

Lawrie & Anor v Lawler [2015] NTSC 40

PARTIES: LAWRIE, Delia Phoebe

AND

WYVILL, Alistair

v

LAWLER, John

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 68 of 2014

DELIVERED: 22 July 2015

HEARING DATE: 5 June 2015

JUDGMENT OF: SOUTHWOOD J

CATCHWORDS:

PROCEDURE – Courts and judges generally – objection to trial Judge hearing application for costs – apprehended bias – Judge married to public service officer involved in administering the procurement of ad hoc legal services for the defendant – applications dismissed

Criminal Code Act (NT) Schedule 1, s 1, s 76

Financial Management Act 1995 (NT) s 3(1)

Inquiries Act 1945 (NT)

Procurement Act 1955 (NT) s 3(2), s 9, s 11

Procurement Regulations r 3

Public Sector Employment Management Act 1933 (NT) s 3, s 5F(1), s 16,
s 49, s 49C
Evidence (National Uniform Legislation) Act 2011 (NT)

Johnson v Johnson (2000) 201 CLR 488, applied

Lawrie v Lawler [2015] NTSC 19; *Tasmania v Johnston* (2009) 197 A Crim
R 152; *Cachia v Hanes* (1994) 179 CLR 403; *Adams v London Motor
Builders* [1921] 1 KB 494; *Attorney-General (NT) v Director of Public
Prosecutions & Ors* [2013] NTCA 2, referred to

REPRESENTATION:

Counsel:

| | |
|-------------------|------------------------|
| First Applicant: | A Young, A George |
| Second Applicant: | W Sofronoff QC |
| Respondent: | M Maurice QC, D McLure |

Solicitors:

| | |
|-------------------|---------------|
| First Applicant: | Ward Keller |
| Second Applicant: | Carter Newell |
| Respondent: | P Maher |

| | |
|-----------------------------------|---------|
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lawrie & Anor v Lawler [2015] NTSC 40
No. 68 of 2014

BETWEEN:

DELIA PHOEBE LAWRIE
First Applicant

AND:

ALISTAIR WYVILL
Second Applicant

AND:

JOHN LAWLER
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 22 July 2015)

Introduction

- [1] On 8 May 2015 Mr John Lawler filed a summons naming Ms Delia Lawrie, Mr Alistair Wyvill and Ms Catherine Spurr as respondents. The summons seeks the following orders for costs in *Lawrie v Lawler*,¹ being proceeding No. 68 of 2014.

1. The plaintiff [Ms Lawrie] is to pay the defendant's [Mr Lawler's] costs in the gross amount specified by the Court.

¹ [2015] NTSC 19.

2. In the alternative, the plaintiff to pay the defendant's costs on an indemnity basis.
3. Alistair Wyvill and Catherine Louise Spurr are jointly and severally liable for the costs payable by the plaintiff to the defendant.

[2] In response to Mr Lawler's application for costs, Ms Lawrie and Mr Wyvill have each made an application that I disqualify myself for apprehended bias from hearing Mr Lawler's application for costs. Ms Lawrie's application is based on an email my wife, Mrs Denise Southwood, sent to Mr Lawler's solicitor, Mr Maher, on 5 August 2014, and an email Mr Maher sent to Mrs Southwood on 20 January 2015. Mr Wyvill's application includes the grounds relied on by Ms Lawrie and some additional grounds.

[3] The applications based on Ms Lawrie's grounds were heard on 5 June 2015. The hearing of the additional grounds of Mr Wyvill's application that I disqualify myself has been adjourned to a date to be fixed. Those additional grounds are not the subject of these Reasons for Decision.

[4] In my opinion, for the following reasons, the applications for apprehended bias heard on 5 June 2015 should be dismissed.

The facts of the applications for disqualification for apprehended bias

[5] The following facts are established by the affidavits which were read in Court on 5 June 2015, two affidavits made by Mr Maher on 8 January 2015, various interlocutory orders made by the Court and the transcript of the hearing of the interlocutory applications in open court on 9 and 14 January

2015. I have referred to Mr Maher's affidavits of 8 January and the documents that follow for the reasons which are apparent at [58] to [97], [98] to [117] and [159] to [177].

The Legal Services Coordination Unit and procurement of ad hoc litigious legal services by the Northern Territory from lawyers in private practice

- [6] Within the Attorney-General's Department of the Northern Territory there is a unit called "Legal Services". Within the Legal Services unit there are a number of smaller units and divisions. One unit is the Solicitor for the Northern Territory, which is made up of the following four divisions: the Litigation Division, the Commercial Division, the Aboriginal Land Division and the Legal Policy Division.
- [7] At all relevant times, Mr Craig Smyth was the Acting Director of the Litigation Division. He is a legal practitioner and he has been Acting Director since mid-December 2013. One of his functions is to recommend the outsourcing of legal services for the Northern Territory to lawyers who are in private practice. These recommendations are made by Mr Smyth in consultation with the Northern Territory Government Agency that has requested legal services.
- [8] In the Legal Services unit there is also a small *administrative* unit called "Legal Services Coordination" (the Unit). The Unit comprises a Manager at the public service administrative level of Administrative Officer 7, an Assistant Manager at the public service administrative level of Administrative Officer 6, and an administrative officer at the public service

administrative level of Administrative Officer 3. The Unit's *main role* is to provide *internal legal practice management assistance* to the various divisions of the Solicitor for the Northern Territory.

[9] The Unit also manages and undertakes *some of the administrative tasks* in the outsourcing of legal services for the Northern Territory to lawyers who are in private practice. The Unit uses a generic email address for the receipt of requests for legal services from Northern Territory Government Agencies. *For litigious matters*, the Unit passes the requests for legal services to the Director of Litigation, Mr Smyth, and waits for directions. Mr Smyth recommends whether a request for legal services should be allocated to a Government lawyer or outsourced to a private law firm or to a lawyer in private practice. Mr Smyth's recommendation is communicated to the Government Agency seeking legal services for its approval. In paragraph 4 of his affidavit made on 4 June 2015 Mr Smyth stated, "If outsourcing is approved the Unit prepares the appropriate procurement paperwork and contacts the firm to confirm the terms of the engagement and request an estimate of costs, and then prepares the appropriate procurement paperwork."

[10] I do not take Mr Smyth's statement that the Unit "contacts the firm to confirm the terms of the engagement" to mean that those in the Unit do anything more than communicate to the lawyer in private practice the terms which have been decided upon by the relevant Government Agency and the relevant Director in the Solicitor for the Northern Territory. Anything more

than this would be inconsistent with what Mr Smyth states in paragraph 8 of his affidavit made on 4 June 2104 and what occurred in this case namely, Mrs Southwood clarified the nature of Mr Maher's engagement with Mr Smyth and then communicated to Mr Maher what Mr Smyth told her.²

[11] In this case the procurement paperwork is comprised of the documents headed APPROVAL TO ENGAGE AD HOC LEGAL AND OTHER EXPERTS in annexures CAS 6 and CAS 9 to Mr Smyth's affidavit made on 4 June 2015, being approvals for the engagement of Mr Maher, Mr Maurice QC and Mr McLure. As can be seen from annexure CAS 9 to Mr Smyth's affidavit, this paperwork was updated as the estimate of fees increased and after Mr McLure was briefed.

[12] Increases in a private law firm's estimate of costs and/or scope of legal services must also be referred by the Unit to the Government Agency seeking legal services for approval in accordance with the same process. Thereafter, lawyers in private practice submit their invoices to the Unit for arithmetical checking and entry into a database. The Unit then sends the invoices to the Government Agency for payment. Presumably, the database and the records it contains exist for the purpose of maintaining a complete and accurate record of legal services which have been outsourced to lawyers in private practice. This provides an accurate procurement audit trail for the procurement of these legal services, and a collection of statistical information that can be used for the provision of detailed reports to

² See par [40] and par [41] below.

Government about the outsourcing of legal services to lawyers in private practice.

- [13] If the Government Agency has an issue with an estimate of legal costs or an invoice - for example, the estimate is too high or the invoice is incorrect - the Government Agency refers the matter to the Unit which in turn refers the matter to Mr Smyth for assessment and advice.
- [14] Although the procedure for invoices is that the lawyer in private practice must submit the invoices to the Unit first, the invoices must be addressed to the Government Agency who requested the legal services. This is because the invoices are paid by the Government Agency that has requested the legal services, not by the Attorney-General's Department.
- [15] The Unit has no role in collecting monies payable under costs orders made by the courts in favour of the Northern Territory. Payment of monies pursuant to costs orders are made directly to the Government Agency concerned and are deposited in consolidated revenue.
- [16] Due to the confidential and ad hoc nature of a lot of legal services, in particular legal services for litigious matters, the Northern Territory Government is not required to procure legal services from lawyers in private practice by competitive public quotation or tender in the same way that the Northern Territory Government procures other services above \$15,000. As can be seen from the documents in annexures CAS 6 and CAS 9 to Mr Smyth's affidavit made on 4 June 2015, there are standard exemptions

from provisions of the *Procurement Act 1995* (NT) and *Procurement Regulations* that apply to the procurement of legal services³. Each of the approvals that comprise annexures CAS 6 and CAS 9 to Mr Smyth's affidavit made on 4 June 2015 state that they are made, "Pursuant to Procurement Direction PR8 attachment 1(g) standing exemption"⁴ and contain reasons why the particular lawyers were engaged and competitive quotes or tenders were not obtained.

[17] Other provisions of the *Procurement Act* and *Procurement Regulations* continue to apply to the procurement of ad hoc legal services greater than \$15,000. There is a procurement process that Government Agencies must comply with when procuring ad hoc legal services, including directions made under s 11 of the *Procurement Act*. Hence the reference to Procurement Direction PR8 and the justification for competitive tenders not being obtained in the approvals to engage Mr Maher, Mr Maurice and Mr McLure.

[18] For example, r 3 of the *Procurement Regulations* states:

- (1.) A person shall requisition supplies for the Territory on a form approved by the Accountable Officer.
- (2.) A requisition under subregulation (1) shall be approved by the Accountable Officer.
- (3.) Before the Accountable Officer approves a requisition under subregulation (2), the requisition shall be endorsed as to the

³ s 9 *Procurement Act*.

⁴ Presumably this is a direction made under s 11 of the *Procurement Act*.

availability of funds sufficient to procure the supplies specified in the requisition.

[19] An “Accountable Officer” in relation to a Government Agency is the Chief Executive Officer of the Agency or a person who the Treasurer of the Northern Territory declares in writing to be an Accountable Officer for the Agency.⁵

[20] In this case, the request for Mr Maher’s legal services was approved by Mr Gary Barnes who was the Chief Executive Officer of the Department of the Chief Minister. He is an Accountable Officer. The Paying Agency is the Department of the Chief Minister, Office of the Chief Executive. Each of the APPROVALS TO ENGAGE AD HOC LEGAL AND OTHER EXPERTS SERVICES states that “Client has been advised of the estimated expenditure and has authorised this engagement and the availability of funds.” Each of the approvals is signed by Mr Smyth and Ms Hanson, who is an “Accountable Officer/Delegated Officer”.

Mrs Southwood’s position in the Attorney-General’s Department

[21] Mrs Denise Southwood is my wife.

[22] Mrs Southwood is a public servant who is employed in the Attorney-General’s Department of the Northern Territory. She has been employed in the Department since 2010. At all material times Mrs Southwood was either the Acting Assistant Manager or the Assistant Manager of the Unit. She has been in her current position since 2011. She was permanently appointed to

⁵ s 3(1) *Financial Management Act 1995* (NT) and s 3(2) *Procurement Act*.

the position in 2014. Mrs Southwood is not a lawyer and she does not have a law degree.

[23] In paragraph 8 of his affidavit made on 4 June 2014, Mr Smyth stated that Mrs Southwood has no significant or substantive decision making authority, delegated or otherwise, for procuring ad hoc legal services that are outsourced to lawyers in private practice. Nor does she have any financial authority for such matters. Any decisions, apart from very routine administrative decisions, are made by the relevant Directors of the various Divisions within the Solicitor for the Northern Territory in conjunction with the Government Agency that requested legal services and the lawyer who is in private practice. Mrs Southwood's role is to act as a point of communication between the Agency requesting legal services, the lawyer who is in private practice and the Director of the relevant Division within the Solicitor for the Northern Territory. Mr Smyth was not cross-examined by Mr Young and his evidence to this effect was not challenged in any way whatsoever. I accept Mr Smyth's evidence. It describes just the way you would expect these kinds of transactions to be dealt with by a Government Department.

[24] Like all public servants, Mrs Southwood is bound by the provisions of the *Public Sector Employment Management Act 1993* (NT) and the Northern Territory Public Sector Code of Conduct which is Employment Instruction Number 12 made under s 16 of the Act. Section 5F(1) of the Act sets out five performance and conduct principles to which public sector employees

must adhere. They include any code of conduct applicable to the officer under s 16(2)(c) of the Act.

[25] Under s 49 of the *Public Sector Employment Management Act*, a breach of the Public Sector Code of Conduct constitutes a breach of discipline. Under s 49C of the Act an employee who is found to have breached discipline may be subject to sanctions ranging from formal caution to reduction in salary and termination of employment.

[26] Clause 14.1 of the Code of Conduct states:

A Public Sector Officer must not disclose information or documents acquired in the course of his or her employment, other than required by law or where proper authority has been given.

[27] Clause 14.5 of the Code of Conduct states:

The Northern Territory Criminal Code contains provisions relating to the misuse and communication of confidential information and other matters relating to the public sector.

[28] Section 76(1) of the Criminal Code (NT) states:

Any person who, being employed in the public service or engaged to do any work for or render any service to the government of the Territory or any department or statutory body, unlawfully communicates confidential information coming to his knowledge because of such position is guilty of a crime and liable to imprisonment for 3 years.

[29] The description of the crime created by s 76 of the Criminal Code (NT) as “Disclosure of official secrets” does not mean that the confidential information referred to in the section must be information of the nature of

that which is commonly understood to be an official secret, such as information linked with espionage, national security and the gathering of intelligence.⁶ Section 1 of the Criminal Code (NT) defines unlawful to mean without authorisation, justification or excuse. The operation of this definition and the scope of s 76 of the Criminal Code (NT) would be affected by the mandatory nature of s 5F(1)(a)(iii) of the *Public Sector Employment Management Act*, the provisions of s 16(2)(c) of the Act and clauses 14.1 and 14.5 of the Public Sector Code of Conduct.

[30] Since 23 October 2014, Mrs Southwood's job description has been as follows.

Primary Objective

Work with the Manager, Legal Service Coordination to provide administrative and management advice and support in relation to a range of critical operational functions to ensure objectives of the Solicitor for the Northern Territory are met and manage the process for procurement of legal services by the government in accordance with relevant policies and procedures.

Key Responsibilities

1. Manage the Northern Territory Legal Services List (NTLSL) to obtain outsourced legal services.
2. Allocate requests for legal services from client agencies to the appropriate legal service provider being conscious of and being informed about sensitive and whole of government issues.
3. Ensure Participants comply with the terms and conditions of the NTLSL Deed.

⁶ *Tasmania v Johnston* (2009) 197 A Crim R 152 at [30].

4. Manage the evaluation process to monitor performance and service quality of the NTLSL participants by the client agencies.
5. Encourage effective relationships with client agencies, legal firms and practitioners, offering mediation when necessary.
6. Monitor and review businesses processes of the Work Unit to ensure good time frames are met and efficiencies are identified and maintained.
7. Ensure systems and procedures are in place to facilitate the collection of statistical information relating to outsourced legal services and the ability to provide detailed reports.

