IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2014-409-45
[2019] NZHC 2184

	BETWEEN	DAVID IAN HENDERSON Plaintiff
	AND	ROBERT BRUCE WALKER Defendant

Hearing:	13–17 May 2019
Counsel:	J Moss and H M Weston for Plaintiff R J B Fowler QC and S B McCusker for Defendant
Judgment:	3 September 2019

JUDGMENT OF THOMAS J

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Introduction

[1] To say there is bad blood between David Henderson and Robert Walker is an understatement. From the time Robert Walker was appointed liquidator of Property

Ventures Ltd (PVL) on 27 July 2010, he has been on a collision course with David Henderson, former director of companies in the PVL group. Frustrated by PVL's liquidation being stayed, when Mr Walker was appointed liquidator of five other companies in the group, he set about his task with gusto. Fearing that documents relevant to the liquidations might be unlawfully accessed following the February 2011 Christchurch earthquake, Mr Walker was instrumental in the police seeking and obtaining warrants to seize records of the companies. It is what Mr Walker did on receipt from the police of PVL's tape drive and a laptop (used by Mr Henderson but owned by PVL) that is the subject of these proceedings. Mr Henderson claims Mr Walker, fuelled by malice towards him, provided his personal information to the Inland Revenue Department (IRD), the Official Assignee and other third parties.

[2] Mr Henderson claims Mr Walker not only breached his rights to privacy and confidence in confidential information but also that he breached a number of duties associated with his office as liquidator and as an officer of the Court.

[3] Mr Henderson seeks declarations in respect of his six causes of action, orders that Mr Walker provide a schedule of material accessed and to whom it has been distributed and $100,000 in general damages for personal anguish, humiliation and stress.

[4] Mr Walker denies there has been any unlawful disclosure of Mr Henderson's personal information and says none of the claims can succeed.

[5] In this decision, I will first outline the background in some detail as it provides important context. I will then consider each claimed breach and make factual findings, before considering those findings as against the law applicable to the six causes of action.

Background

[6] PVL was placed into receivership in March 2010, and liquidated on 27 July 2010, but the liquidation was stayed until 8 February 2012. This caused Mr Walker some considerable frustration.

[7] On 29 November 2010, Mr Henderson was adjudicated bankrupt.

[8] On 13 December 2010, Mr Walker was appointed liquidator of Tay Properties Ltd and, on 16 December 2010, liquidator of Cashel Ventures Ltd, Tay Ventures Ltd, Hotel So Corporation Ltd and Dweller Ltd. All those companies were subsidiaries of PVL. Mr Henderson was a former director of those companies.

[9] On 16 December 2010, Mr Walker wrote to Mr Henderson pursuant to s 261 of the Companies Act 1993, requesting the records of the five companies.[1] He requested that Mr Henderson:

- provide all business records and information in respect of the companies in his possession;
- advise him of the whereabouts of any records he did not hold; and
- advise the identity of the accountants, lawyers and bankers to the companies.

[10] He also required Mr Henderson provide or otherwise direct him to all records the subject of s 189 of the Companies Act, including minutes of meetings of directors and shareholders, certificates signed by the board, interests registers, financial reports prepared in accordance with s 10 of the Financial Reporting Act 1993 and the general ledgers, along with all supporting workings or primary documentation such as invoices, receipts, cash records, and bank statements that supported the general ledgers. Mr Walker also expected Mr Henderson to provide him with all company correspondence, contracts, legal documents and advice of whatever nature generated in the name of, or addressed to, the companies.

[11] On 20 December 2010, Maurice Andrews, an employee of Mr Walker, went to Christchurch in an effort to retrieve documentation. He met Mr Henderson (without an appointment) and requested the accounting records. Mr Henderson said the office

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[1] By s 261(1) of the Companies Act 1993, a liquidator has power to require anyone with company books, records or documents to deliver them to the liquidator. A document, as defined in s 2, means a document in any form, including information stored electronically. Pursuant to s 266, the Court, on the application of a liquidator, may order a person who has failed to comply with a requirement under s 261 to comply.

would not be open until mid-January. It was agreed Mr Andrews would send Mr Henderson a letter outlining the records he wanted. They made a tentative date for Mr Andrews to pick up the relevant records around the middle of January but Mr Andrews was to phone Mr Henderson beforehand.

[12] On 24 December 2010, Mr Walker emailed Mr Henderson regarding the s 261 notice. He requested cooperation and informed Mr Henderson that a failure to comply was a criminal offence. He told Mr Henderson that there were two ways a liquidator could achieve statutory objectives – an easy way or a hard way. He expressed his indifference between the two alternatives but said he was prepared to carry out the task in a conciliatory way to the extent it was consistent with his duties. He said, however, it was not really his choice but that of Mr Henderson and his fellow erstwhile directors. He offered to fly to Christchurch to meet, if Mr Henderson wanted to explore a less fractious route.

[13] Mr Walker concluded his email with the following words:

> To redeem the past is to transform every "it was" into "I wanted it thus", that alone would I call redemption.

[14] On the same day, Mr Walker and Mr Henderson spoke on the telephone. When Mr Walker again wrote to Mr Henderson on 12 January 2011 requesting all records, Mr Henderson responded by email referring to his telephone conversation with Mr Walker on 24 December 2010, saying he then made it clear he was unavailable until late January and would work with Mr Walker then to meet his obligations and assist in any reasonable way. Mr Walker responded, noting his obligations under the Companies Act to report to creditors and the Companies Registrar within 25 working days of appointment, meaning his first reporting date was 21 January 2011. He said it would be preferable to report against the backdrop of information relating to the companies. He asked Mr Henderson not to put hurdles in his path.

[15] In his response, Mr Henderson expressed some frustration, noting Mr Andrews' unannounced visit and the arrangement he had made with him. He said he was working to meet Mr Walker's requirements as quickly as he could. Relatively ill-tempered email exchanges ensued. On 20 January 2011, Mr Henderson emailed

Mr Walker saying they had pulled together information as requested but there may be more. He noted a lot of records had been in storage and had to be relocated following the Christchurch earthquake on 4 September 2010.

[16] On 21 January 2011, Ryan Eathorne, another employee (or contractor) of Mr Walker, went to Christchurch and collected some documents relating to three of the companies from Grant Smith at Canterbury Legal Ltd, the companies' lawyers. Mr Smith said the remaining documents in respect of the two other companies would be available within seven days. Mr Eathorne delivered the documents to the IRD in accordance with s 17 of the Tax Administration Act 1994. Mr Eathorne then went to BDO, the companies' accountants, and was given approximately 30 boxes of documents relating to three of the companies, including creditor listings for two of them and a profit and loss statement and budget for one (Hotel So Corporation).[2] Mr Eathorne then went to Mr Henderson's premises, again requesting the records for all five companies. Mr Henderson was away and Mr Eathorne made an appointment to meet him on his return. This appointment was subsequently cancelled by Mr Henderson.

[17] Mr Eathorne returned to Christchurch on 1 February 2011. He met with Mr Henderson and collected three folders of records pertaining to two of the companies. He questioned the absence of accounting records, for example the general ledgers, in respect of each of the five companies. Mr Henderson insisted they had been given to the receivers.

[18] On 4 February 2011, Mr Walker wrote to the National Enforcement Unit of what was then the Ministry of Economic Development, reporting that Mr Henderson had committed an offence under s 258A of the Companies Act by repeatedly failing to comply with the s 261 notice. Around the same time, there were ongoing emails between Mr Walker and Mr Henderson, Mr Walker informing Mr Henderson he had committed a criminal offence by "serial failures to comply" with s 261. Mr Henderson continued to rely on the arrangement he had made with Mr Andrews to meet him in mid-January.

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[2] Although Mr Eathorne's file note says he was also given a general ledger, Mr Walker said that was incorrect.

[19] On 18 February 2011, Mr Walker wrote to Mr Henderson at his residential address (despite being requested by Mr Henderson to write to a PO Box number), referring to what he termed Mr Henderson's failure to comply with the s 261 notice and saying he had engaged lawyers to seek a formal court order against him. He declined Mr Henderson's request to meet and discuss matters.

[20] On 22 February 2011, Christchurch suffered the devastating earthquake that resulted in loss of life. A red zone was erected around the central business district (CBD), which included Mr Henderson's business premises.

[21] This led Mr Walker to write to the District Commander for the Canterbury Region of New Zealand Police on 28 February 2011, recording his role as liquidator of the five companies, alleging Mr Henderson had failed to comply with the s 261 notice and recording his suspicion that premises located within the CBD may contain the records in respect of the five companies that ought to have been in his custody. He referred to the records of PVL and other subsidiaries, which he said would more probably than not be due to fall into his custody. He noted Mr Henderson's offices in two premises in Lichfield Street, Christchurch and asked for his interests to be considered when any access was given to persons to enter the CBD.

[22] Mr Henderson obtained approval to enter the Christchurch red zone on 21 March 2011 and removed the server for PVL and a subsidiary, Livingspace Properties Ltd, from 96 Lichfield Street. Mr Walker wrote to Mr Henderson in early April 2011 requesting access to the servers.

[23] On 1 April 2011, Grant Thornton, joint receiver of a number of the companies, including Livingspace Properties and PVL, wrote to Civil Defence expressing concern that Mr Henderson had accessed the premises and removed records. It noted that Mr Henderson, as an undischarged bankrupt, was prohibited from being involved in the management of a company.

[24] On 6 April 2011, Detective Sergeant Wendy Riach of the New Zealand Police applied for search warrants in respect of 96 and 110 Lichfield Street. Her affidavit in support of the application referenced Mr Walker's position as liquidator of the five

companies and PVL (noting the stay). She said Mr Walker had conducted inquiries into the accounting practices for one of those companies (Cashel Ventures) and considered there had been a possible criminal offence of false accounting in respect of Cashel Ventures' purchase and development of the property known as Hotel So. Detective Sergeant Riach noted Mr Walker's assertion that he had not been supplied with the documents he required under s 261 and that this was hindering his investigation into Cashel Ventures' finances. Detective Sergeant Riach sought warrants on the basis of her belief a search of the two premises would reveal evidence of failing to comply with a s 261 notice, being an offence punishable by imprisonment.

[25] Search warrants in respect of the two premises were issued, authorising the police to seek all financial statements for the five companies and PVL (the Warrants). The search was executed on 8 April 2011. Mr Eathorne attended on behalf of Mr Walker. A representative of the receiver also attended. The police removed boxes of materials, computers and a laptop that belonged to PVL but was used by Mr Henderson (the Laptop). They also removed a tape drive, which was a backup of PVL's server (the Tape Drive). All of the material was provided to Mr Walker, despite the requirement in s 199 of the Summary Proceedings Act 1957 that property seized pursuant to a search warrant "shall be retained under the custody of a constable".

[26] Subsequently, Mr Henderson obtained a declaration that the Warrants were unlawful and inconsistent with s 21 of the New Zealand Bill of Rights Act 1990.[3] Mr Walker's role in holding the materials seized as a result of the Warrants is discussed later in this decision but Mr Henderson's position is that Mr Walker can only have held those materials as an agent of the police because the purpose of the Warrants was to seize the materials in order to determine whether a criminal offence had been committed.

[27] There was media interest in these events, the fact of the Warrants being reported both by *Stuff* and *The National Business Review* (*NBR*). On 27 May 2011, *NBR* published an article headlined, "Who Snitched on Hendo to SFO?" The article referred to Mr Walker's delivery to the Serious Fraud Office of more than 7,000

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3 *GP 96 Ltd v Attorney-General* HC Christchurch CIV-2014-009-366, 7 May 2015.

documents about "numerous inter-company transactions within the Property Ventures group". It recorded Mr Walker as having told the *NBR* he was absolutely determined in his pursuit of Mr Henderson, which had involved the Warrants in order to obtain documents. It quoted Mr Walker as saying:

> I have about 45,000 emails from him and a great deal of other evidence. He's been saying a lot of interesting things.

[28] The article also quoted Mr Walker as saying:

> This man has been permitted to continue as though nothing has happened but it's coming to an end.

[29] Concerned about whether Mr Walker had access to his private information and worried about what he might do with it, Mr Henderson engaged a private investigator, Wayne Idour. Mr Idour telephoned Mr Walker in early June 2011 and recorded that telephone conversation. Although there is some dispute about whether Mr Idour misrepresented himself by saying he was phoning on behalf of a number of creditors or, as Mr Henderson contended, he was effectively phoning on behalf of Mr Henderson as a creditor, there is no doubt Mr Walker said some revealing things in that telephone conversation. He told Mr Idour he held Mr Henderson's personal computer with over 5,000 emails. Mr Walker made his personal feelings about Mr Henderson abundantly clear, using derogatory terms. He described Mr Henderson as not thinking the law applied to him and said, by holding Mr Henderson's personal computer, "I hold vast amounts of information". He alluded to the fact he was not entirely clear whether he had a "complete legal right to all this stuff". He referred to Mr Henderson's access to the red zone, taking the main computer, and then said:

> And that's where all the data's sitting. But there was a umm tape backup. I can't access it but we've got it. We've also got other sources of information, I've tried to build it all up, but it's incredibly difficult and I'm getting resistance here, there and everywhere. I can see, I can get that basically I've probably got more information than I can ever deal with to be honest umm and not withstanding that I'm kinda at the margins of the law of being able to give people stuff. I mean, no doubt he'll start squealing about the Privacy Act in the near future and I'll just say "little pricks like you – you have no rights, see you in Court, Fuck Off".

[30] Mr Walker suggested that Mr Idour could "come and look at everything". He said he did not know how far he could go and again referred to privacy issues. He

then commented that he would push it right up to the edge of the law and slightly beyond because he knew Mr Henderson had no means of enforcing anything against him.

[31] Throughout 2011 and 2012, Mr Henderson complained on multiple occasions to the police, Mr Walker and the Official Assignee about his private information being held and distributed by Mr Walker. Eventually, on 13 September 2012, Mr Walker confirmed, following a memorandum of arrangement he entered into with the police, that he had returned to the police all the records he obtained following the execution of the Warrants (other than information related directly to the companies of which he was liquidator).

[32] After investigation, the police decided not to pursue the alleged criminal offending and applied to the District Court for directions under s 199 of the Summary Proceedings Act as to who was entitled to the material seized pursuant to the Warrants.[4] Around the same time, Mr Walker applied to the High Court for directions under s 266 of the Companies Act regarding return of the information to which he claimed he was entitled as liquidator. By this time, the stay of PVL's liquidation had been lifted.

[33] Judge Somerville, in the District Court, dealt with the issue of the Tape Drive.[5] Finding it (including the tapes found inside it) was owned by PVL, he ordered it should be delivered to PVL. He further found that the information on the Tape Drive related to PVL, or companies within the group, and that PVL was entitled to that information. Judge Somerville considered he could not deal with the external hard drive, which stored electronic data extracted from the Laptop, because his jurisdiction was limited to the items seized pursuant to the Warrants and not copies taken.[6] By this stage the Laptop had been returned to Mr Henderson.

[34] Associate Judge Osborne (as he then was) considered orders for possession of the electronic data copied from the Laptop.[7] Mr Walker had sought the return to him

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4 The application was made prior to the Search and Surveillance Act 2012 coming into force.
5 *Riach v Property Ventures Ltd* DC Christchurch CIV-2012-009-2031, 13 May 2013.
6 At [56].
7 Associate Judge Osborne became a High Court Judge in 2018.

of the data with specified safeguards to protect the interests of Mr Henderson and others, whereas Mr Henderson sought the release of the data to Mr Walker only once it had been independently examined and confirmed as information to which Mr Walker as liquidator was entitled.

[35] Mr Walker's position as regards information concerning PVL, and his belief as to how the affairs of PVL and other entities within the group had become intermingled, was set out in the affidavit he filed in the High Court when he sought return of the data extracted from the Laptop.[8] He deposed:

> It is important that I clarify the extent of inter-mingling of the affairs of the PVL group and the importance that I have access to information relating to the affairs. PVL was the only company that maintained audited accounts. The parent company controlled all of the finances across the group and monies were simply redistributed through PVL from one subsidiary company to another as needs arose. There were cross guarantees between numerous entities and interlinked borrowings again with PVL acting as the conduit. It is impossible to understand the business of PVL without reference to a wide range of related and subsidiary companies, which includes the food and beverage companies as well as the individual development companies.

[36] Associate Judge Osborne referred to the Court's powers under s 266(2) of the Companies Act to order a person holding documents relating to the business accounts or affairs of the company in liquidation to produce those documents to the liquidator. He noted Mr Walker's undertaking that his immediate need for the documents was in relation to civil proceedings before the High Court that were potentially affected by statutory limitations under the Limitation Act 2010. He specifically referred to Mr Walker's undertaking that he would not disclose information that may have been contained on the external hard drive that was not relevant or that was privileged.[9]

[37] Associate Judge Osborne was in no doubt that the physical property sought by Mr Walker was his property as liquidator. There was no dispute that the hard drives and flash drives contained electronic documents that included information on PVL and the group companies. The Court's discretion under s 266(2) was therefore engaged. In respect of the personal information contained on the hard drive, Associate Judge Osborne said:

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8 *Commissioner of Inland Revenue v Property Ventures Ltd (in liq and in rec)* [2013] NZHC 1368.
9 At [43].

> [48] At some point in the history of his involvement with the various Henderson companies and his control of his personal affairs, Mr Henderson, (or his employees) chose to carry on the hard drive of the laptop information relating to the affairs of a number of different legal persons. Once that decision and practice was adopted, there would be an intermingling to be dealt with in the event that any of those persons was subsequently placed either in bankruptcy or in liquidation. The legal right to access of documents relating to the affairs of those persons would pass to their administrator. That is precisely what has happened in this case with the liquidation of Property Ventures and a number of other companies in the group.
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> [49] The real issue of substance in this case is not whether the liquidator of Property Ventures and other companies in the group should have access to documents related to the affairs of Property Ventures and the group. Rather, the issue is how that should be done assuming that some of the documents held on the hard drives may arguably relate solely to other persons.

[38] Associate Judge Osborne specifically noted that, notwithstanding Mr Henderson's concerns as to past conduct of Mr Walker, he remained the liquidator. As he said:[10]

> As an officer of the Court, he is always subject to the Court's supervision. That includes, for instance, in relation to the use he makes of any document which he obtains pursuant to his powers under the Companies Act generally or pursuant to an order of the Court under the Act.

[39] Associate Judge Osborne then made an order in favour of Mr Walker. He noted that, despite complaints about the lawfulness of the Warrants, he was dealing simply with the consequences of the fact Mr Walker had the right to obtain information under the Companies Act and to that extent it mattered not whether the information was in the hands of the police properly or improperly.[11]

[40] As a consequence, Associate Judge Osborne directed the police to deliver to Mr Walker the external hard drive and flash drives, which stored electronic data extracted from the Laptop. He directed Mr Walker to complete a list categorising the electronic documents as follows:

> (i) Documents required to be disclosed by the liquidator in relation to existing High Court proceedings;
>
> (ii) Documents which relate to the affairs of Property Ventures Ltd or any related company of which the liquidator is liquidator, other than documents which are disclosed under paragraph (b)(i) above;

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10 At [55].
11 At [62].

(iii) Documents which do not fall into either of the preceding ((i) or (ii)) categories.

Private and privileged documents

[41] The Tape Drive was a backup of PVL's server and included a backup of the Laptop. The Laptop (and therefore the Tape Drive) contained documents of a private nature (the Private Documents). They included:

(a) personal emails between Mr Henderson and his wife talking about issues in their marriage;

(b) personal emails between Mr Henderson and his friends relating to marital breakdowns, health, weight loss, and fitness;

(c) emails relating to medical advice and ordering various medical supplements;

(d) photographs of family, friends and pets;

(e) emails to Mr Henderson from public figures (including politicians) seeking advice;

(f) emails with legally privileged material, including in relation to companies of which Mr Walker was the liquidator; and

(g) emails unrelated to the affairs of the companies of which Mr Walker was liquidator.

[42] Mr Walker accepted the Private Documents were private, although he questioned whether legal privilege attached to some of them. In saying that, he appeared to contend that the privilege belonged to him as liquidator of the various companies. I do not understand his counsel to pursue what, in the circumstances, is clearly an untenable proposition.

