PARTIES:	BETWEEN: **ALICIA ZDISLAWA WILLIAMS** Plaintiff AND: **STANLEY GORDON KENNON** and **CRUSHER HOLDINGS PTY LTD** Defendants BETWEEN: **CHRISTOPHER PAUL SMITH** Plaintiff AND: **STANLEY GORDON KENNON** and **CRUSHER HOLDINGS PTY LTD** Defendants
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE NO:	SC No. 296 OF 1991 and SC No. 297 of 1991
DELIVERED:	26 April 1996
HEARING DATES:	14 - 15 September 1995; 15 - 17 January 1996
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Damages for libel - Defamatory statements and allegations made regarding alleged falseness of affidavits, dishonesty, favouritism, deviousness and dubious behaviour designed to mislead - Justification not pleaded - Defence of qualified privilege - Motives in publishing letter - Express malice - Defendant's own legitimate interest - No belief in the assertions made - Allegations made to embarrass Department of Mines and Energy.

Assessment of damages - Plaintiffs entitled to aggravated damages to compensate inter alia hurt feelings and actual pain and grief - Entitled to exemplary damages after proof of express malice.

Legislation

Mining Act, s5

Text

Gateley on Libel and Slander 8th Edition

Cases

Potts v Moran (1976) 16 SASR 284 at 302-3 mentioned
Howe and McColough v Lees (1910) 11 CLR 361 at 373 approved
Horrocks v Lowe [1975] AC 135 at 149 followed
Toyne v Everingham (1993) 91 NTR 1 at 19-25 mentioned
Mallan v A M Bickford and Sons Ltd (1915) SALR 47 at 84 mentioned
Murphy and Ors v Plasterers Society and Ors (1949) SASR 98 at 112-113mentioned
John Fairfax and Sons v Kelly (1987) 8 NSWLR 131 at 142 followed
Plato Films Ltd v Speidel (1961) AC 1090 mentioned

REPRESENTATION:

Counsel:

Plaintiffs	A.H. SILVESTER
Defendants:	G. Kennon appeared in person and by leave for Crusher Holdings Pty. Ltd.

Solicitors:

Plaintiffs:	MILDRENS
Defendants:	NOT REPRESENTED

JUDGMENT CATEGORY: CAT B
JUDGEMENT ID NUMBER: MIL96006
NUMBER OF PAGES: 42

IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

No. SC 296 of 1991

BETWEEN:
ALICIA ZDISLAWA WILLIAMS
Plaintiff
AND:
STANLEY GORDON KENNON and
CRUSHER HOLDINGS PTY LTD
Defendants

No. SC297 of 1991

BETWEEN:
CHRISTOPHER PAUL SMITH
Plaintiff
AND:
STANLEY GORDON KENNON and
CRUSHER HOLDINGS PTY. LTD.
Defendants

CORAM: **MILDREN J**

REASONS FOR JUDGMENT
(Delivered 26 April 1996)

These two actions for damages for libel were heard together pursuant to a consent order made by the Master.

The plaintiff in action No. 296 of 1991 ("the first action") Alicia Zdislawa Williams ("Mrs Williams") was an officer in the employ of the Northern Territory Department of Mines and Energy who in 1990 held the position of Applications Manager responsible for accepting applications for and processing the grant of mining tenements under the provisions of the *Mining* Act. She later became senior Mining Registrar. The plaintiff in action No. 297 of 1991 ("the second action"), Christopher Paul Smith ("Mr Smith") was also an officer of that Department, and he held, and still holds, the statutory appointment of Principal Registrar pursuant to s5 of the Act.

The defendant Stanley Gordon Kennon ("Mr Kennon") is and was a director, together with his son Paul, of the defendant Crusher Holdings Pty Ltd ("Crusher Holdings"). At all relevant times,

Mr Kennon was the main proprietor of Crusher Holdings, owned nearly all the shares in that company and personally managed its affairs on a daily basis.

For many years Crusher Holdings held certain tenements in the Mount Bundey area being MLNs215 to 220 (inclusive) for the purposes of quarrying granite. I will refer to these tenements as "Crusher's leases". Crusher Holdings operated plant and equipment and maintained a quarry on the leases.

In 1985 Crusher Holdings applied to be granted five further tenements, MLNs966-970. These proposed tenements, which I will call "Crusher's proposed leases," adjoined MLNs217, 218 and 220. The boundaries of Crusher's proposed leases were surveyed and pegged. Crusher Holdings had occupied the land the subject of the applications for MLNs968-70 since 1976 for purposes ancillary to its mining operations. The purpose of the applications for MLNs968-70 was inter alia to secure mining title to that land for purposes ancillary to quarrying granite, including offices, staff accommodation, a campsite, machinery area, and for water storage purposes. Crusher Holdings already had those facilities on those lease applications. I will refer to the applications for MLNs968-70 as "MLNAs968-970." Mr Kennon was advised by Departmental officers that mineral leases were an inappropriate form of tenure and to, instead, lodge extractive mineral leases applications ("EMLAs"). Neither Kennon nor Crusher Holdings acted on this advice, and eventually by letter dated 20 January 1987 from the Secretary of the Department to the defendants, the applications for Crusher Holding's proposed leases was refused.

In 1989 Mr Kennon met Mr Malcolm Robinson, the Exploration and Development Manager of Clutha Minerals Ltd. As neither Mr

Robinson nor anyone else from Clutha Minerals Ltd was called to give evidence at the trial, (I do not suggest that this was necessary) my findings concerning them must be read in that light. According to Mr Kennon, Mr Robinson sought his permission to inspect Crusher's leases and Crusher's proposed leases which Crusher Holdings still occupied to the knowledge of the Department. Clutha Minerals Ltd were interested in exploring the Mt Bundey and Mt Goyder areas for granite suitable for dimension stone. Crusher Holdings was also interested in dimension stone. In 1988 Mr Kennon had held discussions with the architects of the new Supreme Court building, in which large quantities of dimension stone would be used. The granite which had been mined by Crusher Holdings for dimension stone was affected by xenolith flares and streaks, and both Crusher Holdings and Clutha Minerals were interested in locating a better quarry site.

In 1989 negotiations begun between Crusher Holdings and Clutha Minerals to form a joint venture to quarry stone on Crusher's leases and for permission by Clutha to utilise Crusher Holding's facilities located on Crusher's proposed leases. Mr Robinson knew that Crusher Holdings had no mining title to Crusher's proposed leases and that Mr Kennon planned to acquire mining title over that area in the future. Mr Robinson told Mr Kennon that Clutha Minerals was interested in acquiring title only over areas to the west of Crusher's leases and Crusher's proposed leases. In late 1989, Mr Robinson told Mr Kennon that a site for granite had been found to the west of the Crusher leases and proposed leases. Mr Kennon believed, from the description of the area given to him, that this site was about one kilometre to the west of the western boundary of MLNA970. He was also told of another site further to the south west and that Clutha Minerals intended to peg these areas and to apply for extractive mineral leases.

During December 1989 and January 1990, negotiations between Clutha Minerals and Crusher Holdings continued in respect of the proposed joint venture.

On 28 December 1989 Clutha applied inter alia for Extractive Mineral Lease North 46 ("EMLN46"). Clutha's application contained a map which incorrectly showed EMLN46 to the west of MLNA970. By fax dated 3 January 1990, Clutha advised the Department of this error and sent a new map which located the eastern boundary of EMLN46 roughly on a line 131° 35" East. In consequence, EMLN46 overpegged about a third of the area of MLNA970. Unfortunately, when the Department advertised in the *Northern Territory News* Clutha's application for EMLN46 the map published accorded with the original and not the amended map. Mr Kennon saw the advertisement in February 1990, thought that the area being claimed was to the west of MLNA970 and was therefore not concerned.

In the meantime, another explorer, International Stone Pty Ltd, had shown interest in the general area and applied for an exploration licence to search for rock suitable for quarrying dimension stone. The Department created a mining reserve over part of the area and in July 1990 granted to that explorer an authority to work part of the area. The Department deliberately excised from the authority given to that explorer most of the area covered by Crusher's proposed leases in the hope that eventually Crusher Holdings would be able to be granted suitable title to the area occupied by it.

In March 1990, Clutha Minerals and Crusher Holdings entered into the joint venture agreements.