[31] On a plain reading of their terms, the first five key responsibilities of Mrs Southwood's Job Description relate to management of the Northern Territory Legal Services List. It has not been suggested by any of the parties that the ad hoc engagement of Mr Maher, Mr Maurice and Mr McLure in the proceeding of *Lawrie v Lawler* had anything to do with the Northern Territory Legal Services List; nor has it been suggested that any of them is on the list.

[32] It is notorious that the Northern Territory Legal Services List comprises private law firms and practitioners who have been pre-qualified to provide legal services to the Northern Territory Government in selected categories of law. The list is accessible by the public on the Northern Territory Attorney-General's Department website.

[33] Key responsibility 7 of Mrs Southwood's job description requires her to ensure systems and procedures are in place to facilitate the collection of

statistical information relating to outsourced legal services and the ability to provide detailed reports.

- [34] Before 23 October 2014 Mrs Southwood's duties were effectively the same as those described in her current Job Description.

Mrs Southwood's involvement in the procurement process in this case

- [35] On 1 August 2014 Mrs Teresa (Terri) Hart, who is the Executive Director of the Office of the Deputy Chief Executive Officer of the Department of the Chief Minister, sent an email addressed to the generic email address for requests for legal services. The "Subject" of the email was "URGENT Request for Legal Services" and attached to Mrs Hart's email was a standard form Request for Legal Services. The email was copied to Mr Gary Barnes who was the Chief Executive Officer of the Department of Chief Minister. The email simply stated, "Please feel free to call me to discuss."

- [36] The Request for Legal Services contains the following information. The request for legal services was approved by Mr Gary Barnes, the Chief Executive Officer of the Department of Chief Minister. The "Subject" of the request for legal services was the Stella Maris Inquiry. The "Issue" was that Ms Cathy Spurr had advised the Department of the Chief Minister by email dated 31 July 2014 that her firm had filed an originating motion in the Supreme Court. Ms Spurr was advised by the Supreme Court Registry that she was also required to file a summons. Ms Spurr was intending to file the summons the next day and she asked to be advised where Mr Lawler could

be served with the originating motion and the summons. The “Background Information” was that the Government appointed the Commissioner for the Stella Maris Inquiry under the *Inquiries Act* (NT). **The content of the originating motion was unknown.** As to “Previous legal advice”, the request for legal services stated that Mr Paul Maher was previously engaged to provide advice to the Inquiry. He had also obtained the services of Michael Maurice QC. The “Relevant document” was the Stella Maris Inquiry Report which could be found on the webpage for the Stella Maris Inquiry. The “Relevant legislation” was the *Inquiries Act* (NT). As to “Timing”, the request for legal services stated that an originating motion was lodged with the Supreme Court on 31 July and Halfpenny’s had advised they would lodge a summons with the Supreme Court on 1 August 2014. A return date for the summons was not yet known. The Request for Legal Services stated that there were no issues with outsourcing and “It is requested that Paul Maher be engaged given his previous role in providing advice during the Inquiry proceedings and his familiarity with the matter.” The “Paying Agency” was stated to be the “Department of the Chief Minister, Office of the Chief Executive”.

[37] The request was received by Mrs Southwood, who usually monitors the generic email address. Other members of staff in the Attorney-General’s Department also monitor the email address. Mrs Southwood forwarded the Request for Legal Services to Mr Smyth by email. Her email simply stated “Attached request received from Terri Hart/DCM.”

[38] Mr Smyth telephoned Mr Maher's office on 1 August 2014 to speak to Mr Maher about being engaged in the matter. He was told by Mr Maher's clerk that he was on leave but would be back the following week. Mr Smyth told Mr Maher's clerk that the Solicitor for the Northern Territory would be sending through a matter in which it sought to brief Mr Maher.

[39] On 1 August 2014 Mr Smyth recommended that the matter be outsourced to Mr Maher. He sent an email to the generic email address stating, "OK sorted, outsource to Paul Maher asap – and he can accept service of any docs – he is away but his office has given a heads up. BA might be needed for Maurice QC but later on." "BA" is an acronym for "Brief Approval".

[40] On 5 August 2014, Mrs Southwood sent the following email to Mr Smyth.

I have tried to get hold of Paul Maher this morning but haven't been able to speak to him as yet. In sending him the instructions, are we asking him to act on behalf of the Department of the Chief Minister?

[41] At 2.24 pm on 5 August 2014 Mr Smyth sent the following email in reply.

A little tricky but he will be engaged by DCM to act for the Commissioner appointed under the Inquiries Act. So acting for Commissioner Lawler. Can that be done?

[42] After Mrs Southwood received this email from Mr Smyth, she telephoned Mr Maher. In the affidavit he made on 4 June 2015 Mr Maher states that "on 5 August 2014, I was telephoned by Mrs Denise Southwood of the Office of the Solicitor for the Northern Territory." Mr Maher has no independent recollection of the content of that telephone call and he made no note of it.

[43] At 5.09 pm on 5 August 2014, Mrs Southwood sent the following email to Mr Maher.

New Instructions: Ad hoc Legal Referral: Stella Maris Inquiry – Our ref: 20142426

Further to my phone call of today, **I attach the request** we received from the Department of the Chief Minister to engage you to act *on behalf of Commissioner Lawler* in this matter.

As advised on the phone we have not received the Originating Motion and Summons filed by Halfpennys but I will contact Cathy Spurr to let her know that you will accept service on behalf of Commissioner Lawler.

Once you have received the documents and have had the opportunity to consider the matter, it would be appreciated if you could provide me with an estimate of your fees.

Please note your invoice should be sent to the Legal Services Coordination Unit via email (legalservices.sfnt@nt.gov.au) but addressed to the Department of the Chief Minister as follows:

Attention: Terri Hart
Department of Chief Minister
GPO Box 4396
DARWIN NT 0801

If you have any queries in regards to this engagement, please do not hesitate to contact me on [...].

[44] Mrs Southwood's email attaches the Request for Legal Services from the Department of the Chief Minister. The email mirrors the directions she was given by Mr Smyth and the established procurement process for procuring outsourced legal services from lawyers in private practice. The penultimate paragraph of Mrs Southwood's email advises Mr Maher how his invoices

“should” be addressed. Presumably, this was done to ensure compliance with the established procurement process so as to facilitate the efficient processing of Mr Maher’s invoices. Mrs Southwood’s advice is consistent with the process that Mr Smyth stated had been adopted by the Northern Territory Government for payment of invoices for outsourced legal services and with the fact that the request for legal services, which was attached to her email, states that the paying agency and division was the Department of the Chief Minister, Office of the Chief Executive. Mrs Southwood’s advice reflects this fact.

[45] As Mr Smyth’s email to Mrs Southwood was sent at 2.24 pm and Mrs Southwood’s email to Mr Maher was sent at 5.09 pm, it may be inferred that Mrs Southwood’s email was sent soon after her telephone call with Mr Maher. Given the time at which the email was sent and the specific reference to the telephone call, it is a fair inference that the email covers all that was discussed between Mrs Southwood and Mr Maher; particularly as the contents of the originating motion were unknown. The originating motion was not provided to the Solicitor for the Northern Territory until 12 February 2015. It was not even known whether the party who had instructed Ms Spurr to file the originating motion was Ms Lawrie or Mr McCarthy or both. Ms Spurr had acted for both of them during the Inquiry into Stella Maris. If more had been discussed, it is most likely that Mr Maher would have made a file note of the telephone conversation and

would have raised the matters in his email of 6 August 2014. Mr Young did not seek to cross examine Mr Maher to suggest anything to the contrary.

[46] At 5.11 pm on 5 August 2014, Mrs Southwood sent an email to Ms Spurr advising her that Mr Lawler could be served care of Mr Maher. The email described Mrs Southwood's position as A/Assistant Manager, Legal Services Coordination Solicitor for the Northern Territory. At no stage has Ms Spurr raised any concerns about the fact that she received the email from Mrs Southwood.

[47] On 6 August 2014 Mr Maher sent an email to Legal Services SFNT *that was copied to Mr Smyth and Mrs Hart* in which he stated, "Denise - Thanks for these instructions" and set out his new email address.

[48] At 4.05 pm on 6 August 2014 Mr Maher received a copy of the originating motion and a covering letter by email from Ms Spurr's personal assistant.

[49] On 7 August 2015 Mr Maher sent the following email to Mr Lawler.

I understand that Terri Hart from the Chief Minister's office has told you about the originating motion which Delia Lawrie has caused to be filed. I attach a copy of it. The Department informed Halfpennys, the solicitors representing Ms Lawrie, that service could be effected on me. I would be grateful if you could directly confirm that you are happy for me to act.

I have been told that your mobile number is [...]. I tried to telephone that but it rang out. I would be grateful if you could confirm that is the correct number. Please let me have a postal address.

You can see from the attached originating motion that it is very generally expressed as an allegation that you failed to observe the

requirements of procedural fairness. The plaintiff has chosen to use an originating motion rather than a writ and statement of claim. I am not sure that is the appropriate course. In due course we might consider whether we might seek a direction from the court that a statement of claim be filed and served. One way or another we will have to be informed of the precise nature of the alleged failure so that we can properly respond to it.

No summons on the originating motion has been served, so I assume that none has been filed. Therefore, at present, there is no particular court date. In any case, the first date would merely be a mention at which directions would be given.

It will be necessary in due course to engage a barrister to advise and then to appear at the hearing. You met Michael Maurice QC who gave discreet advice regarding the question of corruption. Did you feel comfortable with him and have confidence with him? Would you be happy for me to brief him in this matter?

Ms Hart of the Department of Chief Minister has confirmed that all my invoices should be directed to the Department for payment [emphasis added].

[50] On 8 August 2014 Mr Lawler sent an email to Mr Maher stating that he would be pleased if he would act for him and he would also be pleased for Mr Maurice to be briefed as counsel.

[51] On 14 August 2014 Mr Maher sent an email to Mrs Southwood providing an estimate of his fees and Mr Maurice's fees and attaching his costs disclosure statement and agreement. Mr Maher also stated that he obtained Mr Lawler's instructions to brief Mr Maurice to advise and appear. After the receipt of Mr Maher's email, Mrs Southwood sent an email to Mrs Hart stating that Mr Maher had been engaged to act *on behalf of Mr Lawler* and requesting approval for the estimates of fees that had been provided by Mr Maher. On

14 August 2014, the Acting Deputy Chief Executive Officer of the Department of Chief Minister approved the estimate of fees and on the same day Mrs Hart sent an email to Mrs Southwood advising her that the estimates of fees provided by Mr Maher had been approved.

[52] On 18 August 2014 Mrs Southwood sent an email to Mr Maher advising him that his estimate of fees had been approved. Mrs Southwood stated in her email - “As previously advised, could you please ensure your invoice is sent to Legal Service Coordination via email legalservices.SFNT@nt.gov.au but is addressed to the client agency responsible for payment....”

[53] On 20 August 2014 Mrs Southwood prepared two APPROVALS TO ENGAGE AD HOC LEGAL AND OTHER EXPERT SERVICES⁷ for Mr Smyth’s approval, one for Mr Maher the other for Mr Maurice. Mr Smyth signed the brief approvals on the same day and Ms Hanson, who is an “Accountable Officer/Delegated Officer”, signed them on 21 August 2014. *Both approvals state that Mr Smyth is the Case Manager and that the Client Agency is the Department of the Chief Minister.*

[54] On 16 October 2014, Mr Maher sent an email to the generic email address, legalservices.SFNT@nt.gov.au, and to Mrs Hart. The email attached an interim invoice and a revised estimate of Mr Maher’s and Mr Maurice’s fees. The email states the following.

⁷ Brief approvals.

As both Michael Maurice and I have done a fair bit of work I attach an interim invoice from each of us. I would be grateful if you could arrange payment.

It is becoming apparent that costs are going to exceed my initial estimate. Senior Counsel for both parties have now agreed that two days should now be allocated for the matter, and not one. On 22 October 2014 we have a listing hearing before the Registrar, when the matter will be set down for hearing hopefully before Christmas.

Not only has the hearing itself doubled from 1 day to 2 days, but it is becoming apparent that we are having to delve much more deeply into the facts than we first anticipated. The problem is that on 17 February 2014 Mr Lawler wrote to the plaintiff's solicitors stating that if it appeared he was to make adverse findings he would provide notice with all relevant materials and provide an opportunity to make submissions. No formal notice, of the kind that appear to be contemplated by that letter, was actually given. Therefore, our task is to examine the relevant facts in order to be able to submit that the promise given by Mr Lawler was in substance satisfied and that procedural fairness was accorded Ms Lawrie.

My present revised estimate is that the total fees might be in the vicinity of \$80,000 plus GST, with approximately half being Mr Maurice's fee and half my own.

[55] Both Mr Maher's revised estimate and payment of his invoice were approved on the same day by the Deputy Chief Executive Officer of the Department of the Chief Minister. The email containing the approval was sent to Mrs Hart and copied to Mrs Southwood.

[56] On 17 October Mrs Hart sent an email to Mrs Southwood asking if the Department of the Chief Minister could process Mr Maher's invoice for payment or if there was another step required within the Solicitor for the Northern Territory. Mrs Southwood sent the following email in reply.

DCM can now pay the invoice. *We have recorded the cost in our database for the expenditure on legal services for the NT Gov* [emphasis added].

We have also noted the increase in the estimate from Paul Maher, has someone advised Paul Maher that this is approved. If not, I am happy to contact Paul Maher to approve the increase.

[57] On 20 October 2014 Mrs Southwood sent an email to Mr Maher informing him that his increased estimate had been approved.

Further and better discovery and the interlocutory proceedings

[58] On 25 August 2014 the plaintiff filed her summons on the originating motion.

[59] On 11 September 2014 the matter was mentioned in court for the first time. It was mentioned before her Honour Justice Kelly and she made the following directions.

1. The plaintiff to file and serve a statement of facts, issues and contentions by close of business on Friday 19 September 2014.
2. The defendant to file a reply by the close of business on Friday 3 October 2014.
3. The plaintiff to file and serve further affidavits by the close of business on Friday 3 October 2014.
4. Listed for further directions hearing at 9.00 am on Tuesday 7 October 2014 before Kelly J.
5. Leave for Mr Maurice to appear via audio-visual link.
6. Liberty to apply.

[60] On 24 September 2014 Ms Lawrie filed the Plaintiff's Statement of Facts, Issues and Contentions in Court. Paragraph 7 of the Plaintiff's Statement of Facts, Issues and Contentions states:

The plaintiff *and her legal representatives* relied on the defendant's statements in this letter in determining how the plaintiff ought to participate in and contribute to the inquiry.

[61] Paragraph 12 of the Plaintiff's Statement of Facts, Issues and Contentions states:

The plaintiff *and her legal representatives* acted as set out in paragraph 11 above in the belief that, by reason of the defendant's conduct (most particularly as set out in paragraphs 6 and 9 above), he was not considering making any findings in his report which were adverse to the plaintiff. In the circumstances this belief was reasonable.

[62] On 13 October 2014 Mr Lawler filed the DEFENDANTS STATEMENT OF FACTS, ISSUES & CONTENTIONS.

[63] Paragraph 8 of the DEFENDANTS STATEMENT OF FACTS, ISSUES & CONTENTIONS pleads the following.