Distributions

[43] In the period between April 2011 and February 2016, Mr Henderson claims Mr Walker made 11 unlawful distributions of his private information. Ten of those distributions are undisputed, being to the IRD, the office of the Official Assignee, the police and lawyers involved in discovery. There were also three distributions to private individuals, one of which is disputed.

(i) 12 April 2011 – Tape Drive to the IRD

[44] On or about 12 April 2011, four days after execution of the Warrants, Mr Walker passed the Tape Drive to the IRD. As discussed, this comprised the entire backup of PVL's server, although at this stage Mr Walker's liquidation of PVL had been stayed. It therefore must have included all the Private Documents.

[45] Mr Walker's defence is that the Tape Drive was provided pursuant to an extant IRD request to the receiver under s 17 of the Tax Administration Act (the s 17 notice). Therefore, he claims his distribution was pursuant to a lawful request addressed to the receiver and passed to him.

[46] The s 17 notice to the receiver of PVL, Grant Thornton, requested:

> A copy of all documents and/or company records that you obtain in respect of the Company during the course of your term as receiver of the Company.

[47] The letter pointed out that failure to comply with the notice may lead to Court orders to ensure compliance and/or prosecution. It also stated:

> Control here is used in its wider sense and includes material held by others on your behalf.

[48] There is no evidence the receiver passed the s 17 Notice to Mr Walker prior to 12 April 2011 or authorised Mr Walker as agent to deliver the Tape Drive to the IRD.

[49] Importantly, Mr Walker's evidence was that he could not access the Tape Drive and therefore he could not have known what was on it. All he could have known was that it was a computer component that was the property of PVL. Mr Walker's evidence was that he gave the Tape Drive to the IRD because he could not afford (or did not

want to spend the money) to pay an external agency to extract the data for him to review.

[50] Mr Fowler QC, for Mr Walker, submitted that Mr Walker passed the Tape Drive to the IRD before he was aware of possible confidentiality issues, notice of which he did not receive until 5 July 2011, or more probably 20 July 2011, which is the date Mr Walker confirmed to police that he no longer had possession of any of Mr Henderson's personal information. Mr Fowler stressed what he maintained was Mr Walker's proprietary interest in the Tape Drive as liquidator. Furthermore, that the extent of intermingling of company and confidential information meant it would have been, on a practical level, impossible for Mr Walker to sift through all the material. In this regard, he referred to PVL's computer policy to the effect that all hardware and software, including data, remained the property of PVL and personal use of email was acceptable but personal emails had to be contained in one folder called "personal".

(ii) 28 May 2011 – email from Mr Walker to a United States university address, Mr Holden, Mr Thorne and Mr Tubb

[51] Mr Walker sent an email to Mr Holden, Mr Tubb, Mr Thorne and a group he described as an early form of social media comprising approximately 100 accountants, almost all based in the United States. He attached to his email the *NBR* article discussed above. He described Mr Henderson in derogatory terms, saying he was "not a worthy adversary". He said:

> Every business decision he made was disastrous. He becomes a developer on a grand scale at the peak of the property bubble. He enters the wine industry at the moment a great glut has formed. He even invested in an engine patent – yes an engine patent – that even I could see from the technical drawings was simply going to fail. The company into which he put the money spent a reasonably large sum of money obtaining patents around the word until it got to Japan. The Japanese denied the patent, pointing out that nothing was original.

[52] Mr Walker accepted that, at the time, he knew Mr Thorne was an adversary of Mr Henderson and he knew Mr Holden was hostile to Mr Henderson (and Mr Hyndman, discussed below). Mr Tubb was Mr Walker's family trustee.

[53] Mr Walker referred to Mr Henderson's involvement in property, wine and an engine patent. Mr Henderson acknowledged the information about property and wine was already in the public domain. The references to the engine patent are more controversial. In Mr Henderson's submission, the engine patent was not related to any company in liquidation and was not public. Mr Walker maintained that Dweller Ltd (of which he was liquidator) had received an invoice from an Australian patent attorney in connection with the engine patent and therefore had a proprietary interest in it.

(iii) 13 June 2011 – email from Mr Eathorne to Mr Slevin attaching a screenshot concerning SOL Management Ltd

[54] Mr Henderson was adjudicated bankrupt on 29 November 2010, having previously been bankrupt in August 1996 and automatically discharged in August 1999.

[55] In 2011, Terry Marshall, a Deputy Official Assignee who was administering the bankruptcy, was engaged in an inquiry into Mr Henderson's assets held on trust and the nature and extent of Mr Henderson's interest in trust assets. In the course of assisting Mr Marshall, Grant Slevin (a solicitor working for the Insolvency and Trustee Service) was investigating whether Mr Henderson may have received funds personally from companies with which he was associated. He became aware that Mr Walker was in possession of records seized by the police pursuant to the Warrants.

[56] On 13 June 2011, Mr Slevin wrote to Mr Walker asking him to supply information relating to payments to Mr Henderson by his companies or any company payments made to third parties on Mr Henderson's behalf. He specifically requested any detail around payment of money by SOL Management Ltd to Mr Henderson in October 2010.

[57] Mr Eathorne sent Mr Slevin an extract by way of a screenshot from the Tape Drive in respect of the accounting records of SOL Management. The screenshot is not visible on the version of the email produced in evidence, and it is unclear from the context of the email what the screenshot actually showed.

[58] Mr Henderson's position is that Mr Walker had no right to do this and indeed no right to the information at all, as SOL Management was not in liquidation. Mr Walker accepted he was not liquidator of SOL Management at the time and he had not received an official request on behalf of the Official Assignee.

(iv) and (v) 14 June 2011 and 26 August 2011 – Mr Walker provided Mr Slevin flash drives of all emails and voice recordings from the Laptop

[59] Mr Walker and Mr Slevin then spoke on the telephone and Mr Slevin became aware Mr Walker was in possession of the Laptop.

[60] On 14 June 2011, Mr Slevin requested that Mr Walker provide a clone of the Laptop "pursuant to s 171 of the Insolvency Act 2006". Mr Walker was unable to provide a clone and instead provided flash drives. The flash drives contained emails and some voice recordings.

[61] Mr Slevin was unable to search the flash drives so, in mid-August 2011, he asked Mr Eathorne to provide emails in searchable form. On 26 August 2011, Mr Eathorne provided a second flash drive. Given the conclusions Mr Slevin reached after having viewed the emails, on 31 October 2011 he forwarded the flash drive to Mr Wolmarans, Acting Investigations Manager of the National Enforcement Unit. Mr Wolmarans was unable to search the flash drive, so Mr Slevin provided him with copies of the relevant emails.

[62] By her judgment dated 30 March 2017, Hinton J considered whether Mr Slevin's request constituted an unreasonable search and seizure for the purposes of s 21 of the New Zealand Bill of Rights Act.[12] She noted that, during the course of locating relevant emails, Mr Slevin also viewed irrelevant emails, including some of a personal nature, for example correspondence between Mr Henderson and a well-known political figure in relation to a diet programme.

[63] Hinton J observed that s 101 of the Insolvency Act vests all property of the bankrupt in the Official Assignee and s 171 gives the Official Assignee authority to

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12 *Henderson v Attorney-General* [2017] NZHC 606.

require any person to deliver any document relating to the bankrupt's property, conduct or dealings. In her view, there would seem to be little or no expectation of privacy by the bankrupt against intrusion in respect of their financial affairs.[13] Hinton J, however, considered the email of 14 June 2011 fell into a different category. It requested all of the data on the Laptop, the scope of the contents being unknown. She referred to the reasonable expectation of privacy in some of the stored data. She therefore ruled that Mr Slevin's exercise of s 171 constituted a search and seizure.[14]

[64] Hinton J held that s 171 covers all documents, whether of the bankrupt or others, that are or could be relevant to the administration of the bankruptcy, but the section does not extend to personal documents that are clearly irrelevant to the bankruptcy.[15] Applying that to the facts of the s 171 request, Hinton J found the request was unlawful because the request for a clone of the Laptop could not be considered synonymous with a request only for documents relating to property, conduct or dealings of the bankrupt. Hinton J therefore concluded that the request was unlawful, and it followed that the receipt or seizure of the flash drives, Mr Slevin's continued control of them and his searches of personal irrelevant documents from the Laptop were also unlawful.[16] She did, however, say:

> [66] I should add that had the request been within the scope of s 171 and lawful, and documents had been provided that were personal and irrelevant, I would not consider that made the seizure of the documents unlawful. An ability to inspect documents to determine their relevance is a necessary aspect of a requisition power. The Official Assignee should not be responsible for the receipt and initial inspection of documents that are, as a result of inspection, found to be outside the scope of s 171. That is necessary to ensure the Official Assignee's power under s 171 is not unjustifiably curtailed.

[65] Hinton J also considered whether Mr Slevin obtained the documents unlawfully because Mr Walker had himself obtained the documents unlawfully. She rejected that proposition, saying:

> [68] I agree with Mr Kinsler that it would not be unlawful for the Official Assignee to require provision of documents from someone who had them unlawfully. The power under s 171 is extremely broad and expressly empowers obtaining documents relating to the bankrupt, from any other

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13 At [43].
14 At [45].
15 At [57].
16 At [64].

> person. It does not refer to a person having to be in possession or control of the documents lawfully, and I agree with the Attorney-General that it would be unworkable if the Official Assignee were required to establish lawful possession before it could make a s 171 requisition. The lawfulness of Mr Walker's possession of the documents has no bearing on the case before me.

[66] Hinton J found the search and seizure was unlawful and unreasonable. She said:

> [75] Even if the original search and seizure were lawful, Mr Slevin's continuing retention or seizure would still be unreasonable for the purposes of s 21 of the BORA. This is because, as a matter of general principle, the State should not be holding onto documents that are personal and clearly irrelevant to any regulator's purpose. Once such documents have been identified, there is no longer the rationale of the Official Assignee needing to assure herself as to whether the files are relevant to her investigation. Any document that has been opened, that in the view of the Official Assignee is clearly of a personal nature and that can be ruled out as relevant, to the bankruptcy, should not be retained even when lawfully acquired. Such a document should be copied to the bankrupt and then deleted from the file. That is, in fact, what Associate Judge Osborne ordered as a condition when he directed that the entire file be returned to the Official Assignee on 11 June 2013, although I note that the condition was proposed by Mr Henderson and not objected to by the Attorney-General. The Attorney-General had sought that such documents be quarantined, but still available to the Official Assignee and employees.

[67] Hinton J made a declaration but declined to make an award of damages, considering the breach of Mr Henderson's right against unreasonable search and seizure was appropriately vindicated by the declaration.[17]

(vi) 11 July 2011 – Mr Eathorne provided the police with materials relating to SO Systems Ltd

[68] Mr Eathorne emailed the police on 11 July 2011 saying:

> Attached are several emails that clearly show Henderson acting as a shadow director post his bankruptcy (29/11/2010) – this is a breach of section 436 of the Insolvency Act 2006 (attached).
>
> There will be more emails of this nature on his laptop however in the meantime this is a robust example.
>
> Hope these can form part of some type of charge, let me know what you and your legal teams thinks.

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17 At [85].

[69] Mr Henderson claims these emails are private, irrelevant and privileged, and came from the Laptop.

[70] Mr Fowler referred Mr Henderson to a draft email from his lawyer saying that Mr Henderson's bankruptcy was not to have any effect on SO Systems and Mr Henderson's reply email in December 2010 (at which time Mr Henderson was bankrupt) saying, "My personal position is that it is long past time to get back producing". A month or so later, Mr Henderson emailed his lawyer wanting to have a discussion about "our plans for the year and to strategi[se] with you". This included discussing "all the productive things we intend doing", noting there are "a number of good opportunities we need to advance".

[71] Mr Fowler put it to Mr Henderson that he had behaved inconsistently with his bankruptcy and conditions on release, which prevented involvement in the management or control of a business without consent. He was referred to what Associate Judge Osborne described as patterns of behaviour on the part of Mr Henderson, including refusing to recognise the authority or reasoning of rulings.[18] Mr Fowler also put to Mr Henderson his 25 convictions for PAYE offences and 12 convictions for other taxation offences.[19]

[72] The purpose of these questions was to support Mr Walker's contention that Mr Henderson was acting contrary to the conditions of his bankruptcy and that Mr Eathorne was therefore justified in contacting the police with these concerns.

[73] Mr Henderson's response was that he had advised his bankruptcy case manager of the complaint to the police about SO Systems, telling him he did not believe he had acted contrary to his conditions of bankruptcy.

(vii) 12 June 2012 – Mr Walker sent Mr Thorne an email between Mr Henderson and the then Mayor of Christchurch

[74] Mr Thorne and Mr Henderson had been good friends but fell out. Mr Henderson said Mr Thorne then began harassing him, including by use of a false

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18 *Havenleigh Global Services Ltd and FM Custodians Ltd v Henderson* [2016] NZHC 2969 at [152].
19 At [153].

email address. Mr Henderson brought civil harassment proceedings against Mr Thorne. Eventually, Mr Thorne admitted creating a false email address and issued a formal apology.

[75] One of Mr Thorne's complaints related to a company called Gibbston Water Services Ltd, a company with which Mr Henderson (or his family trust) had an involvement of some sort. It provided water to a Queenstown subdivision where Mr Thorne lived. Mr Thorne maintained that Mr Henderson was threatening to cut off supplies.

[76] On 11 February 2011, Mr Thorne had emailed Mr Walker on the subject of Mr Henderson, saying:

> I have been informed that you are going to deal with/to D I Henderson.
>
> For my sins my wife and family have got caught up in his web.

[77] Mr Walker responded:

> I'll give you a call over the weekend to update you on my interaction with Mr Henderson and what I have planned for him.

[78] That is by way of background. The distribution to Mr Thorne concerned a February 2011 email from Mr Henderson to the then Mayor of Christchurch, attaching a brief summary of a proposal to develop 1500 to 2000 apartments on land in the Christchurch CBD. He said:

> Let me know if there is interest in discussing further. It all works commercially, the key would seem how it can work politically. However, there is clearly strong support from the other side on rent to own/affordable housing propositions. We have refined this further.

[79] On 12 June 2012, Mr Eathorne forwarded this to Mr Walker. He had changed the subject line to "Parker & Cuckoo" with the comment:

> A bankrupt trying to do a deal with the Mayor – oh really?

[80] The following day, Mr Walker forwarded the email to Mr Thorne.

[81] Mr Walker did not accept any criticism for having forwarded this email to Mr Thorne. He maintained that Mr Thorne, as a resident in Gibbston Valley, had a direct interest in the PVL group and the broader workings of Mr Henderson's business empire.

[82] Mr Walker "judged" this email to the Mayor to be subject to the Local Government Official Information and Meetings Act 1987 and therefore public information.

[83] Mr Fowler did not pursue that line. Rather, he submitted that there was a public interest in the disclosure. In particular, the fact that Mr Henderson, while bankrupt, was conducting business with a public official conflicted with his duties as a bankrupt under the Insolvency Act. Any distribution of this information was therefore in the public interest.

[84] A number of points need to be made in this regard. First, it is not entirely obvious to me that the email shows Mr Henderson "conducting business" with a public official. Mr Henderson is an entrepreneur who, as often happens, has experienced enormous success as well as significant misfortune in his business dealings. It is fair to say that as an entrepreneur, even while bankrupt, he is a man of ideas and will be looking for opportunities. I do not read the attachment to the email as anything more than suggestive that Mr Henderson might be involved in business dealings in breach of his obligations as a bankrupt.

[85] Secondly, if there were a public interest in the email, then that public interest was not met by sending it to someone who had a beef with Mr Henderson. If Mr Walker's real concern was Mr Henderson's behaviour as a bankrupt, then the appropriate person to whom any such information should have been forwarded was the Official Assignee.

[86] Thirdly, the change in the subject line and text of the email does not support any assertion that the disclosure was made in the public interest.

(viii) 4 July 2013 – Mr Walker gave emails from the Laptop on a flash drive to Ron McQuilter of Paragon New Zealand

[87] Less than a month after the orders of Associate Judge Osborne dated 11 June 2013, set out at [40] above, Mr Walker gave a flash drive containing some of the contents of the Laptop and Tape Drive to Ron McQuilter of Paragon New Zealand, a private investigator acting on behalf of the Official Assignee's office. By this time the stay on PVL's liquidation had been lifted.

[88] Mr McQuilter contacted Mr Walker on 27 June 2013, saying he was agent for the Official Assignee Compliance Unit and had been tasked with making inquiries relating to Mr Henderson. On 5 July 2013, Mr McQuilter emailed Mr Walker saying:

> Thank you for meeting with me yesterday and for producing documents to me as requested pursuant to Section 171 Insolvency Act 2006.
>
> I have read the Judgement of Associate Judge Osborne dated 11 June 2013 that relates to the production of company records, more particularly the documents on the USB drive you handed me.
>
> For my records, can you please confirm that the documents on the drive are only documents that you are entitled to have possession and control over resulting in your capacity as a receiver and or liquidator of the companies referred to in the proceedings.

[89] Mr Walker responded by saying that there were hundreds of thousands, possibly millions, of documents in three places – a Seagate drive (being a copy of the Tape Drive), Mr Henderson's emails on a memory stick (about 40,000) and a memory stick with voice recordings. He said the Seagate drive had been replicated about half a dozen times. He said Mr McQuilter was welcome to a copy if he wanted.

[90] Mr Henderson became aware that the flash drive had been provided to the Crown Solicitor's Office in Christchurch and contacted them expressing his concern. The Crown Solicitor's Office acknowledged that they had been given the flash drive but said it had not been accessed or reviewed, given their understanding the contents did not form part of the prosecution and referring to Mr Henderson's repeated assertions that the Warrants were illegal.

[91] In his defence, Mr Walker referred to the Official Assignee's powers of inspection under the Insolvency Act. He noted Mr McQuilter was investigating the

origins and applications of funds he believed Mr Henderson was using personally during his bankruptcy, as well as whether those funds were taken from a PVL subsidiary, Livingspace Properties. Mr Walker confirmed that, in his capacity as liquidator, he held a number of documents pertaining to those companies and that money. It was a selection of those documents that he says was given to Mr McQuilter on the flash drive. He said the documents were those specifically identified as relevant to the inquiry and he did not believe any irrelevant or privileged material was provided.

[92] Unfortunately, when the Official Assignee's Office returned the flash drive to Mr Walker, it was addressed to an incorrect address and the letter never arrived.

[93] Mr Walker referred to the report of the Chief Privacy Officer for the Ministry of Business, Innovation and Employment wherein she set out her findings on whether there had been a breach of privacy in relation to a complaint regarding the flash drive made by an associate of Mr Henderson. The review concluded that the flash drive was highly unlikely to have contained personal information. The report writer noted the sensitivity as to treatment of personal information and the High Court direction pertaining at the time. She also noted Mr Walker's sworn evidence that he personally reviewed and selected the documents on the flash drive.

[94] Mr Moss sought to challenge the Chief Privacy Officer's conclusion, pointing to several facts that he said were contrary to it. However, I am satisfied that none of those matters detract from the conclusion that it was unlikely that any personal information was contained on the flash drive.

[95] First, Mr Moss pointed to a statement in an affidavit sworn by Mr Slevin on 19 December 2013 that "the flash drives contain emails that are not relevant to my enquiries" and that there were "emails that are obviously personal in nature". It is obvious from the context of the affidavit that this refers to the two flash drives that had earlier been provided to Mr Slevin and not to the flash drive that was provided to Mr McQuilter.

[96] Secondly, Mr Moss pointed to a statement in the Chief Privacy Officer's report that Mr Slevin had conducted a key word search which identified 21 purely personal

emails. This also did not refer to the flash drive provided to Mr McQuilter. The key word search was carried out on the copy of Mr Henderson's Laptop that was returned to the Official Assignee following the orders of Associate Judge Osborne on 18 March 2014.

[97] I accept that, by the stage the flash drive was provided to Mr McQuilter, some effort had been made to isolate private information. Furthermore, I do not accept Mr Walker gave the Seagate drive (a copy of the Tape Drive) to Mr McQuilter – at worst, he offered to do so.

