor-General. If they had, they would have wanted them moved.

[86] Thus, on an overview, looking at the events relating to the final signing of the list of documents on 16 March 2009:

(a) At paragraph 8 of the original draft prepared there was a clause prepared by Miss du Claire that implied disagreement on the part of the deponent with the listing in Part 3 of the Jersey documents, and a reluctant acquiescence to the Solicitor-General's advice to claim confidentiality.

(b) However, what paragraph 8 does show was that Miss du Claire understood that in Part 3 of the schedule privilege should only be claimed for those documents that had been "obtained by [the SFO] from Her Majesty's Attorney-General for the Bailiwick of Jersey in 2000". This is inconsistent with an implicit claim in her submissions that she misinterpreted the original draft advice as to what should be disclosed.

(c) The wording was changed and a neutrally worded paragraph 8 substituted. Also some documents that were not privileged were deleted from Part 3 by either Crown Law or Miss du Claire or someone else at the IRD, and moved.

(d) However, other documents that were on their face neither privileged nor confidential remained listed in Part 3 in the affidavit that was executed and filed. I am satisfied that those documents had been put in the list by Miss du Claire.

Miss du Claire's later statements relating to the affidavit of documents

[87] Miss du Claire's later e-mails of 4 and 5 May 2009, when the listing of non-privileged documents was discovered, also indicate that she deliberately placed non-confidential or privileged documents that were not Jersey documents in Part 3.

[88] In her e-mail of Monday 4 May 2009 to Mr Ebersohn, she commented that she was following the Solicitor-General's advice and had "gone one step more conservative than the plaintiffs'" by withholding the transcripts. She stated that objection should be taken to the plaintiff's (as opposed to the IRD, the defendant) listing of the Jersey documents, due to the public interest immunity.

[89] Dr Palmer, when he saw this e-mail in the days that followed, interpreted this as a "gotcha" letter by Miss du Claire, indicating that the Solicitor-General's advice had now landed the IRD in a difficult position, in that documents for which the IRD was claiming privilege were in the "open" part of the plaintiff's affidavit. She was implying that the IRD's position in claiming privilege was not tenable, given the plaintiff's approach. Dr Palmer's interpretation was reasonable.

[90] Then on 5 May 2009, Mr Ebersohn, upon becoming aware of the non-privileged documents having been listed in Part 3, wrote to Miss du Claire. He pointed out that certain of the documents listed would not have come from the Jersey authorities. He asked to what extent she was certain that the documents listed were given under the undertaking. He asked if she could identify which documents in Part 3 should not have been listed there.

[91] Part of Miss du Claire's response has to be set out in full:

> You are correct, we were advised by Crown Law to list all documents disclosed by the SFO to IR, and all documents obtained by IR under the Criminal Proceedings (Search of Court Records) Rules, and did so. *We knew*

> *that a lot of that information was not, and indeed could not, have been covered by the undertaking (for example, the transcript of the relevant SFO trial, held in Auckland before an open Court which our officers sat in and listened to, could not possibly have been covered by the Jersey undertaking). But the advice from Crown Law, as we understood it, was clear as to its intent* – we needed to protect the transcript (para 9.2.1), and indeed the written advice is that we should go well beyond not using it but also apply to have that Court file sealed and have Priestley J's orders allowing IR access rescinded (para 56.2.1 and 56.2.2.).
>
> (Emphasis added.)

[92] She then went on to state that she did not have the advantage of the full version of Dr Palmer's opinion and that the IRD did what it thought Crown Law wanted it to do. She proceeded to state that it would have been better if Crown Law had not provided an opinion which went as far as it did and that there may have been a misunderstanding along the way. She stated that:

> … at the time I was troubled that there were meetings about the issue to which I was not invited, and that it was clear that what Crown Law was asking us to withhold was significantly beyond the 10 folders that I had understood to be originally of concern to the SFO.

[93] In this e-mail Miss du Claire appears to say that she knew that some documents listed in Part 3 were not Jersey documents and could not have been covered by the undertaking. She may have also meant what she understood was that Crown Law was advising the IRD to list them in Part 3 regardless. But for the reasons already given, it is not possible on any objective reading of Dr Palmer's opinion to see how Miss du Claire could have held this view; documents such as the 2003 company certificate and annual return were patently New Zealand documents created after 2000 when the Jersey documents were provided, and not privileged. This letter indicates that her listing of the non-privileged documents was deliberate.

Other matters

[94] The draft advice of 13 January had specifically stated that "documents at issue", being documents "obtained originally by the SFO from the Jersey authorities" should not be disclosed. It was clear on any objective reading of the advice that this meant the Jersey documents, yet Miss du Claire took no steps. If Miss du Claire had had any doubt about the matter, she had ample time to seek

clarification from Crown Law. She did not. Dr Palmer had indicated on 13 March that the substance of his draft advice would not be changed, and reflecting that, the 16 March advice described the "documents at issue", for which privilege should be claimed, in exactly the same words as in the original draft advice. Miss du Claire did not attempt to clarify the meaning of the advice, or to draw Crown Law's attention to the listing in Part 3 of non-privileged documents after the 16 March final advice other than her e-mail of 4 May.

[95] Miss du Claire argued that Dr Palmer was wrong in claiming embarrassment and additional cost to the IRD as a consequence of her actions. However, it is clear that these consequences were caused by Miss du Claire in that the IRD had to notify the taxpayer of the error and change the claim of privilege in the affidavit of documents, all at the IRD's expense.

[96] For the avoidance of doubt, I record that Dr Palmer was relying on these true facts, most of which were set out in the appendix, when he gave his statements of opinion in the letter of 13 May 2009.

Conclusion as to the true facts

[97] I am satisfied that the summary in the appendix to the letter was a correct summary of events and I conclude that Dr Palmer's statements were based on facts that were true or not materially different from the truth.

[98] I comment specifically as follows:

(a) It is correct that Miss du Claire did not implement the advice from Crown Law as to the documents for which privilege should be claimed in the *X v C* affidavit of document.

(b) The final version of the affidavit of documents inaccurately recorded at the start of Part 3 the view of the Solicitor-General as to which documents were privileged and could be listed under that Part. In

doing so, this would cause embarrassment to the Solicitor-General as the solicitor responsible for the list.

(c) Insofar as the list of documents would have to be altered and an error that should not have been made corrected, the actions caused unnecessary embarrassment to Crown Law and unnecessary cost to the IRD in relation to the affidavit of documents.

(d) The effect of her wording was to undermine the advice.

[99] In the circumstances, Miss du Claire's actions were a serious transgression. Despite the fact that Crown Law had been asked to provide advice as to whether or not the Jersey documents were privileged, and the fact Miss du Claire's seniors at the IRD would expect her to follow that advice, she had not followed it. She was listing non-privileged documents as privileged – a serious matter. Given that circumstance it was a logical conclusion that, in relation to this matter and possibly other matters, Miss du Claire might not act in future in accordance with Crown Law advice, causing Crown Law and the IRD embarrassment or worse. In that situation it was reasonable for those in Crown Law who were aware of her actions not to wish to work with her any more.

[100] By this time Miss du Claire's judgment about the claiming of privilege in respect of the Jersey documents was so coloured by her very strong view that Dr Palmer was giving wrong advice that she was not thinking rationally in her work in this area. Miss du Claire, in my view, does try to do the right thing. But it has to be right on her terms, and her views by March had become obsessive and irrational on the Jersey documents issue.

[101] The letter and the detailed appendix contain between them an accurate summary of Miss du Claire's actions, which are the basis for Dr Palmer's opinion. So I conclude that the facts relied on are indicated in the letter, and were materially true. I also record that insofar as any of the alleged defamatory statements of Dr Palmer can be seen as statements of fact and not opinion, they were also true.