The search map held in the offices of the Department showed the location of EMLN46 in the area advertised and not in its

actual location. In late March 1990 the Mining Warden recommended the grant of EMLN46 and the Minister authorised Clutha Minerals to commence mining. Crusher Holdings had not objected to Clutha Mineral's application.

In May 1990, the Department's mine safety inspectors caused Crusher Holdings' quarry to be shut down because of safety concerns. This caused Crusher Holdings to take remedial action, and coincidentally, to discuss with officers of the Department once again the question of title to Crusher's proposed leases. In early July 1990, Mr Kennon met with certain officers of the Department about these matters. It is clear that, until then, Mr Kennon had done nothing to protect Crusher's interest in Crusher's proposed leases for two reasons: first, Mr Kennon considered that the rental for extractive mineral leases was too expensive, and secondly, because he had no immediate intentions of mining in that area. Mr Kennon knew he was taking a risk, but trusted Clutha to respect his company's interests. At this meeting, Mr Kennon agreed to formalise his tenure. He was informed of International Stone's interest in the area. I infer he knew that International Stone had not yet been granted an authority to work the area. This was not in fact granted until 16 July 1990, although there is nothing to show that the defendants knew precisely when the authority would be granted.

What happened after this meeting is a matter of some controversy. I find that Mr Kennon called at the Department's office and spoke with the plaintiff, Mrs Williams, on 11 July 1990. Mr Kennon told Mrs Williams he wished to secure mining title to Crusher's proposed leases for the purposes of his stockpile, machinery and storage and accommodation areas and he did not wish to pay significant amounts of money for the area. Mrs Williams advised Mr Kennon that most of the area

was within a mining reserve and that he should apply for an authority pursuant to s178 of the *Mining Act*, that if he was interested in areas outside the reserve, he could apply for extractive mineral leases which cost $200 per hectare per annum; alternatively, the mining reserve over Crusher's proposed leases could be cancelled if he took out extractive mineral leases. Mr Kennon said he was not interested in extractive mineral leases. Mrs Williams then assisted Mr Kennon to fill out two application forms for authorities under s178 over the area being AN337 and AN338 ("the authorities"). It is apparent that at this stage the areas being applied for would be smaller in area then the original area of Crusher's proposed leases. However the fees for the applications were also $200 per hectare, and when this was pointed out to Mr Kennon, and Mrs Williams calculated the total amount of rent to be paid, he became angry and left without paying the fees or lodging the applications for the authorities. Mrs Williams had also informed Mr Kennon that the land had to be pegged and details of the pegging had to be included in the application form. This is the usual procedure for all forms of mining tenements, which Mr Kennon, an experienced miner, well knew. The land had not been pegged at that stage, although it had previously been surveyed, and I have no doubt that Mr Kennon wished if he could, to avoid the expense of repegging the area. I find that he raised with Mrs Williams if he could rely on the existing pegs, but was told that he had to repeg the area. I do not accept Mr Kennon's evidence that he was told by Mrs Williams (or by anybody else) to put in anything he liked about when the area was pegged. After that meeting, Mr Kennon decided to see the Minister and so informed the Department. In consequence a departmental memorandum was prepared for the Minister by the Secretary (Ext P12) which set out briefly the history of the matter to that date.

Mr Kennon met with the Minister on or about 25 or 26 July 1990. The minister indicated that he would approve the authorities. I find, contrary to Mr Kennon's evidence, which I do not accept on this point, that the Minister instructed his departmental officers to charge a total of $20 per hectare per annum for the authorities. Consequently, on 26 July 1990 Mr Kennon returned to the Department, saw Mrs Williams, lodged the applications for the authorities, and paid the fees (see Ext D5). At that time the applications which Mr Kennon signed falsely stated to his knowledge that the areas had been pegged on 9 July 1990. The reason this date was chosen may have been to predate International Stone's authority. Mr Kennon himself acknowledged that was false; but in any event I find that he did not then know that the minute line 131° 35"E formed the western boundary of the area available for the authorisation. The authorisations, when lodged, did not cover the whole of the area covered by Crusher's proposed leases, and Mr Kennon knew this. One reason for this was that the area to the west of Minute line 131°35"E was outside of the mining reserve; there may have been another reason in that that area was subject to an existing exploration licence. In any event, the upshot of this was that the authorities covered only the eastern half of MLNA968 and 970. Mr Kennon knew that if he wished to retain these areas, he had no alternative but to apply for extractive mineral lease applications in respect thereof. Consequently, his evidence is that he engaged a firm of surveyors to carry out a further survey of the area covered by the authorities and in early September 1990 he applied for EMLN54 and MLN4030 covering the western areas of the former MLNs970 and 968 respectively. He claimed that he first discovered that EMLN46 overpegged the western end of MLN970 (or EMLN54) following certain advice he received from his surveyors in late September 1990. I accept this evidence, despite the suggestion that having visited the area of

Clutha's quarry earlier in the year, he must have realised this at a much earlier time. I accept Mr Kennon's evidence that when he visited Clutha's quarry, he was unsure whether or not the quarry was on Crusher's proposed leases. I consider he may well have not pursued this further at that time, as he hoped to supply at least some of the stone under the joint venture agreement. I consider Mr Kennon either consciously or subconsciously decided that he did not want to know where Clutha's quarry was. He hoped to make money out of the joint venture, and did not want to spoil his relationship with Clutha. There is a suggestion that Crusher's relationship with Clutha had deteriorated by the end of the first half of 1990, but I find that Clutha and Mr Kennon were then still on good terms. However, by late September, I consider it more likely that Mr Kennon would have reacted very promptly the moment he realised that Clutha's tenement had "overpegged" an area he regarded, rightly or wrongly, as his, particularly if the area contained valuable dimension stone available to be used to supply the Supreme Court building project, and particularly as, by then, it was clear that his own quarry was not going to be used by Clutha under the terms of the joint venture.

Following that discovery, Mr Kennon attended at the Department on 1 October and spoke to both plaintiffs. His purpose was to persuade the Department to intervene on his behalf to force Clutha to remove its pegs. Mrs Williams told him that "It's the pegs that count, and Clutha's was in first". Mr Smith advised him take the matter up with Clutha. Consequently, on 3 October 1990 Mr Kennon sent the following fax to Mr Robinson:

> "Hi Malcolm
>
> I trust the Italy rock Show has been worthwhile and helpful. I look forward to hearing your impressions of their latest developments in granite working when you next visit.

In the meantime I have run into another little problem which I trust you can quickly rectify for me.

You may not be aware yet but the Minister for Mines has approved tenure at last - for those three areas which have been under consideration for several years.

There is a hitch to the final signing in as much as in the course of checking our boundaries the surveyor found that Datum peg for EMLN 46, and eastern boundary was placed about 2.1 km from Mt Bundey Outstation instead of the 1.92 Km as advertised.

I guess it wouldn't matter that much in clear country but in this instance it encroaches by that difference onto our pegged area.

I will be greatful if you can instruct Richard to move your peg back to where shown on the map as quickly as possible so that our tenure may be finalised.

It would mean that you will be quarrying on our leases but this should not be a problem as the arrangement would be covered by our current agreement.

About the only worry would be to see that we do not fall into breach with Mines Department.

Regards,

Stan"

On 17 October 1990, Mr Robinson informed Mr Kennon that Clutha was not prepared to move its pegs to the west, and Mr Kennon instructed solicitors to act for Crusher Holdings. After initial attempts to resolve the matter failed, Crusher Holdings commenced proceedings in this Court in early 1991 against the Minister, the Secretary of the Department of Mines and Energy and Clutha Minerals Ltd, seeking injunctive relief. The principle relief sought was an injunction restraining the grant to Clutha of EMLN46. (Although the Warden had recommended the grant and Clutha had been given authority to mine, the Minister had not yet in fact made the grant.) Those proceedings were heard before Angel J on 7 and 8 February 1991. It is not necessary to go into that litigation in detail, but certain matters should be mentioned briefly. First, both plaintiffs swore affidavits which were filed in that action but not formally read or relied upon during the hearing. Counsel for Crusher Holdings advised Angel J he did not seek to cross-examine either of the plaintiffs on their affidavits. Secondly, Mr Kennon filed affidavits which were read at that hearing and he was cross-examined on those affidavits.