(ix) 26 September 2013 – Mr Eathorne provided the Official Assignee with a brief of evidence containing information about Mr Henderson's American Express card

[98] On 26 September 2013, Mr Eathorne provided the Official Assignee with a draft brief of evidence in support of an application for directions concerning the use, in Mr Henderson's bankruptcy proceedings, of documents obtained from Mr Walker.[20] In the brief, Mr Eathorne stated that Mr Walker was liquidator of Dweller and Mr Henderson was a former director of that company. It went into liquidation on 13 December 2010. He said, on 21 August 2013, the Official Assignee served a s 171 notice as a result of which he searched Dweller's business records for, amongst other things, emails relating to Mr Henderson and American Express. He located an email exchange between Mr Henderson and Mr Patel of Dweller, dated 6 December 2010 (at which time Mr Henderson had been adjudicated bankrupt). He quoted from Mr Patel's email to Mr Henderson, sent eight days after the date of Mr Henderson's bankruptcy, wherein Mr Patel asked:

> Just a query before I pay this, will you still be able to use the Amex cards given the events of last week? If not then maybe we can hold off making the $11K payment.

[99] On the same day, Mr Henderson replied:

> All sorted. Please make the payment!

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[20] See *Havenleigh Global Services Ltd and FM Custodians Ltd v Henderson* [2014] NZHC 499.

[100] Mr Eathorne then referred to Mr Henderson's American Express statement, noting a payment on 7 December 2010 for $10,944.70.

[101] An email to similar effect was sent to a Mr Godden in January 2011.

[102] Mr Henderson claims that this related to emails of a private nature taken from either his Laptop or the Tape Drive. Mr Moss put it to Mr Walker that the American Express bill was paid by Mr Henderson's family trust.

[103] The brief of evidence post-dates Associate Judge Osborne's direction as to ownership of the Laptop and Tape Drive. Mr Henderson's position was that, although Mr Patel uses his Dweller signoff, he was not acting on behalf of Dweller at the time and that there was no signoff in the email from Mr Godden. He suggested, prior to providing the brief, the matter should have been referred to Associate Judge Osborne for directions.

(x) 29 February 2016 – PVL discovery of 848,000 documents, including 65,000 from the Laptop

[104] In associated proceedings brought by PVL, and Mr Walker as liquidator, against former directors and auditors of the PVL group (the main PVL proceedings), Mr Henderson applied for an order that Mr Walker be held in contempt for breaching the terms of the undertaking he gave to this Court on 1 March 2013.[21] That was the undertaking referred to by Associate Judge Osborne when ordering the return of the external hard drive and flash drives containing electronic data extracted from the Laptop. Mr Walker provided the hard drive and flash drives to his lawyers, who then drafted an affidavit of documents listing some 848,737 documents. Mr Walker affirmed the affidavit. This was served on the defendants in the main PVL proceeding and Mr Walker's lawyers provided them with flash drives containing copies of the listed documents. Unknown to Mr Walker, some of the documents on the list were not relevant and contained some of the Private Documents.

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21 *Walker v Forbes* [2017] NZHC 1090.

[105] Lang J considered the evidence that, on 2 March 2016, Mr Henderson asked Mr Walker's lawyers to provide an undertaking that none of the documents supplied to the defendants constituted private documents or related to companies of which Mr Walker was not the liquidator. Mr Walker's lawyers declined to do so.

[106] On 4 March 2016, Mr Walker's lawyers received a letter from the lawyers acting for one of the defendants raising concerns about the nature of the discovery. They said they had undertaken only a high level preliminary review of the documents but considered the plaintiffs had not adequately reviewed them from the standpoint of relevance. They noted, by way of example, an email that clearly related to Mr Henderson's personal affairs. As Lang J observed, this demonstrated that those lawyers had already accessed material Mr Walker had disclosed to them in breach of the undertaking. Lawyers for other parties echoed those concerns.

[107] Counsel for all the defendants but one agreed to return the hard drives to Mr Walker's solicitors and to disregard the documents on them.

[108] Lang J accepted that Mr Walker never intended to breach his undertaking and that, if fault lay anywhere, it lay with the apparent lack of care taken by his lawyers when they prepared and served his affidavit of documents. He also accepted Mr Walker's lawyers did what they could to rectify the situation. As far as liability was concerned, Lang J said:[22]

> … I place significance on the fact that Mr Walker has known from the outset, and certainly well before he gave his undertaking to the Court, that Mr Henderson was insisting that the material downloaded from the laptop included a large quantity of personal and irrelevant material. In giving his undertaking Mr Walker knew that Mr Henderson would expect the Court to hold Mr Walker to it. Mr Walker should therefore have been especially vigilant to ensure that his solicitors did not allow any personal or irrelevant information to be provided to the other defendants. Mr Walker has not pointed to any precautions that he took to ensure this would not occur.

[109] Lang J made a finding that the breach of the undertaking amounted to an act of contempt. Given the circumstances and the steps taken to remedy it, he made no further order.

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22 At [45].

(xi) 22 September 2011 – Messrs Walker and Eathorne to Mr Holden

[110] Mr Walker denies this alleged distribution.

[111] First, a little more background. Mr Henderson is a friend and business associate of Ian Hyndman. Mr Hyndman has a parallel claim against Mr Walker that is the subject of a separate but related decision.[23] Following Mr Henderson's bankruptcy, Mr Hyndman became director of a number of companies of which Mr Henderson could no longer be a director. On 9 February 2012, Mr Walker and John Scutter were, between them, appointed liquidators of 15 companies in respect of which Mr Hyndman was a director. Mr Hyndman believes he was caught in the cross-fire of the enmity between Mr Walker and Mr Henderson and that Mr Walker provided his private information to outsiders.

[112] The breaches of privacy that Mr Hyndman considers most egregious are Mr Walker's alleged provisions of personal information to Garry Holden. Mr Holden was the partner of Mr Hyndman's former de facto partner. He had no interest in PVL or any of the group companies but intensely disliked Mr Hyndman (and by association Mr Henderson). Mr Hyndman claims he was harassed and intimidated by Mr Holden for approximately three years, culminating in Mr Hyndman obtaining a restraining order against him on 5 March 2015.

[113] When interviewed by the police, as a result of Mr Hyndman's complaint of criminal harassment in February 2014, Mr Holden admitted being good friends with Mr Walker, saying they got on like a house of fire.

[114] Mr Henderson maintains that Mr Walker passed his private information to Mr Holden. Mr Henderson claims that, from 21 July 2011, Mr Holden sent a series of text messages to Mr Hyndman referring to information that could only have come from the Laptop. Mr Henderson claims Mr Walker either provided this information directly to Mr Holden or to Mr Thorne, who in turn sent it on to Mr Holden.

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[23] See *Hyndman v Walker* [2019] NZHC 2188.

[115] On 22 September 2011, Mr Hyndman received a series of text messages from Mr Holden saying:

> P.s. Wayne is working for me!
>
> He even got me copies emails between you and H. Back then you stated I was pot smoker and pokie addict, great emails. Your number now blocked.

[116] It does not appear to be in dispute that the reference to Wayne must be to Wayne Idour, the private investigator who recorded the telephone call he held with Mr Walker. Mr Henderson says the email Mr Holden refers to is a personal email between him and Mr Hyndman on his Laptop, which (jokingly) insinuated that Mr Holden smoked cannabis and was addicted to gambling. The context for the exchange between Mr Henderson and Mr Hyndman was an aggressive and abusive email Mr Holden sent Mr Hyndman, which Mr Hyndman forwarded to Mr Henderson. Mr Henderson then replied to Mr Holden with a tongue-in-cheek draft message for Mr Hyndman to send to Mr Holden – which Mr Hyndman says he never did. All he did with it was forward it to the lawyer acting for him at the time.

[117] In this email, Mr Henderson drafted the comment:

> Given you are now driving buses, I am left to assume the pokies and the dope cleaned out your share …

[118] It is difficult to ignore the remarkable coincidence between the language employed by Mr Henderson in the draft email and Mr Holden's text to Mr Hyndman. Mr Walker categorically denied forwarding this email to Mr Holden or Mr Thorne. He said, once he understood Mr Holden's behaviour, he had nothing more to do with him. It is fair to say, however, Mr Walker was somewhat more equivocal as to whether Mr Eathorne might have forwarded the email to Mr Thorne and he could not categorically refute the proposition that Mr Thorne forwarded that email to Mr Holden.

[119] Mr Fowler put to Mr Hyndman in cross-examination that the reference to "Wayne" was to Wayne Idour, the private investigator hired by Mr Henderson, and that it was Mr Idour who provided the email to Mr Holden. Unfortunately, Mr Idour has since died and was unable to give evidence. Mr Hyndman strongly refuted the suggestion that Mr Idour was working for Mr Holden. Mr Hyndman gave evidence

he this checked with Mr Idour, who denied having ever worked for Mr Holden (or Mr Walker).

[120] In Mr Fowler's submission, it was implausible to suggest that Mr Holden and Mr Walker conspired with each other to falsely attribute the source of the email to Mr Idour. However, I do not understand Mr Hyndman to have been suggesting any sort of collusion. When Mr Fowler put this proposition to Mr Hyndman in cross-examination, Mr Hyndman rejected it. Nor is it necessary to find collusion to reject the proposition that Mr Idour was the person who provided Mr Holden with the email. While Mr Fowler spoke of Mr Holden "covering for Mr Walker", Mr Holden may have had any number of reasons for lying to Mr Hyndman. It is unnecessary to speculate on his motivations.

[121] A further difficulty for the theory Mr Idour provided the email to Mr Holden is the question of how Mr Idour could have come in possession of the email. Mr Hyndman's evidence was that he only provided the email to Mr Henderson and his lawyer. Mr Walker then came into possession of Mr Henderson's copy.

[122] On balance, I am satisfied Mr Holden indirectly obtained the email from Mr Walker, likely by Mr Eathorne providing it to Mr Thorne or to Mr Holden directly, a possibility not ruled out by Mr Walker's evidence. That version of events is more plausible than Mr Idour providing it to Mr Holden, which is inconsistent with Mr Hyndman's evidence. I accept that, if indeed the reference to "Wayne" does refer to Mr Idour, then Mr Holden's text messages were not entirely truthful, for whatever reason.

Other disclosures

[123] Mr Henderson also referred to other examples that he said supported his claim that Mr Walker made disclosures of the Private Documents to third parties. He referred to an email Mr Holden sent to a friend of Mr Henderson's, referring, he said, to the email exchange between Mr Henderson and the former Mayor of Christchurch described above at [78]–[80]. Mr Henderson said it can be safely inferred that Mr Thorne passed that email to Mr Holden.

[124] Mr Henderson then referred to an email sent by Mr Holden on 5 May 2012 (using an alias that he admitted to the police he used) saying, "I believe you called Robert Walker a crook recently". Mr Henderson then pointed to an email he sent to Mr Walker dated 2 May 2012 wherein he said Mr Walker was a crook.

[125] Relying on what he described as Mr Walker's propensity to ignore Court directions and to mislead the Court (for example when Mr Walker said he did not give any personal information to the Official Assignee), Mr Henderson claimed there was no doubt that there was a great deal more email traffic between Mr Walker and Mr Thorne, Mr Holden and others, of which Mr Henderson was unaware.

Factual findings

[126] PVL was placed into liquidation by Associate Judge Osborne on 27 July 2010. Counsel for PVL immediately applied for a stay, indicating an appeal would be pursued, an aspect of it being that PVL "now has the funds available to meet the indisputable $88,724.27".[24] The Commissioner of Inland Revenue, the first plaintiff,[25] neither consented to nor opposed the application. Associate Judge Osborne made the following orders:

> [5] There will be a stay of the execution of the judgment to the extent that no step is to be taken in the administration of the liquidation of the defendant, other than that the Registrar of this Court is to send the appropriate notice to the liquidator.
>
> [6] The terms of the stay are that:
>
> (a) The appeal of Property Ventures is to be progressed expeditiously, including in relation to the filing of the case on appeal and the application for a fixture.
>
> (b) Leave is reserved to both parties to revert to the Court for further directions.

[127] Although Mr Walker was appointed liquidator of PVL on 27 July 2010, his powers were stayed until February 2012. I reject the defence submission that the stay

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[24] *Commissioner of Inland Revenue v Property Ventures Ltd* HC Christchurch CIV-2010-409-123, 27 July 2010.

[25] The second plaintiff was Smiths Crane and Construction Ltd.

was irrelevant. It was highly relevant because Mr Walker's authority over the Tape Drive and the Laptop depended upon his being liquidator of PVL.

[128] The terms of the stay were clear. The purpose of the stay was to preserve the position pending appeal.

[129] That being the case, the fact that Mr Walker was struggling to obtain information regarding the five companies of which he was liquidator, or that there was a complicated intermingling of company information, is irrelevant. Because the liquidation of PVL was stayed, the only authority Mr Walker could have had to deal with the Tape Drive or the Laptop came from either the police or PVL's receiver. While the police might have given (somewhat unusually and with questionable authority) the Tape Drive and Laptop to Mr Walker in order for him to consider whether Mr Henderson was guilty of any criminal offending, Mr Walker did not seek to justify his actions by reference to that authority. In any event, any such authority would have been very limited, authorising Mr Walker only to report his findings to the police.

[130] I accept that PVL's receiver accompanied the police when the Warrants were executed and therefore must have been aware the Tape Drive and Laptop were handed to Mr Walker. While there might have been implicit agreement that Mr Walker should hold those items, there is no evidence that the receiver authorised Mr Walker to deal with third parties such as the IRD or Official Assignee on behalf of the receiver.

[131] In the civil jurisdiction, the Court is entitled to draw an adverse inference where a party can reasonably be expected to provide information within that party's knowledge but fails to do so.[26]

[132] In none of his communications with either the IRD or the Official Assignee, did Mr Walker say he was acting on behalf of the receiver. There is no evidence he communicated with the receiver and asked how he should deal with the s 17 and s 171 notices.

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[26] *Pepi Holdings Ltd v BMW New Zealand Ltd* CA22/97, 25 August 1997 at 23–24; and *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at [153]–[155], cited with approval in *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129 at [15].

[133] It is evident that Mr Walker was upset with the stay. I would not go so far as to say he deliberately did his best to circumvent it, but he clearly did not regard it as an obstacle to his looking at the Tape Drive and Laptop. He should have. This is so, even in respect of the five companies of which Mr Walker was liquidator. The point remains the Tape Drive and Laptop belonged to PVL and, while the liquidation was stayed, Mr Walker had no right to deal with PVL's property. I reject Mr Fowler's suggestion, in respect of which I can find no authority, that the stay did not prevent Mr Walker doing what he did. Mr Fowler relies on s 248 of the Companies Act, which provides, amongst other matters, that from the commencement of the liquidation of a company, the liquidator has custody and control of the company's assets and the directors remain in office but cease to have powers, functions or duties other than as required. Even if the stay meant that Mr Walker continued to have custody and control of the company's assets, that did not give him the right to do anything with them. I agree with Mr Moss, for Mr Henderson, that, at the very least, if Mr Walker had concerns, he could and should have applied to the Court for directions.

[134] The stay was granted on the basis PVL claimed it could meet the relevant debt. It intended to go to the Court of Appeal to prove that. The fact the appeal was eventually abandoned does not justify Mr Walker's actions two years prior to that abandonment. Mr Walker was also not entitled to regard the stay as in effect lifted because, in his opinion, the appeal was not being prosecuted expeditiously. Again, had he a legitimate concern in this regard, he should have applied to the Court for the stay to be lifted and for directions.

[135] Of course, once the stay was lifted in February 2012, the position changed. Mr Walker was then authorised as liquidator of PVL to access both the Tape Drive and the Laptop. Even so, duties of confidentiality arose when he, including his employees and contractors, happened upon what was obviously private material. In this regard, I endorse the observations made by Associate Judge Osborne in *Havenleigh Global Services Ltd and FM Custodians Ltd v Henderson*, to the effect that, where a person uses a computer for both work and personal purposes, there will be a risk that the documents become subject to a third party's powers, for example, in that case, the

Official Assignee.[27] Notwithstanding those observations, Associate Judge Osborne made orders providing the Official Assignee with documents under s 171 but subject to conditions to protect Mr Henderson's privacy and rights of privilege.

[136] Mr Walker and his employees were clearly sifting through all the information on Mr Henderson's Laptop and it would have been immediately obvious that some of the information was clearly private. This goes beyond simply the photographs that Mr Eathorne managed to sift out. The fact Mr Henderson's email to the then Mayor of Christchurch was specifically identified and forwarded by Mr Eathorne to Mr Walker serves to demonstrate the position. An exercise similar to that directed by Associate Judge Osborne, set out at [40] above, would have been an obvious step for Mr Walker to have taken.

[137] Mr Fowler suggested that at no point prior to his disclosures did Mr Walker know the Tape Drive or Laptop may have contained personal information about Mr Henderson. In particular, in relation to the provision of the Tape Drive to the IRD, Mr Walker was not even in a position to examine its contents.

[138] I am satisfied that Mr Walker knew, or ought to have known, that the Laptop contained private and confidential information from at least as early as 27 May 2011, when the *NBR* published the article in which Mr Walker said that he had about 45,000 of Mr Henderson's emails and that Mr Henderson had "been saying a lot of interesting things". Shortly thereafter, in early June 2011, Mr Walker bragged to Mr Idour that he had Mr Henderson's personal computer with 5,000 of Mr Henderson's personal emails. This supports a finding that Mr Walker knew Mr Henderson used the Laptop for personal purposes, a fact which would have been immediately obvious from the personal photographs on it. Furthermore, that comment supports an inference that Mr Henderson was aware a number of the 45,000 emails were personal in nature.

[139] However, I accept Mr Fowler's submission that Mr Walker could not have known in April 2011 that the Tape Drive contained private or confidential information. The Tape Drive was provided to the IRD very shortly after the Warrants were executed. At that stage, Mr Walker said he did not know what was on the Tape Drive but he did

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[27] *Havenleigh Global Services Ltd and FM Custodians Ltd v Henderson*, above n 20, at [107]–[111].

know it was the property of PVL. I accept, at that time, Mr Walker was unlikely to have turned his mind to whether the Tape Drive contained private information. I accept his evidence that he did not at that time know the Tape Drive also contained a backup of the Laptop. Had Mr Walker known that, he should have appreciated the reasonable possibility it contained private or confidential information.

[140] Mr Walker believed right was on his side. He appeared to see himself as something of an avenging angel and it is fair to say he went above and beyond what many liquidators might. For example, insisting on Dwellers' ownership rights to the engine patent on the basis it had been sent a bill by an Australian patent attorney. He clearly believed Mr Henderson was manipulating the system (and worse) and was doing all he could to try and expose that. In saying that, Mr Walker openly acknowledged that his primary motivation was to earn money for himself rather than to recover it for creditors.

[141] Mr Walker's justifications for the provision of clearly private emails to his associates, including Mr Thorne, do not hold water. Mr Walker was clearly gossiping/boasting to his friends with, at a minimum, a disregard for what they did with the information he provided. While I doubt Mr Walker had the time, or interest, to delve into Mr Henderson's truly personal matters, his focus being on finding evidence of business and financial irregularities, that is scant comfort to Mr Henderson, who is understandably concerned that intensely private communications have been accessed and potentially circulated.

[142] The irresistible inference from the evidence is that, when the opportunity presented itself, Mr Walker forwarded or gave information to Mr Thorne at a minimum. That does not mean he was actively searching out personal emails but, when he came across names or items of interest, the inference is he could not resist looking at them and, if sufficiently gossip-worthy, forwarding them on. Mr Walker's responses to questions in cross-examination do not preclude that conclusion.

[143] Having made those findings, the question now is, are there any consequences? I turn to consider the seven causes of action.