Whether the opinion was genuine

[102] Dr Palmer was first alerted to the problem on 5 May 2009 when he received a copy of Miss du Claire's e-mail of that date. After discussion, a draft of the letter that is the subject of this first cause of action was prepared by senior members of his legal team. That draft had stronger wording, and stated that "Ms du Claire's recent actions … have led me to form the view that she has deliberately undermined the advice given by me …". After receiving the draft on 7 May 2009, Dr Palmer changed a number of words in the draft and the appendix to keep the facts accurate and to use words that were more neutral. He met with Mr Ebersohn later, after the initial meeting with his legal staff, to discuss the issues and review Miss du Claire's e-mails before sending the letter of 13 May 2009. Mr Ebersohn explained to him at those meetings that he could think of no explanation other than that Miss du Claire had deliberately sought to undermine the Crown Law advice. I accept Mr Ebersohn's evidence in this regard.

[103] Dr Palmer explained the process of how he developed his views as to Miss du Claire's conduct. I accept that they were based on his own review of the documents and his discussions, and not just an adoption of the first draft.

[104] Before sending the letter Dr Palmer double-checked that its contents were accurate with his staff. He also called his counterparts at the IRD to let them know that the letter was coming and he stated that he would be happy to discuss matters raised once they had considered his letter. He deliberately expressed himself in an appropriately conservative way, leaving the door open at the end of his opinion to there being a further discussion if it transpired that Miss du Claire's actions had been authorised at a higher level, contrary to his understanding.

[105] Dr Palmer was cross-examined at length before me. I had an opportunity to view his demeanour and his reaction to provocative propositions put to him by Miss du Claire. Dr Palmer clearly takes his responsibilities as Deputy Solicitor-General most seriously. He does not appear to me to be a person who is prone to emotional responses or bears grudges. He seeks to do his duty to the best of his

ability and expects others with whom he has a professional association to do the same.

[106] Dr Palmer had not met and did not know Miss du Claire and bore her no ill will. The opinion he formed was, in the end, based on his own interpretation of Miss du Claire's communications and the list of documents she prepared, and his discussions with other members of Crown Law who were concerned at Miss du Claire's actions. He formed a genuine view on the basis of the information before him that she had rejected his opinion and sought to undermine it and that, by drafting the list of documents in the way she did, she had sought to embarrass Crown Law and display what she thought was the fundamentally erroneous nature of his advice. His view that he and his team could not work with her, given that background, was sincerely held.

[107] I am satisfied, having heard Dr Palmer, that his views were genuine.

Conclusion on honest opinion

[108] The defence of honest opinion on the first cause of action has been made out, and Miss du Claire's first cause of action must therefore fail. For completeness, I will also consider the pleaded defence of qualified privilege.

Qualified privilege

[109] Qualified privilege arises when a communication is made to a recipient who has a right or need to know.[14] It arises where there is a common and corresponding duty or interest between the person who makes a communication and the person who receives it. It was described in this way by Lord Atkinson in *Adam v Ward*:[15]

> Such a privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and a person to whom it is so made has a corresponding interest or duty to receive it.

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14 *Attorney-General v Leigh* [2011] NZSC 106 at [17].

15 *Adam v Ward* [1917] AC 309 (HL) at 334 cited with approval in *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at [18].

A classic situation in which qualified privilege can arise is a communication from A to B where A and B have a common interest in the matter that is the subject of the communication.[16] However, the circumstances that can constitute a privileged occasion are not exact and there is no exhaustive list of situations.[17]

An occasion of qualified privilege?

[110] The Crown Law Office is a government department, as is the IRD.[18] It is necessary to consider the role of Crown Law in the *X v C* proceeding.

[111] Paragraph 7 of Appendix C of the Cabinet Directions for the Conduct of Crown Legal Business 1993 recognises the role of Crown Law in giving an opinion on an issue where there is a difference between departments. The Cabinet Manual[19] also recognises that the conduct of legal proceedings involving the Crown is the responsibility of the Attorney-General, and in practice, the Solicitor-General and the Crown Law Office will provide legal services to the department involved in the proceedings.

[112] Miss du Claire in submissions equated IRD's position to that of a client choosing not to accept the advice of its solicitor. However, I accept Mr McClelland's submission that the Crown Law Office's role cannot be fully explained through a traditional solicitor/client relationship model.

[113] When it is representing a department in court proceedings the Crown Law Office has, in addition to the usual duties of counsel in court proceedings a general responsibility to ensure the interests of the Crown are protected. Just as it is necessary for the Solicitor-General, when advising Ministers, departments and other government agencies to keep government interests in mind and accept that the highest value is in maintaining the integrity of the law,[20] so in the actual *X v C* proceeding the Solicitor-General and through him members of the Crown Law

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16 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington 2009) at [16.11.01].

17 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 (HL) at 22.

18 State Sector Act 1998, s 27 and Sch 1.

19 Department of the Prime Minister and Cabinet, *Cabinet Manual 2008* at [4.6].

20 John McGrath "Principles for Sharing Law Officer Power – The Role of the New Zealand Solicitor-General", (1998) 18 NZULR 198 at 206.

Office had to ensure that the integrity of the law was preserved. In particular, the Crown Law Office could not countenance a government department pursuing a course of conduct that constituted a breach of the government's international obligations. It was also the Solicitor-General's duty, in addition to his duty to the court, to ensure that in litigation the government observed the best possible standards of practice in a court proceeding.

[114] The Solicitor-General is ultimately responsible for litigation involving the executive government, including litigation in the name of the Commissioner.[21] The protocols between the Solicitor-General and the Commissioner of July 2009, which were finalised shortly after the May letter and e-mail, reflect this as they record:[22]

> The Solicitor-General is ultimately responsible for the conduct of all litigation in the name of the Commissioner. … Ultimately the Solicitor-General, after consultation with the Commissioner of Inland Revenue, will resolve any outstanding issue over the conduct of litigation.

[115] While it is possible that aspects of the protocols in their final form might reflect aspects of the issues that arose with Miss du Claire (although there is nothing to indicate this), I have no doubt that the Solicitor-General's senior role in determining how IRD litigation should be conducted had been the reality in practice for some time. It is the Solicitor-General who has the overall responsibility for the litigation and who will be most open to criticism if a court later concludes that there was an error.

[116] The SFO had no direct role in the *X v C* proceeding. However, in relation to the Jersey documents issue, Dr Palmer quite properly on occasions copied the SFO into communications. It was the Solicitor-General and Crown Law's duty to ensure that the government of New Zealand generally observed its duties in relation to the undertakings given by the SFO to the Attorney-General of the Bailiwick of Jersey. The SFO had an interest and indeed a duty to know what action was being taken in relation to the breach.

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21 See McGrath above n 20 at 212 and "Protocols between the Solicitor-General and Commissioner of Inland Revenue" (29 July 2009) <www.ird.govt.nz> at [1.2].

22 At [5.1].

[117] Crown Law were working together with the IRD to achieve the best possible result for the government in the *X v C* litigation. But Crown Law had to ensure that international obligations were observed by the government, as well as observe its duties to the court. It also had to give good guidance and sound advice to the IRD and work with the IRD efficiently. The IRD lawyers in turn had to observe their professional duties to the court.

[118] Dr Palmer was acting in his capacity as Deputy Solicitor-General when he published the letter. He had the overall responsibility for public law group litigation and the relationship between Crown counsel and the IRD. There were interests and joint duties to the court that were shared by Crown Law and the IRD. Dr Palmer had a duty to communicate his concerns about Miss du Claire's conduct in the course of the litigation to the representatives of the Crown agencies affected by her conduct. Further, the IRD and indeed the SFO as parties affected by Miss du Claire's conduct had a corresponding interest in receiving his advice regarding the conduct of the Crown litigation. Crown Law was, after all, in charge of the litigation and IRD staff were, with the exception of Miss du Claire, looking to it for guidance.

[119] I have no doubt, therefore, that the sending of the letter was an occasion of qualified privilege.

Ill will?