8. Paragraph 4 of the PSFIC omits mention the following facts:
 - a. A list was posted on the Inquiry's website giving advance notice to the Plaintiff;
 - b. A representative from the plaintiff's office, Kerry Wetherall, was present and took notes on behalf of the plaintiff at all public hearings;
 - c. Audio tapes of all in camera hearings were provided to Halfpennys;

- d. Audio files of all the oral evidence were provided to Halfpennys in the FTR Gold format (including detailed log notes and time points), the format used by the courts along with a copy of the FTR Gold software.
- e. All relevant documents were provided to Halfpennys in advance of the plaintiff giving evidence to the Inquiry; and
- f. During the pre-hearing meeting with the plaintiff and her senior counsel on 10 March 2014, as well as during the formal questioning of the plaintiff the defendant produced to her and to her senior counsel the documents he had acquired pertaining to the plaintiff's involvement in the matters the subject of the Inquiry's terms of reference.

[64] Paragraph 9 of the DEFENDANTS STATEMENT OF FACTS, ISSUES & CONTENTIONS pleaded as follows.

- 9. The defendant refutes paragraphs 4.3 and 4.4. As to the latter, the plaintiff had abundant opportunity to request assistance from the defendant and his staff to identify documents referred to in the testimony of other witnesses. No such request was or would have been denied as the plaintiff and her advisers well knew. During the course of the Inquiry the plaintiff was shown all documents he had acquired pertaining to the plaintiff's involvement in the matters the subject of the Inquiry and given abundant opportunity to comment on and make submissions regarding them.

[65] Paragraph 11 of the DEFENDANTS STATEMENT OF FACTS, ISSUES & CONTENTIONS pleads as follows.

In response to para 7 of the PSFIC, the defendant says the Inquiry unfolded differently to how he envisaged in his letter of 17 February 2014 and this must have been and was apparent to the plaintiff and her legal representatives. During the course of taking the plaintiff's evidence, the defendant himself put to her all of the materials that might provide a foundation for the drawing of inferences or the making of comments adverse to or critical of her, he presaged and framed his questions in such a way as to make those possible

findings and comments obvious to the plaintiff and her senior counsel, and gave the plaintiff and her senior counsel abundant opportunity to respond and make submissions to him. By the time the plaintiff's evidence was completed on 14 March 2014, the plaintiff and her senior counsel were well aware of the possible findings and critical comments that might be made regarding her conduct and role in the decision to grant the site to Unions NT, they were afforded ample opportunity to address those matters, and they did so.

[66] On 14 October 2014 her Honour Justice Kelly made the following orders.

1. By 28 October 2014 the Plaintiff is to provide discovery in relation to:
 - 1.1 The reliance alleged in paragraph 7 of the Plaintiff's Statement of Facts, Issues and Contentions;
 - 1.2 The state of mind alleged in paragraph 12 of the Plaintiff's Statement of Facts, Issues and Contentions.

[67] On 22 October 2014 the matter was listed for hearing before his Honour Justice Barr on 29 and 30 January 2015.

[68] On 29 October 2014 Ms Spurr filed an affidavit she made purportedly in compliance with the orders made by her Honour Justice Kelly on 14 October 2014. The schedule in Ms Spurr's affidavit did not individually list any communications passing between Ms Lawrie, Mr Wyvill, Ms Spurr and Ms Lawrie's advisors. Paragraph 2 of Ms Spurr's affidavit stated, "The documents enumerated in Part 2 of Schedule 1 are privileged, and I object to produce them." Part 2 of the schedule simply stated the following.

Professional communications of a confidential nature passing between Solicitors and Solicitors and Agents, drafts of documents prepared by Solicitors for their own use and in anticipation of and for

the purposes and progress of this action, instructions to Counsel, cases for Opinion, drafts, memoranda and other documents prepared by Counsel, the Solicitors, witnesses and correspondence.

[69] On 21 November 2014 Mr Maher wrote to Ms Spurr asserting that legal professional privilege had been waived for the documents Ms Spurr had claimed legal professional privilege for in her affidavit of discovery, and calling for production of the relevant communications which went to the state of mind of Ms Lawrie, Mr Wyvill and herself.

[70] Between 24 November 2014 and 15 December 2014 I was on circuit and sitting in Alice Springs.

[71] On 28 November 2014 his Honour Justice Barr moved the proceeding from Justice Barr to me.

[72] On 15 December 2014 there was a discussion between Mr Maher and Mrs Hart during which Mrs Hart advised Mr Maher that the Northern Territory Government indemnifies Mr Lawler in respect not only of his own solicitor/client costs but also for any adverse costs order which may be made in the present Supreme Court proceeding brought by Ms Lawrie.

[73] On 15 December 2014 Ms Spurr responded to Mr Maher's letter of 21 November 2014. Although not accepting that privilege had been waived, she offered to provide the documents for which privilege had been claimed in her affidavit of documents made on 29 October 2014 to Mr Maher on the

basis that they were only seen by him and Mr Maurice. Mr Maher accepted Ms Spurr's offer.

[74] On 15 December 2014 Ms Spurr filed a further affidavit of discovery. Part 2 of the original Schedule 1, being the documents for which privilege was claimed by Ms Lawrie, was expanded as follows.

- | | | |
|-----|--|--------------------------|
| 2. | Email from A Wyvill to D Lawrie and ors | 31.03.2014 |
| 3. | Draft letter Halfpennys to Lawler | 14.04.2014 |
| 4. | Email from Cathy Spurr to Delia Lawrie | 14.04.2014 |
| 5. | Email from Delia Lawrie to Cathy Spurr | 14.04.2014 |
| 6. | M Gleeson to A Wyvill and Wyvill reply | 23.04.2014 |
| 7. | M Gleeson to A Wyvill and Wyvill reply about passage of Hansard suggesting government had been given access to draft findings critical of G McCarthy | 19.05.2014 |
| 8. | A Wyvill to M Gleeson with attached draft media release for discussion | 26.05.2014 (10.36 am) |
| 9. | A Wyvill to D Lawrie and ors | 26.05.2014 (12.15pm) |
| 10. | M Gleeson to A Wyvill | 26.05.2014 (12.35pm) |
| 11. | C Tilmouth to A Wyvill and reply | 26.05.2014 (3.49pm) |

- | | |
|--|-------------------------|
| 12. A Wyvill to M Gleeson | 10.6.2014 |
| 13. M Gleeson to A Wyvill and reply with 2 attachments – (1) SM Inquiry One Page (Wyvill), (2) SM and Territory Union Movement (Burns) | 12.06.2014 (10.50am) |
| 14. M Gleeson to D Lawrie cc A Wyvill and C Spurr with 2 attachments | 18.06.2014 (12.40pm) |
| 15. A Wyvill to D Lawrie and ors and reply and attached draft writ | 18.06.2014 (8.10pm) |
| 16. M Gleeson to D Lawrie and ors and reply | 19.06.2014 (10.20am) |
| 17. M Gleeson to A Wyvill with attachment “Delia Speaking Notes” | 19.06.2014 (10.25am) |
| 18. M Gleeson to A Wyvill and reply | 19.06.2014 (11.36am) |

[75] On 22 December 2014 Ms Spurr provided to Mr Maher the documents in respect of which Ms Lawrie had claimed privilege. All of these documents were included in volume 4 of Exhibit P1 which was tendered during the course of the hearing of this proceeding on 27 January 2015.

[76] On 22 December volumes 1, 2 and 3 of the Bundle of Agreed Documents, which became part of Exhibit P1 during the hearing, were filed in Court.

[77] On 24 December 2014 Mrs Hart sent the following email to Mr Maher.

On Mr Gary Barnes' behalf, this email is to confirm the earlier verbal advice provided to you on 15 December 2015 that the Northern Territory Government indemnifies Mr John Lawler in respect not only of his own solicitor/client costs but also in respect of any adverse costs order which may be made in the present Supreme Court proceeding brought by Ms Lawrie.

[78] On 7 January 2015 the matter was listed before me for the first time on 9 January 2015 for directions.

[79] On 8 January 2015 Mr Maher filed two affidavits that he made on 8 January 2015. The first affidavit made by Mr Maher annexed the bundle of documents that had been provided to Mr Maher by Ms Spurr's personal assistant on 22 December 2014. Those documents were included in volume 4 of Exhibit P1 which was tendered during the course of the hearing on 27 January 2015.

[80] Included in the documents annexed to Mr Maher's affidavit was Mr Wyvill's email of 31 March 2014 which stated the following.

Hi all

Just to confirm that Gerry is back on tomorrow at 9am for what hopefully should be a short stint.

Can I also confirm ...

- Given what is happening elsewhere, no news from the inquiry is definitely good news?
- That said:

- we need to respond quite firmly to Lawler’s bold suggestion that we withdraw the allegation that he has expressed a “final view” – prejudged the connection between Stella and Unions NT – by giving him both barrels including about the “urban myth” comment etc. *I thinki (sic) it is important to put a few quotes on the record which you can later use to discredit his report without risking contempt/defamation [emphasis added].*

- is it time to say to him that we have no confidence in the inquiry or him because of the unfairness of his conduct of the inquiry to date, Delia and Gerry have important public duties to perform to which this is a serious distraction and, given the fact that no lease was actually granted, *we consider the inquiry to be a pointless waste of time and will not be co-operating with it any further?? And then to ignore him from now on? By staying engaged we may actually be giving him the opportunity to try to fix up the messes we say he has created and also more chance to verbal us [emphasis added].*

Gerry, do you want to pick me up from chambers at 8.30 so we can discuss how to deal with tomorrow on the way out there?

[81] The second affidavit of Mr Maher set out the history of Mr Maher’s quest for further discovery and inspection of the various communications that were relevant to paragraphs 7 and 12 of Plaintiff’s Statement of Facts, Issues and Contentions. He stated:

1. I am the solicitor for the defendant.

2. On Friday 21 November 2014 I sent an email to Cathy Spurr, the solicitor for the plaintiff. A copy of that email without its attachments is annexed and marked “PGM1”.

3. I sent a further email to Ms Spurr on Friday 12 December 2014. A copy of that email is annexed and marked “PGM2”.

4. I received a letter from Ms Spurr by email on 15 December 2014. A copy of that letter is annexed and marked “PGM3”.

5. On 16 December 2014 I sent an email to Ms Spurr a copy of which is annexed and marked “PGM4”.
6. In Ms Spurr’s absence on leave, on Wednesday 17 December 2014 I sent an email to Ms Sarah Little, Ms Spurr’s personal assistant. A copy of that email is annexed and marked “PGM5”.
7. I sent a further email to Ms Little on Monday 22 December. A copy is attached and marked “PGM6”.
8. I received the requested documents enumerated in Part 2 of the amended list of documents of the plaintiff dated 15 December 2014, by email on 22 December 2014.
9. On 23 December 2014 I sent a letter to Ms Spurr, via email in her absence to Ms Little. A copy of my covering email, and of my letter, together is annexed and marked “PGM7”.
10. On Wednesday 24 December 2014 I exchanged emails with Ms Little. A page containing Ms Little’s email sent at 10.45am and my reply at 11.13 am on that day is annexed and marked “PGM8”.
11. I sent a letter to Ms Spurr by email on Tuesday 6 January 2015. A copy of that letter is annexed and marked “PGM9”.
12. On the morning of 7 January 2015 I received a letter from Ms Spurr by email. A copy of that letter is annexed and marked “PGM10”.
13. On the afternoon of 7 January 2015 I replied to Ms Spurr’s letter. In my letter I:
 - a. Informed her that both she and Mr Wyvill would be required for cross-examination;
 - b. Stated that it appeared that the documents provided on 22 December 2014 did not include all those encompassed by the order of Kelly J of 14 October 2014;

- c. Called upon her to make her position clear in respect of the claim for privilege over these documents.

I have not yet received a reply to that letter.

14. Prior to me sending the email on 21 November 2014 which is PGM1, I had discussed with my counsel Mr Maurice QC whether there was any point in requesting the documents. He agreed with me that, although there was every likelihood that the documents would merely confirm the plaintiff's Statement of Facts, Issues and Contentions and the matters set out in the affidavits filed on behalf of the plaintiff, we owed a duty to the defendant to at least investigate the issue.
15. Upon examining the documents provided by Halfpennys on 22 December 2014, Mr Maurice and I realised that, against our earlier expectations, there are substantial issues of fact to be resolved. Both Mr Maurice and I have formed the view that both Mr Wyvill and Ms Spurr will be required for cross-examination at the trial of this matter. Both Mr Maurice and I have therefore formed the view that the two days currently allocated for the hearing will be inadequate.
16. Further, in light of his long professional experience with Mr Wyvill, Mr Maurice has declined to continue to represent the defendant at the trial in circumstances where Mr Wyvill would be cross-examined. It is therefore necessary for me to locate a replacement senior counsel who has no history of dealing with Mr Wyvill or Ms Spurr and who would conduct the trial appropriately having regard to the sensitive nature of the issues.

[82] "PGM1", Mr Maher's letter to Ms Spurr dated 21 November 2014, states the following which is of relevance.

[....]

On 14 October 2014 Kelly J ordered that by 28 October 2014 the plaintiff was to provide discovery in relation to:

- a. The reliance alleged in paragraph 7 of the Plaintiff's Statement of Facts, Issues and Contentions; and
- b. The state of mind alleged in paragraph 12 of the Plaintiff's Statement of Facts, Issues and Contentions.

In the plaintiff's list of documents dated 28 October 2014 the plaintiff claimed legal professional privilege in relation to documents "enumerated" in part 2 of schedule 1. *By making the assertions of facts, and by filing and serving affidavits by herself, Alistair Wyvill and you, the plaintiff has waived the right to maintain privilege in documents encompassed by the description in part 2 of schedule 1.* Accordingly, the defendant requires the plaintiff to make full and proper discovery of all documents in her possession or control as per the order of Kelly J, including communications or records of communications with her legal advisers.

[....]

Depending on what arises from further discovery, I may want further documents to go in the agreed bundle.

[83] "PGM4", Mr Maher's email to Ms Spurr dated 16 December 2014 states:

1. In respect of your without prejudice letter of 15 December 2014, I confirm that the defendant is content to receive the documents on the basis that you propose. Please scan and email the documents to me as soon as possible.
2. In respect of your open letter of 15 December 2014, I confirm that we have no present intention to call or cross-examine either you or Mr Wyvill. Neither Mr Maurice or I want that situation to arise if it can be avoided at all. The only thing that would change our view is if any of the documents produced by you appear to clearly contradict what is in your own or Mr Wyvill's affidavit.
3. Sometime (sic) ago I called for you to discover and produce copies of the notes made by Ms Lawrie's staffer who attended throughout the hearings of the Inquiry. Your response was that those documents were irrelevant. I again press for them to be

discovered and produced. Whilst a document may seem to be irrelevant, even subtle factors such as underlining or use of exclamation marks can be revealing and could be significant in the cross-examination of Ms Lawrie. I therefore request that you produce those notes at the same time as you provide me with the other documents. If you continue to refuse to produce those notes I will cause a subpoena to issue.

4. It may be that the staffer who attended the hearings reported to Ms Lawrie only orally and did not produce memoranda to her. If there are any memoranda please produce those. Otherwise, please confirm that none exist.

[84] “PGM7”, Mr Maher’s letter to Ms Spurr dated 23 December 2014 states:

In response to my email of 21 November 2014 you wrote to me, on a without prejudice basis, on 15 December 2014. In your letter you did not concede that privilege over the subject documents had been waived, but offered them to me on certain conditions, which I accepted.

Those documents were subsequently provided by email on 22 December 2014. There are 17 of them, although curiously they are numbered from 2 to 18 inclusive. I have now examined those documents, and so has my counsel Mr Maurice QC.

Those documents are inconsistent with the position taken in the affidavits of Mr Wyvill, the plaintiff and you that the plaintiff had no expectation of the possibility of Commissioner Lawler making adverse findings.

I therefore now request that you make discovery of the balance of documents relating to these issues, in accordance with the order of Kelly J on 14 October 2014. This will include your own file and Mr Wyvill’s brief and other documents in his possession. As we are fast approaching the hearing date (but making allowance for the Christmas/New Year break) I request that those documents be provided no later than Tuesday 6 January 2015.