Thirdly, both plaintiffs were in court for a short time at the beginning of Mr Kennon's cross-examination but they left the Court when this was drawn to the attention of Angel J. Fourthly, neither plaintiff gave evidence before Angel J. Fifthly, after counsel for Clutha had cross-examined Mr Kennon, Angel J advised counsel for Crusher Holdings that, in effect, (and I am paraphrasing what his Honour said)he was unable to accept Mr Kennon's evidence on a matter which was critical to the outcome. Counsel for Crusher Holdings sought an adjournment to seek instructions. Later the parties announced that the litigation had settled, on the basis that inter alia Crusher Holdings would not proceed with its claims. Accordingly on 8 February 1991 Angel J dismissed Crusher Holdings' application.

On 21 February 1991, the defendants caused the following letter to be sent to the Secretary of the Department:

"February 20th. 1991.

"The Secretary,
Dept. of Mines & Energy of the Northern Territory,
DARWIN.

Dear Sir,

Confirming my telephoned advice I wish to set down the releva(relevant) facts of the matter so there will be no misunderstanding.

Since 1985 I have been wanting to secure our applications MLN969 and 970 on a reasonable rental basis similar to our other MLN'S or as a straight exchange for three other MLNs that had become unworkable because of the construction of the Arnhem Highway adjacent.

On 25th. July, 1990 the Minister for Mines advised me that it had been decided to let me have these areas under 178 authorisations and advised that I should then go to the Department to get the paperwork fixed up.

I attended Mines Dept. the following morning. Ms Alicia Williams brought out the Authorisation 178 application forms and assisted by partially filling them in for me and handed same to me for signature. Ms Lee Chan was also present. I signed the first sheet and as there was a line for Date and Time of pegging, I asked what should be done about that "as most of the pegs have been in five years". I was told to put

down any date. Thinking this must be to satisfy some Mines Dept. filing purpose I said "Will 2 weeks prior be suitable?" and was told it would be.

I completed both applications and handed them back to Ms. Williams. The first year's rental was calculated and I paid the cashier then gave the receipt details to Ms. Williams and was advised that the next step would be drawing up the necessary contract which normally took a few weeks.

During the course of this business it was explained that the AN's could only go to the longitude line 131°-35" - the limit of the reservation - and that the portion of application MLN970 west of that longitude would have to be taken out as an E.M.L.N.. I agreed to this and said I would get a surveyor to accurately to determine where that longitude line intercepted our boundaries and then complete the application for EMLN 54.

Our surveyor was not far enough advanced until mid September and then I was able to lodge my application for EMLN 54 on 20/9/90, paying the 12 months rental required, using the registered survey pegs of our original application I on the West and new pegs for Datum and eastern boundary.

On the 24th. September the counter tenement map showed EMLN 54 side by side with EMLN 46 as had been indicated by the Mining Notices advertised for EMLN 46.

On Monday morning, 1/10/90, I advised Leases Officer and later the Chief Registrar that a Datum peg had been found indicating that Clutha Minerals had pegged an EMLN which overlapped part of our claimed area now EMLN 54. I requested that Clutha be instructed to remove their pegs. Mr. Smith suggested that I ask Clutha directly.

My challenge of their right to be there progressed to a hearing for an injunction before a Supreme Court Judge on 7/2/91. For this hearing Ms Alicia Williams signed an affidavit which was false in several areas and can readily be shown to be and Mr. Chris. Smith submitted both my applications for AN's 337 and 338 as evidence that I had signed a false statement regarding date of pegging.

The Judge would not accept my explanation about these dates and from that moment on it was apparent I was completely devoid of credibility in his eyes. The "false declaration" however did not worry your representatives when a settlement was discussed between the Lawyers for it was readily agreed that the contracts for AN 178 Nos. 337 and 338 would be completed if I withdrew my injunction to restrain your Department, withdrew my objection to two of Clutha's other lease applications and withdrew a Small Claims Court action against Clutha for cheating on Plant Hire charged amounting to $4500.

I am quite sincere in my insistence that both Mr. C. Smith and Ms. A. Williams be removed from their present positions of authority on the grounds of dishonesty and favouritism. I further request that my application EMLN 54 be granted in its entirety and that the whole of Clutha's application EMLN 46 be rejected because of their devious description and dubious behaviour designed to mislead as to true location.

> My Company is to date, almost three million dollars out of pocket over development and promotion of our Mt. Bundey Quarries and I do not intend to let a notoriously arrogant and devious outfit like Clutha deprive us of any part of our resource. Things have come to a sorry pass when a "Thief-in-the-night" - Clutha - can instruct a senior officer of your Department on the performance of his duties.
>
> Yours faithfully,
> CRUSHER HOLDINGS PTY. LTD.
>
> (Signed) S.G. Kennon"

The plaintiffs complain that this letter ("the first libel") defames them both.

The plaintiffs plead the following imputations:

(1) that they performed their respective duties as officers of the Northern Territory and as the holders of statutory offices in the manner contrary to their statutory obligations.

(2) that they performed their said duties without due and proper regard to the truth.

(3) that they performed their said duties dishonestly.

(4) that they performed their said duties inefficiently.

(5) that they failed to perform their duties impartially.

I consider that each of these imputations is conveyed by the first libel in respect of both plaintiffs. Imputations (2), (3) and (5) are clearly defamatory of both plaintiffs. Imputations (1) and (4) are also defamatory: *Potts v Moran* (1976) 16 SASR 284 at 302-3.

On 28 February 1991, the Secretary of the Department wrote to the defendants advising that he was investigating the matter. On 1 March 1991, the Solicitor for the Northern Territory wrote to the defendants on behalf of the Department, denying the allegations made against the plaintiffs, advising the defendants that the allegations were defamatory of the plaintiffs, requesting a written retraction of the allegations and an apology in writing to the plaintiffs.

The Secretary of the Department caused an internal investigation into the allegations to be made. It is not necessary at the stage to relate the facts relating to that investigation. In the meantime, Mr Kennon met with Mr Plummer on 8 March 1991, who was then Acting Secretary of the Department, having just taken over from Mr Campbell. Mr Plummer's evidence was that Mr Kennon wanted to talk about the agreements that had been reached in Court with Clutha, and he repeated the allegations contained in the first libel later. Mr Plummer was somewhat vague about the details of that meeting, but he made a file note in which he recorded that Mr Kennon wanted him "to consider a way in which he might seek redress and perhaps even overturn the agreements reached and recorded in the Supreme Court." Mr Kennon also gave evidence about that meeting, and I will return to that evidence later.

On 11 March 1991, the defendants wrote to the Secretary of the Department in the following terms:

> "The Secretary
> Dept of Mines & Energy
> DARWIN N.T.
>
> Dear Sir,
>
> I wish to thank you for allowing me to voice my dissatisfactions with the treatment I received from two officers in important positions in your Department.

I must make it clear however that until 1st October 1990 I had no complaint and had always received friendly and helpful assistance.

It was on this date that I had confirmed and brought to the notice of the Leases Officer and the Principal Mining Registrar the information that another company had pegged an application area partly overlapping our area of occupation.

From then on I was met with obstruction, unsatisfactory explanations and later-lies and removal of maps.

The obstruction is confirmed by correspondence from Mr DMJ Hart 7-11-90.

Because of Mr Smiths admission that we had a right to occupy the areas covered by the MLN applications 968 969 970 map S/85/130 I contend that he wrongly interpreted Provision 97(h) of the Mining Act. He failed to notify us that another applicant intended to remove part of the area from our care and control.

I believe the Principal Registrar was also remiss in his duty for not rejecting Clutha's application EMLN 46 on the grounds of unsatisfactory and confusing description when simpler and more recognizable descriptions were instantly available.

viz (A) - The S.E. corner peg Is 260m on bearing 292 from N.W. corner of MLN 220

(B) - the S.E. corner peg is 112m from Crusher Holdings Nitropril Storage Shed and 128m from western end of dam wall shown on Tenement Map N.W. of MLN 220 N.W. corner.

(c) - the Datum Peg is 171m on bearing 73 from N.W. corner of EML 970 area shown on Registered Survey Map S/85/130.

Many similarly simple descriptions readily available would instantly identify the location without need to engage a surveyor (Mining Regulations Provision 19(3)).

Thirdly the Principal Registrar was again remiss in his duty for failing to reject Clutha's Application (EMLN 46) on grounds that description map supplied with the application contained very serious conflicting details, (which I now believe were intended or some future ulterior purpose).

Despite the rambling diatribe of how to recognize the location of their Datum their map clearly indicated that 98% of the area applied for was to the east of Line Longitude 131° 35' when in fact it was pegged wholly to the west of that line.