[120] Under s 19(1) of the Defamation Act 1992, the defence of qualified privilege fails if the plaintiff proves that in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff or otherwise took improper advantage of the occasion. However, s 19(2) provides that, subject to subs (1), a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[121] Once the defendant has satisfied that the occasion of publication was one that attracted qualified privilege, the onus shifts to the plaintiff to rebut the defence by showing ill will or the taking of improper advantage. In carrying out this assessment the words the plaintiff complains of are assumed to be untrue and the focus of the

inquiry is on the defendant's motives for making the statement, not the correctness of the statement made.[23] It must be shown that the defendant's predominant motive was ill will towards the plaintiff, or otherwise taking improper advantage of the occasion of publication. Miss du Claire served a notice under ss 39 and 41 of the Defamation Act setting out a detailed allegation that Dr Palmer acted with malice and/or improper motive.

[122] I note that the Court of Appeal has recorded that s 19 was intended to reflect the common law concept of malice.[24] I do not consider that, on the facts of this case, any difference (if such difference exists) between the words "ill will" and the common law test of malice is material.

[123] For the reasons already given as to the genuineness of Dr Palmer's opinion, and which are developed further later in this judgment in relation to malice in the misfeasance in public office causes of action,[25] I do not consider that malice or improper advantage have been established here. I have heard Dr Palmer give his evidence and I am satisfied that he had no personal ill will towards Miss du Claire and acted always in accordance with what he thought was in the interests of the IRD and the SFO.

Conclusion on first cause of action.

[124] I am satisfied that, assuming the statements were defamatory, the defences of honest opinion and qualified privilege apply. Dr Palmer was in the pleaded defamatory statements expressing his opinion on facts before him that were true or materially true. He did so honestly, genuinely and without malice, and in the context that Crown Law and the IRD had a common interest in the subject matter of his letter, a context which I find attracts the protection of qualified privilege.

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23 *Laws of New Zealand* Defamation (online ed) at 124.
24 *Lange v Atkinson*, above n 15, at [42].
25 See privilege [140]–[149] and misfeasance [182]–[191].

Second cause of action: the 18 May 2009 e-mail

[125] This e-mail was sent by Crown Law and signed by Dr Palmer. It was addressed "Dear Carolyn/Mike and Grant", referring to Carolyn Tremain, Deputy Commissioner at the IRD at the time; Michael Cook, a solicitor in the LMU and Miss du Claire's manager; and Grant Liddell, Director of the SFO. It is necessary to set out the e-mail in full:

> Dear Carolyn/Mike and Grant
>
> I'm sorry that I have to raise yet another issue about the SFO/IRD matter, but this is both serious and urgent.
>
> I gave advice to IRD and SFO on 16 March 2009 about the disclosure and use of information acquired from Jersey pursuant to an undertaking given by SFO. Both IRD and SFO accepted that advice and my recommendations.
>
> In order to implement part of the recommendations Crown Counsel, on behalf of the SFO, filed a memorandum with the High Court on 30 April 2009. The memorandum:
>
> - Noted that Justice Priestley of the High Court had in 2008, on application by IR, granted leave for IR to search the Court records and that SFO did not object;
>
> - Noted that SFO has subsequently become aware of undertakings made by SFO to the Jersey authorities about the purposes for which the documents provided by Jersey to SFO would be used;
>
> - Noted that SFO is working with IRD to remedy the disclosure and comply with the undertakings, including IR returning the released documents to SFO;
>
> - Requested that a note be placed on the Court file preventing it being searched, copied or inspected without the leave of the Court with notice to SFO.
>
> On 12 May 2009 Crown Law was advised by the High Court that, in response to the memorandum, Justice Priestley has indicated that the IR are directed to destroy any copies of notes taken from the documents, which were subject to the SFO's undertaking, and sealed the file. Crown Law followed up on 14 May inquiring as to whether a minute would be issued by the Court on that basis.
>
> On Friday 12 May we have been sent the email string below from the High Court which we have opened today. *It appears that Lysette du Claire of IR decided to email the court herself on this matter without reference to Crown Law. In so doing, she has disclosed that IR considers that the information is relevant to existing civil proceedings and potential criminal proceedings. (I note that Crown Law has not been advised of the latter, to my knowledge).*

> As you will see, the Court, understandably, has said "This is very serious if the SFO has breached an undertaking and documents are being used by the IRD for purposes which the undertaking was designed to prohibit." And has ordered counsel for SFO and IR to appear before him in person to explain.
>
> The Solicitor-General has determined that Crown Law will file a memorandum (draft attached) with the court explaining the situation. If personal appearance is required Crown Counsel will appear and represent both of these two Crown parties, the IR and SFO, at IR's cost.
>
> Paras 3 and 4 of the memorandum states:
>
> 3. "The purpose of this memorandum is to inform Your Honour that Ms du Claire was not authorised by the Commissioner or Inland Revenue to send that email and nor does its content reflect the position of the Commissioner of Inland Revenue or his Department.
>
> 4. The Commissioner has instructed Counsel to advise Your Honour that he undertakes to locate and destroy all copies of the documents concerned and any notes taken of their contents immediately and that he will not use those documents or any such notes in any litigation of any kind."
>
> **Would IR please advise us immediately if either of these statements is not correct.**
>
> I will send a further email to Carolyn and Mike about Crown Law's dealings with Ms du Claire from now on.
>
> This Office will also send IR a letter shortly with instructions about what IR needs to do to implement Priestley J's directions.
>
> Matthew Palmer
>
> (Emphasis added.)

[126] Miss du Claire pleads that the statement that it appears that she "decided to e-mail the court herself on this matter without reference to Crown Law" was defamatory "in the context of the conduct of the practice of law, and specifically carries a strong implication from the context that the Plaintiff acted inappropriately in contacting the Court". It is therefore this single specific statement that is the focus of this cause of action.

[127] The defendants accept that the ordinary, natural meaning of this statement prepared in the context of the e-mail as a whole is that the plaintiff acted inappropriately by contacting the Court in the way that she did. This is apparent on

the face of the document and it is unnecessary to consider the plaintiff's innuendo pleading.

[128] In the course of the hearing Miss du Claire appeared to allege that other aspects of this e-mail were defamatory. No amendment was sought and any attempt to treat the pleading as extended would prejudice the defendants. In the further particulars of defamatory meaning there is no change from the pleading. It is not possible to accept as a pleading these further vague statements that were made. I am satisfied that the suggested extensions that arose in the course of Miss du Claire's submissions were too imprecise to be capable of determination. The defamatory pleading cannot be expanded in its scope in this way.

[129] Given the defendants' concession it is not necessary to consider whether the pleaded meaning was defamatory. The defendants further accept that the e-mail concerned Miss du Claire and was published. So it is necessary to consider the affirmative defences.

Honest opinion

Are the statements of opinion and not fact?

[130] The letter begins by Dr Palmer apologising that he has to "raise yet another issue" in relation to the matter which is serious and urgent. In the allegedly defamatory paragraph it is stated "[i]t appears" that Miss du Claire decided to send the e-mail to the Court herself.

[131] The e-mail string is attached and it is stated later in the e-mail that Crown Law was intending to file a memorandum with the court containing two paragraphs, one of which included the statement: "Ms du Claire was not authorised by the Commissioner of Inland Revenue to send that e-mail …". Immediately after the words setting out the two paragraphs, it is stated in bold type: "Would [the IRD] please advise us immediately if either of these statements is not correct." Those words are indicative of the statements being the writer's interpretation of the facts available, and leave open the possibility of correction. The criticism is not by

specific words but arises from the background context of a strong protest at Miss du Claire's actions in relation to the affidavit of documents made five days earlier in the 13 May 2009 letter. Dr Palmer is saying that it appears to him that she has yet again acted in an inappropriate manner.

[132] I am satisfied that the pleaded defamatory meaning was an expression of opinion by Dr Palmer.

Are the statements based on facts that are true or not materially different from the truth?

[133] The facts are set out in the letter itself. Miss du Claire undoubtedly sent the e-mail that Dr Palmer complains about to the Court. The statement of fact that Miss du Claire had decided to e-mail the Court herself without reference to Crown Law was correct in that it was her e-mail, and Crown Law had not been consulted beforehand. It was also correct as a matter of fact that she had disclosed that the IRD considered that the information was relevant to existing civil proceedings and potential criminal proceedings.