The documents will have to be produced on an unconditional basis, as privilege has been waived, I will have no choice but to make an application, which should be heard by Southwood J. I do not know of

the availability of Southwood J or of Mr Young. Mr Maurice will largely be available from 5 January 2015, but he is unavailable in February – that is why the hearing dates are at the end of January. If you do contest the waiver of privilege and an application has to be made, it could be that application will have to be heard on one of the present specified hearing dates, and the hearing will have to be deferred until March.

Therefore, if you do dispute that privilege has been waived and so refuse to produce the documents on an unconditional basis, please inform me of that as soon as possible so that I can bring the application promptly. If I do not hear from you by close of business on 6 January 2015 I will assume that production of the documents is refused, and I will go ahead with application.

[85] “PGM9”, Mr Maher’s letter to Ms Spurr dated 6 January 2015 states:

I am writing to you in relation to the documents the subject of the order of Kelly J of 14 October 2014, but over which your client maintains privilege. Notwithstanding that claim for privilege, you provided copies of certain of those documents to me on 22 December 2014, on a without prejudice basis. There are 17 of those documents, although they appear to be numbered 2 to 18 inclusive.

In my letter of 23 December I called upon those documents to be discovered in an open fashion as the contents of some of them were clearly inconsistent with the assertions made in the affidavits sworn by the plaintiff, by you and Mr Wyvill. The privilege which the plaintiff would otherwise be able to claim is therefore been waived as a result of that inconsistency. I also indicated that, in due course, I would want to access your own file in relation to acting for the plaintiff prior to delivery of the Stella Maris Inquiry report, and the relevant documents in the possession of Mr Wyvill. If necessary I will arrange for subpoenas to issue in respect of those documents, but I invite their voluntary production.

On Christmas Eve, Ms Little of your office informed me that she had spoken with your new counsel Mr Tony Young who asked for detailed submissions as to why I maintain privilege had been waived. I now provide those submissions.

1. The Plaintiff's Statement of Facts, Issues and Contentions contains the following assertions:
 - a. Paragraph 7: The plaintiff *relied* on the defendant's letter of 17 January 2104 *in determining how the plaintiff ought to participate in and contribute to the Inquiry.*
 - b. Paragraphs 11 & 12:
 11. From on about 26 March the plaintiff did not seek to make any further contribution to the Inquiry, whether by responding to inquiries by the defendant, by seeking to put further evidence, by making further submissions herself or via her solicitor or counsel, or otherwise. On 14 April 2014, the plaintiff's solicitors ceased representing the plaintiff at the Inquiry.
 12. The plaintiff and legal representatives acted as set out in paragraph 11 above **in the belief that**, by reason of the defendant's conduct (most particularly as set out in paragraphs 6 and 9 above), he was not considering making any findings in his report which were adverse to the plaintiff. In the circumstances, **this belief was reasonable.**
2. Unquestionably the plaintiff has put in issue the beliefs of herself, her solicitor and her counsel as to the defendant's intentions regarding the making of findings adverse to the plaintiff and, as well, the reasonableness of those beliefs. The resolution of these issues in favour of the plaintiff is central to her claim for relief.
3. On 14 October 2014, Kelly J ordered the plaintiff to provide discovery in relation to:
 - a. The reliance alleged in paragraph 7 of the Plaintiff's Statement of Facts, Issues and Contentions.
 - b. The state of mind alleged in paragraph 12 of the Plaintiff's Statement of Facts, Issues and Contentions.

4. In the plaintiff's list of documents dated 28 October 2014, she claimed legal professional privilege in relation to a number of relevant documents. Since then a number of documents in respect of which privilege is claimed have been supplied on a without prejudice basis. It appears clear to me they do not include Ms Spurr's or Mr Wyvill's documents, understandable given the initial request for privileged documents did not include documents held by them.
5. The plaintiff has filed affidavits by herself, her solicitor (Ms Spurr) and her counsel (Alistair Wyvill) supporting the assertions in the Statement of Facts etc.
6. The plaintiff in her affidavit says: ... *I believed the defendant was not considering making any adverse findings against me* [par 11]. After setting out the findings made against her, the plaintiff says she was *surprised and shocked* to read them in the report [par 28]. She goes on to say: *Whilst I had been asked about some of these matters by the defendant during my testimony I had not received from him any warning that he did not accept my answers and was considering making adverse findings against me as extensive and wide ranging* [as he did]. Given the plaintiff had the assistance of solicitor and counsel to represent her during the Inquiry and to give her advice concerning her cooperation and participation, including in relation to how to respond to the defendant's invitation to make a submission in response to Mr Maher's advice, it is inconceivable the beliefs she asserts she held in her Statement of Facts etc. and in her affidavit were not shaped or at least strongly influenced by communications with her solicitor and counsel. Indeed, so much is implicit from the inclusion in her Statement of Facts etc. of assertions about the beliefs of her solicitor and counsel – the only relevance they can have is to the formation of the plaintiff's own state of mind concerning the possibility of the defendant making adverse 'findings'. In short, the plaintiff has raised the issue of what advice she received from her solicitor and counsel about the likelihood or otherwise of adverse findings being made against her, the desirability or otherwise of placing further evidence or submissions before the defendant, and the courses open to her for doing so.
7. Were it to be ruled the plaintiff has not waived privilege in the documents held by her, Ms Spurr or Mr Wyvill, the plaintiff would be entitled, on the same ground, to object to cross-

examination of herself and of her witnesses about her or their states of mind, alleged reliance, and the reasonableness of the plaintiff's failure to make submissions in response to Mr Maher's advice or to seek the opportunity to put further submissions or evidence before the Inquiry.

8. Ms Spurr's affidavit contains the following statements:

- *... I believed that if the Commissioner was considering adverse findings against either of my clients then we would be specifically informed of that and given an opportunity to respond [par 7].*
- *A critical factor in my decision to cease to act for the plaintiff and Mr McCarthy was neither the plaintiff nor Mr McCarthy had received notice from the Commissioner that he was considering making any adverse findings against them. In those circumstances, I was not prepared to continue to act in the matter on a pro bono basis.*

9. Referring to the days on which the plaintiff gave testimony to the Inquiry, in his affidavit Mr Wyvill states: *Nothing the Commissioner said during those two days left me thinking that he was contemplating making any particular adverse finding or findings against the plaintiff at that stage ... If ... the Commissioner believed that the plaintiff's conduct could be open to adverse comment by him I expected to have that belief, the grounds for it, and the material which he considered supported it, drawn to my attention ... [par 9].* In paragraph 12, Mr Wyvill states that he advised Ms Spurr that he was not prepared to continue acting for the plaintiff on a pro bono basis and, in paragraph 14 he elaborates *three factors which influenced my decision in this respect.* The second factor outlines aspects of Mr Wyvill's thinking at that time.

Mr Maher then set out in this letter the relevant provisions of the *Evidence (National Uniform Legislation) Act 2011* (NT) and quoted from two authorities about waiver and continued as follows.

I call upon you to make known your client's position in respect of this issue by close of business on Thursday 8 January 2015. By the same time I ask you to also let me know whether you and Mr Wyvill will voluntarily produce your respective file and brief material.

One way or another it is clear that the present trial dates cannot stand. If your client continues to assert privilege, we are going to have an extended argument on the issue. That argument will take at least a day and possibly run into a second day. It seems obvious that the present dates should be made available for that argument in those circumstances.

On the other hand if your client no longer maintains privilege then I can confirm in the absence of the documents being voluntarily produced, I will cause subpoenas to issue for the production of your own file up to the date of the delivery of the Stella Maris Inquiry Report, and for related materials which may be in the possession of Mr Wyvill. In that circumstance, you will have to consider whether it is appropriate for you to continue to act in proceeding 68 of 2014. If you cease to act, an adjournment of the hearing dates will obviously be necessary.

Further, this turn of events which has only come about since Mr Maurice and I sighted the documents on 23 December creates obvious difficulties for us all. Whilst Mr Maurice is prepared to proceed with the privilege argument if your client continues to maintain privilege, he is not in a position to run the trial if you, and particularly Mr Wyvill, are likely to be cross-examined. In that event I will have to engage some southern counsel who is unknown to either you or Mr Wyvill. Those circumstances do not fill me personally with much joy, but doing the best I can to balance understandable sensitivities with the rights of Mr Lawler, I have determined that I will continue to act even if you and Mr Wyvill are likely to be cross-examined, because at least I will not be doing that directly, but will have assistance of a new counsel.

Because, one way or another the trial dates will have to be moved, I intend to contact the associate of Southwood J to have the matter listed for directions as promptly as possible on or after Friday 9 January 2015.

[86] On 9 January Mr Young provided the Court with a document headed, Plaintiff's Outline of Issues – Directions 9.1.15, which stated the following.

1. The discovery and inspection issue has been resolved with the plaintiff agreeing to an order for inspection in the following terms:

The plaintiff produce for inspection the documents numbered 2 to 18 in Part 2 of the plaintiff's amended list of documents dated 15 December 2014.

2. The plaintiff will not consent to the vacation of the trial dates and, if possible, wishes to maintain those dates.
3. The reason for Mr Maurice's withdrawal – unwillingness to cross examine Mr Wyvill and Ms Spurr as to credibility – is a proper reason for withdrawal. However, the defendant has had the affidavits of those witnesses since November 2014 and has copies of the relevant documents from their brief since 23 December 2014. In any event there is almost 3 weeks to trial and no reason why alternative counsel could not be retained during that period.
4. *The more serious issue may be your Honour's willingness to preside in a trial where a central issue, according to the defendant, is whether those witnesses should be believed on their oaths [emphasis added].*

[87] On 9 January 2015 Mr Young read the document set out at [86] above to the Court. He also told the Court that there had been further discussions between the parties about discovery which had been put off to a later time and that the plaintiff did not consent to the trial dates being put off. I then asked Mr Maurice if his difficulty concerning the cross-examination of Mr Wyvill and Ms Spurr could be resolved by briefing Junior Counsel.

[88] I also raised with the parties whether the key issues in the trial involved what Mr Lawler had pleaded in paragraphs 8, 9 and 11 of the DEFENDANTS STATEMENT OF FACTS, ISSUES & CONTENTIONS and, if that was the case, whether any alleged reliance by Mr Wyvill and Ms Spurr on the letter of 17 February 2014 was irrelevant.

[89] There was then the following exchange between Mr Maurice and myself.

Mr Maurice: Well, we have seen the statement in paragraph 12 of the plaintiff's statement of facts as being an important element of the plaintiff's claim to relief. There she says that the plaintiff and legal representatives acted as set out in paragraph 11 in the belief that by reason of the defendant's conduct, he was not considering making any findings in his report which were adverse to the plaintiff and in the circumstances this belief was reasonable.

Southwood J: Yes, I note that, but it seems to me if what is pleaded in the defendant's response about the change in the course of the Inquiry, and the discussions that took place between Mr Wyvill and him, the presentation of documents prior to Ms Lawrie giving evidence before the Inquiry and so on, is made out, [...] what may or may not have been their states of minds, at different times, really does not amount to much.

Mr Maurice: *Well we would like to have the advantage of being able to put both before your Honour as reasons for declining the relief sought. Because, if I can just say this, the material that has been discovered for which legal professional privilege was initially claimed, it does, in our view give quite an inconsistent picture with what appears in that paragraph of the statement of facts – and what appears in the affidavits of the plaintiff and her two legal advisers [emphasis added].*

It does seem to us that they would found a basis for a court finding that indeed the plaintiff and her legal advisers really set a trap for the defendant and chose to ignore – and chose to ignore him chose to not participate further in whatever finding he made and that indeed they did expect him to make adverse findings. They were all aware that he probably would [emphasis added].

Southwood J: Yes.

Mr Maurice: *But they chose to do nothing [emphasis added].*

[90] The proceeding was then adjourned to 9.00 am on 14 January 2015 to give Mr Maher an opportunity to brief Junior Counsel.

[91] In an email dated 12 January 2015 Mr Maher advised the plaintiff as follows:

I intend to seek leave for the early return [no later than 21 January 2015] of a subpoena addressed to the plaintiff requiring her to produce the following documents:

1. All notes made by Kerry Wetherall during or concerning her attendances at the Stella Maris Inquiry conducted by the defendant on 2014.
2. All records of reports made by or discussions held with Kerry Wetherall concerning the Inquiry.
3. All records of communications to or from or discussions involving the plaintiff, Michael Gleeson, Cathryn Tilmouth, Cathy Spurr or Alistair Wyvill in the period from 10 March 2014 to 27 May 2014, concerning the prospects of the defendant including in his report to the Administrator following completion of the Inquiry remarks critical of:

- a. The process leading to the decision to grant a lease of the Stella Maris site to Unions NT; or
- b. The decision itself.

[92] On 13 January 2015 the plaintiff filed a document headed, Plaintiff's Outline – Directions 14.1.15, which was signed by Mr Young. The outline set out the contents of Mr Maher's email dated 12 January 2015 and stated that the plaintiff opposed any application for a subpoena on the grounds that the application (1) seeks to improperly use the subpoena as a substitute for discovery and (2) the proposed terms of the subpoena were not limited to relevant documents.

[93] On 14 January 2015 Mr Maher filed in court a document headed, ORDER FOR PARTICULAR DISCOVERY SOUGHT BY THE DEFENDANT. The document stated the following.

On or before 21 January 2014 the plaintiff [Ms Lawrie] is to make and serve on the defendant an affidavit stating whether documents of the following classes are or have been in possession, custody or power and, if they have but no longer are in her possession custody or power, when she parted with them and what became of them:

1. Notes made by Ms Kerry Wetherall during or concerning her attendance at the Stella Maris Inquiry conducted by the defendant at the request of the Administrator during 2014 (the Inquiry)
2. Communications with Ms Wetherall during the Inquiry.
3. Communications with Mr Alistair Wyvill QC or Ms Cathy Spurr concerning their representation of Mr Gerry McCarthy MLA on 1 April 2014 at the Inquiry or what transpired between Mr Wyvill QC and the defendant on that day.

4. Communications relating to the suggestions or stratagems proposed by Mr Alistair Wyvill QC in his email dated 31 March 2014 to the plaintiff and others.
5. Communications relating to the advice contained in Mr Paul Maher's letter to the defendant dated 26 March 2014.
6. Communications relating to the invitation to make submissions contained in the letter from the defendant to Ms Spurr dated 28 March 2015.
7. Earlier drafts of the letter referred to in Ms Cathy Spurr's email to the plaintiff and Mr McCarthy dated 14 April 2014 in which Ms Spurr asked: "Are you happy with Alistair's amended letter being sent?"
8. Communications relating to the pro bono assistance no longer being available to the plaintiff, as referred to in Ms Cathy Spurr's letter to the defendant dated 14 April 2014.
9. Communications relating to the proposal that Mr Wyvill prepare a dissenting report, as referred to in Michael Gleeson's email to Mr Wyvill on 23 April 2014.

[94] On 14 January 2015 Mr Maher informed the Court that Mr McLure had been briefed and that Mr Lawler was in a position to proceed with the hearing on the dates that had been allocated. However, it was suggested that the matter should be listed for four days rather than two days and the matter was listed from 27 to 30 January 2015 inclusive.

[95] During the course of submissions about further discovery on 14 January 2015, there were the following exchanges between Mr Young and me and between Mr Maher and me.

As to the notes of Ms Wetherall -

Mr Young: Your Honour, in my submission, those [the notes of Ms Wetherall] are not relevant to an issue for the following reason. If it is the case that the defendant says, as I understand them to be saying, that what was said in the course of the Inquiry constituted sufficient notice to the plaintiff that should be evident from the transcript that has now been produced.