I further contend that the Principal Registrar committed a serious offence when he allowed that description and map to be recorded in the Register.

To compound (or was it to aid?) Clutha's saga of "confusion for deceit" the Principal Registrar permitted - to the extreme detriment of another party - the advertising of a Mining Notice for EMLN 46 showing the location of Datum for that EML as being

> 1.92 km from an obscure stockmans hut (Old Mt Bundey Outstation marked on Tenement Map) when in fact the distance was 2.1 km.
>
> He further allowed to be exhibited various tenement maps between January 1990 and 1st October 1990 showing that EMLN 46 was clear of our areas.
>
> The map for the last week of September showed EMLN 54 and EMLN 46 side by side. This map seems to have since disappeared.
>
> It is hard to look back on the ramifications of this application EMLN 46 and not consider that there exists a strong possibility of connivance between an officer in the employ of Dept of Mines and Clutha.
>
> I hope this is not so, for I have found Clutha as represented in the N.T. to be parsimonious, shabby, sharp and capable of downright dishonesty in their business dealings.
>
> Their ethics as exhibited in the N.S.W. coalfields in the 1970s appear not to have changed.
>
> Mr Plummer we are grateful for your kind assurance but so much wrong doing has occurred and so much harm has been done to me that I still insist on the removal from office of the two people who elected to completely destroy me by dubious means rather than admit their own errors.
>
> Yours faithfully
>
> (signed) S.G. Kennon
> for CRUSHER HOLDINGS P/L"

The plaintiffs also claim that this letter ("the second libel") defames them both. The same imputations are pleaded by both plaintiffs and I consider that those imputations are conveyed by the second libel of and concerning both plaintiffs. Likewise I find these imputations to be defamatory of both plaintiffs. On 12 March 1991 the defendants wrote to the Solicitor for the Northern Territory. Apart from making a minor correction to the text of the letter of 20 February 1991, the letter contained no apology. On the contrary, the defendants advised:

> "However please advise the Dept of Mines I am quite prepared to let the matter drop provided I receive two million dollars or some other acceptable compensation."

On or about 3 April 1991, the Acting Secretary of the Department wrote to the defendants (Ext P6). After referring

to the allegations and the review of them which had been undertaken, the Acting Secretary advised:

> "I have concluded that the staff concerned have acted in a most satisfactory manner in dealing with the issues of concern to you. I recognise that the events surrounding these issues would have cause you some agitation but they were not the responsibility and did not affect the role of the staff of this Department in attempting to deal with your requirements. I would urge you to consider carefully the content of the letter from the Solicitor for the Northern Territory and to make a written retraction of your allegations and a proper apology in writing to the persons concerned."

By letter dated 15 April 1991 from the defendants addressed to the Secretary of the Department of Mines and Energy ("the third libel") the defendants wrote:

> "The Secretary
> Department of Mines & Energy
> DARWIN N.T. 0801
>
> Dear Mr Plummer,
>
> Your undated letter to hand on 3rd April 1991 but I am afraid I cannot understand your reasoning.
>
> My complaint against Ms A Williams is that in her capacity as Leases Officer on 26/7/1990 she produced to me two application forms purporting that they were proper forms for such AN 178 applications, Ms Williams partly filled in both forms herself (with the intention I believe of being helpful) but then was party to instructing me to complete and sign the forms and include a date - any date.
>
> When this was done the applications were inspected by Ms Williams, approved by Ms Williams, the rental calculated by her assistant and I was instructed there and then by Ms Williams to proceed to the cashier and make the payment called for. This done I returned the Cashiers receipt Number for $700 to Ms Williams and departed with her advice that the application was in order and approval would come through in due course.
>
> Not until the 7th February 1991 was it rudely brought home to me that the documents referred to were absolutely improper.
>
> There is no way I can believe that the leases Officer was not aware that the forms were not proper forms for that purpose, and I believe that I should have been made aware of this.
>
> Instead I had been led along to sign and pay $700 for two false documents.
>
> In completing these applications I accepted Ms Williams advice as proper and bona-fide.

> Because of my ignorance of the law pertaining to these applications I believe I had every right to accept that I would be given honest and proper advice and instructions.
>
> Furthermore Mr C Smith the senior staff member in his section, no doubt by the 7th February 1991 was well aware of matters concerning these applications ye he chose to decide then that the above two documents contained false declarations and to produce them in a court of law, in connivance with others, as a weapon destroy me.
>
> Mr Plummer I do not know how you can arrive at the conclusion that the actions of these two officers "were performed in a most satisfactory manner." To me their actions were initially completely inexcusable and were later developed into wilful dishonesty.
>
> They caused me irreparable harm and enormous financial loss.
>
> I again ask for their removal from office.
>
> One further request. Now that the Department has had proper forms printed for AN 178 applications I will be grateful if you will arrange for an appropriate officer (not being Ms Williams or Mr C Smith) to prepare two forms for my signature to legally replace the two illegal documents in the Departments files and for the latter originals to be handed to me or destroyed in my presence.
>
> Yours faithfully.
> S.G. KENNON & CO PTY LTD.
> CRUSHER HOLDINGS PTY LTD
>
> (Signed) S.G. KENNON"

Both plaintiffs claim that the third libel is defamatory of them. The same imputations as were pleaded in respect of the first and second libels are pleaded by both plaintiffs in respect of the third libel. I find that these imputations were also conveyed by the third libel, and are defamatory of both plaintiffs.

By letter dated 23 April 1991 the secretary replied:

> "Thank you for your letter of 15 April 1991. I refer to your last paragraph in which you appear to be confused as to the legal status of authorities AN337 and AN338. These authorities were validly granted, notwithstanding any error as to the date on which they were marked out. The *Mining Act* makes no provision for marking out authorities, although the

> Department usually requires this to be done after grant, if the applicant has not already done so.
>
> As the authorities have been validly granted, I will not authorise any changing of the historical file data, and this matter need not be pursued any further."

The plaintiffs commenced these actions by writs filed 14 August 1991. The defendants by their Defences admit writing each of the libel letters and their publication. The defendants deny that the letters are defamatory of the plaintiffs, and deny the defamatory imputations pleaded. I have already found for the plaintiffs on these issues. The defendants have not pleaded justification; so the defendants have not attempted to plead that any of the imputations are true. The only defence to the actions raised is qualified privilege. The plaintiffs deny that any of the occasions when the libels were published were protected by qualified privilege. Further, the plaintiffs assert that the defendants were actuated by malice in the publication of each of the libels.

As to whether the occasions were such as to attract the defence of qualified privilege, it is sufficient to refer to *Gatley on Libel* and *Slander*, 8th Edn., para 523:

> "... it is the duty of everyone, in the interests of public efficiency and good order, to bring any misconduct or neglect of duty on the part of a public officer or employee, or any public abuse, to the notice of the proper authority for investigation. Any complaint or information as to such misconduct, neglect of duty, or abuse is privileged, provided it is made in good faith to the person or body who has the power or duty to remove, punish or reprimand the offender, or merely to inquire into the subject-matter of the complaint. Any citizen who bona fide believes that wrong has been done has the right and duty to bring the alleged fact before the proper authority for investigation. In doing so he exercises an undoubted privilege which it is not in the public interest to penalise."

In this case, I find that subject to the question of express malice, each of the letters complained of were published on a privileged occasion. Clearly the complaints which the defendants made related to alleged misconduct and neglect of duty by the plaintiffs, and the complaints were made to the Secretary of the Department, who was the proper authority for the investigation of them. This being so, it is assumed that the defendants acted honestly believing the statements to be true, unless there is proof by the plaintiffs that the defendants were actuated by "express malice", i.e. that the defendants were actuated by "improper motives" or that the occasion was "mis-used". *Howe and McColough v Lees* (1910) 11 CLR 361 at 373; *Horrocks v Lowe* [1975] AC 135 at 149; *Toyne v Everingham* (1993) 91 NTR 1 at 19-25.

Consequently, the question of the defendants' motives in publishing the letters is crucial to the outcome of these actions and naturally was much focused upon at the trial.

In considering whether or not the plaintiffs have established that the defendants were activated by express malice, I have been guided by the observations of Lord Diplock in *Horrocks v Lowe*, (supra) at 149-153, from which the following propositions are derived:

1. "Express malice" is a term of art descriptive of some dominant and improper motive, other than either a motive to act out of a public or private duty, whether legal or moral, on the maker of the defamatory statement, which would otherwise justify his communicating it, or to protect some interest of his own which he is entitled to protect.