[134] The issue of whether or not Miss du Claire had been instructed by the IRD to send the e-mail to the Court requires further examination. I accept Miss du Claire's evidence that her superior, Mr Vickery, had told her to obtain a copy of Priestley J's minute.

[135] However, the e-mail that Miss du Claire sent went considerably further than requesting a copy of a minute. Such a request would have been quite unexceptional and unlikely to have provoked any response from the Judge. However, Miss du Claire was aware that there was no minute. The contents of her e-mail of 14 May 2009 need to be set out in full:

> Dear [Deputy Registrar of the High Court]
>
> The Crown Law Office, acting on behalf of the Serious Fraud Office, have passed on to us your e-mail of Tuesday, 12 May 2009 17:04 relating to the matter [*R v D*]. We have of course taken steps to begin giving effect to His Honour's direction in that e-mail.

> I write to enquire whether His Honour will be issuing a formal minute recording his direction. *Implementing His Honour's direction will have the consequence of Inland Revenue destroying its copies of information that is relevant to existing civil proceedings before the High Court at Wellington, as well as a criminal prosecution still under consideration, so we would prefer to have a formal document to provide to the Courts and other parties in those proceedings to explain our actions with respect to these documents.*
>
> I know from your voicemail that you are in Court today, however I would be happy to discuss later this week or next at your convenience, if that is required.
>
> Kind regards
>
> Lysette du Claire
>
> (Emphasis added.)

[136] The general tone of the second paragraph is that Priestley J's direction has the consequence of necessitating the destruction of material relevant to existing proceedings, and implies that this is inconvenient. The further implication is that a formal document, a minute, is required so that recipients of the direction can comply. There is a querulous tone about the e-mail. After all, the only negative consequence of the destruction of the documents was going to be for the two government departments that had use for that information, the IRD and the SFO. It was a little disrespectful to say "we would prefer to have a formal document", rather than to make a polite request along the lines of "we would be most grateful". The general tone of the e-mail is not that which an experienced court lawyer would use in any communication that was likely to go before a Judge. It could well be interpreted as somewhat disrespectful and even critical. I do not consider that Mr Vickery, or anyone senior to Miss du Claire at the IRD, had instructed or permitted her to send an e-mail using that tone and those words.

[137] The e-mail did indeed provoke an immediate and strong reaction from the Judge who required counsel for the IRD and the SFO to appear before him in chambers. This was a clear indication that the Judge, who had not taken that step before the e-mail, was now in light of it dissatisfied with the state of affairs. The Judge's response recorded that it was very serious if the SFO had breached an undertaking and documents were being used by the IRD for purposes which the undertaking was designed to prohibit. He stated that he was not prepared to hear the parties by telephone conference.

[138] An experienced counsel would have predicted a strong reaction to Miss du Claire's e-mail and would not have sent it or permitted it to be sent.

[139] So my finding is that the facts on which Dr Palmer's criticisms were based were true, or materially true.

Whether the opinion was genuine

[140] Given the factual background, it is entirely understandable that Dr Palmer was alarmed when he saw the exchange with the Court, and sent the letter of 18 May 2009. Crown Law, the SFO and the IRD were all affected by Miss du Claire's e-mail and were all the subject of the adverse reaction by the Judge. Dr Palmer's e-mail is not an e-mail so much of complaint, but rather a proposal for immediate action. He attached the draft memorandum that he had prepared for the Judge to assuage the Judge's concerns. It was a perfectly proper memorandum of the type that senior counsel could be expected to prepare in such a situation.

[141] As observed, Dr Palmer's letter of 18 May is singular in that, despite the unfortunate tone of Miss du Claire's e-mail of 14 May 2009 and the strong reaction of the Judge, it lacks any adjectival criticisms of Miss du Claire's actions. It sets out the circumstances and the proposed course of action without embellishment.

[142] Having heard Dr Palmer's evidence about why he reacted in the way he did, I have no doubt that the opinion he implicitly expressed about Miss du Claire's actions in sending the e-mail were inappropriate was genuine. The fact that he was not aware that Mr Vickery had asked Miss du Claire to seek a copy of the minute is in my view irrelevant. Miss du Claire's e-mail went much further than just seeking a copy of a minute. It was inappropriately worded and somewhat disrespectful, and had provoked an unwelcome response from the Court. Dr Palmer's strong reaction was what could have been expected from experienced counsel faced with such an error.

[143] Therefore, the defence of honest opinion is made out in relation to the second cause of action.

Qualified privilege

[144] Crown counsel were shown on the court documents as counsel/solicitors acting in the *R v D* proceeding. Crown Law was effectively acting for both the IRD and the SFO. The background position was highly delicate for both the SFO and the IRD as both were parties to the breach of an undertaking given to a sovereign body. This situation was fraught with the risk of serious consequences for the parties and counsel if any of them were shown to have deliberately breached the undertaking.

[145] The e-mail was sent to those persons at the IRD (Ms Tremain and Mr Cook) in part responsible for the *X v C* proceedings and the Jersey document issue, and the Director of the SFO (Mr Liddell). Copies were also sent to Mr Vickery and to Crown Law lawyers. The IRD and the SFO both had been involved with Jersey documents in the *R v D* proceedings. The SFO was party to the proceedings and the IRD had obtained an order in the proceedings in relation to the documents. They were the logical persons for Dr Palmer to advise about his concerns, as Priestley J's direction and any further orders he would make affected them. Indeed, given their involvement, he would have been remiss had he not communicated to each of them in the way that he did. They would be the ones suffering the consequences if the Court's concerns were not answered.

[146] The tone of the e-mail is, as observed, factual and contains no directed criticism of Miss du Claire. It was moderate in tone and shows no ill will towards her. The act of sending it was reasonable.

[147] This type of communication is exactly the type of communication that the defence of qualified privilege is designed to protect. There was no ill will. I am satisfied that the defence of qualified privilege is made out.

Third cause of action: the 25 August 2009 letter

[148] Mr Cook's investigation of Miss du Claire's conduct culminated in him sending to Dr Palmer on 6 August 2009 a summary of his investigation about what he considered to be the four specific complaints about Miss du Claire, and his

conclusion that they were not established. It is Dr Palmer's letter in response of 25 August 2009 that is the subject of the third cause of action. Although only one paragraph of the letter is referred to in the statement of claim as being defamatory, it is necessary to set out the whole letter:

> Dear [Mr Cook]
>
> **Lysette du Claire**
>
> 1. Thank you for your letter of 6 August 2009 and the opportunity to discuss it on 10 August 2009. I refer also to your email of 17 August regarding Ms du Claire's work on the [*X v C*] file.
>
> 2. I understand the outcomes of your investigation into the matters I raised in my letter of 13 May 2009 and I acknowledge and appreciate the amount of effort and care that IRD has put into these issues.
>
> 3. I would have to say that I am not convinced by your conclusions. In particular, in relation to what you term "allegations one and three" your investigation appears to have focussed on the wording of the draft list as modified through discussions with Crown Law, and you have accepted Ms du Claire at her word in relation to her motivations. *However it seems to me that Ms du Claire's original proposed wording in paragraph 8 of the draft list of documents (version marked 12:55), is reasonably capable of being characterised as Ms du Claire having "deliberately sought to undermine advice with which she did not agree".* This is further reinforced by her email to Harry Ebersohn of 5 May 2009 at 17:00, (including the passage in which Ms du Claire states "We knew that a lot of that information was not, and indeed could not, have been covered by the undertaking …").
>
> 4. I do, therefore, continue to hold significant concerns about Ms du Claire's actions, as identified in my letter of 13 May 2009. *At the same time, I recognise that Ms du Claire's employment by the Litigation Management Unit of Inland Revenue is largely oriented towards litigation matters. I am willing to facilitate Ms du Claire having an opportunity to demonstrate that she is willing to work cooperatively and constructively with Crown Law, in the best interests of the Crown.*
>
> 5. My willingness in this regard depends on Ms du Claire and Inland Revenue being prepared explicitly to agree with Crown Law on a set of behavioural expectations. We can discuss these expectations further, and I am open to suggestions, but I would expect that such expectations might include:
>
>   5.1 Explicit agreement by Ms du Claire to abide by the Protocols agreed between the Solicitor-General and Commissioner of Inland Revenue;
>
>   5.2 Explicit agreement by Ms du Claire to seek to fulfil, and by Inland Revenue to manage her performance against, specific competencies (such as three expectations in Crown Law's competency framework for Assistant Crown Counsel as attached.)