Southwood J: Well, I think this is more about did her communications include matters which were incorporated in any tactical decision. I think that is really the gist of it. Not so much what is heard in the tribunal.

Mr Young: That is certainly the case. To that extent, your Honour, it is fishing. Those documents from my summary perusal of them yesterday, do not have any bearing on the matters that were subject of her Honour, Kelly J's discovery order. That is, matters relevant to the state of mind of the ...

Southwood J: Well, do you have those documents?

Mr Young: The notes, your Honour?

Southwood J: The notes of Ms Wetherall, do you have them on you?

Mr Young: I don't have them on me your Honour.

Southwood J: Because I mean one way of resolving that, is simply in the first place for them to be produced to me, I will have a look at them.

Mr Young: Yes, your Honour.

Southwood J: And then the relevance issue can be taken into account.

As to order 3 in the document headed, ORDER FOR PARTICULAR
DISCOVERY SOUGHT BY THE DEFENDANT filed on 14 January 2015 -

Mr Young: In my submission orders in these terms are unnecessary; and particularly I point your Honour to the document sought in paragraph 3 which reads: “Communications between Mr Wyvill or Ms Spurr concerning the representation of Mr McCarthy” ... “or what transpired ...

Southwood J: Yes, I see that notes that. I must say I thought it was the plaintiff.

Mr Young: No. Mr McCarthy is not a party to these proceedings.

Southwood J: Yes.

Mr Young: And on the face of it I cannot see the relevance of that.

Southwood J: Yes. How is that said to be relevant Mr Maher?

Mr Maher: The circumstances, your Honour, were that Mr McCarthy was called back after a significant break in the Inquiry, when it appeared to have been concluded, to deal with one issue and that was whether or not he had – he, as Minister for Lands at the time, had actually been physically present at the subject cabinet meeting.

He [Mr McCarthy] had earlier given evidence that he had been there but subsequent evidence from other persons made it clear that he could not have been there and he was called back for that purpose.

Southwood J: Yes.

Mr Maher: Now, it is connected with the present proceeding in this way. Mr Wyvill and Ms Spurr were acting for Mr McCarthy as well as for the plaintiff in this proceeding and it is connected with this belief and the reasonableness of the alleged belief that there was to be no adverse finding. And the transcript that we have from that day indicates to Mr Maurice and I that there were concerns.

Mr Wyvill in particular seemed to apprehend that this further evidence of Mr McCarthy was significant for Ms Lawrie too because if ...

Southwood J: Yes, I do have the train of enquiry at the Commission.

Mr Maher: Yes and ...

Southwood J: So in effect she had taken over this matter completely.

Mr Maher: Indeed.

Southwood J: And brought it forward, dealt with it, the rubber stamps have been put on by people other than the Minister himself and so on.

Mr Maher: Indeed, your Honour, and so it goes. It is connected with the second issue, that is the belief and the reasonableness of the belief as to – the alleged belief that there was no adverse finding on the horizon. So, in other words, it is in the same category as paragraphs 4 to 9 of the proposed order [ORDER FOR PARTICULAR DISCOVERY SOUGHT BY THE DEFENDANT see par [124] above] connected with that same issue.

[...]

Southwood J: Well coming back to 3, do you want to say anything further about 3, Mr Young?

Mr Young: I do your Honour. I think it is clear from the very general way that Mr Maher expressed that it is a fishing expedition. There is nothing to suggest that there is any evidence. Mr Maher is seeking to see if there is some evidence that may assist. So I must say, your Honour, that is not – well it is not said by Mr Maher that there must have been some communication. Mr Maher hasn't mentioned what was said in the hearing and he says – would alert Mr McCarthy who then would have given his view.

Southwood J: Well, I think that is really implicit in it ...

Mr Young: It's implicit, your Honour, but it's not ...

Southwood J: No. But I think what needs to be made clear, or if it is confined to – because it is seeking communications about whether adverse findings may be made about the plaintiff in this case. I mean if there are none there are none.

Mr Young: That is so, your Honour, if there are none there are none. But again, your Honour, it is the way that is formulated. It's been ...

Southwood J: Well, I think what is intended is too wide as currently drafted. But if it is confined to any such communication about those matters which involve consideration of whether the plaintiff may have adverse findings made against her ...

Mr Young: Your Honour, I concede that if there were such a document that would be relevant. It is also ...

Southwood J: Well the answer to it may be ... it does not mean that they are not discoverable if they exist. If the answer is none exist, that is the answer.

Mr Young: I agree with your Honour, with respect, on that point.

[96] After the exchanges referred to in par [95] above Mr Maher made submissions to the effect that the documents that had been discovered by Ms Lawrie to that date indicated that there were other documents which had not been discovered which were relevant to the plaintiff's and her adviser's states of mind as to the alleged reliance on Mr Lawler's letter of 17 February 2014 and his alleged failure to give further notice. In the course of those submissions, there were the following exchanges between Mr Young and me.

Southwood J: But what if we go to paragraph 2, number 2 in the email of 23 April 2014 – what is said is that, “assuming May 26 date is adhered to, when do you need something from Chris Burns to help you compile your dissenting report?” Now what is obviously being sought there are all communications about the dissenting report including communications with Chris Burns about that.

Mr Young: Yes, your Honour, I can see your Honour's point. I can simply repeat the point that I made a moment ago your Honour, a moment ago I read that dissenting report. I am not aware of any document that actually came from Chris Burns apart from a history of the Stella Maris site, which in my assessment was not relevant.

But the dissenting report, so called, and it was you know a one page draft – was excluded from the discovery process for the reasons I gave your Honour, that it didn't appear to be relevant. But (inaudible).

Southwood J: *Yes. But I think maybe it should not have been. I mean if the strategy is – obviously there are two things which confronted the plaintiff. One was to make sure she was appropriately represented*

before the Commission. Two, was to develop a political strategy to deal with the fallout that may have occurred [emphasis added].

Mr Young: Yes.

Southwood J: *Both perfectly normal, perfectly proper, but the way in which things have been put in that context is - in reliance on certain things we assumed X. Now the answer to that is – no you did not. What you did was adopt a strategy and you were given an opportunity commensurate with the involvement you sought from the Commission; seems to be the point taken [emphasis added].*

So that all of these matters, so far as they go to the overall structure of that strategy, are matters which must relate to the extent of reliance placed on that letter received from the Commissioner about what was to be the process which would be followed.

Mr Young: I think your Honour, where I would differ from your Honour's assessment is in the use of the word "must". Those documents and I have looked through those documents and *I have looked through them with Mr Wyvill at different times* (inaudible). They were to the extent that they were indicative of either reliance on the defendant's failure to give formal notice or the state of mind that the alleged – that the plaintiff was not aware the adverse comments were coming, that was the filter - that was the filter used in assessing the documents.

So the fact that they were not discovered suggests to me very strongly that when I examined those documents or I examined them with Mr Wyvill we considered that ...

Southwood J: But I think you may have been looking at them in a particular light. So let me put it a different way. The fact that any strategy is adopted at all is of itself indicative that adverse comments were

anticipated. Otherwise there would be no need for any strategy to deal with the potential adverse fallout.

To the extent that issue arises in that way, then the overall scope and nature and development of the strategy is also relevant to that issue.

Mr Young: Well it may be, your Honour, if that is what the dissenting report contained. The so called dissenting report contained some indication of the likelihood that criticisms would be made (inaudible).

Southwood J: No. No. It is all about developing the full picture. All these are bricks in the wall, if you like. So it is not as if to say – look that is relevant for this reason. That document in itself may simply be a piece of the jigsaw which completes the strategy that was adopted. The strategy adopted is said to reveal, based on the documents which have already been disclosed, that there was an anticipation of adverse comments. Otherwise, for example, why run the alternate report?

Mr Young: Well ultimately one was never written. It was a draft.

Southwood J: Well, or give consideration to them at all, whatever – and how that feeds in.

Mr Young: I take your point, your Honour.

Southwood J: Yes. So unless there is a real problem with, and subject to having a look at documents 1 and 2 – in the light of the further amplification that has been provided from the bar table, I am minded to make the orders in terms of 3 to 9, subject to the matters discussed.

Mr Young: Yes, your Honour. So we have had a reasonable wide range of discussion about it but as I understand it your Honour is of the view that in relation to 4, 5, 6 and 7 [of the ORDER FOR PARTICULAR DISCOVERY SOUGHT BY THE DEFENDANT set out in para [124] above], they are relevant.

Southwood J: But also 3, to the extent that it relates to Ms Lawrie's state of mind.

Mr Young: Sorry your Honour. (inaudible)

Southwood J: Yes.

Mr Young: So 3, 4, 5, 6, 7 in so far as they relate to the state of mind of Ms Lawrie or her advisers.

Southwood J: Yes. Well, it is in particular Ms Spurr, Mr Wyvill or – and I mean what has to be looked at in that regard in relation to all of them is the development of the political strategy.

Mr Young: In other words, the state of mind.

Southwood J: Yes, but I am just trying to ensure that we are not at cross purposes. All of the issues that we have traversed in relation to those documents pick up a consideration of the political strategy. Once the whole picture has emerged, it may well indicate that at all times there was a view that it was likely adverse comment was to be made; and, indeed, it may also identify the areas in respect of which it was thought adverse comment may be made.

Mr Young: It may, your Honour. But the very formulation suggests that it's (inaudible) fishing expedition.

Southwood J: No it doesn't because the strategy is relatively confined, isn't it?

Mr Young: Well, if your Honour considered that a strategy was necessarily relevant to the necessarily relevant issue, I would agree with your Honour.

Southwood J: But it must be, surely?

Mr Young: Your Honour, in my view, correctly identified the nub of this case when we came before your Honour a few days ago. Last week I think it was where your Honour said that the case really turned on the matters that are mentioned in the defendant's statement of facts and contentions (inaudible).

Southwood J: Yes. But the difficulty is the plaintiff is obviously concerned about that. Otherwise, the plaintiff would not go to reliance on those issues. You see this issue can be easily resolved by abandonment of that point. Because the plaintiff is in effect saying - look we had a legitimate expectation that nothing adverse was going to occur unless we were advised it would occur.

Mr Young: Yes. That is part of it your Honour.

Southwood J: At the same time it is clear from the documents that the plaintiff was – *query whether it is enough, put that aside for the moment* – given a lot of opportunity to deal with all of the issues, starting with the discussion with Mr Wyvill and the defendant; the way the process was conducted – documents were produced, questions asked about the documents, quite specific issues were raised, and at the end a very full opportunity given to make submissions.

The [plaintiff's] submission was along the lines of this. The building was an historic building. The community had an interest in preserving that building. The government did not want to incur costs in relation to that building. The best candidate for that was Unions NT because (a) they had an association with the building; (b) they had capacity, either in cash or by calling on mates to come and do repairs, to look after it. That was not available to Birds of Australia, it was not available to

24Hr Art given all that is known about the financial limitations of those enterprises.

Now, what more do you want? [...]

But you see the plaintiff doesn't simply come before the court and say look all of that was not enough; we thought, despite all of that, no adverse findings were going to be made; and, if they were, we would be given an opportunity to deal with them. But query, what more is required?

But the problem is, if the issue remains, and I understand it does?

Mr Young: It does, your Honour.

Southwood J: Then it gives rise to what was the political strategy, because the political strategy goes to the state of mind. Because the fact that there is a political strategy indicates that there is an anticipation of adverse comments being made by the Commissioner. [...]

[97] Consistent with the rulings that I made on 14 January 2015 and the direction that Mr Maher file minutes of orders consistent with my rulings, on 15 January 2015 I made the following orders.

On or before 21 January 2015 the plaintiff is to make and serve on the defendant an affidavit stating whether documents of the following classes are or have been in her possession, custody or power and, if they have been but are no longer in her possession, custody or power, when she parted with them and what has become of them.

1. Communications with Mr Alistair Wyvill or Ms Cathy Spurr concerning their representation of Mr Gerry McCarthy MLA on 1 April 2014 at the Inquiry or what transpired between Mr Wyvill and the defendant on that day in so far as it relates to the possibility of adverse findings about the plaintiff.

2. Communications with the plaintiff, Mr Wyvill, Ms Cathy Spurr, Mr Michael Gleeson or Ms Mandy Taylor relating to the suggestion or stratagems proposed by Mr Wyvill in his email dated 31 March 2014 (3.35pm) to the plaintiff and others.
3. Communications with the plaintiff. Mr Alistair Wyvill, Ms Cathy Spurr, Mr Michael Gleeson or Ms Mandy Taylor relating to the advice contained in Mr Paul Maher's letter to the defendant dated 26 March 2014.
4. Communications with the plaintiff, Mr Alistair Wyvill, Ms Cathy Spurr, Mr Michael Gleeson or Ms Mandy Taylor relating to the invitation to make submissions contained in the letter from the defendant to Ms Cathy Spurr dated 28 March 2014.
5. Earlier drafts of the letter referred to in Ms Spurr's email to the plaintiff and Mr McCarthy dated 14 April 2014 in which Ms Spurr asked: "Are you happy with Alistair's amended letter being sent?"
6. Communications with the plaintiff, Mr Alistair Wyvill, Ms Cathy Spurr, Mr Michael Gleeson or Ms Mandy Taylor relating to the pro bono legal assistance no longer to be available to the plaintiff, as referred to in Ms Cathy Spurr's letter to the defendant dated 14 April 2014.
7. Communications with the plaintiff, Mr Alistair Wyvill, Ms Cathy Spurr, Mr Michael Gleeson, Ms Mandy Taylor or Mr Chris Burns relating to the proposal that Mr Alistair Wyvill prepare a dissenting report, as referred to in Mr Gleeson's email to Mr Wyvill on 23 April 2014 (8.29 am).

Mr Maher's email to Mrs Hart dated 14 January 2014

[98] On 14 January 2015 Mr Maher sent the following email to Mrs Hart in the Department of the Chief Minister.

I am providing the report I promised and an update estimate of costs:

1. I have already provided to you the advice of Mr Maurice of 18 November 2014. Mr Maurice advised at that time that, although there was no prospect of the plaintiff [Ms Lawrie] obtaining certiorari, it was more likely than not that she would obtain a declaration that she had not been accorded procedural fairness. Mr Maurice reached that conclusion because Mr Lawler had not given Ms Lawrie the formal notice that he might make adverse findings and had not given her a formal and final chance to make submissions as his earlier letter had promised. Notwithstanding that other steps had been taken by Mr Lawler to ensure Ms Lawrie had a full opportunity to present her case, Mr Maurice felt the facts were probably against us, based on the facts of our situation.
2. At the time he gave his advice Mr Maurice felt we could probably strengthen our prospects of resisting a declaration by arguing that to grant a declaration would be futile. This was on the basis that both the government and the public had effectively made up their minds as to the role played by Ms Lawrie in this whole affair and had already decided whether or not to accept Mr Lawler's report. That is why I met with Mr Barnes and Mr Grant last year, in order to obtain letters which were subsequently written to support that argument.
3. There was one other potential issue at that time, but neither Mr Maurice nor I really expected it to so dramatically impact on the case. It had seemed at first inconceivable to Mr Maurice and I that Ms Lawrie and her advisers Cathy Spurr and Alistair Wyvill did not expect adverse findings to be made. Even when it was asserted in Ms Lawrie's Statement of Facts, Issues and Contentions that neither she nor her advisers expected an adverse finding, we found that difficult to believe. We were therefore surprised when both Alistair Wyvill and Cathy Spurr swore affidavits stating that they did not expect adverse findings.
4. Although Mr Maurice and I felt it highly unlikely that Alistair Wyvill and Cathy Spurr would make affidavits which were not true and accurate, we felt that at least we should explore the issue in order to satisfy our obligation to Mr Lawler. The fact that the plaintiff has made those assertions acted as a waiver of the privilege she would have otherwise been able to maintain over communications between her, Cathy Spurr and Alistair Wyvill relating to that issue.