Breach of confidence – relationship with the invasion of privacy tort

[144] The two central causes of action pleaded by Mr Henderson are breach of confidence and invasion of privacy. Following the decision of a majority of the Court of Appeal to depart from English authority and establish invasion of privacy as a separate tort in *Hosking v Runting*, it is appropriate to consider the relationship between these two causes of action in New Zealand.[28]

[145] Breach of confidence is an equitable cause of action of ancient origins,[29] developed to protect unpublished manuscripts and trade secrets.[30] The basis for judicial intervention was justified on differing grounds throughout its history,[31] but it is now generally accepted that a person who has received information in confidence is bound to uphold the confidence that springs from that relationship and that equity binds the conscience of the recipient.[32] In its modern formulation, breach of confidence has been used to protect personal information since at least 1967.[33]

[146] In *Coco v AN Clarke (Engineers) Ltd*, Megarry J set out the three elements required to establish a breach of confidence:[34]

(a) the information has the necessary quality of confidence about it;

(b) the information has been imparted in circumstances importing an obligation of confidence; and

(c) there has been an unauthorised use of that information.

[147] As Megarry J explained it, the second of those elements requires an assessment of whether the circumstances are such that a reasonable individual, standing in the

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28 *Hosking v Runting* [2005] 1 NZLR 1 (CA).
29 *Coco v AN Clarke (Engineers) Ltd* [1969] RPC 41 (Ch) at 46.
30 *Hunt v A* [2007] NZCA 332, [2008] 1 NZLR 368 at [71].
31 These included property rights, fiduciary duties, contract and unconscionability: John Katz *Laws of New Zealand* Intellectual Property: Confidential Information at [4]–[5].
32 *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515 at 520–521, citing *Seager v Copydex Ltd* [1967] 2 All ER 415 (CA) at 417 per Lord Denning MR and *Morison v Moat* (1851) 9 Hare 241 at 255, 68 ER 492 (Ch) at 498.
33 See *Argyll v Argyll* [1967] Ch 302.
34 *Coco v AN Clarke (Engineers) Ltd*, above n 29, at 47.

shoes of the recipient of the information, would have realised that, on reasonable grounds, the information was being given in confidence.[35] That will be a question of fact in each case. Traditionally, this has involved the finding of a relationship of confidence between the confider and the confidant.[36] However, once established, the courts have been willing to enforce such an obligation of confidence against third parties who come into receipt of the confidential information in breach of the obligation arising from that relationship.[37] Consistent with the equitable principle that knowledge will bind the conscience of the recipient whenever acquired, an obligation of confidence can arise after the acquisition of the confidential information.[38]

[148] The extent of, and the basis for, third party liability was addressed in New Zealand in *Hunt v A* following a comprehensive survey of the international jurisprudence.[39] The Court of Appeal concluded:

> [92] In the current state of the law in New Zealand, it appears to us that the most satisfactory principle to proceed on is to determine whether a third party recipient of confidential information has acted unconscionably in relation to the acquisition of the information or in the way it has been employed. As a matter of approach this is consistent with the basis of the underlying equitable doctrine of breach of confidence itself; it avoids a somewhat formalistic incantation of rules derived from other areas of the law; and it has the benefits of simplicity and directness. It should also be recalled that New Zealand does not face the unfortunate doctrinal imbroglios to be found in some other jurisdictions because it has squarely adopted a regime of remedial flexibility: if there is a breach of an obligation, whatever remedy is most appropriate will be employed.
>
> [93] When so approached, the factors to be considered in a given case will include: the nature of the information; the state of knowledge of the acquirer of the confidential information; the extent of any breach; what kind of detriment has resulted or might result to other parties; and the degree of "culpability", as it were, of the third party acquirer and discloser. This is not, of course, a closed list of the considerations which may be appropriate in a given case.
>
> [94] Clearly the most critical factor in the vast majority of cases will be the state of the defendant's knowledge. A third party recipient with actual knowledge of the confidence likely faces almost insuperable difficulties; as does somebody acting in "wilful blindness" (as Lord Goff noted in *Spycatcher*). The much more problematic areas are those of constructive

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35 At 48.

36 *Hunt v A*, above n 30, at [75].

37 *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50, citing *Tipping v Clarke* (1843) 2 Hare 383 at 393, 67 ER 157 at 161 and *Lamb v Evans* [1893] 1 Ch 218 at 235.

38 *Fraser v Evans* [1969] 1 QB 349 at 361, [1969] 1 All ER 8 (CA) per Lord Denning MR.

39 *Hunt v A*, above n 30.

> knowledge (which some of the judges in Lenah would have proscribed), and true "innocence". We do not have those latter sorts of categories before us in this instance and leave them for another day, on specific facts.

[149] Those last remarks refer to another (related) debate; the extent to which an individual can be held liable for breach of confidence in the absence of *any* relationship of confidence. Everyone accepts that a third party who obtains confidential information surreptitiously, or by other improper means, can be held liable, although the jurisprudential basis for this is far from clear.[40] In the *Spycatcher* case, Lord Goff went further, suggesting that an individual who innocently came into possession of "obviously confidential" information could be held liable if he or she had notice of its confidentiality:[41]

> … a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection.
>
> I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties – often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers – where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by.

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40 See *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475; *Exchange Telegraph Co Ltd v Gregory & Co* [1896] 1 QB 147 (CA); *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613, [1975] 1 All ER 41 (QB); *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431, [1982] 2 All ER 241 (Ch); *Franklin v Giddins* [1978] Qd R 72; and *Deta Nominees Pty Ltd v Viscount Plastics Products Pty Ltd* [1979] VR 167 at 191.

41 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) (the *Spycatcher* case) at 281.

[150] In the United Kingdom, Lord Goff's remarks have taken on a revolutionary character and played a part in the development, in that country, of breach of confidence into an action to protect privacy. The learned authors of *Gurry on Breach of Confidence*, a leading English text, make the following observation about Lord Goff's comment in the context of distinguishing between the modern action for misuse of private information and the traditional action for breach of confidence:[42]

> Another difference is that the 'traditional' action for breach of confidence is usually concerned with communication of confidential information in the context of a pre-existing *relationship* or at least an active communication of the information from the confider to the confidant. The *dicta* of Lord Goff in *Spycatcher*, which suggested that an obligation of confidence could arise in the absence of a relationship on the basis of *knowledge* that the information was confidential, indicated a possible change in the traditional approach. But the significance of Lord Goff's *dictum* – that it authoritatively extended the law of confidence 'to apply to cases where the defendant had come by the information without the consent of the claimant' – has been overstated. It must be remembered that Lord Goff's comments in *Spycatcher* were *obiter*, from only one member of the House of Lords, and, prior to the [Human Rights Act 1998 (UK)] coming into effect, were followed in only two first instance decisions in England. Whereas, subsequent to the [Human Rights Act], and with that legislation as the impetus, appellate courts have imbued Lord Goff's *dicta* with more significance. Thus, it is submitted that Lord Goff's *dicta* has been more influential *after* the [Human Rights Act] than before its enactment, and decisions such as *Campbell* and *Murray v Express Newspapers plc* would not have satisfied the pre-[Human Rights Act] 'traditional' approach…

[151] In 2004, the House of Lords released its decision in *Campbell v MGN Ltd*.[43] Lord Nicholls, who dissented in the outcome of that decision, described the importance of Lord Goff's remarks in the following way:

> [14] This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658–659, [1990] 1 AC 109 at 281. Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more

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42 Tanya Aplin and others *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd ed, Oxford University Press, Oxford, 2012) at [7.148], referring to *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 and *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481.

43 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

> natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

[152] It is evident that the revolutionary consequences of Lord Goff's remark can be squarely attributed to the English courts' desire to protect the privacy right enshrined in art 8 of the European Convention on Human Rights and given effect by the Human Rights Act.

[153] That brings me to the development of the privacy tort in New Zealand. In *Hosking v Runting*, the Court of Appeal expressly considered the English approach of using breach of confidence to protect privacy interests, but the majority concluded that it would be "conducive of clearer analysis" to develop a new tort to fulfil that role.[44] As Tipping J explained: [45]

> … In the United Kingdom the Courts have chosen incrementally to develop the equitable remedy of breach of confidence. But, in so doing, it has been necessary for the Courts to strain the boundaries of that remedy to the point where the concept of confidence has become somewhat artificial. The underpinning element of the breach of confidence cause of action has conventionally been that either by dint of a general or a transactional relationship between the parties, one party can reasonably expect that the other will treat the relevant information or material as confidential and will not publicly disclose it. It is of course of the essence of breach of confidence that for whatever reason the information or material be confidential and intended to remain so.
>
> … It therefore seems to me, with respect to those who do not share this view, that it is more jurisprudentially straightforward and easier of logical analysis to recognise that confidence and privacy, while capable of overlapping, are essentially different concepts. Breach of confidence, being an equitable concept, is conscience-based. Invasion of privacy is a common law wrong which is founded on the harm done to the plaintiff by conduct which can reasonably be regarded as offensive to human values. While it may be possible to achieve the same substantive result by developing the equitable cause of action, I consider it legally preferable and better for society's understanding of what the Courts are doing to achieve the appropriate substantive outcome under a self-contained and stand-alone common law cause of action to be known as invasion of privacy. …

[154] Gault P, writing on behalf of Blanchard J and himself, said:

> [48] Privacy and confidence are different concepts. To press every case calling for a remedy for unwarranted exposure of information about the

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44 *Hosking v Runting*, above n 28, at [45].
45 At [245]–[246].

> private lives of individuals into a cause of action having as its foundation trust and confidence will be to confuse those concepts.
>
> [49] If breach of confidence is to be used as the privacy remedy in New Zealand, then the requirement of a confidential relationship must necessarily change. That will lead to confusion in the trade secrets and employment fields. The English authorities seem largely to ignore the fact that Lord Goff of Chieveley's dictum was only directed at exceptional cases where the relevant information was "obviously confidential", yet no confidential relationship existed. The expansion of the focus of the cause of action was not contemplated by him to change the nature of the information disclosed, but rather the nature of the relationship or circumstances of the parties.

[155] The corollary of the decision in *Hosking v Runting* to depart from the English approach to privacy is that modern English decisions involving breach of confidence must be put to one side when considering a claim for breach of confidence in New Zealand, or at least viewed with considerable caution.

[156] It is more consistent with the equitable nature of breach of confidence to retain, in this country, the focus on the relationship giving rise to that obligation. As the Court of Appeal acknowledged in *Hunt v A*, there may be difficult issues involved in cases of innocent third-party recipients of confidential information, but those issues are best left to be dealt with in an appropriate case.[46] For the reasons I explain at [170]–[183], this is not such a case.

[157] In this respect, I note the decision in *R v X (CA553/2009)*, where the Court of Appeal observed in passing, by reference to Lord Goff's obiter remark, that the House of Lords had "remov[ed] the need for some pre-existing confidential relationship".[47] The Court went on to refer to further English developments before concluding:

> [45] The result has been that the basic principle in the civil law is now (as a matter of substantive law) that information of a requisite character will be protected as confidential where the complainant has a reasonable expectation of confidentiality or privacy and the defendant has agreed to keep the information confidential or has notice of its confidentiality.

[158] Those observations were made in the context of a criminal appeal challenging the admissibility of evidence of admissions made by the defendant to two psychiatric nurses during a mental health assessment. The Court merely referred to the civil law

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46 *Hunt v A*, above n 30, at [94].
47 *R v X (CA553/2009)* [2009] NZCA 531, [2010] 2 NZLR 181 at [45].

on breach of confidence by analogy, and it is not clear that those remarks were the subject of detailed submissions by counsel. Certainly, there was no claim for breach of confidence in that case. In light of the Court of Appeal's earlier comments in *Hosking v Runting*, which were not referred to in *R v X (CA553/2009)*, the Court's remarks cannot be considered authoritative.

[159] I also note that, while *R v X (CA553/2009)* was cited with approval in *Earthquake Commission v Krieger*,[48] there was in fact a pre-existing relationship of confidence in that case of which the defendant had notice.[49]

[160] It seems to me the references to a relationship of confidence has caused some confusion. As discussed above, the basis for judicial intervention is that a person has received information in confidence and that is the extent to which the "relationship" is a pre-requisite. It is the circumstances of receipt of the information that is important to the breach of confidence – that is, a person has received information in confidence knowing it to be confidential and is therefore bound to observe that confidentiality. This fits with the tort being conscience based.

Breach of confidence – application

Does the information have the necessary quality of confidence about it?

[161] Mr Moss said the Private Documents include private correspondence between Mr Henderson and his wife and friends that was clearly meant for his eyes only. He pointed to Mr Walker's acceptance that the majority of the Private Documents were of a private nature.

[162] Mr Fowler relied on Associate Judge Osborne's observations in *Havenleigh Global Services* in support of his submission that it was very difficult to sever or disentangle the PVL related information from the Private Documents on the Laptop.[50] He said, in those circumstances, any quality of confidence was lost when

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48 *Earthquake Commission v Krieger* [2013] NZHC 3140, [2014] 2 NZLR 547 at [32].
49 At [54].
50 *Havenleigh Global Services Ltd and FM Custodians Ltd v Henderson*, above n 20, at [107]–[111].

Mr Henderson made the decision to store the Private Documents on his Laptop, intermingling them with the business affairs of PVL.

[163] I am satisfied that the information did indeed have the necessary quality of confidence. Although the intermingling of the information made it more difficult to identify, Mr Walker was clearly aware that he was in possession of confidential information – made obvious by the fact of his email in connection with the then Mayor of Christchurch. Non-compliance with PVL company policy might mean Mr Henderson was at greater risk of others seeing the Private Documents but it does not mean that the information lost the quality of confidence.

[164] Mr Fowler submitted that the email to the United States university server referred only to matters already in the public domain. Matters already in the public domain lack the necessary quality of confidence.[51] In evidence, Mr Henderson claimed the only way Mr Walker could have known about the engine patent and the technical drawing was from his personal files on the Laptop. There is no suggestion, however, that the technical drawings were attached to the email. The email simply referred to the drawings, the fact the patent application had been denied in Japan and that Mr Henderson had spent a reasonably large sum of money applying for patents in other countries. None of that information was confidential. The patent applications would presumably have been matters of public record.

[165] I also have my doubts whether the screenshot concerning SOL Management, which was attached to Mr Eathorne's 13 June 2011 email to Mr Slevin, had the necessary quality of confidence about it. As already mentioned, the screenshot was corrupted and not visible in evidence. The body of the email reads:

> The below extract is from the PVL back up tape drive we have obtained and in particular that the accounting records (SAP) of Sol Management limited are present up until Feb 2011.
>
> As Robert has alluded to, the back up tape drive has not been processed as yet, we are hoping the SFO will assist in this.

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[51] *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 (CA) at 415 per Lord Greene MR.

[166] From that context, I am not willing to conclude that the screenshot was of the accounting records themselves. It is equally plausible – and supported by the fact that the Tape Drive had not been processed by this stage – that the screenshot merely showed the presence of files on the Tape Drive that appeared to be accounting records for SOL Management up until February 2011. If that is correct, such information would not have the necessary quality of confidence. Accordingly, I find that Mr Henderson has failed to demonstrate on the balance of probabilities that the 13 June 2011 email contained confidential information.

[167] The email sent to police on 11 July 2011 attached privileged legal communications. I have no difficulty accepting that those privileged communications had the necessary quality of confidence. Lawyers are obliged to hold in strict confidence all information concerning a client's business and affairs acquired in the course of the professional relationship.[52]

[168] The draft brief of evidence provided to the Official Assignee on 26 September 2013 included private emails of a transactional nature between Mr Henderson and his business associates. I am satisfied that those emails had the necessary quality of confidence.

[169] For the reasons outlined at [93]–[97], I am not willing to find on the balance of probabilities that the flash drive provided to Mr McQuilter contained documents possessing the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

[170] In Mr Moss' submission, there is no question that the information was imparted in circumstances importing an obligation of confidence. He submitted Mr Walker was on notice of the confidential information. From at least 20 July 2011, Mr Walker identified to the police that there were personal documents contained on the Laptop, assuring the police that "any emails extracted from the [Laptop] and [Tape Drive] that were marked 'personal' have been deleted".

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[52] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch, r 8.

[171] Mr Fowler, in contrast, claimed that Mr Walker received the contents of the Laptop and Tape Drive in accordance with his statutory function as liquidator and nothing in the Companies Act stipulates he was under a duty of confidence in receipt of any documents. There was therefore no relationship of confidence between Mr Henderson and Mr Walker that might have been capable of giving rise to a breach of confidence.

[172] As I have already explained, in New Zealand it is not enough to demonstrate that the defendant had notice of the confidential nature of the documents in order to establish a duty of confidence. Mr Henderson has not alleged that Mr Walker obtained the Private Documents surreptitiously or by improper means, so he must be able to show Mr Walker received them in circumstances that involved an obligation of confidentiality.

[173] Relevant to this assessment is the purpose for which the information was imparted. In the first edition of his textbook, *Breach of Confidence*, which preceded the post-Human Rights Act developments in the English law on the subject, Dr Gurry identified the touchstone of an obligation of confidence in the following way:[53]

> The test which has been most frequently used by the courts for establishing the existence of an obligation of confidence is predicated on the basis of a disclosure of confidential information *for a limited purpose* – an obligation will exist whenever confidential information is imparted by a confider for a limited purpose. In these circumstances the confidant will be bound by a duty not to use the information for any purpose other than that for which it was disclosed.

Dr Gurry also argued that a confidant must have actual or constructive knowledge that confidential information was disclosed for a limited purpose in order for an obligation of confidence to arise.[54]

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53 Francis Gurry *Breach of Confidence* (Clarendon Press, Oxford, 1984) at 113–114. Compare Aplin and others, above n 42, at [7.02]–[7.03], where the authors of the second edition of Dr Gurry's text depart from this test in favour of what they called the "notice of confidentiality test", which is derived from Lord Goff's dictum in the *Spycatcher* case.

54 At 115.

[174] There are two possibilities for such a relationship in the circumstances of this case: between Mr Henderson and the police; and between Mr Henderson and Mr Walker.

[175] In *The Stepping Stones Nursery Ltd v Attorney-General*, Harrison J held that police are under an obligation of confidence with respect to confidential information acquired in the course of a criminal inquiry.[55] That decision made reference to reg 7(1) of the Police Regulations 1992, which have since been repealed. During the passage of the Policing Act 2008, the Select Committee removed the corresponding clause because it considered the clause was rendered unnecessary by the Protected Disclosures Act 2000 and the introduction of the Police Code of Conduct.[56] The Police Code of Conduct, issued under s 20 of the Policing Act, recognises that police are trusted "to be exemplary" in their dealings with confidential information and states that police "need to handle information appropriately, for legitimate work purposes and in line with the law, [police] policies, processes and systems".[57] This clearly supports the conclusion that confidential information seized by police will attract an obligation of confidence.

[176] Similarly, in *Marcel v Commission of Police of the Metropolis*, the Court of Appeal of England and Wales indicated a public authority that obtains documents by a statutory search power will owe an obligation of confidence to the owner of the documents.[58] Nolan LJ said:[59]

> The statutory powers given to the police are plainly coupled with a public law duty. The precise extent of the duty is, I think, difficult to define in general terms beyond saying that the powers must be exercised only in the public interest and with due regard to the rights of individuals. In the context of the seizure and retention of documents, I would hold that the public law duty is combined with a private law duty of confidentiality towards the owner of the documents. The private law duty appears to me, as it did to the Vice-Chancellor, to be of the same character as that which formed the basis of the House of Lords decision in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109. It arises from the relationship between the parties. It matters not, to my mind, that in this instance, so far as the owners of the documents are concerned, the confidence is unwillingly imparted.

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55 *The Stepping Stone Nursery Ltd v Attorney-General* [2002] 3 NZLR 414 at [27]–[28].
56 Policing Bill 2007 (195-2) (select committee report) at 12.
57 New Zealand Police *Code of Conduct* (May 2015) at 5.
58 *Marcel v Commission of Police of the Metropolis* [1992] Ch 225 (CA).
59 At 261.

[177] Sir Christopher Slade said:[60]

> In my judgment, documents seized by a public authority from a private citizen in exercise of a statutory power can properly be used only for those purposes for which the relevant legislation contemplated that they might be used. The user for any other purpose of documents seized in exercise of a draconian power of this nature, without the consent of the person from whom they were seized, would be an improper exercise of the power. Any such person would be entitled to expect that the authority would treat the documents and their contents as confidential, save to the extent that it might use them for purposes contemplated by the relevant legislation.