6. If there is agreement on expectations then *I would be prepared to agree to Ms du Claire working* directly with specified Crown Counsel on specified cases, as determined by Crown Law, *on a four to six month trial basis*. We would need to discuss which counsel and which cases further. I would also expect that those Crown Counsel would be regularly and frequently consulted in the course of Inland Revenue's management of Ms du Claire's performance during this period. At the end of the six months Crown Law and Inland Revenue would jointly review the arrangement. Should there be a serious breach of the agreed behavioural expectations during the course of the six month period, such that Crown Law considers that the legal interests of the Crown are impeded, I would expect that the trial would cease immediately.

7. *I reiterate that I am willing to discuss these matters further* in the interests of reaching agreement on a constructive set of arrangements that are in the collective interests of Ms du Claire, Inland Revenue and the Crown.

Yours sincerely

Matthew Palmer
Deputy Solicitor-General (Public Law)

(Emphasis added.)

[149] The statement shown in italics at paragraph 3 is pleaded by Miss du Claire to be defamatory in its ordinary and natural meaning. The defamatory meaning is essentially the same as that pleaded (amongst other things) in the first cause of action: that Miss du Claire deliberately sought to undermine advice with which she did not agree. The defendants accept that the words are capable of bearing this defamatory meaning, that they concern Miss du Claire and that they were published. The defendants again rely on the affirmative defences of honest opinion and qualified privilege.

Honest opinion

[150] This allegation can be dealt with quite shortly, as considerations that applied to the first cause of action largely apply to this in relation to honest opinion. The statement is clearly one of opinion and not fact. The words "it seems to me ..." and "... is reasonably capable of being characterised..." are clearly the language of opinion rather than fact.

[151] As previously observed[26] Miss du Claire did not accept Dr Palmer's advice regarding what should be done with the Jersey documents. She had prepared a list of documents that, originally in paragraph 8 (the statement having been picked up and removed by Crown Law), contained a statement that made the Solicitor-General look, at the very least, foolish, and had listed in Part 3 documents that were clearly not privileged (as explained, this was not picked up by Crown Law). These were the facts upon which Dr Palmer's opinion was based, and I have accepted that these facts were true or materially true.[27]

[152] In light of these background facts, Dr Palmer's opinion that Miss du Claire's wording of the original affidavit of documents was reasonably capable of being characterised as deliberately seeking to undermine advice with which she did not agree, was undoubtedly genuine.

[153] I am therefore satisfied that the statement was an expression of opinion, was based on true facts which were indicated in the letter, and was genuinely held. The defence of honest opinion is made out.

Qualified privilege

[154] Mr Cook had previously discussed his findings with Dr Palmer on 10 August 2009. It had been agreed at the end of that meeting that Dr Palmer would formally write to Mr Cook, responding to his letter of 6 August 2009 and setting out his views on how to move forward. The letter of 25 August needs to be viewed as a whole and in that context.

[155] In the letter Dr Palmer formally sets out his views on the conclusions in Mr Cook's letter of 6 August and makes a proposal as to how Miss du Claire's return to work with Crown Law could be managed. This was part of the ongoing management of the relationship between Crown Law and the IRD. Dr Palmer had to communicate openly about his concerns so that a way forward could be found to meet those concerns and the needs of the IRD.

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[26] See [60]–[71].
[27] See [54]–[101].

[156] The letter is addressed to Mr Cook and Ms Tremain, both of whom had a legitimate interest in Dr Palmer's reaction to Mr Cook's report of 6 August, given the need for Crown Law to continue working with IRD. Miss du Claire's position appears to be, based on her submissions, that Dr Palmer should have accepted Mr Cook's report as a complete vindication of her position. However, Mr Cook's findings do not go that far. In any event, the IRD would expect that Dr Palmer would have his own views, as indeed he had to have if he was to carry out his role properly.

[157] Mr Cook was not prepared to conclude that Miss du Claire had deliberately set out to undermine Dr Palmer's advice. But it was entirely open for a reasonable person to disagree with Mr Cook's opinion. The communication in August 2009 was between two parties liaising on the issue of Miss du Claire's conduct and her ongoing ability to work with Crown Law, an issue in which they had a common interest. I am satisfied, for reasons broadly the same as those stated in relation to the first two causes of action, that Dr Palmer's letter of 25 August attracted qualified privilege.

[158] I am further satisfied that Dr Palmer's letter shows no ill will towards Miss du Claire. He sought input from his legal team about the contents of his letter of 25 August. His position has softened. He is retreating from his position in his 13 May letter and accepting a basis on which Miss du Claire could continue to work with Crown Law. Given his justifiably negative view of her actions, the letter of 25 August was a reasonable and moderate response to a report with which Dr Palmer disagreed. It provided an opportunity for Miss du Claire to work towards being a fully functioning solicitor working again with Crown Law, providing she complied with reasonable proposals for future conduct. I do not consider Miss du Claire has come close to proving that Dr Palmer was predominantly motivated by ill will towards her, or otherwise took improper advantage of the sending of the letter in any way. Indeed, there are signs of some goodwill towards her, in the change of position and willingness to recommence working with her.

[159] The defendant of qualified privilege is made out in relation to the second cause of action.

Fourth and fifth causes of action: misfeasance in a public office

[160] The tort of misfeasance in a public office is aimed at preventing the deliberate injury of members of the public by a public officer who deliberately disregards official duty.[28] The plaintiff must prove that:[29]

(a) the act complained of is done by a public officer;

(b) the act was done in the exercise of the public officer's public functions;

(c) the public officer acted with knowledge of the illegality of his or her act, or with a state of mind of reckless indifference to the illegality of the act;

(d) the plaintiff has standing to sue;

(e) the conduct of the public officer caused the plaintiff loss; and

(f) the public officer had knowledge that his or her conduct would probably injure the plaintiff or a person of a class of which the plaintiff was a member (this being "targeted malice"), or had been reckless about the consequences of his or her conduct in the sense of not caring whether the consequences happen or not (this being "non-targeted malice").

[161] The defendants accept that Dr Palmer was a public officer, that he was acting in exercise of his public function, and that Miss du Claire has standing to sue. There is no doubt also that Dr Palmer's actions, pleaded in both the fourth and fifth causes of action, affected Miss du Claire in her employment, although the defendants do not accept that it was Dr Palmer's communications or actions that led to her dismissal. The important issue in this case is whether there was illegality, and whether

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[28] *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at 350.
[29] *Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216, [2008] 3 NZLR 649 at [107].

Dr Palmer acted with knowledge of, or reckless indifference towards the illegality of his actions, and with targeted or non-targeted malice.

[162] Both targeted and non-targeted malice require a plaintiff to prove subjective bad faith on the defendant's part. It was stated in a majority of the High Court of Australia in *Northern Territory of Australia v Mengel*:[30]

> ... the mental element is satisfied when the public officer engages in the impugned conduct with the intention of inflicting injury or with knowledge that there is no power to engage in that conduct and that that conduct is calculated to produce injury. These are states of mind which are inconsistent with an honest attempt by a public officer to perform the functions of the office. Another state of mind which is inconsistent with an honest attempt to perform the functions of a public office is reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is calculated to produce. The state of mind relates to the character of the conduct in which the public officer is engaged – whether it is within power and whether it is calculated (that is, naturally adapted in the circumstances) to produce injury.