2. Generally speaking, to destroy the privilege, the plaintiff must prove that the dominant motive of the defendant was a desire to injure him. It is not enough to show that the

defendant knew that the publication would have this consequence if the defendant nevertheless acted in accordance with the required sense of duty or in protection of his own legitimate interests.

3. Proof that the defendant did not believe in the truth of what he published will be conclusive evidence of express malice, except where the defendant is under a duty to pass on defamatory reports made by another person. Reckless indifference by the defendant as to whether what was published was true or not, is treated as a lack of such a belief.

4. Proof that the defendants acted carelessly, impulsively, irrationally, were swayed by prejudice, relied on intuition rather than reasoning, or leapt to the wrong conclusions on inadequate materials, is not in itself proof of express malice, if nevertheless the defendants held a positive belief in the truth of what they published. Nevertheless, proof of such matters is relevant to the question of whether or not the relevant positive belief existed as a matter of fact.

5. Proof that the defendants held the relevant positive belief will not negative express malice if the plaintiff proves that the defendant misused the occasion for some purpose other than that for which the law granted the privilege. Examples of misuse of the occasion are where the dominant motive of the defendant is

   (a) to give vent to personal spite or ill will towards the plaintiff; or
   (b) to obtain some private advantage unconnected with the duty or interest which constitute the reason for the privilege.

6. The burden of proof of express malice is on the plaintiff and is not lightly satisfied.

7. Where what is published incorporates defamatory matter not really necessary to the fulfilment of the relevant duty or the protection of the relevant interest, this may be relevant to deciding whether the inference of express malice can be properly drawn. The test is not whether the material is logically irrelevant,

but whether it can be inferred from all the circumstances either that the defendants did not believe in its truth, or that, the defendants otherwise misused the occasion.

8. A refusal to apologise is at best tenuous evidence of express malice as it is consistent with a continuing belief in the truth of what is said.

Mr Silvester, counsel for the plaintiff, submitted that the plaintiff had established express malice on two bases. First, it was submitted that irrespective of whether or not the defendants held any honest belief in the truth of the defamatory imputations, the dominant motive of the defendant was to obtain a private advantage unconnected with the duty or interest which constituted the reason for the privilege. Secondly, it was submitted that the defendants did not hold any belief in the truth of the defamatory imputations.

Before discussing the evidence and Mr Silvester's submissions further, it is necessary to consider what was meant by Lord Diplock when he referred, in *Horrocks v Lowe*, supra at 149, to the bona fide protection of the defendants "own legitimate interests," or to "some interest of his own which he is entitled to protect." The law recognises that this includes the personal interest of the victim of an injury done to him or her to complain to an appropriate authority: see *Gatley*, 8th Edn., para 528. But this is not the only kind of personal interest which is protected: see generally, *Gatley*, paras 504 to 519. It is wide enough to include legitimate commercial interests if the recipient of the information has an interest of his own in receiving it: *Gatley*, 8th Edn., para 511. The interest of the recipient need not mirror the interest of the defendants, so long as there exists a relevant interest in the recipient: *Mallan v A.M. Bickford & Sons Ltd* (1915) SALR 47 at 84. But if the personal interest is a commercial one, it must

be a legitimate one. It is not a legitimate one if, for instance, the interest relied upon is an unlawful one: *Murphy and Others v Plasterers Society and Others* (1949) SASR 98 at 112-113.

But otherwise the law takes the word "interest" in a broad, popular sense. In *Howe and McColough v Lees* (1910) 11 CLR 361, O'Connor J said, at 377:

> "The interest relied on as the foundation of privilege must be definite. It may be direct or indirect, but it must not be vague or unsubstantial. So long as the interest is of so tangible a nature that for the common convenience and welfare of society it is expedient to protect it, it will come within the rule."

Mr Silvester submitted that the defendant's dominant motive was not to complain about alleged improper conduct on the part of the plaintiffs, but to put pressure on the Department to rescind the settlement which had been reached in the 1991 proceedings with the defendants and Clutha Minerals' title to ELMN46; alternatively the defendants wanted compensation for the loss of ELMN54. And if the defendants were successful in this, they would drop their complaints against the plaintiffs.

In cross-examination Mr Kennon conceded the defendants hoped to get the contract for the supply of dimensions stone for the Supreme Court building; and that he had hoped to be able to supply the stone from Crusher Holdings' quarry on MLN220. He conceded that none of the stone actually supplied came from Crusher Holdings' quarry; in fact it came from Clutha's quarry on EMLN46. He conceded that he had placed a value of $2m on the dimension stone resource available from EMLN46 and Crusher Holdings had invested $3m over the years in developing its quarry. These figures are clearly the same amounts referred to in the first libel letter and in the Defendants' letter to the

Secretary of 20 February 1991. He further conceded that when he wrote the three libel letters in 1991, uppermost in his mind was his belief that he had been cheated out of $2m because the defendants had been unable to mine the stone from EMLN46.
In cross-examination the following exchanges occurred (Tr p220-23)

"Q: So, on the one hand, you are telling us that the quarry on Mineral Lease 220 had perfectly good stone in it and you were perfectly capable of mining it ---?---I didn't say 'perfectly good.'

Q: Well, you feel that it was adequate for the job, don't you?---Yes.

Q: You told us you thought Mr Robinson had somehow procured that others disagreed with that opinion of yours and preferred his stone from EMLN46?---Yeah, he said that, yes.

Q: But that is what you feel, isn't it? You told us that just a few minutes ago?---yes.

Q: Yes. So, on the one hand, you are saying that you could have produced $2m-worth of dimension stone out of your quarry; but, on the other hand, because it eventually came out of Clutha's quarry on EMLN46, you should have that $2m?---No, I didn't say that we could produce $2m-worth of stone out of that - my quarry; there was not that value in an order for this building.

Q: Well, then why were you claiming $2m as being the amount of the loss from not having access to the rocky outcrop on EMLN46?---Because of the calculated total resource of that area.

Q: So that was your valuation---?---Yes.
- - - of the dimension stone deposit on EMLN46?---Yes.

Q: And you now say that only some of that was mined for this project?---Yes.

Q: And there's a lot left there?---That is right.

Q: I see. And so the purposes of your complaints, were they not, was to yet again try to have the department deliver EMLN46 to you?---Yes.

Q: That was the real purpose of the complaint, wasn't it?---Yes, to return that area to me.

Q: Yes, and you thought you could attack Ms Williams and Mr Smith in a ferocious way so that presumably that would embarrass the department into meeting your demands for either $2m or the return of the deposit? That's what drove you, wasn't it?---I did not seek to attack them in a ferocious way. I was endeavouring to protect my own interests.

Q: How is a complaint about what Mr Smith and Ms Williams did to you, allegedly, in September and October in the case of Mr Smith and on 26 July in the case of Ms Williams, going to protect your ability to secure either compensation or those mineral deposits? How did you figure that?---Well I wanted to have that lease application withdrawn by Clutha.

Q: Yes, and that's why you made the complaints to the Secretary of the department, wasn't it, because you wanted EMLN46 delivered into your hands, and if you ---?---Returned to me.

- - - couldn't get it you wanted $2m, didn't you?---I wanted that area returned to me.

Q: Yes?---Yes.

Q: And you had previously had a court case where you sought injunctive and other relief from the minister and the department preventing - seeking to prevent the grant of EMLN46 to Clutha?---Yes.

Q: And you came a cropper in that, didn't you?---Yes, I - - -

Q: Before the case really got under way you agreed to settle it, and weren't the terms of the - - - ?---I

didn't agree to settle it, my solicitor agreed to settle it and I had to - I could see that he was hopeless against Mr Maurice, and did not properly understand the situation, and I realised that the costs were going to get beyond me so with much reluctance I accepted surrender.

Q: Yes, and one of the terms of surrender was that Clutha would be granted ELMN46 by the minister?---Yes, to close that case, that's right.

Q: And another of the terms was that Crusher Holdings would be granted authorities north 337 and 338?---Yes.

Q: Insomuch as they were to the east of the meridian 135 degrees 35 minutes?---Yes.

Q: And able to be granted because they were subject of a mining reserve?---Yes.