5. On 21 November 2014 I wrote to Cathy Spurr asserting that the privilege had been waived and calling for her to produce the relevant communications which went to the state of mind of Ms Lawrie, Alistair Wyvill and herself regarding the expectation of adverse findings.
6. It was not until 15 December that Cathy Spurr responded. Although not accepting that privilege had been waived, she offered to provide the documents on the basis that they were seen only by me and Mr Maurice. I accepted her offer.
7. The documents were only provided to me on the afternoon of 22 December 2014. Nothing effective could be done before Christmas. However, when Mr Maurice and I examined these documents we were surprised indeed. We had expected they would confirm what Alistair Wyvill and Cathy Spurr had asserted in their affidavits, but the contrary was the case. This is what has had such a dramatic impact on the matter.
8. The first impact is that it has significantly increased the prospect of success. Whilst no litigation is certain, Mr Maurice now advises that it is more likely than not that the declaration would be refused. The argument that we now have is that both the plaintiff and her legal advisers fully expected an adverse finding. That being the case, they presented to Mr Lawler everything they wanted to present to him. The fact that they were not given a formal warning of the prospect of an adverse finding means nothing, because they had in fact anticipated that and had in fact made all the submissions they intended to make.
9. The other significant impact is that in order to run this argument we must cross-examine not only the plaintiff but also Cathy Spurr and Alistair Wyvill. Cathy and Alistair have been known to me for many years and it is obviously awkward for me to be challenging their credibility. Alistair has been known to Michael Maurice for many years. Michael felt he could not conduct a cross-examination of Alistair as it should be conducted, so was intending to cease to act. As recently as last Friday morning I was expecting to have to find a replacement senior counsel and have the hearing dates adjourned.
10. When I had the matter mentioned before Southwood J on Friday 9 January (with Mr Maurice appearing by phone), Southwood J

made it clear that he did not want the hearing delayed. He came up with the suggestion that we brief junior counsel who would be given the specific task of cross-examining Alistair Wyvill. Although Mr Maurice and I were somewhat taken aback by the judge's approach, it was clear that he was not going to adjourn and that we were therefore effectively stuck with his suggestion. Upon reflection it is probably very good for us because we retain the invaluable services of Mr Maurice but also have the advantage of an experienced counsel cross-examining Mr Wyvill.

11. One of the consequences of the cross-examinations is that the originally allocated two days is quite insufficient. Consequently Southwood J has now allocated 4 days (27 to 30 January inclusive) for the hearing.
12. You know that Mr Grant authorised me to go ahead and engage junior counsel and was even kind enough to give me a list of recommended counsel. Fortunately I was able to procure the services of the preferred counsel, Mr David McLure of the Sydney Bar. I have sent a brief to him.
13. I have kept Mr Lawler fully informed throughout, in recent weeks by telephone first, because of fast moving events, and then in writing. He is happy for us to proceed as we are.
14. The inevitable consequence of these events, encouraging as they are in boosting the chances of success, is a very significant increase in costs. I can report that my current unbilled work in progress is about \$18,000. My communications with Mr Maurice since his last invoice have been fairly intense, particularly in relation to the formerly privileged documents. I expect that his unbilled work would be in about the same amount. I will send an invoice shortly and I will ask Mr Maurice to raise another interim invoice also.
15. The hearing is now for 4 days during which Mr Maurice, Mr McLure and I will obviously be fully occupied. Mr Maurice could need up to three days' preparation. I expect Mr McLure will need 4 days in preparation. I expect that I will need the equivalent of 4 days in preparation also, having regard to the fact that the solicitor has to deal with the more mundane areas of preparation. I think I might need up to 20 hours of clerks time

also, charged at \$140 per hour in accordance with the Supreme Court scale.

16. The Sydney bar tends to be the most expensive in Australia. Mr McLure's rate is \$4,500 per day. I am not surprised by that. It accords with the levels normally charged by a senior/junior in Sydney, in my experience. It is not dissimilar from the rates charged by barristers of similar experience here. The fact that it is almost the same as Mr Maurice's rate reflects more on the modesty of Mr Maurice's charges than on excess in Mr McLure's charges.
17. Obviously both counsel will have to travel to Darwin and back. They will need to be accommodated. Mr Maurice is going to arrive on Saturday 24 January. I do not know Mr McLure's arrangements as yet but I will allow 14 nights and assume about \$200 per night for accommodation costs. In addition I expect we will need at least some running transcript and will estimate \$1000 for that.
18. I therefore estimate future costs (with all the figures exclusive of GST) to the end of the 4 day hearing as follows.

| | |
|-----------------------|-----------|
| Mr Maurice (7 days) | \$35,000 |
| Mr McLure (8 days) | \$36,000 |
| Solicitor (8 days) | \$30,000 |
| Clerk (20 hours) | \$3,000 |
| Counsel travel | \$4,000 |
| Counsel accommodation | \$3,000 |
| Transcript | \$1,000 |
| TOTAL | \$112,000 |

19. I regret that costs have blown out so extensively and in particular that they have so far exceeded my initial estimate, but the startling evidence of the expectation of an adverse finding, its impact on the length of the trial and the need for a junior counsel were all quite unpredictable.

Please call me if you have any questions.

[99] The first thing to note about this email is that it is not an advice or an opinion that is given to Mr Lawler for whom Mr Maher is engaged. It is a report to the Department of the Chief Minister about developments that have occurred in the running of the proceeding which was provided to the Department primarily to explain why there had been a significant increase in Mr Maher's estimate of his fees and counsel fees. It is in effect written for the purpose of obtaining approval of the increased estimates. The email notes that Mr Lawler has been "fully informed throughout" about all of the developments and "is happy" for Mr Maher and his barristers to proceed as they are.

[100] In paragraph 10 of his affidavit made on 4 June 2015 Mr Maher gave the following reason for sending the email to Mrs Hart.

On 14 January 2015 I sent an email to Ms Teresa Hart of the Department of Chief Minister. My costs to that date had exceeded my earlier estimate and future estimated costs were far greater than my original estimate. I felt compelled to give to Mrs Hart an appropriate explanation as to the causes of the increased costs, as her office was responsible for payment of them.

[101] Most of the matters raised in Mr Maher's email to Mrs Hart dated 14 January 2015 were known to the plaintiff, her legal advisers and the Court and had been examined at some length in the Court during the interlocutory applications heard on 9 and 14 January 2015. They were not confidential. This demonstrated by what is set out [58] to [98].

[102] The matters mentioned in paragraphs numbered 1 and 2 of Mr Maher's email to Mrs Hart dated 14 January 2015 had ceased to be of any consequence other than for the purpose of explaining why Mr Maher's estimate of costs had increased so significantly.

[103] The second sentence of paragraph 14 of Mr Maher's affidavit of 8 January 2015 is very similar to the first sentence of paragraph 4 of Mr Maher's email to Mrs Hart of 14 January 2015. The question of waiver of legal professional privilege in paragraph 4 of the email is raised in similar terms in the following documents which are annexed to Mr Maher's affidavit made on 8 January 2015 which was filed in Court on 8 January 2015: (1) in the third paragraph of Mr Maher's email to Ms Spurr dated 21 November 2014 (PGM1); (2) Ms Spurr's letter to Mr Maher dated 15 December 2015 (PGM3); (3) Mr Maher's email to Ms Little dated 22 December 2014 (PGM6); (4) Mr Maher's letter to Ms Spurr dated 23 December 2014 (PGM7); and (5) Mr Maher's letter to Ms Spurr dated 6 January 2014 (PGM9).

[104] As to paragraph 5 of Mr Maher's email of 14 January 2015, the email of 21 November 2014 was annexure PGM1 to Mr Maher's affidavit made on 8 January 2015. The state of mind of Ms Lawrie, Mr Wyvill and Ms Spurr was raised in the following documents: (1) Mr Maher's email dated 21 November 2014 (PGM1); (2) Mr Maher's letter to Ms Spurr dated 23 December 2014 (PGM7); and (3) Mr Maher's letter to Ms Spurr dated 6 January 2015 (PGM9). It was also raised in Mr Maher's email of

12 January 2015 (see par [91] above) and was the reason why Mr Maher filed the document headed, ORDER FOR PARTICULAR DISCOVERY SOUGHT BY THE DEFENDANT. The state of mind of Ms Lawrie, Mr Wyvill and Ms Spurr and the discovered documents which were inconsistent with their affidavits were discussed in Court on 9 and 14 January 2015 and were the subject of the interlocutory applications which were dealt with on those days.

[105] As to paragraph 6 of Mr Maher's email of 14 January 2015, Ms Spurr's letter is annexure PGM3 to Mr Maher's affidavit of 8 January 2015.

[106] As to paragraph 7 of Mr Maher's email of 14 January 2015, the topic of the inconsistency between Ms Lawrie's, Mr Wyvill's and Ms Spurr's affidavits and the documents produced following further discovery is canvassed in par 15 of Mr Maher's affidavit made on 8 January 2015, Mr Maher's letter to Ms Spurr dated 23 December 2014 (PGM7) and Mr Maher's letter of 6 January 2015. It was also the subject of the interlocutory applications which were heard in Court on 9 and 14 April 2015.

[107] As to paragraph 8 of Mr Maher's email of 14 January 2015, it naturally followed and was obvious to all who were involved in the proceeding that, as a result of the plaintiff's production of the further discovered documents, the defendant's prospects of success were considerably greater than they had been prior to the discovery of those documents. As can be seen at [89] above, the matters expressed in paragraph 8 of the email were succinctly

stated to the court by Mr Maurice on 9 January 2015 and were discussed at length on 14 January 2015.

[108] As to paragraph 9 of Mr Maher's email of 14 January 2015, the necessity to cross-examine Ms Lawrie, Mr Wyvill and Ms Spurr and the difficulties caused by that possibility is raised in paragraphs 15 and 16 of Mr Maher's affidavit of 8 January 2015 and in Mr Maher's letter to Ms Spurr dated 6 January 2015 (PGM9). The issues were the subject of Mr Young's Outline of Issues – Directions 9.1.15 and were discussed in Court on 9 January 2015.

[109] On 9 January 2015 I raised with the parties the possibility of Mr Lawler briefing junior counsel. On 14 January 2014 Mr Maher told the court that he had briefed Mr McLure as junior counsel and on the same day I listed the matter for four days commencing on 27 January 2015.

[110] As of 9 January 2015, and more fully by 14 January 2015, it was known by the plaintiff and the Court that the defendant's lawyers were examining the truthfulness and accuracy of the allegations pleaded in paragraphs 7 and 12 of the Plaintiff's Statement of Facts, Issues and Contentions and of the contents of the affidavits of Ms Lawrie, Ms Spurr and Mr Wyvill and wished to cross-examine each of them. It was also known that the defendant's position was as asserted in par [89] above.

[111] As at 14 January 2014 the following was known to the Court and to the plaintiff and her lawyers. It was known that the defendant's lawyers had

examined the documents which had been provided by Ms Spurr's office on 22 December 2014 and had formed the view that the discovered documents, for which legal professional privilege was initially claimed, gave an inconsistent picture with what appears in the Plaintiff's Statement of Facts, Issues and Contentions and what appears in the affidavits of the plaintiff and her two lawyers. That it seemed to the defendant's lawyers the discovered documents found a basis for a court finding that indeed the plaintiff and her legal advisers "set a trap" for the defendant and chose not to participate further in the Inquiry and that indeed they did expect him to make adverse findings. That the defendant's lawyers intended to argue that the plaintiff and her lawyers were all aware that the defendant would probably make adverse findings about the plaintiff and had made submissions to the full extent that they wished to make submissions.

[112] At 11.48 am on 20 January 2015 Mrs Southwood sent the following email to Mr Maher.

I note this matter is set for hearing on 29 and 30 January 2015.

It would be appreciated if you could provide an updated estimate of your fees. I understand that David McLure has now been briefed in this matter. It would also be appreciated if you could provide an estimate of counsel fees.

If you have any queries please call me on [...].

[113] I find that Mrs Southwood's email to Mr Maher was sent to him as part of her role in administering the procurement process applicable to Mr Maher's

and counsels' legal services for the Department of the Chief Minister, who had engaged Mr Maher and counsel to act on behalf of Mr Lawler.

[114] At 11.53 am on 20 January 2015 Mr Maher forwarded to Mrs Southwood the email he sent to Mrs Hart on 14 January 2015 which contained an estimate of his fees and counsel fees. In his email to Mrs Southwood, Mr Maher stated:

My apologies – I should have copied you in on my email of 14 January to Terri Hart, which I now forward to you. I will also forward the invoices I subsequently sent to Terri.

[115] I find that Mr Maher's email to Mrs Hart was forwarded to Mrs Southwood as a result of her email requesting an update of the estimate of fees prior to the commencement of the hearing, and as part of the established procurement process for ad hoc outsourced litigious legal services.

Mr Maher's email to Mrs Southwood was not sent to her to advise her about any legal issues in the proceeding or the approach being adopted by Mr Lawler's lawyers. Nor was it sent to her to advise her about the prospects of Mr Lawler's success.

[116] Mrs Southwood's function in receiving the email was to ensure that (1) up to date estimates of fees for the outsourced legal services had been provided prior to hearing, (2) the estimates had been approved and recorded by the Client Agency, (3) the availability of funds to meet the revised estimates had been endorsed by an Accountable Officer, and (4) the required paperwork had be executed by the appropriate people. She was not in any

sense engaged in or part of the defendant's legal team. She was administering the procurement process for the outsourced legal services.

[117] On 30 January 2015, in accordance with the established procurement process, further APPROVALS TO ENGAGE AD HOC LEGAL AND OTHER EXPERTS SERVICES for Mr Maher, Mr Maurice and Mr McLure were prepared by Mrs Southwood for Mr Smyth's approval. The documents which were signed by Mr Smyth and Ms Hanson stated that Mr Smyth was the AGD case manager, gave a reason for why competitive tenders were not obtained and contained a statement that "Client has been advised of the estimated expenditure and has authorised this engagement and the availability of funds."

The postal address of the Department of the Chief Minister on counsels' invoices

[118] On 2 February 2015 invoices for pre-hearing and hearing fees were received from Mr Maher and counsel. Contrary to the established procurement procedures for outsourced legal services, the invoices were first sent to the Department of the Chief Minister.

[119] On 12 February 2015 Mr Smyth received a telephone call from Mr David Ryan, the Executive Director of Corporate Services for the Department of the Chief Minister. Mr Ryan told Mr Smyth that the postal address of the Department of the Chief Minister had been handwritten in the top left hand corner of the invoices received from Mr Lawler's counsel and that this was causing an issue with the Department's account section.

[120] On the same day, Mr Smyth spoke to Mrs Southwood about the addresses on counsels' invoices and then told Mr Ryan that no one in the Legal Services Unit had handwritten the Department of the Chief Minister's address on the invoices. Mr Smyth told Mr Ryan that, if necessary, he would ask Mrs Southwood to assist and she could request that the invoices be reissued by counsel.

[121] On 12 February 2015, during a file review, Mr Smyth noted that the Solicitor for the Northern Territory had not been provided with a copy of the originating motion filed in *Lawrie v Lawler* and he asked Mrs Southwood to obtain a copy of the originating motion. On the same day, Mrs Southwood sent an email to Mr Maher asking for a copy of the originating motion and Mr Maher sent her a copy of the originating motion as an attachment to an email.