[163] It is not sufficient that the public officer failed to make adequate inquiry or acted *ultra vires* or unreasonably. What is necessary is bad faith: a lack of honesty in the performance of the public office or a reckless indifference as to whether the action is lawful and justifiable and as to the injury that it may produce.

[164] The act of misfeasance pleaded in the fourth cause of action is Dr Palmer's implementation of his expectation, recorded in his letter of 13 May 2009 that Miss du Claire would not work with the Crown Law tax and commercial team. Miss du Claire pleaded that Dr Palmer acted knowing that he should not have taken this step and that Dr Palmer's actions ultimately led to her dismissal. She went on to make a number of allegations in her pleadings about his state of knowledge, alleging that he failed to pay heed to certain statutory and other duties in making his decision and had no regard for natural justice. It is further pleaded that he knew his actions would harm her and that he was reckless and indifferent to the consequences. She pleads that it is proper to fix Dr Palmer with knowledge that the Crown already possessed in relation to her personal history and her ill health and vulnerability to special harm.

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[30] *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 at 357 cited with approval in *Pranfield*, above n 27 at [118].

[165] The fifth cause of action is founded on Dr Palmer's decision recorded in his letter of 25 August 2009 where he modified his earlier stance but imposed, it is alleged, "strict restrictions" on how Miss du Claire was to work with the Crown Law Office.

[166] The general background facts, letters and e-mails relied on to support the two alleged misfeasance claims have already been set out above. I examine the circumstances in more detail to see whether Miss du Claire has proved that Dr Palmer knowingly or recklessly acted illegally, and with targeted or non-targeted malice.

Facts of the alleged misfeasance

[167] On 13 May 2009 Dr Palmer had expressed his "expectation" that neither he nor staff from the tax and commercial team would have to work with Miss du Claire again.

[168] At the time Dr Palmer understood that another Deputy Solicitor-General had run into difficulties in dealing with Miss du Claire and had insisted on a similar expectation in relation to another proceeding. He stated in his evidence, and I accept, that he deliberately used the word "expectation" because he was aware that the IRD might not agree with his views about Miss du Claire's conduct. He was willing to discuss the matter further. He also said, and I accept, that if the IRD had come back to him and told him that he had got things wrong and assuaged his concerns, he would not have insisted on his expectation being implemented.

[169] Dr Palmer limited his expectation to the tax and commercial team, presumably because this was the team that he led. This was the area in which his concerns had arisen and I accept that it was possible that Miss du Claire could have been given work to do with Crown Law in areas other than those handled by the tax and commercial team.

[170] Although it is not the express subject of the misfeasance in a public office pleading, I note that in his e-mail on Monday 18 May 2009, after he became aware

of Miss du Claire's e-mail of 14 May 2009 to the court, Dr Palmer advised the IRD that he insisted that his expectation that he and the Crown Law tax and commercial team would not work with Miss du Claire be implemented.

[171] Mr Cook, who had been appointed to investigate Dr Palmer's complaints, was not sure what to make of Dr Palmer's advice and considered the situation to be a "moveable feast". Mr Cook did not interpret Dr Palmer as saying that he and his team would never work with Miss du Claire again. He recorded that it was initially agreed that Dr Palmer's "expectation" would not be implemented immediately.

[172] Upon receiving Dr Palmer's letter and e-mail of 18 May insisting that his expectation be implemented, Mr Cook responded by ringing Dr Palmer. Dr Palmer agreed that matters be held until the next day. On 19 May 2009, Mr Cook met with Miss du Claire. Dr Palmer in the meantime had sent an e-mail to his staff advising those dealing with Miss du Claire to cease doing so. He had amended the e-mail to make it less expansive at Mr Cook's request.

[173] After consultation with the Solicitor-General, it was determined that Dr Palmer would appear on behalf of the IRD before Priestley J in relation to Miss du Claire's e-mail. He in due course appeared. Priestley J was satisfied with the measures that had been taken and recommended. The episode was of sufficient significance for Dr Palmer on 11 June 2009, after the appearance, to send a written brief to the Attorney-General outlining what had happened.

[174] Dr Palmer's instruction that his team not work with Miss du Claire applied for the next two months while Mr Cook carried out his investigation of his complaints against Miss du Claire. Dr Palmer gave permission for Mr Cook to speak to Crown Law solicitors directly in relation to his investigation.

[175] On 31 July 2009 Ms Tremain called Dr Palmer to advise him that Mr Cook's investigation had concluded and that Mr Cook had come to a different view to Dr Palmer about Miss du Claire's actions. The parties then had a discussion on 10 August 2009. In summary:

(a) Dr Palmer could not accept Mr Cook's conclusion that Miss du Claire had no intention to undermine or embarrass the Solicitor-General and Crown Law, and in particular could not reconcile that conclusion with Miss du Claire's e-mail of 5 May 2009.

(b) He did not accept that it was proper for Miss du Claire to contact the court in the way she did on 14 May 2009, but was prepared to accept the IRD's different view and move on.

(c) He accepted and believed that the overriding requirement was to find a way of working with the IRD and Miss du Claire.

[176] Following Mr Cook's report, Dr Palmer's intention was to work constructively on Crown Law re-establishing a relationship with Miss du Claire. On 11 August 2009, he was asked whether she could come to a Crown Law discovery seminar. He agreed that she could. Further on 22 September 2009, he had been asked by the IRD whether Miss du Claire could appear in another proceeding with Mr Ebersohn. He agreed that she should do so.

[177] It was in this context of ongoing positive contact that the letter of 25 August 2009 was written, which is the subject of the fifth cause of action. It reflected Dr Palmer's disagreement with some of Mr Cook's conclusions, but also his acceptance that it was important to re-establish a relationship with Miss du Claire if that could be done without risking what he saw to be the effective conduct of the Crown's legal business.

[178] Dr Palmer participated in at least one meeting on 10 September 2009 with the IRD about how the arrangements might work. He left it up to the team leader of his legal team and other members of the team to work matters out from Crown Law's perspective. The idea was that Miss du Claire would be given the opportunity to show that she could work constructively with Crown Law so that the relationship could be rebuilt. He regarded her letter of 16 September 2009 as conveying that same understanding and intention. He was not aware of her less co-operative letter to the IRD of the same date. He thereafter played no part and indeed had no

knowledge of the IRD's ongoing difficulties with Miss du Claire. He was informed on 17 November 2009 that Miss du Claire no longer worked at the IRD. He only learned that she was dismissed after discovery in these proceedings.

[179] Despite Mr Cook's conclusions in his investigation where he did not accept Dr Palmer's complaints, it is clear that Ms Tremain, Mr Cook and other senior members at the IRD, did not consider Dr Palmer's reaction to her actions as illegitimate. They saw what they described as significant performance issues on Miss du Claire's part that needed to be addressed. This was the second time that a Deputy Solicitor-General had made a formal complaint about her to the IRD.

[180] Mr Cook referred to how at a joint session to announce the new Crown Law protocols on 17 August 2009 Miss du Claire had attacked Crown Law and its staff in a discussion group and had accused Crown Law and its staff members of behaving unconstitutionally. Mr Cook described this as re-emphasising to him that Miss du Claire did not have the insight to recognise the inappropriateness of her behaviour or the effect it had on those around her.

[181] It was Mr Cook's view that Dr Palmer's proposal to trial Miss du Claire with certain specified Crown Law staff was a sensible way forward, and was meant to be a step in the process that would allow her to improve her performance and get back to a normal working relationship with Crown Law. Mr Cook was supportive of Miss du Claire, and his view that Dr Palmer's behaviour was reasonable is significant.

Assessment of the misfeasance allegations – was there malice?