[178] I am satisfied that, had they been aware of the confidential information contained on the Laptop and Tape Drive at the time they were seized, the police would have been under an obligation of confidence to Mr Henderson. Although the confidential information was unwillingly imparted, it was imparted for the limited purpose of assessing whether Mr Henderson had committed a criminal offence. As demonstrated by the cases discussed above, that would be sufficient to attract an obligation of confidence. The difficulty for Mr Henderson, however, is that there is no evidence the police were aware of the presence of private confidential documents at the time they provided the Laptop and Tape Drive to Mr Walker.

[179] Had that not been the case, Mr Walker would have been liable as a third party to a breach of confidence by the police (in providing the documents to him) from the time he became aware of the presence of Mr Henderson's personal documents in May 2011.[61] That not being the case, it is necessary to consider whether Mr Walker himself owed an obligation of confidence to Mr Henderson.

[180] I have already noted the uncertainty as to the legal basis upon which Mr Walker obtained the Laptop and Tape Drive. On one view, Mr Walker could have no greater right to the information than the police, as it was acquired by the police through use of a search warrant. On the other view, Mr Walker would have been entitled to the Laptop and Tape Drive in any case by virtue of his power to obtain documents and

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60 At 262.

61 It also makes no difference that the police later became aware of the presence of personal documents on the Laptop and Tape Drive because the essence of third party liability is that it is secondary to liability of the principal. While this knowledge would have rendered any subsequent disclosure by the police a breach of confidence, it could not have the effect of transforming an earlier innocuous act into a breach of confidence. Accordingly, there remained no breach of confidence to which Mr Walker could be a third party.

information under s 261 of the Companies Act. Either way, I am of the view that Mr Walker owed an obligation of confidence to Mr Henderson with respect to the confidential documents contained on the Laptop and Tape Drive.

[181] On both views, Mr Walker obtained the documents in his capacity as liquidator, setting aside for the moment the fact that the liquidation of PVL was stayed at the time. It follows that the confidential information was disclosed to Mr Walker for one limited purpose or another: either assessing whether Mr Henderson had committed a criminal offence or facilitating the liquidation of the various companies of which Mr Walker was liquidator. That the information was imparted to Mr Walker in a somewhat indirect manner ought not to preclude an obligation of confidence. It is clear from the evidence that Mr Walker was instrumental in the police obtaining the Laptop and Tape Drive. He could be described as the driving force behind their actions. It would be contrary to the broad equitable principle of good faith, upon which the action for breach of confidence is based,[62] if Mr Walker were able to escape an obligation of confidence by the legal uncertainty of the peculiar way in which he obtained the information from Mr Henderson.

[182] To the extent Mr Walker effectively utilised the Warrants for his own purposes, the authorities referred to above at [175]–[177] are equally applicable to him. To the extent Mr Walker implicitly relied on his own powers as liquidator, his obligations would be analogous to those of the police. I note that English authorities suggest the *Marcel* principles also apply to liquidators to the extent an obligation of confidence is not inconsistent with statutory disclosure obligations.[63] There is nothing in pt 16 of the Companies Act that would be inconsistent with liquidators owing an obligation of confidence to the directors or former directors of the companies in liquidation. This is supported by the Court of Appeal's decision in *Finnigan v Ellis* that the s 261 power does not enable a liquidator to collect a director's private documents.[64]

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62 *Hunt v A*, above n 30, at [64].

63 See *Re Esal (Commodities) Ltd (No 2)* [1990] BCC 708 (Ch) at 723; *Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208 (Ch) at 217; and *Hamilton v Naviede* [1995] 2 AC 75 (HL) at 102 per Lord Browne-Wilkinson.

64 *Finnigan v Ellis* [2017] NZCA 488, [2018] 2 NZLR 123.

[183] Accordingly, the confidential information was imparted to Mr Walker in circumstances importing an obligation of confidence from 27 May 2011, that being the date from which Mr Walker can safely be attributed with knowledge that the Laptop contained confidential documents. However, I have concluded at [139] that Mr Walker could not have known that the Tape Drive contained confidential information when he provided it to the IRD on 12 April 2011, which means the information contained therein had not been imparted in circumstances importing an obligation of confidence.[65] Mr Walker is not, therefore, liable for breach of confidence in relation to that distribution.

Has there been an unauthorised use of the information?

[184] In Mr Fowler's submission, it was neither practical nor feasible, having regard to the intermingling and interrelated nature of all the companies in the PVL group, to quarantine any private documents. Furthermore, in his submission, the disclosures were made to government departments, public officers or lawyers bound by obligations of confidence, including the Official Assignee.

[185] As far as inadvertent disclosure during discovery was concerned, Mr Fowler pointed to the steps Mr Walker immediately took upon finding out about the inadvertent disclosure. To the extent that one of the parties in the main PVL proceeding did receive information, and then provided it to Mr Hyndman, Mr Fowler pointed to the decision in *Whakatane District Council v Bay of Plenty Regional Council*.[66] This decision confirmed that privileged information inadvertently disclosed during discovery will have the necessary character of confidentiality, imposing an obligation of confidence on the recipients.

[186] Mr Fowler's point was that any breach of confidence arising from further disclosure beyond the parties to that litigation would be the responsibility of the recipient, not Mr Walker. I do not see this as absolving Mr Walker of responsibility, as an inevitable result of breaching confidentiality is that there may be further dissemination of that information. Mr Henderson has established a breach of

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65 This matter is discussed further below at [229].

66 *Whakatane District Council v Bay of Plenty Regional Council* (2009) 18 PRNZ 984 at [19]–[20].

confidence in respect of this disclosure. In saying that, it is relevant to the assessment of the appropriate remedy that Mr Walker's actions were held to be inadvertent and Mr Henderson has already received a remedy by way of a declaration in respect of this disclosure.

[187] Mr Fowler attempted to mitigate the seriousness of the other disclosures. He submitted that only two emails were provided to Mr Thorne and that disclosure to Mr Thorne was in the public interest in any event.

[188] Mr Fowler pointed out that the disclosure to the Official Assignee under s 171 of the Insolvency Act was made on 14 June 2011 and it was not until 5 July 2011 at the earliest that Mr Walker was notified by the police that confidential information might have been contained in the items seized pursuant to the Warrants. He noted that, on 20 July 2011, Mr Walker undertook to the police that any personal information would not be disclosed to third parties.

[189] All that is required to satisfy this limb is that Mr Walker was not authorised by Mr Henderson to disclose the information. That is clearly so with respect to the third parties (Mr Thorne and Mr Holden). There can be no argument about that and Mr Fowler's submissions rightly focused on mitigating the extent of the loss.

[190] In relation to the Official Assignee (including Mr Slevin and Mr McQuilter), however, the argument is that disclosure was *authorised* by s 171 of the Insolvency Act. With respect, that misconstrues what is required. The question is simply whether the defendant made use of the confidential information in a way contrary to the obligation of confidence owed to the plaintiff. Clearly, any disclosure of private information without permission of the plaintiff is contrary to the defendant's obligation of confidence. The existence or otherwise of any lawful authority to breach that obligation of confidence is a matter going to the defence that there was public interest in the disclosure of the information.

Defence of public interest

[191] In some circumstances there may be just cause for the use or disclosure of confidential information. This qualification can be seen in the equitable maxim that "there is no confidence in an iniquity".[67]

[192] I have already discussed Mr Walker's role as far as the Official Assignee is concerned, prior to the lifting of the stay. Until the stay of PVL's liquidation was lifted, Mr Walker had no rights in connection with PVL's property over and above simply holding possession of the Laptop and Tape Drive. I agree with Mr Moss that there can be no circumstances in which the Official Assignee could be entitled to receive private material such as medical documents, private emails between a husband and wife and personal photographs. Hinton J has already concluded that the s 171 request was unlawful for that very reason.[68] This is also consistent with *Finnigan v Ellis*.[69]

[193] It might be arguable that it is in the public interest for individuals to respond to s 171 notices without needing to question their underlying lawfulness. However, particularly in circumstances where Mr Walker could have applied to the Court for directions, I am not persuaded the public interest defence is a complete one for him. Mr Walker knew (whereas the Official Assignee could not have known) that the information he was providing contained private information in respect of which he owed obligations of confidence. However, the seriousness of the breach of duty is significantly tempered by reason of the statutory powers of the Official Assignee. The same reasoning might also apply to the disclosure to the IRD pursuant to the s 17 notice, but it is not necessary to reach a concluded view on that in light of my finding at [183].

[194] I have also rejected the proposition that disclosures were made in the public interest as far as the disclosures to Mr Thorne (and Mr Holden) are concerned. I would also have reached the same view in relation to the email to the United States university server, had it been necessary to do so.

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67 *Hunt v A*, above n 30, at [65].
68 *Henderson v Attorney-General*, above n 12.
69 *Finnigan v Ellis*, above n 64.

[195] On the other hand, I consider that there was a public interest in the disclosure to the police on 11 July 2011 and to the Official Assignee on 26 September 2013 of information that suggested Mr Henderson may have breached the conditions of his bankruptcy. Those parties had an official interest in receiving information of that kind, and the distributions were limited only to information that was relevant to their respective official interests. In those circumstances, and despite the fact the distribution to the Official Assignee on 26 September 2013 post-dated Associate Judge Osborne's directions, it would have been overly formalistic to expect Mr Walker to seek directions before providing this clearly pertinent information.

Damages

[196] Damages for breach of confidence are assessed on the tortious measure, with the guiding principle being to compensate the plaintiff for the loss or injury by placing them, so far as possible, in the position they would have been in if they had not sustained the wrong.[70] In commercial cases, this is typically the value of the information or an account of profits, however, general damages are available for injury to feelings in cases concerning personal information.[71]

[197] It is difficult to find breach of confidence cases involving personal information that are not essentially claims for invasion of privacy. In *Archer v Williams*, the High Court of England and Wales awarded £2,500 to a claimant whose personal assistant provided private information to a public relations consultant with the aim of selling her story to the press, which accidentally resulted in a story about a facelift operation the claimant had undergone being leaked and published in a newspaper.[72] Although *Archer v Williams*, and the other English authorities referred to below at [243], involved breach of confidence, those cases would likely have been dealt with under the invasion of privacy tort in New Zealand. In *X v Attorney-General*, Williams J awarded $15,000 to a former undercover police officer after the police published his real name in the former *Auckland Star* newspaper.[73]

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70 *Dowson and Mason Ltd v Potter* [1986] 2 All ER 418 (CA) at 421, citing *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1975] 2 All ER 173 (HL) at 177 per Lord Wilberforce.

71 Stephen Todd (ed) *The Law of Torts in New Zealand* (online ed, Thomson Reuters) at [14.5.04(2)].

72 *Archer v Williams* [2003] EWHC 1670 (QB) at [74]–[78].

73 *X v Attorney-General* [1997] 2 NZLR 623 (HC).

[198] I am satisfied that an award of $5,000 is sufficient to compensate Mr Henderson for his personal anguish, humiliation and stress resulting from the various breaches of confidence identified above.

Invasion of privacy – scope of the tort

[199] The tort of invasion of privacy was recognised in New Zealand law in the Court of Appeal decision *Hosking v Runting* on the basis that few would seriously question the desirability of protecting aspects of people's private lives from publication.[74] Gault P and Blanchard J described the elements for a claim of invasion of privacy as:[75]

(a) the existence of facts in respect of which there is a reasonable expectation of privacy; and

(b) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

Reasonable expectation of privacy

[200] What constitutes a private fact, which is the essence of the first element, has been helpfully described by the High Court of Australia as follows:[76]

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

[201] In an extra-judicial capacity, Winkelmann J, as she then was, has recently suggested that the focus on contemporary standards of privacy entails a risk that "a retrograde development in society may be incorporated into that standard":[77]

> This risk is real, not merely theoretical, given the increasing every day surveillance we are all subject to (of the public and private camera kind, and on the various phones, watches and apps we use) the modern media world

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74 *Hosking v Runting*, above n 28, at [116].
75 At [117].
76 *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199 at [42] per Gleeson CJ.
77 Helen Winkelmann, Judge of the Court of Appeal of New Zealand *Sir Bruce Slane Memorial Lecture* (Victoria University of Wellington, 30 October 2018) at 17–18.

> (some would say, intrusive media), the culture of sharing of intimate detail on social media, and the growth of a business model in which we are the product.

[202] Winkelmann J approved of Professor Moreham's argument that the reasonable expectation test must involve a normative element – in other words, the courts should ask whether "society [should] protect privacy in the circumstances of this case", rather than asking "what potential privacy infringers can or usually do in the situation in question".[78] She also recommended that, when applying the reasonable expectations test, the courts establish and protect "minimum standards needed to secure the community and individual benefits of privacy".[79]

Highly offensive to the objective reasonable person

[203] The second element is more controversial. Gault P justified the requirement on the basis that:[80]

> … publicity, even extensive publicity, of matters which, although private, are not really sensitive should not give rise to legal liability. The concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned. The right of action, therefore, should be only in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm.

[204] Tipping J preferred the question of offensiveness to be controlled within the need for there to be a reasonable expectation of privacy.[81] That is the approach adopted by the House of Lords in *Campbell v MGN Ltd*.[82] Tipping J acknowledged that "it will always be necessary for the degree of offence and harm to be substantial, so that freedom of expression values are not limited too readily".[83]

[205] In *Rogers v Television New Zealand Ltd*, the Supreme Court had occasion to consider the privacy tort, but for various reasons chose not to address the correctness, or proper application, of the elements established in *Hosking v Runting*.[84] Elias CJ

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78 At 18–19, citing Nicole Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 LQR 651.

79 At 19.

80 *Hosking v Runting*, above n 28, at [126].

81 At [256].

82 *Campbell v MGN Ltd*, above n 43, at [96] per Lord Hope and [135] per Baroness Hale.

83 *Hosking v Runting*, above n 28, at [256].

84 *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [23] per Elias CJ, [99] per McGrath J and [144] per Anderson J.

did, however, take the opportunity to question the necessity of the highly offensive criterion.[85] Nevertheless, the law as it stands today has that as a requirement.

[206] What is highly offensive is assessed from the perspective of a reasonable person in the position of the plaintiff as opposed to a reasonable bystander.[86] It should also be emphasised that it is the *publicity* and not the *information* that must be highly offensive. In other words, the Court is concerned with whether the breach is sufficiently serious – offensive – such that the law should intervene to protect the privacy interests of the plaintiff. No doubt, the nature of the information is a relevant consideration in determining whether publication would be considered highly offensive, but other considerations are also important, including the circumstances and extent of the publication and the nature of the relationship between the parties.

Publicity

[207] The *Hosking v Runting* formulation of the tort was concerned with publicity given to private facts. As Gault P explained:[87]

> The concern of the law, so far as we are presently concerned, is with widespread publicity of very personal and private matters. Publication in the technical sense, for example as applies in defamation, is not in issue.

[208] At first glance, this would seem to provide a complete answer to Mr Henderson's case, which did not involve "widespread publicity". However, it is worthwhile noting that the tort has received very little judicial consideration in its now almost 15-year history. Notably, neither of the claims in *Hosking v Runting* and *Rogers v Television New Zealand Ltd* succeeded. The only successful privacy case in the senior courts following *Hosking v Runting* seems to be Whata J's decision in *C v Holland*.[88] That decision purportedly recognised the existence of another tort known as intrusion upon seclusion. The elements of the intrusion tort bear a striking similarity to what has come to be called the publication tort:[89]

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85 At [25].
86 *P v D* [2000] 2 NZLR 591 (HC) at [39].
87 *Hosking v Runting*, above n 28, at [125].
88 *C v Holland* [2012] NZHC 2155, [2012] NZHC 3 NZLR 672.
89 At [94].

(a) an intentional and unauthorised intrusion;

(b) into seclusion (namely intimate personal activity, space or affairs);

(c) involving infringement of a reasonable expectation of privacy; and

(d) that is highly offensive to a reasonable person.

[209] There has, however, been significant academic commentary and several developments abroad. One of the more interesting developments in England arises from the phone hacking scandal that engulfed two of the county's major newspaper companies. In *Gulati v MGN Ltd*, Mann J awarded extensive damages against MGN for hacking the phones of eight public figures on a regular basis over a period of years.[90] MGN admitted liability on all claims, including claims for the phone hacking itself, even where the hacked information was never published. Accordingly, the proceeding concerned only the quantum of damages, but Mann J was nevertheless satisfied the claims were actionable:[91]

> I accept that there are three areas of wrongful behaviour which need to be looked at separately. First there is the general hacking activity. Each of the individuals had their voicemails (and some of those whom they rang) hacked frequently (in their own cases daily), with most hacks not resulting directly in an article. Their private information was thus acquired and their right to privacy infringed, irrespective of whether an article was published. That fact makes it appropriate to take the activity separately and assess its effect (in terms of compensation) separately from damages arising from publication.

[210] Mann J's decision was upheld by the Court of Appeal[92] and leave to appeal to the Supreme Court was declined.[93]

[211] Professor Moreham explores the basis for this form of liability in her article: *Liability for Listening: Why Phone Hacking is an Actionable Invasion of Privacy*.[94] She explains that the decision in *Gulati v MGN Ltd* involved an extension of the

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90 *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch).
91 At [155].
92 *Gulati v MGN Ltd* [2015] EWCA Civ 1291, [2017] QB 149.
93 *Gulati v MGN Ltd* [2016] 1 WLR 2559 (SC).
94 Nicole Moreham "Liability for Listening: Why Phone Hacking is an Actionable Invasion of privacy" (2015) 7 Journal of Media Law 155.

pre-existing English law on misuse of private information, which had until that point focused exclusively on publication.

[212] Professor Moreham adds:[95]

> The rule against the acquisition of private information therefore provides some protection against unjustified incursions into private activities, belongings or spaces themselves. This is to be welcomed. It is widely accepted that physical privacy – the right to be free from intrusion into private spaces or activities – is an important part of the privacy interest. Most people, it is suggested, would feel that their privacy had been breached if someone listened to their private conversations; watched them engaged in private activities; or obtained access to their private spaces or belongings. Commentators therefore consistently argue that interferences with privacy include 'peeping, following, watching, and photographing individuals; intruding or entering "private" places; eavesdropping, wiretapping, reading of letters'.

[213] These developments recognise that privacy is a multifaceted interest that requires protection in a variety of different contexts and against varying types of invasion. In this respect, it is useful to have regard to the principles underlying the protection of privacy. In *Hosking v Runting*, Tipping J said:[96]

> It is of the essence of the dignity and personal autonomy and wellbeing of all human beings that some aspects of their lives should be able to remain private if they so wish.

[214] The majority in *Hosking v Runting* were very clear that, consistent with the common law method of incremental development of the law, they were concerned only with identifying the scope of the tort insofar as it applied to cases of the kind before them. The Court did not preclude further development of the law. For instance, Gault P said:[97]

> The scope of a cause, or causes, of action protecting privacy should be left to incremental development by future Courts.
>
> …
>
> No Court can prescribe all the boundaries of a cause of action in a single decision, nor would such an approach be desirable. The cause of action will evolve through future decisions as Courts assess the nature and impact of particular circumstances. However, some general comments may be useful.

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95 At 163 (footnotes omitted).
96 *Hosking v Runting*, above n 28, at [239].
97 At [117]–[118].

> First, we emphasise that at this point we are concerned only with the third formulation of the privacy tort identified by Prosser and developed in the United States cases: wrongful publicity given to private lives.

[215] Whata J's decision in *C v Holland* can be considered an incremental development of the principles enunciated in *Hosking v Runting*, underpinned by the concepts of autonomy and dignity. The privacy tort is capable of capturing a wide range of behaviour, so long as the plaintiff can meet the two central requirements of demonstrating a reasonable expectation of privacy and that the invasion of privacy would be considered highly offensive to an objective reasonable person. An invasion of privacy could take place in many ways, including by giving widespread publicity to private information or affairs; by intruding into private affairs (or arguably information); or, relevantly, by providing private information to third parties without authorisation.