The costs issues

[122] The only remaining issues to be determined are to do with the costs of the proceeding. There are two main cost issues arising between Mr Lawler and Ms Lawrie. First, did Mr Lawler have an actual liability to pay Mr Maher's costs and disbursements? Second, should costs be awarded on an indemnity basis?

[123] Ms Lawrie contends that Mr Lawler is not entitled to costs on the ground that Mr Lawler was under no liability to Mr Maher for his costs and disbursements and therefore is not entitled to recover costs against her.

Ms Lawrie submits that Mr Maher and counsel were retained upon the terms that they should look only to the Department of the Chief Minister, and not Mr Lawler, for payment of their costs. The principle upon which costs as between party and party are allowed is that the costs are awarded to the person claiming them as an indemnity.⁸ That being the principle, it follows that anyone who is not in a position to claim to be indemnified is not entitled to an order for party and party costs.⁹

[124] Mr Lawler contends that he does have an actual liability to pay Mr Maher's costs because no agreement was entered into with either Mr Maher or the Department of the Chief Minister that he would not be liable for Mr Maher's costs. He relies on the evidence of Mr Maher and Mr Smyth.

[125] In the circumstances, the main costs issue arguably is: did Mr Maher enter into an agreement with either Mr Lawler or the Northern Territory Government that under no circumstances was he to look to Mr Lawler for his costs and disbursements?

Ms Lawrie's submissions about apprehended bias

The email dated 5 August 2014

[126] There are two limbs to Ms Lawrie's application that I disqualify myself for apprehended bias. Both limbs are based on my association with my wife. The first limb of Ms Lawrie's application is as follows.

⁸ *Cachia v Hanes* (1994) 179 CLR 403 at 410.

⁹ *Adams v London Motor Builders* [1921] 1 KB 494 at 499 - 500.

[127] Mr Young says I have a personal interest in the outcome of Mr Lawler's application for costs of the proceeding, which means that a fair minded lay observer might reasonably apprehend that I might not bring an impartial mind to the resolution of the remaining questions I am required to decide. The interest I am said to have is that I will not want to make a finding that may *potentially* embarrass Mrs Southwood who Mr Young says is concerned in the case. He says that Mrs Southwood's concern in the case is that she wrote an email to Mr Maher which resulted in there being an agreement that Mr Lawler was not liable for Mr Maher's costs and disbursements; and, as costs are awarded on an indemnity basis, Ms Lawrie does not have to pay Mr Lawler's costs. If Mrs Southwood's email means what Mr Young says it means, Mr Young says the Northern Territory Government will not be able to recover the money it has paid to Mr Maher and counsel on behalf of Mr Lawler. If the Court finds the email means what he says it means, Mr Young says such a finding *may be* embarrassing to Mrs Southwood *as it may reflect* a failure on her part to take adequate steps to protect the interests of the Northern Territory Government, who is Mrs Southwood's employer. Therefore, Mr Young says a reasonable person might think I might not interpret Mrs Southwood's email the way Mr Young says it should be interpreted because I will not want to do anything that would *potentially* embarrass Mrs Southwood.

[128] Mr Young's argument cannot be sustained. It is almost wholly based on conjecture and bare assertion. No fair minded lay observer might reasonably

apprehend that I might not bring an impartial mind to the resolution of the questions I am required to decide because Mr Young has not provided an explanation or articulated any concerns that may logically satisfy the fair minded objective lay observer.

[129] The detailed analysis of the facts and evidence which I have undertaken in pars [6] to [57] above lead me to the following factual conclusions.

[130] First, Mrs Southwood is not concerned in Mr Lawler's application for costs or indeed in any aspect of this litigation. She is not a party. She has no interest in the outcome of the costs application. The Unit she is employed in is not involved in the recovery of costs orders that may benefit the Northern Territory Government.

[131] Second, Mrs Southwood will not be called as a witness. Ms Lawrie will not call Mrs Southwood as a witness because Mr Young says the email Mrs Southwood sent to Mr Maher on 5 August 2014 means Ms Lawrie wins the costs application. No additional evidence is needed. They "have it in writing". Mr Lawler will not call Mrs Southwood as a witness because he relies on the evidence of Mr Smyth and Mr Maher that there was never a communication between anyone to the effect that Mr Lawler would not be liable for Mr Maher's fees. Mr McLure also says, when the terms of the email are considered in their proper context, Mrs Southwood's email to Mr Maher does not have the effect contended by Mr Young.

[132] Third, Mrs Southwood's only current relevant association is that she is employed by the Attorney-General's Department of the Northern Territory as a mid-level administrative officer in the Unit that administers the procurement of outsourced legal services from lawyers who are in private practice.

[133] Fourth, Mrs Southwood is not employed as a Professional Officer in the Attorney-General's Department. Mrs Southwood is not a lawyer and she does not have a law degree.

[134] Fifth, Mrs Southwood's employment will not be affected in any way if the Court determines the costs application adversely to Mr Lawler.

[135] Sixth, at the beginning of August 2014 the Department of the Chief Minister made a request for Mr Maher's legal services on behalf of Mr Lawler. The request was approved by the Chief Executive Officer of the Chief Minister's Department, and recommended by the Acting Director of Litigation in the Solicitor for the Northern Territory. They made all of the decisions about engaging Mr Maher on behalf of Mr Lawler. They have the responsibility and authority to do so. Mrs Southwood had no such authority.

[136] Seventh, Mr Smyth tried to telephone Mr Maher and speak to him but Mr Maher was away so he then asked Mrs Southwood to contact Mr Maher.

[137] Eighth, on 5 August 2014 Mrs Southwood spoke to Mr Maher on the telephone and asked if he could be engaged on Mr Lawler's behalf. Very

soon after the telephone call Mrs Southwood sent Mr Maher an email. The email had attached to it the Request for Legal Services which was approved by the Chief Executive Officer of the Department of the Chief Minister. The first two sentences of the email were written in accordance with what Mr Smyth, one of Mrs Southwood's bosses, told her to write. The other parts of the email are consistent with the requirements of the *Procurement Act*, the *Procurement Regulations* and the procurement process that had been adopted by the Northern Territory Government for obtaining legal services in ad hoc litigious matters that had been outsourced to lawyers in private practice. Mrs Southwood knows about the procurement procedures; it is desirable that she does.¹⁰ It is part of her job.

[138] Ninth, the email of 5 August 2014 is, no doubt, one of many similar emails that Mrs Southwood would have written over the last 5 years.

[139] Tenth, before Mrs Southwood wrote the email, she checked with one of her bosses, Mr Smyth, about what should be said in the email and she wrote the email as she was directed to write it by him, and in accordance with the request which was approved by the Chief Executive Officer of the Department of the Chief Minister which was attached to the email, and the established procurement process.

[140] Eleventh, apart from writing the email, as she was instructed to write it, and sending it as she was instructed to send it by one of her bosses,

¹⁰ Job Description at Annexure CAS 1 to M Smyth's affidavit made on 4 June 2015.

Mrs Southwood had no responsibility for the contents of the email. The contents of the email were determined by Mr Smyth's directions, the Request for Legal Services which was approved by the Chief Executive Officer of the Department of Chief Minister and the applicable procurement process. The purpose of the email was to facilitate Mr Maher's engagement for Mr Lawler in accordance with the established procurement process.

[141] Twelfth, if Mrs Southwood's email is ultimately construed as Mr Young says it should be construed, there will not have been any failure on Mrs Southwood's part to take adequate steps to protect the Northern Territory's interest in recovering costs against Ms Lawrie. There is no reasonable criticism whatsoever that could be made about the manner in which Mrs Southwood drafted the email. There is absolutely no likelihood that such a finding would be potentially embarrassing to Mrs Southwood. She was not responsible for either determining or negotiating the terms of Mr Maher's engagement. Mrs Southwood checked what she should do and she did precisely what she was asked to do by one of her bosses. Mr Smyth says that if there is a problem with the email he is responsible. Mr Young did not seek to cross-examine Mr Smyth to the contrary.

[142] I find that the relevant facts known to the lay observer would include the essence of the facts that I have set out above. The lay observer would know: (1) the client agency is the Department of the Chief Minister; (2) there is a procurement process that applies to government agencies procuring services from private enterprise (3) the decision to engage the lawyers for Mr Lawler

was made by the Chief Executive Officer of the Department of the Chief Minister and endorsed by Mr Smyth who is one of Mrs Southwood's bosses;

(4) Mrs Southwood had nothing to do with the decision to engage the lawyers for Mr Lawler; (5) Mrs Southwood is an administrative officer not a professional officer and she is not a lawyer; (6) Mr Smyth tried to contact Mr Maher, but could not, so he asked Mrs Southwood to contact him;

(7) Mrs Southwood asked her boss for this matter, Mr Smyth, what she should say to Mr Maher; (8) Mrs Southwood sent an email to Mr Maher in which she attached the request from the Department of the Chief Minister, stated what Mr Smyth told her to state, and did her job by telling Mr Maher about the relevant government procurement requirements for his legal services, namely the necessity to provide an estimate of his fees, who the client agency was and how to address his invoices; (9) Mrs Southwood telephoned Mr Maher before sending her email dated 5 August 2014 which confirmed what she told him on the telephone; (10) Mrs Southwood's boss for this matter says he is responsible for the email; and

(11) Mrs Southwood's employment will not be affected by a finding, if one is ultimately made by the Court, that the email she sent to Mr Maher means the Northern Territory Government cannot recover the legal costs it has paid on behalf of Mr Lawler from Ms Lawrie.

[143] While the issue for me to determine in deciding the application that I should disqualify myself - whether a fair-minded lay observer *might* think I *might* not bring an impartial mind to the resolution of the questions which have not

been determined - is one of possibility (real and not remote), not probability, no such apprehension arises in this case because it has not even been established that I *might* have an interest in the outcome of Mr Lawler's application for costs. Mrs Southwood does not have the concern in the litigation that Mr Young contends. Nor would an informed lay observer apprehend that Mrs Southwood had an interest in the outcome of the costs application. There is no logical connection between Mrs Southwood's email to Mr Maher dated 5 August 2014 and the feared deviation because a fundamental premise in Mr Young's argument has not, even remotely, been established.

[144] In applying the objective test for the apprehension of bias, it must be remembered that the observer is taken to be reasonable; and the person being observed is a professional judge whose training, tradition and oath require the judge to discard the irrelevant, the immaterial and the prejudicial.¹¹ It would be most unreasonable to conclude that the finding about the email for which Mr Young contends would even be potentially embarrassing for Mrs Southwood or that such a finding *might* reflect a failure on her part. It would also be most unreasonable to conclude that I *might* have an interest in the outcome of Mr Lawler's costs application because I would not make a finding that might potentially embarrass Mrs Southwood when the potential for embarrassment is non-existent or at best extremely remote or highly tenuous.

¹¹ *Johnson v Johnson* (2000) 201 CLR 488 at 492 – 3.

[145] In order to try and establish the necessary logical connection for

Ms Lawrie's application for disqualification to succeed, Mr Young made the following written submissions about the circumstances of this case.

1. At the time she wrote the email to Mr Maher, Mrs Southwood was, to give her full designation, the Acting Assistant Manager, Legal Services Coordination, Solicitor for the Northern Territory, Department of the Attorney-General and Justice. She appears to have been responsible for engaging external legal practitioners on behalf of the Solicitor for the Northern Territory and other government departments. It would appear she was responsible for arrangements as to fees and perhaps other matters (paragraph 4 of the Plaintiff's Outline of Argument – Apprehension of Bias (the Outline)).
2. Her email to Mr Maher is headed "New Instructions: Ad Hoc Legal Referral: Stella Maris inquiry ...". It is clear from the email that she had spoken to Mr Maher, presumably about the terms of the retainer on 5 August 2014 and engaged him, on the instructions of the Department of the Chief Minister, to act on behalf of the defendant (paragraph 5 of Mr Young's submission).
3. The second paragraph of the email makes clear that she instructed Mr Maher, on behalf of the defendant to accept service of proceedings. She was, at least for this limited purpose, acting as the defendant's agent or representative to provide instructions to his solicitors (paragraph 6 of Mr Young's submission).

During the course of his oral submissions on 5 June 2015 Mr Young went even further and stated that the gravamen of the plaintiff's submissions is that Mrs Southwood was involved in confirming or settling the terms of the engagement of Mr Maher.

4. The third paragraph invited Mr Maher, once he had had the opportunity to consider the matter, to provide her with an estimate of his fees. She asks Mr Maher to send his invoices to Legal

Services Coordination that is, to her branch but addressed to the attention of Terri Hart of the Department of the Chief Minister. The final sentence of the email invites Mr Maher to contact her directly if he has any queries “in regards to this engagement” (paragraph 7 of the Outline).

5. This email appears to be the central document in relation to the terms of the retainer between Mr Maher, on the one hand, and the defendant and the Northern Territory Government, on the other hand. The outcome of the respective arguments of the parties that the retainer between Mr Maher and the defendant either included or excluded his liability for Mr Maher’s costs will largely turn on an interpretation of this email (paragraph 8 of the Outline).
6. It is possible, given that there was at least one conversation between Mr Maher and Mrs Southwood, that there was discussion of some matter between them not appearing in the email, in particular, the question of whether the defendant was to be liable in any way for Mr Maher’s costs. The email contains no such suggestion and if there were to be any contrary suggestion this would presumably necessitate calling Ms Southwood as a witness (paragraph 9 the Outline).
7. Mrs Southwood was personally and directly involved. She has personally acted as a representative of the defendant. Her direct involvement consisted of, at least, the following:
 - (a) Retaining Mr Maher on behalf of the defendant and the Office of the Chief Minister.
 - (b) Instructing Mr Maher to accept service of documents on behalf of the defendant.
 - (c) Conferring with Mr Maher about the case, at least in relation to the retainer and perhaps other matters (paragraph 19 of the Outline).
8. It is also significant that Ms Southwood is not a legal practitioner and is therefore not bound by the usual professional obligations that might prevent her from discussing the case with her spouse as was the case in *Attorney-General v DPP* (paragraph 20 of the Outline).

9. However, the most telling point is that the email from Ms Southwood to Mr Maher, along with other circumstances, is strongly indicative that there was an agreement that the defendant would not be liable for Mr Maher's costs. Such a finding would be potentially embarrassing to Ms Southwood as it may reflect a failure on her part to take adequate steps to protect her employer's interest in recovering costs against the plaintiff. The trial judge would naturally wish to spare his wife the possibility of such embarrassment and this provides the logical connection to the feared deviation from the course of deciding the case on its merits (paragraph 21 of the Outline).

[146] All of the above submissions are utter conjecture and are an attempt to embellish the true situation. Mr Young's submissions are contradicted by the undisputed evidence that has been tendered in this application. I reject them for the following reasons.

[147] As to the first submission at [145], there is no basis for the assertions contained in the second and third sentences of the submission.

Mrs Southwood was not "responsible" for engaging external legal practitioners who provided ad hoc litigious legal services to the Northern Territory Government. Nor was she "responsible" for arrangements as to fees and other matters. In this case the Department of the Chief Minister was responsible for engaging Mr Maher, Mr Maurice and Mr McLure to act on behalf of Mr Lawler. The request for their legal services was approved by the Chief Executive Officer of the Department of the Chief Minister and recommended by Mr Smyth who was the Attorney-General's Department Case Manager and one of Mrs Southwood's bosses. Mrs Southwood did as she was told to do by Mr Smyth in circumstances where Mr Smyth had been unable to contact Mr Maher and a decision had been made by those who had

the requisite authority to engage the lawyers for Mr Lawler. The approvals to engage Mr Maher, Mr Maurice and Mr McLure were signed by Mr Smyth, as the case manager, and Ms Hanson who is an Accountable Officer.