[182] Having reviewed this evidence, and having heard from Dr Palmer and Miss du Claire, I have concluded that Dr Palmer's actions that are the subject of the misfeasance causes of action were in all the circumstances, reasonable and lawful. There was no illegality. Miss du Claire had gone far further than simply disagreeing with Dr Palmer's advice. Even though that advice was clear, her pre-occupation with its wrongness led her to take actions that were unpredictable and wrong-headed. They could have led to embarrassment or even disgrace to Crown Law and the IRD

if the IRD had been seen to be using privileged documents in deliberate breach of an undertaking. It had been both wrong and unprofessional for Miss du Claire to word the first draft of the list of documents in the way she did and place discoverable documents in the privileged list. It was also wrong for her to have sent the disrespectful e-mail to the court concerning the minute, although this fault was not so serious as it did not involve the misuse of a court process, but rather a letter showing very poor judgment.

[183] It was a perfectly legitimate response on Dr Palmer's part, when faced with such an uncontrollable and unpredictable opponent to Crown Law's views as to what should happen in the *X v C* litigation, to insist that the Crown Law tax and commercial team stop working with her. In this way Miss du Claire's ability to convert her hostility and beliefs into actions that bore potentially serious adverse consequences for both Crown law and the IRD would be stopped.

[184] Miss du Claire argues that Dr Palmer's proposed work arrangements set out in his letter of 25 August 2009 were not genuine or that they were designed to create an impossible working situation in order to have her dismissed from the IRD. I do not accept that. I do not consider that there was any personal animus held by Dr Palmer towards Miss du Claire. There was just genuine concern at her actions. I also consider his willingness to find a way to work with Miss du Claire if possible to be genuine.

[185] Miss du Claire has not shown that Dr Palmer acted in any way illegally. He did not act with knowledge of or recklessness towards his supposedly illegal acts. He showed no malice towards her. The claim of misfeasance has not been made out.

Other allegations of misconduct/malice by Miss du Claire against Dr Palmer

[186] Miss du Claire in her evidence and submissions made a number of allegations about Dr Palmer's conduct. Although many of these were not pleaded, they were raised presumably to support her argument that he had acted maliciously towards her. I propose dealing with them briefly.

[187] Miss du Claire initially alleged that Dr Palmer was involved in obtaining or giving the undertaking from the SFO to Jersey, which she regarded as "bad" under New Zealand law. This was why, she suggested, he gave his opinion that they not be disclosed. This was clearly incorrect. Dr Palmer had no involvement in the giving of the undertaking. When this was put to Miss du Claire she stated that she would be "very happy" for her allegation of malice against Dr Palmer on this point to be rather against "Crown Law". This was an irrational response given that she was making an allegation as to Dr Palmer's personal motivation.

[188] Miss du Claire also suggested that Dr Palmer had improper motives for his actions in protecting funding for the Crown Law Office and in acting to secure control over departments. These allegations were entirely without any factual foundation. There had been no "plunge" in instructions from the IRD to Crown Law, and there was nothing to show that Crown Law's revenues benefited from the IRD's legal spend on cases of the *X v C* type. The logical connection of the allegations and the causes of action was not obvious. The suggestion that Dr Palmer "attacked" Miss du Claire's reputation to make new work somehow for Crown Law does not make sense and I consider it to be entirely unfounded. I discern no sign in the evidence that Dr Palmer or Crown Law were trying to exercise control over the IRD in any sinister or expansionist way, or create work. Dr Palmer and those who assisted him were endeavouring to conduct the litigation efficiently and successfully for the IRD, while strictly observing their duties to the court and to the Crown.

[189] Miss du Claire submitted that Dr Palmer's actions in personally seeing the Judge in chambers after her e-mail of 18 May 2009 were unwarranted (she submitted that an IRD lawyer should have gone) and in some way a breach of professional duty. This is not so. Dr Palmer was the most senior of the team of counsel acting in the matter and the gravity of the situation required his intervention, and his attendance on the Judge, to assure the Judge that the spirit of his direction would be implemented.

[190] Miss du Claire took the position that Mr Cook's findings in his investigation refusing to accept Dr Palmer's complaints were right and should have been accepted by Dr Palmer. It is not necessary to analyse Mr Cook's findings in detail, although I

record that they give Miss du Claire a most generous benefit of the doubt, and I have set out my conclusions on the events in question. I have already stated that Dr Palmer's letter was based on true facts and a genuine expression of opinion. He was under no moral or legal obligation to accept Mr Cook's conclusions, which were prepared for IRD.

[191] At the time of the events at issue, protocols were being finalised between the Solicitor-General and the Commissioner that reflected their complimentary roles. Miss du Claire suggested some connection between the pending protocols and Dr Palmer deciding to send the letter. However, the protocols did not radically change any of the conventional understandings and there was no evidence at all to support Miss du Claire's suggestion. Dr Palmer rejected this in his evidence and I accept his evidence.

Claims against Crown Law Office

[192] Although Miss du Claire's focus was on the actions of Dr Palmer, and her pleading primarily relates to him, she asserts that the second defendant, the Crown Law Office "... is jointly and severally liable for the causes of action ... as [Dr Palmer's] master".[31] No wrongdoing of the Crown Law Office independent of Dr Palmer is particularised.

[193] For the avoidance of any doubt I record that I am not satisfied that any of the causes of action are made out against the Crown Law Office. Dr Palmer was the officer at Crown Law Office and had the charge of the proceedings. He was supported in all he did by his staff, but he was in all respects the person responsible. Just as he has established defences to the claims, so has Crown Law.

Loss

[194] If the plaintiff had succeeded in any of her causes of action I would have acceded to Crown Law's request that there be a separate hearing in relation to damages. As it is, the plaintiff has failed and I do not carry out any assessment of the

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[31] Amended statement of claim, 30 June 2010 at [87].

claim to damages. I do record that while Dr Palmer's letter was part of the sequence of events that led to her dismissal, the immediate events that led to this were of her own making. She should have been able to resume her work duties in the months that followed the 25 August 2009 letter.

Conclusion

[195] None of the causes of action have been established. The defences of honest opinion and qualified privilege apply to the three defamation causes of action; and there was no illegality or malice in the pleaded acts of misfeasance. The claim must fail.

Suppression

[196] Interim suppression orders have been made in this proceeding in relation to certain documents. At the outset of the trial, those suppression orders were continued on the basis that individual challenges to the suppression orders were to be dealt with as matters arose, or dealt with in closing submissions.

[197] I have not received any further submissions from Miss du Claire on suppression issues. This case is unusual in that many documents that are privileged or confidential because of public interest immunity, or that contain references to the plaintiff's personal health (relevant to damages), are part of the background. It has been necessary for the restricted documents to be referred to on occasions in evidence and in submissions to ensure that the case is heard fully and effectively.

[198] I am satisfied that the privilege and confidentiality claims by the Crown in relation to those documents are proper and should be reflected by permanent suppression orders. The interim suppression orders are therefore made permanent. There are, however, two documents which, after a review, the defendants have accepted are not privileged. Accordingly, the documents at tabs 34 and 54 in the common bundle are not to be suppressed.

[199] There are two references in the transcript where taxpayer names were inadvertently mentioned, at page 40 line 15, and at page 285 line 8. I make suppression orders in relation to those two taxpayers' names. Otherwise there is no suppression of the transcript. There is no suppression of this judgment or any general suppression order.

Result

[200] The plaintiff fails and judgment is entered for the defendants on all causes of action.

Costs

[201] If the parties wish to make submissions on costs, the defendants are to file their submissions within 14 days and the plaintiff within a further 14 days.

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Asher J

Annexure 1

Annex to letter of 13 May 2009

1. Late in 2008 a joint request for a Crown Law opinion was made by Inland Revenue ("IR") and the Serious Fraud Office ("the SFO") in relation to the proposed disclosure and use by IR of documents obtained from the SFO in circumstances that constituted an inadvertent breach of an undertaking given by the SFO to the Jersey authorities. It appeared that other documents that were the subject of the undertaking had also been obtained by IR from the Court file in relation to the SFO prosecution in *R v D* and advice was also sought in relation to those documents.

Discussions about Availability of Documents:

2. Deputy Solicitor-General (Public Law) Matthew Palmer provided a first draft of Crown Law's advice on 13 January 2009. Ms du Claire and Mr Wallace of IR prepared a memorandum dated 22 January in response that was provided to Crown Law on 23 February 2009.