[216] Confining the privacy tort to situations involving "widespread publicity" would be contrary to its purpose of providing effective protection to individuals against violations of their autonomy and dignity occasioned by invading the sanctity of their private lives. A claimant will still have to demonstrate that they had a reasonable expectation of privacy, and that the alleged misconduct meets the threshold of "highly offensive". Invasions of privacy that do not involve widespread publicity are far less likely to engage the freedom of expression concerns that troubled the Court in *Hosking v Runting*. Of course, it will be for the courts to consider in individual cases whether the type of conduct in question is capable of falling within the scope of the privacy tort.

[217] In the circumstances of the present case, I am satisfied that providing private information to third parties without authorisation is the kind of conduct that the privacy tort should encompass. Technology has moved on considerably since 2005, when *Hosking v Runting* was decided. At that time, Facebook was still a private website accessible by only a select few United States universities and Apple had yet to release the original iPhone. Nowadays it is possible to record a video on a phone and share it live on the internet. Individuals communicate and store vast amounts of personal information in electronic form, including text, images and video. The potential implications of losing control over private information in the digital age are far greater

than ever before. Of course, it goes without saying that the more limited an audience, the more difficult it will be for a plaintiff to establish that the invasion of privacy was highly offensive, and therefore actionable. This factor will also be relevant when it comes to assessing the appropriate remedy.

A note about procedure

[218] In his original statement of claim, Mr Henderson pleaded two causes of action based on invasion of privacy: one claim based on the publication of private facts and another based on intrusion upon seclusion. The latter claim was struck out at an interlocutory stage.[98] As will be apparent from the preceding discussion, the conceptual boundary between those two causes of action might not be quite so clear cut. In hindsight it would have been an advantage to have had both claims before me when considering how best to develop the law in this area.

Notice requirement

[219] There is also a question whether the privacy tort contains a notice requirement. The learned authors of *The Law of Torts in New Zealand* note there is no case law on this point and say:[99]

> Another question not settled by *Hosking v Runting* is what mental element is required. When the media are defendants the question is unlikely to arise because publication is hardly ever anything but intentional, although one could perhaps imagine a case where an item which should have been withdrawn is left in a newspaper by mistake. But more difficult questions could arise if someone leaves information in an insecure place where others could find it and publish it, or if material is issued by someone – say a bookseller – who does not know exactly what it contains. In such cases the question might well be whether intention is required, or whether negligence will suffice. Absolute liability would surely be unlikely.

[220] For reasons that will become apparent, it is unnecessary to decide in the present case whether the appropriate mental element is knowledge or negligence, or something else, such as recklessness. Suffice to say, I am satisfied that the tort is not one of absolute liability. That would be contrary to the cautious way in which the Court of Appeal decided to develop the tort in this country. It would also put the tort out of line

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98 *Henderson v Slevin* [2015] NZHC 366 at [62]–[72].
99 Todd (ed), above n 71, at [17.5.04] (footnote omitted).

with the law on breach of confidence which, as I have already explained, requires a relationship of confidence and that third-party recipients have at least notice that the information is confidential.

Invasion of privacy – application

Are there facts in respect of which there is a reasonable expectation of privacy?

[221] The Private Documents fall into the categories set out at [41] above and Mr Walker accepted in evidence that the Private Documents were private.[100]

[222] I accept that emails sent to Mr Henderson by his wife, friends (including the politicians in that category) and business associates were clearly sent on the basis they were intended for Mr Henderson's eyes only. I do not accept Mr Fowler's submission that it was the senders of the email who had the expectation of privacy rather than Mr Henderson. Mr Henderson as receiver clearly also had an expectation of privacy.

[223] Mr Fowler contended that, while in isolation the Private Documents may contain facts indicating a reasonable expectation of privacy, the context in which the information was generated and stored is an important consideration. He emphasised all the communications were stored on a Laptop belonging to PVL and there was no effort to quarantine the information, for example in a folder marked "personal". I have already referred to the comments in the *Havenleigh Global Services* decision, with which I generally agree, but which does not mean that the reasonable expectation of privacy is lost.[101]

[224] While the circumstances can be taken into account when considering the seriousness of any breach, I do not accept that Mr Henderson lost any reasonable expectation of privacy when he made the decision to store his private information on the Laptop. This is notwithstanding PVL's computer policy, which I have already discussed.[102] I am satisfied that a director of a company is reasonably entitled to expect privacy in connection with private material stored on a company laptop.

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100 I have put to one side Mr Walker's assertion that some of what were clearly legally privileged communications belonged to him.

101 *Havenleigh Global Services Ltd and FM Custodians Ltd v Henderson*, above n 27, at [107]–[111].

102 See [163] above.

[225] A similar point was made by the Supreme Court of Canada in *R v Cole*, which recognised that computers are reasonably used for personal purposes, even at work, and the user is entitled to a measure of privacy in relation to personal information stored on such computers, even taking into account workplace policies.[103]

[226] It is plainly evident that several of the categories that comprise the Private Documents constitute information that a reasonable person would understand to be meant to be unobserved.

[227] On the other hand, for the reasons already canvassed at [164]–[166], I do not accept that Mr Henderson had a reasonable expectation of privacy in relation to the email to the United States university server on 28 May 2011, or in relation to the email to Mr Slevin attaching the screenshot concerning SOL Management on 13 June 2011.

[228] I accept that Mr Henderson had a reasonable expectation of privacy in relation to his privileged legal communications, which were the subject of the disclosure to police on 11 July 2011.

Did Mr Walker have notice that the information was private?

[229] Had Mr Walker known or appreciated the likelihood of there being personal information on the Tape Drive provided to the IRD, then there would be legitimate criticism. However, I have already concluded at [139] that Mr Walker could not have appreciated that possibility at the time he provided the Tape Drive to the IRD. Even though I have doubts that Mr Walker provided the Tape Drive to the IRD pursuant to the s 17 notice to PVL's receiver, there is no doubt the IRD was entitled to documents relating to PVL. In these circumstances, Mr Walker's actions did not even reach the level of negligence. For these reasons, Mr Walker cannot be liable for the provision of the Tape Drive to the IRD.

Would disclosure be considered highly offensive to a reasonable person?

[230] In Mr Moss' submission, further context for the distributions is provided by other evidence discussed above, for example the *NBR* article of 27 May 2011 wherein

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[103] *R v Cole* [2012] 3 SCR 34, [2012] SCC 53 at [2] and [8].

Mr Walker was quoted as referring to some 45,000 emails on the Laptop and that Mr Henderson had been "saying a lot of interesting things". Mr Moss then referred to Mr Walker openly offering access to Mr Idour and the willingness with which information was provided to the Official Assignee and Mr McQuilter. He noted, for example, evidence that Mr Slevin confirmed that the flash drive contained emails that were not relevant to the Official Assignee's inquiry and Mr Walker's acknowledgement in cross-examination that he could not be sure there was nothing private on the flash drive provided to Mr McQuilter.

[231] Mr Moss then referred to the information provided to Mr Thorne and, in his submission, Mr Holden.

[232] Against that background, Mr Moss contended publication would be considered highly offensive.

[233] Mr Fowler submitted that any personal information was disclosed only to the Official Assignee, the IRD and lawyers bound by duties of confidence as part of the discovery process. He referred to what he described as an "actual lawful request" for information from the IRD and an "ostensibly lawful request" from the Official Assignee. He said there was no reason for Mr Walker, or any reasonable person in his shoes, to conclude that the s 171 notice was unlawful and should not have been complied with. He characterised the disclosures to Mr McQuilter and Mr Thorne as selective, not involving the revelation of any personal information over which there could be a reasonable expectation of privacy. So far as the PVL disclosures on discovery were concerned, he noted the immediate steps taken to remedy the situation.

[234] In respect of the distributions to the third parties (except Mr McQuilter who was an agent for the Official Assignee), the evidence is not of disclosures that would be considered highly offensive to an objective reasonable person. This is despite the expectation of privacy. Notwithstanding the fact there was no justification for the disclosures to Mr Thorne (and Mr Holden), there is nothing in the evidence to suggest that those disclosures would be considered highly offensive to an objective reasonable person. The same applies to the disclosure of the email exchange between Mr Henderson and the then Mayor of Christchurch. These distributions were of a

limited amount of information, which was innocuous in nature, and were to a limited number of people. While Mr Henderson can justifiably be aggrieved and angry at the use made of his personal and private information, the disclosures do not meet the test required for an invasion of privacy.

[235] For the reasons I have already canvassed at [195], I regard the distributions (to police on 11 July 2011 and to the Official Assignee on 26 September 2013) of information indicating that Mr Henderson was acting in breach of the conditions of his bankruptcy as being in the public interest.

[236] I agree that the disclosures in the course of discovery would not be considered highly offensive to a reasonable person. Those disclosures were inadvertent in nature and were to a limited audience comprised of lawyers bound to maintain the confidentiality of the material.

[237] There is one email from Mr Henderson's wife to Mr Henderson about which there can be no doubt disclosure would be considered highly offensive. Although there is no evidence to suggest Mr Walker deliberately forwarded it to Mr Thorne, someone he knew harboured antipathy towards Mr Henderson, he did inadvertently pass that information on to the Official Assignee by giving them the clones of the Laptop. There was no evidence it was included in the discovery in the PVL proceedings.

[238] It is the disclosures to the Official Assignee that cause the most difficulty. The worst disclosures were made to the party entitled to know the most about Mr Henderson. The first disclosure to the Official Assignee was made on 14 June 2011. That post-dated the email dated 28 May 2011 to Messrs Tupp, Thorne and Holden and the United States university server. While the information referred to in that email might not be considered highly personal, it suggests that, by this time, Mr Walker was aware of the mix of personal and private emails on the Laptop. This is emphasised by the *NBR* article on 27 May 2011. Certainly, by the disclosure to Mr McQuilter in July 2013, Mr Walker must have been aware of the extent of private documents on the Laptop. By that stage he knew of Mr Henderson's concerns and indeed the concerns of the police.

[239] I accept that a reasonable person would regard disclosure of some personal information as a sometimes-necessary consequence of the Official Assignee's statutory functions (in particular, regarding the Official Assignee dealing in personal bankruptcy). That comment fairly applies to the screenshot of SOL Management Ltd, the information concerning the American Express account and any private materials that might have been on the flash drive provided to Mr Quilter (by which time some effort had been made to ensure only relevant documents were provided). The same cannot, however, be said in respect of the provision (twice) of the flash drive, being a copy of the Laptop data, to Mr Slevin in 2011.

[240] Notwithstanding the statutory role, I consider the deliberate sending of this private information to the Official Assignee would be considered highly offensive to an objective reasonable person in Mr Henderson's position. In reaching this conclusion, I have taken into account:

(a) the limited number of persons who would have had the opportunity to see the Private Documents;

(b) the intensely personal and potentially embarrassing nature of the email between Mr Henderson and his wife;

(c) the number of other private documents on the Laptop;

(d) the fact Mr Walker was also in a relationship of confidence with Mr Henderson;

(e) the fact Mr Walker was clearly aware of the presence of private information amongst the Laptop data; and

(f) Mr Walker's cavalier (and arguably malicious) attitude towards Mr Henderson's privacy.

[241] For the reasons already outlined at [191]–[193], I also reject Mr Walker's public interest defence in relation to this invasion of privacy.

Damages

[242] That being the case, I turn to consider the remedies Mr Henderson seeks. I am satisfied it is appropriate to give a declaration that there was a breach of Mr Henderson's privacy in respect of the two disclosures to the Official Assignee.

[243] Counsel were unable to refer to any New Zealand senior court authorities in which an award of damages has been made for invasion of privacy. Mr Moss, however, referred the Court to the following decisions:

(a) *L v G* – a decision where the District Court awarded $2,500 for invasion of privacy involving the provision to a magazine, and subsequent publication, of two sexually explicit photographs of the plaintiff that had been taken by the defendant with her permission (although the Court found no permission had been given to publish the photographs).[104]

(b) *Brown v Attorney-General* – a decision where the District Court awarded $25,000 for invasion of privacy involving a local police officer (acting contrary to police guidelines) dropping leaflets in the community where the plaintiff, a convicted child sex offender, had chosen to reside on his release from prison.[105] The leaflets warned of the plaintiff's prior offending and his presence in their community. As a result, the plaintiff was verbally and physically abused, and ultimately forced to leave the community.

(c) *Director of Human Rights Proceedings v Slater* – a decision where the Human Rights Review Tribunal awarded $70,000 for breach of information privacy principle 11, under the Privacy Act 1993, involving the character assassination of Auckland businessman, Matt Blomfield, by Cameron Slater on his Whale Oil blog.[106] Mr Slater released 43 personal documents belonging to Mr Blomfield, including his

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104 *L v G* [2002] NZAR 495 (DC).
105 *Brown v Attorney-General* [2006] NZAR 552 (DC).
106 *Director of Human Rights Proceedings v Slater* [2019] NZHRRT 13.

contact information. Amongst other things, he also accused Mr Blomfield of engaging in "dodgy arrangements" and called him a "psychopath" and a "pathological liar". Mr Blomfield subsequently received text messages threatening him and his family, and was even attacked at his home by an unknown assailant.

(d) *Hammond v Credit Union Baywide* – a decision where the Human Rights Review Tribunal awarded $98,000 for hurt feelings and humiliation occasioned by a breach of information privacy principle 11, under the Privacy Act 1993, involving a previous employer obtaining a private Facebook photograph the plaintiff had posted that was disparaging of the previous employer.[107] The previous employer disseminated the photograph to the plaintiff's new employer and four employment agencies in the region, with a warning not to employ the plaintiff. The plaintiff felt compelled to resign and was unable to obtain further employment for 10 months. The Tribunal also observed that awards for humiliation, loss of dignity and injury to feelings before the Tribunal had typically fallen into three bands: less than $10,000 for less serious cases; between $10,000 and $50,000 for more serious cases; and over $50,000 for the most serious cases. The Tribunal emphasised that these bands were descriptive only.[108]

(e) *Campbell v MGN Ltd* – a decision where the House of Lords upheld an award of £2,500 (plus £1,000 aggravated damages) for breach of confidence involving the publication of several newspaper articles concerning Naomi Campbell seeking treatment for her drug addiction, including a photograph of her leaving a Narcotics Anonymous meeting.[109]

(f) *Douglas v Hello!* – a decision where the Court of Appeal of England and Wales upheld awards of £7,250 each for distress and inconvenience

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107 *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66.
108 At [176].
109 *Campbell v MGN Ltd*, above n 43.

occasioned by breach of confidence involving the publication of photographs of Michael Douglas and Catherine Zeta-Jones' wedding by *Hello!* magazine in circumstances where *OK!* magazine had exclusive rights to take photographs at the wedding.[110]

(g) *Mosley v News Group Newspapers Ltd* – a decision where the High Court of England and Wales awarded £60,000 for breach of confidence involving the publication of two articles in the *News of the World* concerning the plaintiff's participation in a sadomasochistic orgy, including photographs and video footage that had been obtained through surreptitious recording by one of the other participants.[111] The articles inaccurately alleged that the orgy involved an enactment of Nazi behaviour and mocked victims of the Holocaust.

(h) *Gulati v MGN Ltd* – a decision where the Court of Appeal of England and Wales upheld awards between £72,500 and £260,250 for misuses of private information involving the hacking of phones of several famous individuals by newspapers.[112] The information hacked included that an actor intended to leave the Eastenders television programme; that one of the individuals had taken legal advice on a possible divorce; that one was having an affair; and the location of another's wedding venue, which he had wanted to keep secret. Mann J, in the High Court, explained that the scale of damages was a result of the length, degree and frequency of the hacking, as well as the extent of the publication of articles that followed, which included several newspapers each with readerships over one million.

[244] In *Gulati v MGN Ltd*, Arden LJ upheld Mann J's decision to award a component of damages for the invasion of privacy itself, in addition to damages for any distress that had been caused:[113]

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110 *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125 at [92]–[121]. The award of damages obtained by Mr Douglas and Ms Jones did not form part of the subsequent appeal by *OK!* in *Douglas v Hello! Ltd (No 3)* [2007] UKHL 21, [2008] 1 AC 1.

111 *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

112 *Gulati v MGN Ltd*, above n 92.

113 At [48].

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

[245] Professor Moreham has recently written in approval of this approach to damages for invasion of privacy, arguing that the privacy tort exists to protect autonomy and dignity, so it is only natural that damages should be focused on compensating the loss of autonomy and dignity that results from a breach.[114] In this respect, Professor Moreham draws an analogy with other torts that protect autonomy and dignity, such as assault, battery and false imprisonment, which are also actionable per se.

[246] Professor Varuhas suggests the following guidance on how to quantify damages of this kind:[115]

> Where the violation entails the taking of information, the nature of that information will be material: *ceteris paribus* damages should be higher where the violation entails unauthorised taking of intimate pictures versus unauthorised accessing of the claimant's order history on the Star Wars online store. Extent of publication will be relevant: if the defendant publishes the information in a national newspaper, the inference shall be far more serious than if they publish it to no one. Location may be pertinent: installing a camera in the claimant's family home, and recording them, is likely to entail a far more serious interference with privacy, than recording someone on a public street. Duration shall also bear on quantum: *ceteris paribus*, damages should be higher where the defendant bugs my house for four months relative to where they bug my house for two weeks. The more times a violation is repeated – for example if there have been multiple instances of wrongful accessing of private information – the greater the award should be.

[247] Needless to say, the distress suffered by Mr Henderson is hardly comparable to many of the cases referred to by Mr Moss. Having considered those authorities, I have reached the view that no award of damages is merited to compensate Mr Henderson for any personal anguish, humiliation and stress arising from the breach of his privacy. In reaching this conclusion, I have taken into account the following factors:

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114 Nicole Moreham "Compensating for Loss of Dignity and Autonomy" in Jason Varuhas and Nicole Moreham (eds) *Remedies for Invasion of privacy* (Hart Publishing, Cambridge, 2018) 125.

115 Jason Varuhas "Varieties of Damages for Breach of Privacy" in Varuhas and Moreham, above n 114, 55 at 72.

(a) While the Private Documents included information of a very personal nature concerning Mr Henderson's marriage, there was only a limited number of them and they were buried amongst thousands of other non-private (or inoffensive) documents.

(b) There was no publication of the information to the general public.

(c) The Official Assignee regularly deals with private information concerning bankrupts. As I say, it is ironic that the invasion of privacy occurred in relation to the person most entitled to see private exchanges between Mr Henderson and third parties.

(d) While there were two distinct breaches occurring on separate occasions, they were very much related and concerned the same private information.

(e) Mr Slevin appears to have been the only person to have viewed all the documents on the Laptop and he spent approximately 12 hours doing so. Although the flash drive was forwarded to Mr Wolmarans on 31 October 2011, the evidence suggests he did not view any of the Private Documents because he was unable to search the flash drive. The Private Documents were not amongst the emails Mr Slevin later copied to Mr Wolmarans.

Conversion

[248] As pleaded, the cause of action in conversion raises a novel issue. It remains an open question in New Zealand law whether the tort of conversion applies to intangible property, such as Mr Henderson's private digital files. Before addressing that issue, it is appropriate to briefly consider whether the remedy Mr Henderson seeks, namely general damages for personal anguish, humiliation and stress, is even available under the tort of conversion.

[249] Conversion seeks to remedy the wrongful denial by a defendant of a plaintiff's possessory interest in property. Although the usual measure of damages is the value

of the property at the time it was converted,[116] there is no immutable rule and the overriding requirement is that damages compensate for the loss suffered by the plaintiff.[117] A plaintiff can seek damages for consequential loss.[118] There is no reason in principle why this ought not extend to personal anguish, humiliation and stress suffered as a result of a conversion, provided such loss is demonstrable and not too remote. Such an approach is supported by *Graham v Voigt*, where the Supreme Court of the Australian Capital Territory awarded $2,500 in general damages to a lifelong stamp collector who, out of a sense of disgust and hopelessness, lost the will to continue his hobby after his near-complete collection of Australian stamps was converted.[119]

Conversion of intangible property

[250] The tort of conversion is traditionally understood to involve three elements:

(a) The plaintiff must have the right to immediate possession of the goods.