Q: And you were granted, not as you told the court yesterday ELMN54, but you were granted as ELMN54 what remained of your application for ELMN54 after that part of which had overlapped 46 had been excised from your application. If I might put it this way, you were granted ELMN54 but it didn't contain the quarry, the Clutha quarry. That's what happened, isn't, when I was granted EMLN54 it did contain the Clutha, the quarry that Clutha finally opened up.

Q: No, I'm talking about when you were granted the EMLN54 after the legal proceedings were settled. I'm talking about March or April of 1991. I know that you applied for this EMLN54 including the quarry?---I applied for my application to be accepted in September.

Q: Yes, I know your application was accepted then, but when it was granted, it did not include any area that had been previously covered by EMLN54, did it, of course it didn't?---It did, it did not include every area that had been previous covered by EMLN54.

Q: Yes, and the parts that it did not include when it was finally granted to you in March or April 1991?---Yes.

Q: The parts that were not included in EMLN54 was that part of EMLN46 which you had pegged in September 1990, hoping to get it as part of 54 did it?---I actually pegged it in 1986.

Q: You didn't peg EMLN54 in '86?---No.

Q: You pegged EMLN54 in late September 1990?---Yes.

Q: Didn't you?---Yes.

Q: Right. Now, so you went to court, your affidavits were read, you were cross-examined by Mr Maurice, Angel J made some comments, tell me if I'm wrong with my sequence. You and your solicitor had some discussions and you agreed to the terms of that settlement, didn't you?---Very reluctantly, yes.

Q: Yes, but you consented to the terms of that settlement, and that the terms of that settlement were implemented, weren't they?---Yes.

Q: Yes. You were granted your authorities 337 and 338 on the day you wrote the first (inaudible) letter about Mrs Smith and Mrs Williams were you?---I was very unhappy with the judgment admitted by Angel J. He had falsely called me a liar, and it resulted from the evidence produced in that court by them. By the department, I was very badly done by.

Q: Yes, and I accept that you were unhappy about that. But what your unhappiness prompted you to nonetheless renew your attempts to have the department, grant you an extractive mineral lease over Clutha's quarry which was on EMLN46. And if you couldn't get that, you wanted compensation for the value of the resource, which you estimated at $2 million?---I didn't specify that that was for the value of the resource, I just asked for that in damages.

Q: In response to my question before, you value the resource at $2 million?---Yes.

Q: And you know, don't you that you demanded the payment of $2 million. As consideration for dropping complaints against Mr Smith and Ms Williams. So in effect you went back to the department after this settlement seeking to have return to you Clutha's quarry that was on EMLN46 or $2 million compensation, that's correct isn't it?---Yes, that was my suggestion, yes.

Q: The medium that you chose to interest the department into, perhaps, negotiations with you, or something, was to launch very savage attacks on the credit and credibility and honesty and efficiency of two persons who held statutory positions under the *Mining Act*?---No, that was not the medium I used, that was an explanation of what had been done to me by these people - - -

Q: Well - - - ?---And so harming me.

Q: Yes. So is it your position that they alone were responsible for the loss of this money or this resource?---Not they alone. Robinson was a big factor in it.

Q: Yes, but you have accused Smith and Williams of being in cahoots with Robinson - - -?---Well, Smith. - - - to do this, haven't you?---Smith. Not necessarily Mrs Williams.

Q: I will come back to the details of your letters later. But that is your position, isn't it; somehow Mr Smith was in cahoots with Mr Robinson, and this is how you finished up with this mess?---I felt so. I - I truly felt so.

Q: But you yourself had consented to the settlement in the court case, hadn't you?---I had no option but to - to

get out then the - the judge disbelieved me. I could not get anywhere with him.

Q: All right?---I had no option but to withdraw from the court.

Mr Kennon gave evidence that he genuinely believed in the truth in the assertions he made concerning the plaintiffs in each of the letters. He claimed in effect, that he felt he had lost the court proceedings, and EMLN54, because, in part, the plaintiffs had conspired together with Clutha to cheat him out of "his land", and because the plaintiffs had sworn false affidavits which were used against him at the hearing before Angel J. He held the plaintiffs responsible for his having to settle the action. Whilst his purpose was, in writing the letters, to secure the return of EMLN54, or compensation, from the Department, the import of his evidence was that it was necessary for him to complain about the plaintiffs' conduct to the Department in order to secure a settlement with the Department. In broad terms, the defendants' case was that there was no express malice because Mr Kennon believed in the truth of his assertions, and because he was trying to protect the defendants' legitimate business interests, and it was necessary for him to complain about the plaintiffs' conduct in order to protect these interests - necessary, in the sense that the defendants' claim rested upon, in part, the allegations of misconduct.

It is therefore necessary to examine the evidence concerning Mr Kennon's beliefs with some care. First, in relation to Mrs Williams, I have already found that the allegation that she told Mr Kennon to "put down any date" for the time of pegging is untrue. (Indeed because truth is not in issue, no other finding is open to me.) Further, I do not consider that, when Mr Kennon wrote the libel letters, he believed this to be true.

In fact, his evidence was that he was uncertain who in the Department told him this - it could have been Mrs Williams or it could have been another officer, Ms Chieu (not Chan), who said it in her presence. As she must have heard this, Mr Kennon drew the inference that she as the senior officer present, approved of it. Mrs Williams' evidence was that he was told to put on the form the date of the pegging and the date the datum post was put into the ground. She did not hear Ms Chieu say anything to Mr Kennon indicating that the dates did not matter. I prefer Mrs Williams' evidence to that of Mr Kennon's. At the time of this discussion Mr Kennon had not pegged out the area. The boundaries differed from Crusher's proposed leases. Mr Kennon as an experienced miner was well aware that mining tenants had to be pegged. Even if the authorities were not, as a matter of law, required to be pegged, both Mrs Williams and Mr Kennon believed otherwise. I find that Mr Kennon knowingly put a false date on the application forms. The reason for this is not clear. When this fact came to light in the proceedings before Angel J., Mr Kennon believed that this was the reason that Angel J. disbelieved him. He was forced, on the advice of his counsel to settle the action against Clutha and the Minister. He did so reluctantly.

Having settled the action, Mr Kennon was left without a remedy. He knew that he had no valid claim to EMLN46, first because at the time Clutha had applied for the area, neither defendant had any entitlement to a prior claim under the *Mining Act*; secondly because the terms of settlement to which he was a party, required the Minister to grant EMLN46 to Clutha. He believed Clutha had acted dishonourably in claiming EMLN46 but he knew he had no remedy available against Clutha. As he had settled with the Department and the Minister, he must have known that he had no hope of ever securing any form of title over any part

of EMLN46. The Department and the Minister were contractually bound to grant EMLN46 to Clutha. Mr Kennon knew this and must have known that the defendants had no legitimate claim to that tenement. The request contained in the letters to the Department to grant the tenement to the defendants was not a legitimate request. The defendants were proposing that the Department and the Minister breach their contractual obligations to Clutha. This is not, in my opinion, a situation where the letters are entitled to the protection of qualified privilege as having been written in order to protect the defendants' legitimate business interests which the defendants were entitled to protect. The defendants were not entitled to propose that the contract reached between the parties be ignored without Clutha's consent. Not only would that have exposed the Secretary and the Minister to an action for damages for breach of contract, but it would have amounted to a breach of the same contract by the defendants. If this was the defendant's main motive, in my opinion, the letters are not privileged. On the other hand, the defendant's true purpose may have been to either obtain financial compensation, or alternative leases over other ground adjoining Crusher's leases. I infer that Mr Kennon knew that the Department would not pay him compensation or grant him alternative leases, unless, perhaps, blame for the result of the litigation could be sheeted home to the Department. He knew the allegations about Mrs Williams' being responsible for his putting a false date on the application forms were false. Whilst Mr Kennon may have had some genuine disagreement with some minor matters in Mrs Williams' affidavit, he had no reason to believe that she had deliberately sworn a false affidavit. Even less did he have any reason to suppose that she was dishonest or showed favouritism to Clutha, or that she was inefficient. There is nothing to show that Mr Kennon had any reason for believing that the forms used for the applications were inappropriate for