3. Matthew Palmer and Jessica Gorman of Crown Law met with Deputy Commissioner Carolyn Tremain and Acting LMU Manager Ross Vickery on Monday 9 March and provided in tabular format a Crown Law response to each point raised in the 22 January memorandum. Crown Law advised that nothing in the 22 January memorandum caused Crown Law to change its view. At that meeting it was agreed that IR would provide any further relevant information as soon as possible and that Crown Law would finalise its advice by Monday 16 March - the date by which the inspection affidavit was due to be filed in Court in the [*X v C*] proceedings. It was agreed that if Crown Law's view on whether the documents should be available for inspection did not change then that advice would be followed by IR. It was also agreed that if, by 16 March, further consideration of the matters was still required then the prudent course would be to claim privilege, and therefore withhold, the "Jersey" documents obtained by IR in the [*R v D*] inspection list – on the basis that inspection could be subsequently extended but not subsequently restricted.

4. On Wednesday 11 March there was email correspondence between Crown Law and IR regarding the inspection list (attached). In this correspondence Crown Counsel Harry Ebersohn made clear Crown Law's expectation that:

> "All documents obtained from Jersey (whether from the SFO directly or through the search of the Court file in the SFO criminal proceeding) should be listed as privileged on

> the grounds of public interest immunity (perhaps also referring to s70 of the Evidence Act)".

5. In response on 11 March Ross Vickery clarified that a final decision on whether the material in issue would be disclosed or not was awaiting Crown Law's consideration of further information Inland Revenue had sent to Crown Law that day. He also stated that:

> "Lysette has informed me that we are in a position to list the documents presently under discussion in whichever part of the lists is most appropriate; our timeframe for that is of course when we finalise the affidavit for signature (we are working to mid-morning Friday for that)."

6. On Friday 13 March Matthew Palmer emailed IR (as attached) to advise that the finalised version of Crown Law's opinion would be available on Monday 16 March but that:

> "At this stage, however, I can advise that we have not changed our view as to how the information should be presented in the discovery lists on Monday 16 March. As agreed with you and Carolyn at Monday's meeting, given that we are now confirming to you that our view has not changed on that point, discovery will be managed in accordance with our advice."

Affidavit

7. The specific context in which IR had wished to use the Jersey documents was the tax challenge proceedings that are currently on foot (the [*X v C*] proceeding). As is usual in such proceedings the Commissioner was required to swear an affidavit of documents in which he lists all documents within his power or control that are relevant to the proceedings but to claim confidentiality or privilege over certain of those documents where that is legally appropriate. Claims of privilege or confidentiality are not lightly made, however, as they operate to prevent the other parties to the litigation from having access to documents that are relevant to their case.

8. The preparation of the affidavit of documents for the [*X v C*] proceeding had been completed by Ms du Claire, at her insistence. The first time the draft affidavit of documents was provided to Crown Law as on Monday 16 March, despite earlier queries and despite the fact that as the solicitors on the record Crown Counsel have duties to the Court in relation to documents filed on behalf of the Commissioner and the Solicitor-General is responsible for the conduct of the litigation.

9. At about midday on 16 March 2009, Ms du Claire sent the draft affidavit of documents to Crown Law, with a request that the Crown Counsel concerned provide her with any comments on it within half an hour. Included in the body of the affidavit was the statement that:

> "In Part 3 of the Schedule, I list documents that Inland Revenue obtained in variously 2003 and 2004 from the Serious Fraud Office ["SFO"] which had been obtained by that Office from Her Majesty's Attorney-General for the Bailiwick of Jersey in 2000. Copies of these same documents were obtained from the High Court pursuant to the consent of the accused and subject to the conditions imposed by the Court in Priestley J's judgment in the matter [*R v D*]. I am advised by the Solicitor-General that I must claim confidentiality for those documents, notwithstanding that a set has been previously released under the Official Information Act 1982 to a taxpayer to whom they related."

10. It is arguable that that draft statement would have constituted a waiver of legal professional privilege over Crown Law's advice. However this statement also clearly implied that IR did not agree with the advice. After some debate Ms du Claire agreed to modify the statement so that it simply recorded that confidentiality and privilege was being claimed over the Part 3 documents.

11. Because Crown Counsel Harry Ebersohn had no immediate access to the documents that were subject to the undertakings there was no review by him of the lists themselves on 16 March 2009 and, more particularly, he (and the others who became involved in the issues over the wording of the affidavit itself) assumed that Part 3 would (in accordance with his email instructions) simply comprise a list of the "Jersey" documents (ie the documents that were the subject of the undertaking). The affidavit (with the amended wording) was duly served and filed in Court that afternoon.

12. Subsequently, however, it has become apparent that the Part 3 list in the affidavit was preceded by the statement that:

> "These documents are listed as confidential on the advice of the Solicitor-General."

13. It is arguable that this statement constitutes a waiver of privilege over Crown Law's advice. While Crown Law considers such an argument could be resisted it could certainly be expected to be made by opposing counsel. Furthermore, inclusion of this statement is directly contrary to the advice given by this Office in relation to the contents of the affidavit itself which Crown Law had understood had been accepted and acted upon by Ms du Claire.

14. As well, it is now apparent from a review of the Part 3 list itself that a considerable number of the documents listed there could never have been subject to the Jersey undertaking and are plainly not confidential on any basis whatsoever. To take only the clearest example, New Zealand Companies Office searches (which are public records) have been included in the Part 3 list. The claim of confidentiality, which is stated to be made on the advice of the Solicitor-General, is manifestly unfounded.

The Problem

15. Crown Counsel responsible for the [*X v C*] matter has sought an explanation from Ms du Claire for her actions. In her response, which is attached, Ms du Claire states that:

15.1 IR officials were advised by Crown Law to list all documents disclosed by the SFO to the IR as privileged, which she did, despite her being aware:

> "that a lot of that information was not, and indeed could not, have been covered by the undertaking".

15.2 Despite repeated requests, IR did not have the advantage of the full benefit of Crown Law's opinion when drafting and completing the affidavit of documents.

15.3 Crown Law's opinion went beyond the original questions asked by the SFO and IRD.

16. Crown Law does not accept the accuracy of any of these statements. In particular:

16.1 Ms du Claire knew that Crown Law did not know which of the documents obtained from the High Court file were covered by the Jersey undertaking or which documents were obtained by SFO from the Jersey authority;

16.2 She knew that the conclusion of the draft Crown Law advice of 19 January was that the "documents/information obtained by SFO from the Jersey authority" are confidential, that disclosure is a serious error and that they should not be made available for inspection;

16.3 She knew that on Wednesday 11 March Crown Law considered that "All documents obtained from Jersey (whether from the SFO directly or through the search of the Court file in the SFO criminal proceeding)" should be withheld from inspection;

16.4 She was advised on Friday 13 March that Crown Law's view had not changed "as to how the information should be presented in the discovery lists on Monday 16 March";

16.5 When she provided Crown Law with half an hour to comment on the draft affidavit on the day it was due to be filed she was advised by, and agreed with, Crown Law not to refer to the Solicitor-General's advice in the body of the affidavit;

16.5 She knew she had included a similar reference in the schedule to the affidavit but took no steps either to draw that to Crown Law's attention and she also knew that she had listed in Part 3, and claimed confidentiality and privilege for, documents that

that had not been obtained from the Jersey authority and were not otherwise confidential at privileged;

16.6 The affidavit was then sworn on oath by another IR official, presumably on Ms du Claire's advice.

17. To suggest that Crown Law advised that documents, that were not in fact covered by the undertaking, should be listed as confidential requires a reading of Crown Law's advice that is simply not tenable, Crown Law considers that the only reasonable explanation for what has occurred is that Ms du Claire has deliberately sought to undermine advice with which she did not agree. In so doing she has caused a formal court document, sworn on behalf of the Commissioner and for which Crown Counsel is responsible to the Court, to inaccurately record the view of the Solicitor-General in such a way as to cause embarrassment to him and to this Office.