(b) The defendant's conduct must be deliberate.

(c) The defendant's conduct must be so extensive an encroachment on the rights of the plaintiff as to exclude him or her from use and possession of the goods.[120]

[251] Encapsulated within these elements historically has been the assumption that the tort applies only to tangible personal property. That is because the concept of possession, which underlies the tort, is usually considered to require both physical control and an intention to exclude others. The difficulty with intangible property is that it is by its nature not physical, so at first glance appears incapable of being *physically* controlled, and therefore possessed.

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116 *Nash v Barnes* [1922] NZLR 303 (SC) at 312.

117 *Glenmorgan Farm Ltd (in liq and in rec) v New Zealand Bloodstock Leasing Ltd* [2011] NZCA 672, [2012] 1 NZLR 555 at [62]–[66], citing *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 at [67] per Lord Nicholls.

118 *Hillesden v Securities Ltd v Ryjack Ltd* [1983] 1 WLR 959 (QB) at 963.

119 *Graham v Voigt* (1989) 89 ACTR 11 (SC), relying on the line of authority arising from *Jarvis v Swan Tours Ltd* [1973] QB 233 (CA).

120 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, above n 117, at [39] per Lord Nicholls.

[252] In *Your Response Ltd v Datateam Business Media Ltd*, the Court of Appeal of England and Wales held that a common law possessory lien cannot be exercised over data in an electronic database.[121] This decision followed *OGB v Allan*, where a majority of the House of Lords refused to extend the tort of conversion to cover the appropriation of choses in action, specifically a debt and contract.[122] The Court of Appeal summarised the relevant aspects of the majority's decision in *OBG v Allan* as follows:

> [15] As *OBG v Allan* makes clear, the essence of conversion is a wrongful interference with the possession of tangible property. For these purposes the common law draws a sharp distinction between tangible and intangible property. Even in the case of the conversion of valuable documents (cheques etc), to which several of their Lordships referred, there is an unlawful interference with a physical object to which a commercial value can be attached. In contrast to chattels, choses in action are intangible things and incapable of the physical possession necessary to support a claim for conversion.

[253] It was submitted to the Court in *Your Response Ltd v Datateam Business Media Ltd* that data in an electronic database is intangible property of a different kind to a chose in action, which could be susceptible to possession and thus amenable to the tort of conversion. However, the Court decided that to take such a position "would involve a significant departure from the existing law in a way that is inconsistent with the decision in *OBG v Allan*" such that it was not open to it and that the matter would have to "await the intervention of Parliament".[123] The Court was also hesitant to extend the scope of possession in light of the Torts (Inference with Goods) Act 1977 (UK), which legislatively altered the tort of conversion in the United Kingdom.

[254] Much of the reasoning in *Your Response Ltd v Datateam Business Media Ltd* is specific to the United Kingdom context. New Zealand courts are not bound by *OBG v Allan* and there is no corresponding New Zealand statute that alters the tort of conversion. Accordingly, it is certainly open to this Court to depart from the United Kingdom position.

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121 *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41.

122 *OBG v Allan*, above n 110, at [94]–[107] per Lord Hoffmann, [271] per Lord Walker and [321]-[322] per Lord Brown, with Lord Nicholls (at [220]–[241]]) and Baroness Hale (at [302]-[318]) dissenting.

123 *Your Response Ltd v Datateam Business Media Ltd*, above n 121, at [27].

[255] The New York State Court of Appeals has explicitly extended the tort of conversion to cover electronic records.[124] In a concise decision, the Court of Appeals summarised the history of the tort dating back to the Norman Conquest of England in 1066. The Court focused in particular on the so-called merger doctrine, which the courts had developed to allow claims for the conversion of intangible property where that property was represented by a physical asset, such as a stock certificate.[125] The Court concluded:

> The merger rule reflected the concept that intangible property interests could be converted only by exercising dominion over the paper document that represented that interest (*see Pierpoint v Hoyt*, 260 NY at 29). Now, however, it is customary that stock ownership exclusively exists in electronic format. Because shares of stock can be transferred by mere computer entries, a thief can use a computer to access a person's financial accounts and transfer the shares to an account controlled by the thief. Similarly, electronic documents and records stored on a computer can also be converted by simply pressing the delete button (*cf. Kremen v Cohen*, 337 F3d at 1034 ["It would be a curious jurisprudence that turned on the existence of a paper document rather than an electronic one. Torching a company's file room would then be conversion while hacking into its mainframe and deleting its data would not" (emphasis omitted)]).
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> Furthermore, it generally is not the physical nature of a document that determines its worth, it is the information memorialized in the document that has intrinsic value. A manuscript of a novel has the same value whether it is saved in a computer's memory or printed on paper. So too, the information that Thyroff allegedly stored on his leased computers in the form of electronic records of customer contacts and related data has value to him regardless of whether the format in which the information was stored was tangible or intangible. In the absence of a significant difference in the value of the information, the protections of the law should apply equally to both forms – physical and virtual.

[256] Counsel could not point to any New Zealand case where it was necessary to decide whether the tort of conversion extends to intangible property. However, in *Dixon v R*, both the Court of Appeal and Supreme Court addressed a similar issue in a criminal context. Mr Dixon was charged with accessing a computer system for a dishonest purpose under s 249(1)(a) of the Crimes Act 1961 for downloading CCTV footage of Mike Tindall's encounter with a female patron at a bar during the 2011 Rugby World Cup. Mr Tindall, the captain of the English rugby team, had recently married the Queen's granddaughter. Mr Dixon sought unsuccessfully to sell the

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124 *Thyroff v Nationwide Mutual Insurance Co* 8 NY 3d 283 (NY 2007) at 292.

125 Compare *OBG v Allan, Douglas v Hello! Ltd (No 3)*, above n 110, at [225] per Lord Nicholls.

footage before posting it online. The charge alleged that Mr Dixon had dishonestly obtained "property".

[257] The Court of Appeal concluded that the digital footage was not "property" and substituted Mr Dixon's conviction on the basis that he had instead obtained a "benefit".[126] The Court of Appeal reasoned that digital footage is indistinguishable in principle from pure information.[127] The Supreme Court disagreed and reinstated Mr Dixon's conviction on the basis that he had obtained "property".[128] The Court referred to both *Your Response Ltd v Datateam Business Media Ltd* and *Thyroff v Nationwide Mutual Insurance Co*, but did not find it necessary to consider either in any detail. The Court also found it strictly unnecessary to determine whether digital files are intangible property or tangible property. The Court emphasised that the meaning of the word "property" varies with context.[129]

[258] The Supreme Court's exercise of statutory interpretation in the context of the criminal law is not directly applicable to the questions raised in the context of tort law. Nevertheless, many of the considerations addressed by the Court mirror those commonly discussed in the context of conversion. For instance, in response to the central reasoning of the Court of Appeal, the Court said:

> [24] We do not propose to reconsider [the] orthodox view [that information is not property]. This is because Mr Boldt for the Crown did not contend that "pure information" was property. Rather, he argued that digital files were not simply information but were properly regarded as things which could be owned and dealt with in the same way as other items of personal property…
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> [25] … we have no doubt that the digital files at issue are property and not simply information. In summary, we consider that the digital files can be identified, have a value and are capable of being transferred to others. They also have a physical presence, albeit one that cannot be detected by means of the unaided senses…

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126 *Dixon v R* [2014] NZCA 329, [2014] 3 NZLR 504.
127 At [29]–[31].
128 *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678.
129 At [25].

[259] While there is little judicial comment on the issue in this country, there is substantial academic commentary, domestic and international, advocating both for and against extending the tort.[130]

[260] Those who favour extension point out that property rights are concerned with control over resources and that in modern society intangible property, such as data, is an increasingly valuable resource that requires legal protection. They argue that tangibility is an arbitrary requirement and that the tort of conversion should be brought up to date with advancements in technology.

[261] Those who oppose the extension express their concern with how the concept of possession can be applied to intangible property. As the Court of Appeal of England and Wales observed in *Your Response Ltd v Datateam Business Media Ltd*, "whereas it is possible to transfer physical possession of tangible property by simple delivery, it is not possible to deal with intangible property in the same way."[131] Opponents point out that the common law does not give despotic control over anything with economic value, as even tangible property does not attract protection against ephemeral interferences such as visual trespass, and it is the concept of possession that provides the limitation in the case of tangible property.[132]

[262] Opponents also point out that the common law has carefully developed categories of conversion (physical taking, detention and refusal to return, misusing and transfer to another) that are based on the physical nature of the goods.[133] They

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130 See Kelly McFadzien and Tim Sherman "Digital Files as Property: A Curious Case in New Zealand" *Privacy Law Bulletin* (New Zealand, April 2016) at 71–73; Kelvin Low and David Llewelyn "Digital files as property in the New Zealand Supreme Court: innovation or confusion?" (2016) 132 LQR 394; Margaret Briggs "Criminal Law" (2015) NZLR 115; Colin Picker "Conversion of Intangible Goods: Some Modern Approaches" (2014) 88 ALJ 235; Mariel Belanger "*Amazon.com's Orwellian Gaffe: The Legal Implications of Sending E-Books Down the Memory Hole*" (2011) 41 Seton Hall L Rev 361; Caitlin Akins "Conversion of Digital Property: Protecting Consumers in the Age of Technology" (2010) 23 Loy Consumer L Rev 215; Susannah Lei Kan Shaw "Conversion of Intangible Property: A Modest, But Principled Extension? A Historical Perspective" (2009) 40 VUWLR 419; Sarah Green and John Randall *The Tort of Conversion* (Hart Publishing, Oxford, 2009); Ken Moon "Intangibles as property and goods" [2009] NZLJ 228; Sarah Green "To Have and to Hold – Conversion and Intangible Property" (2008) 71 Mod L Rev 114; Cynthia Hawes "The tort of conversion" [2007] NZLJ 430; Andrew Tettenborn "Liability for interfering with intangibles: invalidly-appointed receivers, conversion, and the economic torts" (2006) 122 LQR 31.

131 *Your Response Ltd v Datateam Business Media Ltd*, above n 121, at [16].

132 Low and Llewelyn, above n 130, at 396–397.

133 Tettenborn, above n 130, at 33.

argue that because conversion is a strict liability tort, the consequences of extending the tort into uncertain territory could be detrimental.[134] Similarly, the Court of Appeal in *Dixon v R*, expressed its concerns about the implications for the right to freedom of expression if data/information were treated as property.[135]

[263] It is well established that information is not property.[136] There is good reason for this position. As Lord Upjohn observed in *Phipps v Boardman*, information "is normally open to all who have eyes to read and ears to hear".[137] Information, unlike property, cannot be separated from any person who once possessed it. It is easily acquired, and its free communication is essential to human existence. Furthermore, classifying information as property would undermine all the intricate distinctions and limitations developed by the law of breach of confidence. However, in my view, it is possible to draw a distinction, as the Supreme Court did in *Dixon v R*, between information and digital assets. Unlike information, it is possible to apply the concept of possession to digital assets. By digital assets, I mean to include all forms of information stored digitally on an electronic device, such as emails, digital files, digital footage and computer programmes.

[264] Anthony Honoré QC famously described possession as "to have exclusive physical control of a thing, *or to have such control as the nature of the thing admits*".[138] Professor Sarah Green and John Randall QC refer to the two elements of possession as *cognitive control* and *manual control*. They argue that physical control is simply one form of manual control. The fundamental elements of manual control are *excludability* and *exhaustibility*. Something is excludable if others can be excluded from its control, while something is exhaustible if its value can be deprived from

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134 At 33.

135 *Dixon v R*, above n 126, at [31]–[34].

136 See *Hunt v A*, above n 30, at [90]; and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 236 ALR 209. See also *Oxford v Moss* (1979) 68 Cr App R 183, where a university student who somehow obtained a copy of an exam paper, read it and returned it before sitting the exam had his charge of theft dismissed on the basis he had stolen information, not property.

137 *Phipps v Boardman* [1967] 2 AC 46 (HL) at 127–128 per Lord Upjohn (dissenting in the result, but with whom Lord Cohen and Viscount Dilhorne essentially agreed on this point).

138 AM Honoré "Ownership" in AG Guest (ed) *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford, 1961) 107 at 113 (emphasis added).

others. These criteria fit logically with the basis for conversion because together they enable someone to control property to the detriment of another.[139]

[265] Professor Green and Mr Randall argue that digital assets are both excludable and exhaustible. In terms of excludability, they point out that digital assets have a material presence in the sense that they physically alter the medium on which they are held, which is illustrated by the fact that hardware only has a finite storage capacity for digital assets, a point the Supreme Court picked up on in *Dixon v R*.[140] Several commentators have been critical of such observations, arguing that there is an important distinction between the property and the medium on which it is stored; no one considers ink to be separate property from the paper it is written on.[141] However, this criticism misses the point, which is that the physical presence allows others to be excluded from the digital asset, either by physical control of the medium or by password protection, which can be considered analogous to locking-up tangible property with a key. Professor Green and Mr Randall draw a comparison with very large tangible property that can only be possessed constructively, such as a motor vehicle.[142] The analogy with ink on paper is imperfect because the ink cannot be obtained separately from the paper in the way that digital assets can be obtained from a digital device.

[266] Digital assets are exhaustible because they can be deleted or modified so as to render them useless or inaccessible.[143] This requirement deals neatly with another objection that is often raised; that the transfer of digital assets actually involves two processes, copying and deletion of the original file, and that copying tangible property (for instance, photocopying a paper document) does not constitute conversion.[144] Professor Green and Mr Randall accept that *merely* taking a copy of a digital asset would not constitute conversion.[145] That makes sense because conversion requires an extensive encroachment on the possessory rights of the plaintiff, so if exhaustibility is a key component of possession, then it follows that the defendant must in some way

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139 Green and Randall, above n 130, at 109–111.
140 At 118–119; and *Dixon v R*, above n 128, at [39].
141 See Low and Llewelyn, above n 130, at 396; and McFadzien and Sherman, above n 130, at 72.
142 Green and Randall, above n 130, at 122.
143 At 123.
144 See McFadzien and Sherman, above n 130, at 72–73; and Low and Llewelyn, above n 130, at 396.
145 Green and Randall, above n 130, at 120.

deprive the plaintiff of the asset to make out the tort. This requirement removes any inconsistency between the tort's application to tangible and digital assets. It also mitigates any policy concerns that extending the tort would inhibit the free exchange of digital information.

[267] There are also very good policy reasons for extending the tort of conversion to digital assets. Currently the (civil) law offers protection where the tangible asset containing the digital assets is converted; where the information recorded on the digital asset is obtained in breach of confidence or privacy; or where the digital asset is subject to contract, copyright or a patent. However, it would be possible to acquire digital assets in circumstances where those protections do not apply, such as if a hacker remotely deleted a non-confidential, but valuable, computer programme from a company's servers.

[268] Digital assets can have immense commercial value in the modern world, which means there is an important economic reason to ensure the law provides adequate protection for such assets. As Professor Green and Mr Randall explain:[146]

> In order for assets to be both produced and employed in the most productive way possible, property interests in them must receive the full recognition and protection of the law.

[269] There may also be a distinction between digital assets and choses in action, as was argued before the Court of Appeal of England and Wales in *Your Response Ltd v Datateam Business Media Ltd*.[147] It is unnecessary to consider the matter in detail, but suffice to say the issues of overlap between conversion and the economic torts that plagued the House of Lords in *OGB Ltd v Allan* do not cause any concern in the present context.[148] In other words, it does not necessarily follow from extending the tort of conversion beyond the traditional divide of tangible property that choses in action such as contractual rights ought to be covered by the tort as well.

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146 At 146 (footnotes omitted), citing Hernando de Soto *The Mystery of Capital* (Basic Books, New York, 2000) at 49.

147 *Your Response Ltd v Datateam Business Media Ltd*, above n 121.

148 See *OBG Ltd v Allan*, above n 110, at [99] per Lord Hoffmann.

[270] Standing back, it seems obvious that digital assets should be afforded the protection of property law. They have all the characteristics of property and the conceptual difficulties appear to arise predominantly from the historical origins of our law of tangible property. There is a real difference between digital assets and the information they record. Such permanent records of information are already convertible when they take a physical form and it would be arbitrary to base the law on the form of the medium, especially now that digital media has assumed a ubiquitous role in modern life.

Did Mr Walker convert Mr Henderson's personal digital files?

[271] The first issue is whether Mr Henderson had the right to immediate possession of the digital files. Mr Fowler advanced two arguments that he did not. First, he submitted that all the data created on the Laptop belonged to PVL by virtue of PVL's Computer Policy. In response, Mr Moss argued that Mr Henderson was a contractor and not an employee, so the Computer Policy did not apply to him. Secondly, Mr Fowler submitted that, even if the files belonged to Mr Henderson, Mr Walker had a superior right to possess them by virtue of his power under s 261 of the Companies Act to obtain documents of the company in the possession of a director. However, s 261 did not entitle Mr Walker to possession of Mr Henderson's personal documents.[149]

[272] The Second Circuit Court of Appeals' remarks in *Thyroff v Nationwide Mutual Insurance Co* are apt in the present context:[150]

> Nationwide owns the [agency office-automation system], but that does not mean that it also owns any records that Thyroff may have saved on the system. Additionally, Thyroff has alleged that he installed his personal computer programs onto the [agency office-automation system], and it is clear that Nationwide does not own these programs. Had Nationwide leased Thyroff a filing cabinet into which Thyroff placed his personal property, such as a camera, Nationwide would not contend that it could seize Thyroff's camera when it reclaimed its filing cabinet. The instant situation is no different.

[273] The second issue is whether Mr Walker's conduct was so extensive an encroachment on the rights of Mr Henderson as to exclude him from use and

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149 *Finnigan v Ellis*, above 64.

150 *Thyroff v Nationwide Mutual Insurance Co* 460 F 3d 400 (2d Cir 2006) at 404.

possession of his digital files. For the reasons explained at [266], Mr Walker did not convert Mr Henderson's personal digital files by copying them and distributing them to third parties. When he did so, he left the originals intact.

[274] However, Mr Walker also retained, for a period of time, possession of the Laptop and thus Mr Henderson's personal digital files. This situation is very similar to the facts of *Thyroff v Nationwide Mutual Insurance Co*, where the plaintiff leased a computer from the defendant and placed personal files on it. Following termination of the lease, the defendant repossessed the computer. Under New York law, this meant the defendant had lawfully taken possession the personal files. Following the New York Court of Appeals' certification that digital files could be converted, the Second Circuit Court of Appeals held that there was no conversion in the circumstances of that case because the defendant had lawfully come into possession of the data and the plaintiff had not specifically demanded its return.[151]

[275] While Mr Walker arguably came into possession of the personal digital files in a lawful way, he could not lawfully refuse to return them when specially asked to do so. A demand and refusal is a classic example of conversion.[152] Mr Moss referred to evidence of an undated telephone conversation in which he said Mr Henderson asked Mr Walker to return to him all of the personal documents contained on the Laptop, which Mr Walker refused to do. The difficulty with this evidence is that the conversion seems, from its context, to have occurred sometime around the end of 2012 or the beginning of 2013. Mr Walker returned the Laptop to Mr Henderson on 12 July 2011. After that point, Mr Walker only retained copies of Mr Henderson's personal digital files, which could not be converted.

[276] For those reasons, although I accept that there may be circumstances in which a person can be liable for converting digital assets, none of those circumstances apply to Mr Walker's conduct towards Mr Henderson's personal digital files. Mr Henderson has therefore failed to make out this cause of action.

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151 *Thyroff v Nationwide Mutual Insurance Co* 360 Fed Appx 179 (2d Cir 2010).
152 Todd (ed), above n 71, at [12.3.02(2)].

Misfeasance in public office

[277] The elements for the tort of misfeasance in public office are:[153]

(a) the plaintiff must have standing to sue;

(b) the defendant must be a public officer;

(c) the defendant must have acted or omitted to act in purported exercise of his or her public office unlawfully either intentionally, or with reckless indifference as to whether he or she was acting beyond the limits of his or her public office;

(d) the defendant must have acted or omitted to act either;

(i) with malice towards the plaintiff, that is, with intention to harm;

(ii) knowing his conduct was likely to harm the plaintiff, or people in the general position of the plaintiff; or

(iii) with reckless indifference as to whether the plaintiff would be harmed; and

(e) the plaintiff must actually have suffered loss and the defendant's actions must have caused the plaintiff's claimed loss.