that purpose, or that this had anything to do with EMLN46. I do not accept Mr Kennon's evidence that he believed in the truth of these matters. I find that his purpose was to attempt to force some sort of settlement out of the Department by making false claims against Mrs Williams which he hoped would embarrass the Department. I make it clear that I have not reached this conclusion lightly. I have borne in mind that Mr Kennon is not legally represented. I have borne in mind the cautionary words of Lord Diplock in *Horrocks v Lowe*, concerning the fact that the burden of proof is not lightly satisfied, and the fact that proof of irrationality, carelessness, impulsiveness, reliance on intuition and relying on inadequate materials by Mr Kennon is not proof of express malice per se. In this case Mr Kennon was not always a satisfactory and forthright witness. Although I have not completely rejected his evidence, I am satisfied that his evidence on crucial issues is not to be accepted. His demeanour and attitude in the witness box left me with the strong impression of a devious and cunning individual, who was evasive in cross-examination, and prepared to lie when necessary. However, although I have rejected his evidence on crucial issues, I have not for that reason found that express malice is proved. Lack of acceptance of his evidence does not in itself prove express malice, the burden of proof of which is upon the plaintiffs. I have drawn the inference that he held no such belief from a combination of the facts and circumstances which I have related above. In addition I have taken into account that Mr Kennon, by his own admissions, had no further information available to him when he wrote the three libel letters in late February than was available to him when he settled the proceedings before Angel J. on 7 February, 1991, and made no effort to make any further enquires between these two dates. Had he done so, he may have been able to have discovered that Clutha's description of the position of EMLN46 had been corrected before it was advertised,

that the officers responsible for the map published in the *Northern Territory News* were not the plaintiffs, and that Clutha had in fact notified the Department that Crusher Holdings was a party who may have had an interest in the application. The circumstances of this case were not such as to have provided any basis even for a suspicion that Mrs Williams may have behaved improperly in any way whatsoever. That, coupled with the extremity of the language used in the letters, the call for her removal from office, and the circumstances generally where I have related, have led me to conclude that the defendants held no belief in the truth of the assertions made against Mrs Williams, and made the allegations, not to promote a genuine case of complaint to the Department, but in an effort to try to embarrass the Department into a financial settlement, either by the payment of money or the provision of alternative leases in exchange for not having secured title to EMLN46. I therefore find that the plaintiff, Mrs Williams, has established express malice on the part of the defendants, and that the occasion was therefore not privileged.

As to Mr Smith, he personally was barely involved in the events which led up to the three letters. His first involvement occurred on 1 October 1990 when Mr Kennon spoke to him about Clutha's alleged overpegging, and he advised him to speak to Clutha. It is difficult to see what other advice he properly could have given. His next involvement was to swear affidavits on behalf of the Department in response to affidavits sworn by Mr Kennon in the proceedings before Angel J. If there was anything controversial in these affidavits, I would have expected counsel for Crusher Holdings to have required Mr Smith to have made himself available for cross-examination. In fact, Crusher Holding's counsel advised Angel J. that he did not require Mr Smith or Mrs Williams to be available for cross-examination. Mr Smith did not give evidence, and his

affidavits were not formally read. It is not clear whether they were relied on or not. I accept that Mr Kennon may well have thought that they were relied upon. Mr Smith's affidavit contained no assertion that Crusher Holdings' application for the authorities contained a false time and date for pegging, although copies of the applications were exhibited. Counsel for the Minister and the Secretary of the Department, apart from announcing his appearance, took almost no part in the proceedings before Angel J. Mr Maurice Q.C. who appeared for Clutha Minerals undertook the whole of the cross-examination of Mr Kennon. There is nothing in the objective circumstances to show that Mr Smith knew, or was likely to have known or even to have suspected that Mr Kennon's applications bore false dates for pegging. There is nothing to show that Mr Kennon had reason to believe that Mr Smith intended or knew that his affidavit was to be used to establish that fact. There is nothing to show he connived or may have given the appearance of conniving with anyone. Other than to be present in court for part of the hearing before Angel J., Mr Smith had no other involvement in the events the subject of that ligation.

Of course, the allegations made against Mr Smith have not been sought to be justified and the question is not whether they are true but whether Mr Kennon believed them to be true. Mr Kennon gave evidence that he did so hold this belief. So far as the false date of pegging was concerned, he said he was not sure how Mr Maurice Q.C. obtained a copy of Mr Smith's affidavit, but he believed it must have been provided either by Mrs Williams or by Mr Smith. He said that Mr Smith was in court when Angel J. said he had made a false declaration and called him a liar, and that Mr Smith had made no effort to correct this impression. He said that he believed that Mr Smith was involved in a conspiracy against him. Other factors which led to this belief were that a senior officer in the Mine's Branch,

Mr Higgins, had told him that "Robinson says he's done everything he can for you". Mr Kennon said that he believed that Robinson had acted badly, whilst he was the one who had provided assistance to Robinson. So far as these matters are concerned, it is impossible to see how anybody could infer from these matters, even if true, that Mr Smith was involved in a conspiracy or had otherwise acted improperly. However, at least two of these matters have no basis in truth. First, not even Mr Kennon believed that it was Mr Smith who gave a copy of his affidavit to Mr Maurice Q.C. In all probability Mr Maurice Q.C. would have been briefed with a copy of that affidavit by his instructing solicitors. Secondly, the transcript clearly shows, and it was Mr Smith's evidence, that he was not in the court at the relevant time. I have already found as a fact that Mr Kennon knew he had falsely stated the time and date of the pegging, and the circumstances of this.

Next Mr Kennon placed reliance on Mr Smith's apparent lack of sympathy for him when he spoke to him on 1 October 1990 about Clutha's pegs. The advice Mr Smith gave was not only appropriate, but in fact he could have done little else. That proves no objective basis upon which an inference of favouritism or conspiracy could be drawn. Mr Kennon gave evidence that he believed Mr Smith had the power to request Clutha to remove its pegs. He conceded that neither Mr Smith nor anyone else suggested to him that Mr Smith had such a power. Mr Kennon said he assumed he had the power because he was the Principal Registrar. Yet Mr Kennon is an experienced miner. He knew that disputes about overpegging were to be resolved in the courts. Even if Mr Smith had some power as Mr Kennon says he believed he had, there was no reason why he should have exercised it on the facts of this case.

Mr Kennon also complained about the fact that the locality map published in the N.T. News was incorrect, as was the tenement map in the Department's office available for public search. He himself did not search the tenement map until after he became aware of the true location of EMLN46. Clearly there were errors, but there was nothing to show that these errors were Mr Smith's personal responsibility or that he knew of them at any relevant time.

These matters must be weighed with the events which occured in February 1991 following the bringing of the litigation by Crusher Holdings, the settlement of the proceedings, the evidence of Mr Kennon as to his motives in writing the three letters to the Secretary, the correspondence with the Solicitor for the Northern Territory, and my rejection of Mr Kennon's evidence, all of which I have already discussed in relation to Mrs Williams' claims.

The conclusion I have reached in relation to Mr Smith's action is the same as that in Mrs Williams' action, viz., that the defendants held no belief in the truth of the assertions made against Mr Smith, and made the allegations either to embarrass the Secretary and the Minister to improperly breach the contract of settlement entered into with Clutha, or to embarrass the Department into a financial settlement of the kind I have previously mentioned. I therefore find that the plaintiff, Mr Smith, has established express malice on the part of the defendants, and that the occasion was therefore not privileged.

Before leaving this topic I should briefly refer to one other matter. Mr Smith was cross-examined by Mr Kennon about his involvement in a company called Litchfield Corporation. Objection was taken to this line of cross-examination by

counsel for the plaintiffs. Mr Kennon said from the bar table that information concerning the plaintiffs' involvement in this company was "part of the whole group of matters which convinced me that I was being harmed by certain people, and I believed that there was a collusion between two parties that aimed at depriving me of a certain piece of property at Mount Bundey". I allowed Mr Kennon to pursue this line of cross-examination to establish a factual basis which he might later use to show the genuineness of his alleged beliefs. Part of the material used to cross-examine Mr Smith were certain matters raised in the Legislative Assembly in relation to Mr Smith and the Litchfield Corporation. Mr Smith denied any impropriety on his part, although he admitted that there was an appearance of a possible conflict of interest between his position as a director of Litchfield Corporation and that of his Department. However Mr Kennon gave no evidence that he was influenced in any way by any of this material at the time he wrote any of the letters. It may be that he forgot to do so, and if that is the case, there is nothing that can now be done about it; there is simply no evidence from Mr Kennon that any of this had anything to do with his stated beliefs. There is however, another possible explanation; that Mr Kennon knew that the plaintiffs could show that this information did not come to his knowledge until after the letters were written. I make no finding about that.