Does Mr Henderson have standing to sue?

[278] I accept that Mr Henderson, as a director or former director of the companies of which Mr Walker is liquidator, falls within a class of persons afforded protection by the duties and powers conferred on the liquidator and therefore has standing to sue.

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153 *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195 at [40].

Are liquidators public officers?

[279] Mr Walker says, although he was a Court appointed liquidator, he did not hold public office such that he could potentially be held liable for misfeasance in public office.

[280] A public officer is someone "who is appointed to discharge a public duty, and receives compensation in whatever shape, from the Crown or otherwise".[154] A public officer "owes duties to members of the public as to how the office shall be exercised".[155] In *Garrett v Attorney-General*, Blanchard J explained that the "purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty".[156]

[281] Counsel were unable to point to any authority directly addressing the question of whether the position of liquidator is a public office. Mr Moss submitted that the position of liquidator is governed by the duties, rights and powers set out in pt 16 of the Companies Act. In his submission, these provisions are designed to protect members of the public including creditors, shareholders, directors and other interested parties from the damage that could be caused by a liquidator disregarding his or her public duties. Mr Moss observed that liquidators are required to act for the benefit of all creditors jointly and they must do so based on the statutory framework in pt 16 of the Companies Act.

[282] Mr Fowler submitted that the functions of a liquidator are essentially private in nature, being a mechanism to collect, realise and distribute assets to creditors. He noted Mr Walker is a chartered accountant acting on his own account, who makes his living by charging fees and is not subject to government control.

[283] The principal duty of a liquidator is:[157]

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154 *Henley v Mayor and Burgesses of Lyme* (1828) 5 Bing 91 at 107, 130 ER 995 (Comm Pleas) at 1001.

155 *Tampion v Anderson* [1973] VR 715 (SC) at 720.

156 *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at 350.

157 Companies Act 1993, s 253.

(a) to take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with this Act; and

(b) if there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with section 313(4)—

in a reasonable and efficient manner.

[284] Section 255 outlines other duties with which a liquidator must comply. Further duties include the duty to keep and retain accounts and records of the liquidation;[158] the duty to prepare and send the final report and accounts to the creditors;[159] the duty to have regard to the views of the creditors and shareholders;[160] and the duty to report suspected offences.[161] A liquidator also has the powers necessary to carry out the functions and duties of a liquidator under the Companies Act, and the powers conferred on a liquidator by the Act.[162]

[285] Beyond the statutory duties, a liquidator also owes fiduciary duties arising out of his or her appointment as an agent for the company. Those duties include the duty to act impartially and in the interests of the whole body of creditors and shareholders, the duty to avoid any conflict of interest and the duty not to profit except by lawfully charging fees for remuneration.[163]

[286] A liquidator may be appointed to a company by special resolution of its shareholders; by its board on the occurrence of an event specified in its constitution; by the Court on the application of various parties; or by a resolution of the creditors passed at a watershed meeting as part of a voluntary administration.[164] Section 280 provides certain requirements for a person to be appointed as a liquidator, including, amongst other things, that the person must be over the age of 18, must not be a creditor of the company and must not be an undischarged bankrupt. A liquidator must also

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158 Section 256(1).
159 Section 257(1)(a).
160 Section 258(1).
161 Section 258A(1).
162 Section 260.
163 See L Theron *Heath and Whale on Insolvency* (online ed, LexisNexis) at [22.3].
164 Companies Act 1993, s 241(2).

consent in writing to their appointment.[165] A liquidator ceases to hold office on completion of the liquidation.[166]

[287] A liquidator other than an Official Assignee "is entitled to charge reasonable remuneration for carrying out his or her duties and exercising his or her powers as liquidator."[167] That remuneration is payable out of the assets of the company.[168]

[288] The Court retains supervision of all liquidations and has the power to give directions to a liquidator; confirm, reverse or modify a decision of a liquidator; order an audit of the liquidation; and review or fix the remuneration of the liquidator at a reasonable level.[169] This has been held to include the power to remove a liquidator from office.[170] Various persons, including creditors and shareholders, may apply to the Court for an order to enforce the liquidator's duties.[171] The Court also has an inherent jurisdiction to supervise liquidators in a manner akin to the Court's supervision of officers of the Court.[172]

[289] The authors of *Heath and Whale on Insolvency* describe the role of liquidator in the following terms:[173]

> The liquidator has a unique legal status which it is difficult to describe with precision. It may best be described as principally an agent for the company who occupies a position which is fiduciary in some respects and who is bound by the statutory duties imposed by the Act.

[290] Although the role of liquidator is prescribed by statute and liquidators must comply with certain statutory duties, I agree with Mr Fowler that the position is fundamentally of a private nature and cannot be considered a public office for the purposes of the tort of misfeasance in public office. Ultimately, liquidation is not a public process, rather a process internal to the affairs of a company. The only

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165 Section 282.
166 Section 279(1).
167 Section 276.
168 Section 278.
169 Section 284(1).
170 *Hyndman v Newson* [2014] NZHC 2513 at [5]
171 Companies Act 1993, s 286.
172 *ANZ National Bank Ltd v Sheahan* [2012] NZHC 3037, [2013] 1 NZLR 674 at [137].
173 *Heath and Whale on Insolvency*, above n 163, at [22.1], citing MGR Gronow *McPherson's Law of Company Liquidation* (5th ed, Thomson Reuters, Sydney, 2006) at [8.20].

individuals affected by the actions of a liquidator will be those associated with the company in liquidation, whether they are creditors, shareholders or directors. Although those individuals are all members of the public, they do not engage with the liquidator in that capacity. Their involvement is instead limited to their previous interactions with the company, most of which will have been contractual in nature. That is quintessentially a private relationship.

[291] The fact Parliament has placed clear controls on liquidators, and the process of liquidation more generally, is not surprising. Companies are creatures of law and would not exist but for the separate legal personality granted to them.[174] Liquidation, being the procedure for dissolving a company, equally must be a creature of the law. Historically, legislative provision was made for winding-up a company at the same time legislation was introduced to allow for the registration of joint stock companies in the United Kingdom.[175] Shortly thereafter, the Court of Chancery came to exercise jurisdiction over the liquidation of companies.[176] These procedures were adopted in New Zealand in our first company law statute, the Joint Stock Companies Act 1860.[177] The controls now found in pt 16 of the Companies Act largely reflect the Court's equitable supervisory jurisdiction over liquidations (and liquidators). However, none of this means that liquidations are public in nature, it just demonstrates the means through which the law has chosen to supervise this unique private interaction.

[292] The conclusion that the role of liquidator is not a public office is also supported by the following observations:

(a) The principal duty of a liquidator is essentially to carry out the liquidation in a reasonable and efficient manner, which can hardly be described as a public duty.

(b) Liquidators are not paid by the state but charge fees that are paid from the pool of assets in liquidation.

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174 See Companies Act 1993, ss 15–16.
175 See Joint Stock Companies Act 1844 (UK) and Companies Winding Up Act 1844 (UK).
176 Ian Fletcher *The Law of Insolvency* (5th ed, Sweet & Maxwell, London, 2017) at [1-024].
177 Lynne Taylor and Grant Slevin *The Law of Insolvency in New Zealand* (Thomson Reuters, Wellington, 2016) at 6.

(c) Liquidators are free to set their own fees, subject only to the control of the Court if they are unreasonable under s 284(1)(e) of the Companies Act.

(d) The Companies Act already provides a regime to supervise compliance by liquidators with their statutory duties and the Court retains a supervisory jurisdiction over liquidators.

(e) Only a limited group of individuals, mainly those associated with the company in liquidation, may apply to enforce a liquidator's duties under s 286 of the Companies Act.

[293] This conclusion is also consistent with the decision in *Society of Lloyd's v Henderson*, where the Court of Appeal of England and Wales rejected the proposition that the Society of Lloyd's was a public office because it was of a commercial rather than governmental nature.[178] In dismissing the appeal, Buxton LJ referred to comments made by the House of Lords in *Three Rivers District Council v Bank of England*, where Lord Steyn said "the rationale of the tort is that in a legal system based on the rule of law executive or administrative power may only be exercised for the public good".[179] Buxton LJ also referred to Lord Hobhouse's observation that the tort concerns "the acts of those vested with governmental authority and the exercise of executive powers".[180]

[294] Buxton LJ went on to say:

> **24** The requirement that the subject of misfeasance in public office should be a governmental body springs from the very nature of the tort. As Hale LJ pointed out in [*Three Rivers District Council v Bank of England*] the nature of the wrong is that a public official, who is given powers for public, governmental purposes, misuses them for a different purpose, conscious that in so doing he may injure the claimant. Or, as the Manitoba Court of Appeal said when discussing this tort in *Dershmann v Manitoba Vegetable Producers Marketing Board* (1976) 69 DLR (3d), 114, p 123: "Public bodies must not use their powers for purposes incompatible with the purposes envisaged by the statutes under which they derive such powers."

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178 *Society of Lloyd's v Henderson* [2007] EWCA Civ 930, [2008] 1 WLR 2255.
179 At [23], citing *Three Rivers District Council v Bank of England* [2003] 2 AC 1 (HL) at 190.
180 At [23], citing *Three Rivers District Council v Bank of England*, above n 179, at 229.

> **25** None of this guidance makes sense save in relation to bodies that have been given governmental powers, that is, the power to interfere with the way in which other citizens wish to conduct their affairs. That cannot possibly be said of a commercial operation like Lloyd's, concerned with the internal commercial interests of its own members. …

[295] The role of liquidator is similar to that of Lloyd's in that it concerns only the commercial interests of those individuals affected by the liquidation. A liquidator can hardly be said to exercise "executive or administrative power".

[296] Similarly, in *Henderson v McCafferty*, the Supreme Court of Queensland held that the President of the Queensland Law Society was not a public officer for the purposes of the tort of misfeasance in public office, even though the Law Society was incorporated by statute, because the relevant provision of the Queensland Law Society Act 1952 (Qld) did not "[require] the president of the Society to perform any duty in any particular way".[181]

Proof of loss

[297] Furthermore, as Mr Fowler pointed out, misfeasance in public office is not a tort that is actionable per se, rather it is actionable on proof of damage. Mr Henderson claims Mr Walker's behaviour caused loss and distress but no damage is specified. As the Court held in *Garrett v Attorney-General*, claims of damages for humiliation, anxiety and distress will not be sufficient to found a claim of misfeasance, although it may be relevant to matters of aggravation.[182]

Conclusion

[298] For those reasons, this cause of action fails.

Breach of statutory duty

[299] The elements of a claim for breach of statutory duty are:[183]

(a) a breach of statutory duty;

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181 *Henderson v McCafferty* [2000] QSC 410, [2002] 1 Qd R 170 at [33]–[35].
182 *Garrett v Attorney-General* [1993] 3 NZLR 600 (HC) at 608.
183 Stephen Todd *Laws of New Zealand* Tort (online ed) at [87].

(b) a legislative intention that breach of the obligation should be a ground of civil liability in relation to a class of persons to which the plaintiff belongs;

(c) injury or damage of a kind for which the law awards damages and against which the statute was designed to give protection; and

(d) a causal nexus between the breach of the obligation and the injury or damage.

[300] Mr Henderson claims that Mr Walker's powers were derived from his position as liquidator appointed under the Companies Act and that he was constrained by those duties and powers, in particular:

(a) section 253 – the duty to take control of the assets of the company, which Mr Moss suggested implies a duty not to take control of any other assets, including the Private Documents;

(b) section 260 – the power to do what is necessary to carry out the functions and duties of a liquidator, which Mr Moss suggested implies a liquidator cannot act beyond that power;

(c) section 261 – the power to obtain documents and information relevant to the exercise of the liquidator's powers and duties, which Mr Moss suggested implies a liquidator has no power to obtain irrelevant documents;

(d) sections 285 and 286, which provide remedies for failure to comply with a relevant duty; and

(e) schedule 6, which grants a liquidator further specified powers, which Mr Moss again suggested implies a liquidator cannot act beyond those powers.

Has there been a breach of statutory duty?

[301] Mr Moss pointed out that the liquidator has no powers other than those given by statute. He submitted that there is no scope to read into the Act additional powers outside those expressly stated. In his submission, failure to comply with a duty would include a liquidator acting outside of his duties and powers.

[302] In Mr Fowler's submission, the Companies Act sets out positive powers and duties of a liquidator but do not impose negative duties, such as not to disclose private or confidential information. In his submission, although liquidators have a positive obligation to exercise their powers as expressed under the Act, it does not impose any express duty on a liquidator not to exceed its powers for a specific purpose. If, and to the extent that, Mr Walker may have improperly disclosed the Private Documents, that does not constitute a breach of statutory duty but is a matter to be addressed by private law remedies.

[303] I agree with Mr Fowler's submissions. The Companies Act provides for the powers and obligations of a liquidator with the purpose of ensuring that a liquidation is carried out properly and to the benefit of creditors. The notion of breach of statutory duty is that a positive obligation has not been complied with (and that positive obligation can be expressed in the negative). I am not satisfied there is any evidence Mr Walker failed to comply with his statutory duties. The powers provided to liquidators by the Companies Act are expressed in the positive rather than the negative. They do not say that a liquidator *may only* act in the specified way, rather they say that a liquidator *may* act in the specified way. Accordingly, a liquidator does not act in breach of a statutory duty by exceeding his or her powers under the Companies Act, although, as Mr Fowler pointed out, such a liquidator would potentially expose themselves to other forms of civil liability.

Did Parliament intend breaches of pt 16 of the Companies Act should be a ground of civil liability?

[304] Part 16 of the Companies Act provides for alternative modes of enforcement, in particular s 286 whereby an affected individual can apply to the Court for an order requiring compliance if a liquidator fails to comply with his or her duties. Failure to

comply with the Court order may result in the liquidator's removal from office and persistent failures can result in a prohibition order. The provision of a mode of enforcement under a statute is evidence Parliament did not intend that any breach of a duty should be enforceable by an action for private damages.[184] In other words, because the Companies Act already provides a remedy in the event of a liquidator's breach of duty, it follows that the Legislature did not intend for a private remedy in damages to be available.

Conclusion

[305] For those reasons, this cause of action fails.

Contempt of Court

[306] As originally pleaded, the claim Mr Walker was in contempt of Court related to discovery in the main PVL proceedings. This has already been addressed by the High Court decision in *Walker v Forbes*, where the Court made a finding of contempt but imposed no penalty in respect of the disclosure in the main PVL proceedings.[185]

[307] Mr Henderson still maintains Mr Walker was in contempt, however, in relation to the distribution to Mr McQuilter on 4 July 2013. Less than a month earlier, on 11 June 2013, Associate Judge Osborne had directed that Mr Walker was entitled to the contents of the Laptop and Tape Drive, subject to conditions as set out above at [40]. In summary, Mr Walker was to complete an analysis of the electronic data delivered to him and file and serve a memorandum listing the documents into various categories of relevance. Following receipt of that memorandum, Mr Henderson was entitled to request the return or deletion of irrelevant documents.

[308] This order was made on the basis of an undertaking given by Mr Walker in the following terms:

> I am very familiar with the information on the copy of the laptop as I have had it in my possession for many months. I can say, with due solemnity, and undertake that I am only interested in information which is relevant to the allegations made in the claim I have filed or such other legal actions I may

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184 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 469.
185 *Walker v Forbes*, above n 21.

> contemplate (for example, the investigation and collection of transactions subject to rules of unfair preference). I will not be disclosing information which is not relevant, or indeed any information which is privileged. Indeed I would be foolish to do otherwise for fear of invoking yet further litigation in the matter of privacy when I have more than sufficient matters legal to concern myself with.

[309] Mr Henderson claims the disclosure to Mr McQuilter was in breach of the order made by Associate Judge Osborne and constitutes contempt.

[310] It should be noted that the order was amended by Associate Judge Osborne on 24 July 2013, which extended the time period for Mr Walker to comply with the conditions and substituted Mr Henderson's right to request deletion with a right to request quarantining. Mr Walker says he complied with the order by serving a memorandum on or around 2 September 2013. On this basis, in Mr Fowler's submission, there has been no breach of the Court order and therefore no contempt.

[311] Mr Fowler suggested the claim has been reformulated essentially to argue that Mr Walker breached the undertaking he gave before Associate Judge Osborne. Mr Fowler viewed the claim as being that the undertaking was breached by Mr Walker allegedly offering Mr McQuilter the contents of the Seagate drive – a hard drive clone of the Laptop – on 4 July 2013. In Mr Fowler's submission, this cannot be a breach because at most Mr Walker offered to provide the Seagate drive. Mr Walker's position when he gave evidence was that he was simply advising Mr McQuilter of the information he had on hand.

[312] Mr Henderson's response is that the terms of Associate Judge Osborne's amended order were clear and unequivocal.[186] They were made on the basis of Mr Walker's undertaking and he therefore had knowledge and proper notice of the terms, and he acted in breach of the order by not quarantining the documents as directed.

[313] In Mr Moss' submission, Mr Walker was in breach of the order by providing any documentation to Mr McQuilter. The orders allowed him only to use the documents in proceedings relevant to the liquidations or in the liquidations

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186 *Commissioner of Inland Revenue v Property Ventures Ltd* [2013] NZHC 1847.

themselves. Mr Moss submitted that Mr McQuilter's request was not made pursuant to a s 171 notice and there was no evidence of a pre-existing one. Furthermore, he said it was clear that the flash drive must have contained private documents. He referred to the disclosure in the main PVL proceedings and said, at that point, the private documents had clearly not been quarantined so it was untenable to suggest that would have been done prior to provision of the flash drive to Mr McQuilter.

[314] Mr Fowler is correct that there is a difference between the terms of Associate Judge Osborne's order and Mr Walker's undertaking to the Court. The order did not require the documents to be quarantined until Mr Henderson requested that course of action, and Mr Henderson was not entitled to make such a request until Mr Walker filed and served the memorandum. In the intervening period, Mr Henderson was left to rely on Mr Walker's undertaking. This is supported by the fact Lang J found a breach of the undertaking and not the order in *Walker v Forbes*.

[315] The distribution to Mr McQuilter occurred prior to 2 September 2013, when the memorandum was served. Accordingly, Mr Walker could only have breached the undertaking and not the order, a breach of which was not pleaded by Mr Henderson. For that reason, I decline to make the declaration Mr Henderson seeks.

Result

[316] I have found Mr Walker liable for breach of confidence in relation to the following distributions:

(a) The provision of the flash drive to Mr Slevin on 14 June 2011.

(b) The email to Mr Thorne on 12 June 2011.

(c) The provision of the flash drive to Mr Slevin on 26 August 2011.

(d) The indirect distribution of the email to Mr Holden prior to 22 September 2011.

(e) The discovery of documents in the main PVL proceedings on 29 February 2016.

[317] Mr Walker is to pay Mr Henderson $5,000 in damages on this cause of action.

[318] I have also found Mr Walker liable for invasion of privacy in relation to the distributions to the Official Assignee on 14 June 2011 and 26 August 2011. I issue a declaration to that effect.

[319] Mr Henderson's causes of action in conversion, misfeasance in public office, breach of statutory duty, and contempt are dismissed.

[320] I decline to order Mr Walker to provide a schedule of the material accessed and distributed from the Laptop and Tape Drive. Mr Henderson has had the benefit of discovery in this proceeding, including particular discovery under r 8.19 of the High Court Rules 2016 (by consent) of all emails between Mr Walker and Messrs Thorne, Tubb and Holden as well as the United States university server. In light of that, further matters are unlikely to be uncovered. There should be finality in litigation, and I am not convinced it would be in the interests of justice to order the production of such a schedule.

[321] Mr Henderson is entitled to some measure of costs. If the parties are unable to agree, submissions on Mr Henderson's behalf are to be filed and served within 28 days of this decision, with any response 14 days thereafter.

Thomas J

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