Accordingly, there will be judgment for both plaintiffs against both defendants.

Assessment of Damages - Mrs Williams

Mrs. Williams commenced employment with the Department in 1978 in Tennant Creek where she was Mining Registrar for 11 years, before having transferred to Darwin on promotion to the

position of Application Manager. In 1991 she was further promoted to Senior Mining Registrar.

The three letters, the subject of these proceedings, came to her attention shortly after they were received in the department through the normal internal mailing system. When the first libel came to her attention she was, naturally, extremely upset, shocked and nervous. She suffered severe backaches. Her neck became stiff. She suffered headaches. She was unable to perform her duties for a short while and went home. She became irritable and unpleasant to her husband. She saw her doctor and had physiotherapy and massages for 6 to 8 months. The second libel compounded her anxiety. The third libel made her feel more nervous and stressed, and that her career was ruined. She felt difficulty in dealing with the public. She was aware that these letters would be read by her superiors and felt her prospects of promotion and of performing acting duties at a higher salary would be affected. She withdrew and hesitated to go to the counter to assist the public. She felt loss of respect at her work. She went through an embarrassing internal investigation by a Mr Jackson, which exonerated her, but did not make her feel any better at the time.

The allegations became known to quite a few people in the Department. She was given a promotion in 1991, but this was the result of a rationalisation of positions in the department. Nevertheless she received a higher salary.

Further prospects of promotion were in any event very limited, although not out of the question. One vacancy became open, but she felt unable to apply for it because of lack of self-respect. The defendant eventually apologised to her privately, although it was not a full apology.

Mrs Williams retired from the department in August 1995. She resigned because she felt that her chances of promotion were limited, and because this matter had been going on too long. In 1991 she was 46 years of age. She is married, and in 1995 left the Northern Territory to live in South Australia.

The publication of the letters themselves was not extensive. It is not possible to make a finding as to how many people read the letters, but it is probable that the actual number is no more than 20 people. In addition others became aware of the allegations in the department. It is not possible to make any finding as to the number of persons involved, other than, in a general way, to say there must have been a relatively small number. However, the numbers were not confined to the Department, and the Minister, his staff, and some persons in the industry were also aware of their general nature. This publication beyond the Secretary is the natural and probable consequence of such letters being written and is reasonably foreseeable.

The plaintiff asks for her award to include an award for aggravated damages. Given my findings concerning malice, the plaintiff is entitled to such an award; the defendant's high handed and contumelious behaviour further injured the plaintiff by increasing her mental pain and injuring her self-esteem and self-confidence, adding to her grief and the annoyance and distress she felt.

The award must compensate her for her hurt to feelings and the actual pain and grief she has suffered. There is evidence that the plaintiff spent money on a doctor and a physiotherapist, although she recouped most of her outlay. There is no claim for special damages. I am not satisfied

that her resignation was caused entirely by the defendants' wrong, but I am satisfied that it was one of the causes. There is no evidence from which I can draw the conclusion that Mrs. Williams has suffered any lost earning capacity which has caused her financial loss. No such claim was made. I do not know what Mrs Williams intends to do since her retirement. I am unable to find that she in fact lost any prospects of promotion. She did, on one occasion, not apply for a position which may have been a promotion if she had got it. There is no evidence upon which I can assess her chances of getting that promotion if she had applied for it, or if she got it, whether or not the promotion would have resulted in an increase in remuneration. As to loss of reputation, these were serious allegations, and until the investigation was over, placed a cloud over her. Mr Plummer gave evidence that he was concerned about her reputation when he read the first of the letters, but she still had a good reputation within the Department. Nevertheless the plaintiff is entitled to an award which will vindicate her in the eyes of those who know or may come to know of these allegations. The allegations were serious; they concerned her in her professional capacity; she was accused of dishonesty, favouritism, incompetence, lying on her oath, and her dismissal was called for. They were repeated in the second and third libels. Bearing in mind these matters, I award the sum of $40,000.

The plaintiff also seeks an award of exemplary damages. The plaintiff has proven express malice. Clearly the defendants' actions were a conscious and contumelious disregard of the plaintiff's rights done for the purpose of harming the plaintiff and for personal profit. An award of exemplary damages is called for to deter the defendants and others minded to engage in such conduct. I see no reason to distinguish between the defendants. Mr Kennon is the alter

ego of Crushers Holdings and owns almost all of its shares. There is no evidence before me as to Mr Kennon's means, although there is some evidence about Crusher's status. I consider that the plaintiff is entitled to an award of an additional $15,000 by way of exemplary damages.

The plaintiff is entitled to interest on damages pursuant to s.84 of the *Supreme Court Act* from the date of publication until verdict. I consider that all the damage suffered to the plaintiff was suffered prior to trial: see *John Fairfax & Sons* v *Kelly* (1987) 8 NSWLR 131 at 142. The plaintiff is entitled to interest on the sum of $40,000 at 4% per annum, which I calculate amounts to approximately $8,000 over approximately 5 years, and I award that sum.

Accordingly, there will be judgement against both defendants for the plaintiff Mrs Williams in the sum of $55,000, plus interest of $8,000.

Assessment of Damages - Mr Smith

Mr Smith is the Principal Registrar, pursuant to s.5 of the Mining Act. He has held that position since 1978. Prior to that he was the Senior Exploration Registrar, and prior to that he was, for 5 years the registrar of mines for Tasmania. He is 50 years of age, and married.

As part of his duties, he is required to deal with members of the public, the members and executives of the Chamber of Mines and Petroleum, Aboriginal Land Councils, other government departments, lawyers, and people involved in the mining industry from small prospectors through to managing directors of medium sized companies.

The three libel letters were also brought to his attention and caused him to feel quite upset, angry and frustrated. He felt that the letters struck at the heart of his credibility with the mining industry. He was fearful about how Mr Plummer, who was about to take over the position of Secretary of the Department would react to him as a consequence. Indeed Mr Plummer was very formal with him when they met. The repetition of the libels made him very angry and upset, and feeling that his credibility not only with the industry, but also with his superiors and inferior staff was on the line after twelve years in his position. He also went through the indignity of an internal enquiry. After he was cleared and the defendant persisted with his allegations in the third libel, he was aggravated and annoyed and he was worried that others would believe the defendants' allegations. He suffered no physical symptoms such as Mrs Williams did, and required no time off work. He has never received any apology from the defendants. His prospects of further promotion have not been affected at all. He has suffered no financial loss. He is still in the same position of Principal Registrar.
The extent of the publication in his case is the same as that of Mrs Williams.

Mr Smith, too, seeks an award of aggravated damages. The nature of the allegations made against him, and the defendant's malice and contumelious conduct is relied upon. In addition Mr Smith was cross-examined concerning his role in the Litchfield Corporation, which I have already mentioned. That was clearly embarrassing to him. This was not led to show that his reputation had been affected by those matters. Indeed it would have been inadmissible for this purpose: *Plato Films Ltd.* v *Speidel* (1961) AC 1090. The defendant's alleged purpose in cross examining Mr Smith about those matters was to provide a factual basis for a circumstance

going to the honesty of the defendant's belief in the truth of the allegations. This was not pursued by the defendants, as I have already explained. In my opinion the cross examination of Mr Smith about this affair was improper, and unjustified, and goes to swell the aggravated damages to which Mr Smith is entitled.

Bearing in mind the hurt to feelings, injury to reputation, the repetition of the libels, the extent of the publication, the need for the award to vindicate the plaintiff, and the matters of aggravation which I have mentioned, I consider Mr Smith is entitled to an award of $25,000 by way of general damages.

Mr Smith seeks also, an award of exemplary damages, and for the same reasons as I have awarded damages under this head to Mrs Williams, I make the same award to Mr Smith of $15,000. In arriving at my awards of exemplary damages, I have borne in mind that the same conduct is being punished in both actions and the total of the amounts awarded.
Mr Smith is also entitled to interest pursuant to s.84 of the *Supreme Court Act* which I calculate amounts to $5,000. I am satisfied that all of the damage to Mr Smith has already been suffered and that it is inappropriate to apportion any of the damages as having continued after verdict.

Accordingly there will be judgment in favour of Mr Smith in the sum of $40,000, plus interest of $5,000.

The defendants are to pay each plaintiff's costs of the actions to be taxed.