Mrs Southwood merely facilitated the engagements and did her job ensuring the engagements complied with, and were conducted, in accordance the established procurement process and the provisions of the *Procurement Act* and Regulations. Mr Young's submission in this regard is nothing more than conjecture based on the description of a position Mrs Southwood was acting in at the time and no more. Mr Young heroically persisted with the submission despite the uncontradicted and unchallenged evidence of Mr Smyth about who made the decisions to engage Mr Lawler's lawyers and the true extent of Mrs Southwood's authority and responsibilities.

[148] As to the second submission at [145], there is no basis for Mr Young's assertion that Mrs Southwood "had spoken to Mr Maher, *presumably about the terms of the retainer*". As I have stated at [45], the only reasonable inference is that Mrs Southwood spoke to Mr Maher about the matters set out in her email to him and no more. That is, during the telephone call Mrs Southwood would have told Mr Maher that a request had been received from the Department of the Chief Minister to engage him to act on behalf of Mr Lawler who had been made the respondent to an originating motion that had been filed by Ms Spurr and asked Mr Maher if he would accept service of the originating motion on behalf of Mr Lawler. If anything more had been discussed, it is likely that Mr Maher, who is a senior solicitor, would have

made a file note of the telephone conversation or dealt with any additional matters in his email to Mrs Southwood dated 6 August 2014.

[149] As to the third submission at [145], all that can be inferred from the evidence before the Court is that Mr Maher agreed to accept service of the originating motion on behalf of Mr Lawler and the email confirmed that he would do so. Further, there is no evidence to suggest that Mrs Southwood had any authority to act on behalf of Mr Lawler. The Department of the Chief Minister was acting as Mr Lawler's agent; and, in circumstances where the request for Mr Maher's legal services had been approved by the Chief Executive Officer of the Department of the Chief Minister, and Mr Smyth had been unable to contact Mr Maher, Mrs Southwood did what she was asked to do by one of her bosses, Mr Smyth. This does not make her Mr Lawler's agent. After he received Mrs Southwood's email dated 5 August 2014, Mr Maher contacted Mr Lawler and sought confirmation that Mr Lawler wanted to retain him as his solicitor.

[150] As to the fourth submission at [145], it is an attempt to attribute to Mrs Southwood more authority and responsibility than she possessed. The Legal Services Coordination Unit is not "her branch". It is a small administrative unit in which she is employed. The fact that Mrs Southwood invited Mr Maher to contact her if he had any queries about his engagement does not mean that Mrs Southwood had authority to resolve any questions that he had. She did not have any authority to resolve any questions about the terms of Mr Maher's engagement. Mrs Southwood was simply in a

position to refer any such questions to the appropriate person so as to facilitate Mr Maher's engagement. There was an established procurement process. The reason for Mr Maher's invoices being sent to the generic email number was so that they could be checked arithmetically and recorded in the database that had been established for the purposes of providing reports about the outsourcing of legal services to Government. It was Mrs Southwood's responsibility to undertake those checks and to ensure there were appropriate entries made in the database. The reason that Mr Maher was advised to address his invoices to the Department of the Chief Minister was that Department was the client agency who had approved the request for his legal services and confirmed the availability of funds for those services and was responsible for paying Mr Maher's invoices.

[151] As to the fifth submission at [145], Mrs Southwood's email to Mr Maher of 5 August 2014 is not *the* central document for the terms of the retainer between Mr Maher, on the one hand, and Mr Lawler and the Northern Territory Government, on the other hand. It is only one document in a chain of documents that will have to be considered in determining the issues that have been identified in pars [122] to [125] inclusive above. The most important documents also include the Request for Legal Services, Mr Maher's email to Mr Lawler dated 7 August 2014, Mr Maher's email to Mrs Southwood dated 14 August 2014 which attached his costs disclosure statement and agreement, the documents in annexures CAS 6 and CAS 9 to Mr Smyth's affidavit of 4 June 2015, and Mrs Hart's email to Mr Maher

dated 24 December 2014. All of these documents will need to be considered in the context of Mr Maher's and Mr Smyth's evidence that there has never been any communications between Mr Maher and Mr Lawler or Mr Maher and Mr Smyth or between Mr Maher and any officer of the Northern Territory Government to the effect that Mr Lawler would not be liable for Mr Maher's costs and disbursements.

[152] As to the sixth submission at [145], there is no suggestion from anybody that there was more than one conversation between Mrs Southwood and Mr Maher. While it is true that it is possible that Mr Maher and Mrs Southwood could have discussed any topic at all during their telephone call on 5 August 2014, Mr Maher has stated that there was no communication with any officer of the Northern Territory Government to the effect that Mr Lawler would not be liable for his fees. The fact that Mr Maher is not able to recall the contents of the telephone call with Mrs Southwood does not preclude him from saying that he never communicated to anybody that Mr Lawler would not be liable for his costs and disbursements because that is something he would not do. Nor is there any suggestion that Mrs Southwood is to be called to give evidence that such a conversation occurred, or at all. The evidence in Mr Maher's affidavit 5 June 2015 has not been contradicted and Mr Young did not seek to cross examine Mr Maher or challenge his statements in anyway.

[153] In respect of submission 6 at [145], Mr Young is trying to "have his cake and eat it too". At the same time as he points out that Mrs Southwood is not

a legal practitioner, Mr Young invites the Court to conclude that there is a real possibility that during their telephone conversation on 5 August 2014, Mrs Southwood and Mr Maher discussed the legal intricacies of the terms of a solicitor's retainer involving an indemnity provided by a third party. Mrs Southwood asked Mr Smyth if Mr Maher was being instructed to act on behalf of the Department of the Chief Minister and the very limited extent of the directions she received was: "A little tricky but he will be engaged by the DCM to act for the Commissioner appointed under the *Inquiries Act*. So acting for Commissioner Lawler. Can that be done?"

[154] As already stated there is no basis for the statements made in submission 7 at [145].

[155] The relevance of the statement made by Mr Young in submission 8 at [145] is illusory. It appears to be nothing more than a gratuitous insult. Mr Young does not state what it is that could be discussed between Mrs Southwood and me or what is said to have been known by Mrs Southwood or when any discussions could have taken place or how any such discussions could influence the remaining costs issues.

[156] During his oral submissions there were the following exchanges between Mr Young and me.

Mr Young: It is also significant that Mrs Southwood is not a legal practitioner and is therefore not bound by the usual professional obligations that might prevent her from discussing the case with her

spouse as was the case in *Attorney-General (NT) v Director of Public Prosecutions & Ors.*¹²

Southwood J: What do you say about conduct rule 14.1?

Mr Young: From the – well that is a conduct rule, your Honour. Mrs Southwood is not an officer of the Court. She is not bound by the conduct rules that apply to legal practitioners. She is certainly bound by a contractual term.

Southwood J: Do you know what the status of those rules is under the *Public Service Employment Management Act*?

Mr Young: I beg your pardon, your Honour?

Southwood J: Do you know what the status of those conduct rules are under the *Public Service Employment Management Act*?

Mr Young: I imagine they are norms of conduct your Honour.

Southwood J: And, no more?

Mr Young: Well, I don't know whether they are more than that, your Honour.

But, nevertheless, your Honour, my point remains that Mrs Southwood is not bound in the same way that both legal practitioners were bound in *Attorney-General (NT) v Director of Public Prosecutions & Ors.*, by rules of professional conduct.

[157] In the context of the findings I made in my Reasons for Decision in *Lawrie v Lawler*, the irony of Mr Young's statements in submission 8 is profound.

¹² [2013] NTCA 2.

There is nothing more frightful than the conjecture and speculation which is the product of ignorance. Before making the statements he made in submission 8 Mr Young gave no consideration to the *Public Sector Employment Management Act*, the Public Sector Code of Conduct or the Criminal Code. As is apparent from what I have stated at [24] to [29], the obligations placed on public servants to maintain the confidence of confidential information are very onerous. As has been said by the Northern Territory Court of Appeal, while the fictitious observer may well assume that married couples talk about their work generally, the court does not attribute to this observer a suspicion that they may also talk about particular matters in a manner which would also be a gross dereliction of their respective obligations.¹³ If Mrs Southwood and I had discussed Mr Maher's retainer, at all, I would have raised it with the parties as I was bound to do.

[158] I have dealt with submissions 9 at [145] at [142] to [144]. Mr Young has failed to establish the logical connection he contends in such away as may satisfy an objective observer.

Mr Maher's email to Mrs Hart dated 14 January 2015

[159] The second limb of Ms Lawrie's application relates to Mr Maher forwarding to Mrs Southwood by email on 20 January 2015 Mr Maher's email to Mrs Hart dated 14 January 2015. Mr Young submitted that Mrs Southwood's receipt of the email to Mrs Hart disclosed to Mrs Southwood, Mr Lawler's strategy to win the trial, which at that time was unknown to the plaintiff,

¹³ *Attorney-General (NT) v Director of Public Prosecutions & Ors* [2013] NTCA 2 at [26].

giving rise to an apprehension that Mrs Southwood was to some degree “in the camp” of the defendant.

[160] Before going on to consider Mr Young’s submissions in detail, I note that during his oral submissions I asked Mr Young about the following matters. First, the manner in which Mr Lawler’s case strategy had developed. Second, the impact of the filing of the affidavits of Mr Wyvill and Ms Spurr on the course of the litigation. Third, the impact of the production of the further discovered documents by Ms Lawrie on the course of the proceeding and the trial. Fourth, the issues to do with the cross-examination of Mr Wyvill and Ms Spurr were only alive because of the manner in which Ms Lawrie had conducted her case. Fifth, there was no grand strategy revealed in Mr Maher’s email to Mrs Hart of 14 January 2015; all the email did was identify the changes in the factual position which resulted from the documents which had emerged during the course of the litigation. Sixth, the fact that the issue of reliance had been discussed in court. Seventh, that the developments in the litigation which are described in Mr Maher’s email to Mrs Hart of 14 January 2014 were well known.¹⁴ Eighth, that Mr Maher’s email to Mrs Hart of 14 January 2015 was passed on to Mrs Southwood for the purpose of dealing with the increased estimate of Mr Maher’s fees as the litigation was evolving; the email was passed on to someone, who was not a lawyer, to deal with evolving administrative issues.

¹⁴ Page 30.9 transcript of 5 June 2015.

[161] It is necessary to consider the matters at [160] in order to deal with

Mr Young's submission in its proper context.

[162] Mr Young put the second limb of Ms Lawrie's application that I disqualify myself for apprehended bias as follows.

Your Honour, there is one further point I wish to raise which goes beyond the oral submissions.

The affidavit of Mr Smyth, the 4 June affidavit at page 58 annexes some correspondence or emails, I should say, including an email to Mrs Southwood on 20 January 2015. That is exactly one week before the trial in this matter began.

It is an email from Mr Maher, the defendant's [Mr Lawler's] solicitor to Mrs Southwood attaching an email he had sent 6 days earlier to Mrs Hart of the Department of the Chief Minister. In that email Mr Maher says, "Denise – My apologies, I should have copied you in on my email of 14 January to Terri Hart which I now forward to you. I will also forward the *invoices* I subsequently sent to Terri."

Your Honour, that email is really a description of the defendant's strategy to win the trial and it is *a revelation of what was entirely unknown* to the plaintiff. But the strategy, just to summarise that document, the strategy outlined in the email can be summarised roughly as follows.

In paragraph one there is the initial assessment of Mr Maurice QC, the leading counsel for the defendant in the case, that the defendant had not given procedural fairness to the plaintiff, with a pessimistic assessment of the prospects.

At paragraph 2, there is a reference to, it appears, Mr Maher and perhaps Mr Maurice, I am not sure about that, but certainly the defendant's advisers coordinating a strategy with Mr Barnes, who I take to be Mr Barnes who was then the head of the Department of the Chief Minister, and Mr Grant, who I take to be the Solicitor General, to coordinate a strategy to defeat the plaintiff's [Ms Lawrie's] claim.

At paragraph nine, the strategy is explained; and it is said that, in substance, to win the strategy will be to attack the credit of Mr Wyvill and Ms Spurr.

Now, your Honour, I am reading that email; it is clear enough, that strategy was played out at the trial and successfully so.

The significance of that email, your Honour ...

Well be that as it may, your Honour, my point is that email sent to your wife, a week before the trial started, outlines the defendant's proposal to win the case, essentially by an attack on the credibility of those witnesses, as your Honour properly points out ...

Your Honour, be that as it may, while the cross-examination that was foreshadowed in this email did not take place, there was nevertheless an attack on the credibility of those witnesses – of those persons by other means.

...

It shows to some degree, your wife was in the camp of the defendant [Mr Lawler] a week before trial.

...

The apprehension, Your Honour, is Mrs Southwood is in the defendant's camp to some degree, at least.

[163] The essence of Mr Young's submission is: (1) Mrs Southwood was to some degree in the camp of the defendant; (2) seven days before the trial started, Mrs Southwood received by email a description of Mr Lawler's strategy to win the case; (3) the strategy revealed in the email was entirely unknown to the plaintiff. Mr Young did not articulate how Mrs Southwood's receipt of Mr Maher's email to Mrs Hart dated 14 January 2015 placed her in

Mr Lawler's camp. Rather, it is to be implied that Mrs Southwood was in Mr Lawler's camp because she had received information about Mr Lawler's case strategy which was "entirely unknown" to the plaintiff. In effect, it is to be implied that Mrs Southwood was in a closed circle of people who had access to information about Mr Lawler's case strategy and for whom it was proper to receive such confidential information. This gives rise to an apprehension of bias with respect to the hearing of Mr Lawler's application for costs.

[164] These submissions cannot be sustained for the following reasons.

[165] Mr Young's suggestion that it was entirely unknown to the plaintiff that the defendant's strategy to win the case was essentially an attack on the credibility of Ms Lawrie, Mr Wyvill and Ms Spurr is grossly inconsistent with the written submission¹⁵ he handed to the Court on 9 January 2015 which included the following statement:

The more serious issue may be your Honour's willingness to preside in a trial where a central issue, according to the defendant, is whether those witnesses should be believed on their oaths.

[166] Mr Young's submission that Mr Maher's email to Mrs Hart was "a revelation of what was *entirely unknown to the plaintiff*" is clearly not correct. As is established by what is set out at [58] to [117], by 14 January 2015 at the very latest, both Mr Young and Ms Lawrie knew about the strategy which is described in the email to Mrs Hart. That is, they and the

¹⁵ Set out at [86].

Court knew about Mr Lawler's strategy at least 6 days before Mrs Southwood received Mr Maher's email to Mrs Hart. On 9 January 2015, which is 11 days before Mrs Southwood received Mr Maher's email to Mrs Hart, Mr Maurice told the Court and Mr Young in very clear and succinct terms precisely what Mr Lawler's strategy was (at [89]). Indeed, as is again demonstrated by the matters set out at [58] to [117], Mr Lawler's strategy must have started becoming very clear to Mr Young, Mr Wyvill and Ms Lawrie from October 2014 onwards.

[167] The fact that as at 20 January 2015, Mr Young and Ms Lawrie may not have known about Mr Maurice's 18 November 2014 assessment of Mr Lawler's prospects of success or about the meeting of Mr Maher, Mr Barnes and Mr Grant but Mrs Southwood did is irrelevant. By 20 January 2015 things had moved on considerably as a result of Ms Lawrie's production of the further discovered documents. The extent to which things had moved on was made very clear to Ms Lawrie and her lawyers by Mr Maher's letters to Ms Spurr dated 23 December 2014 and 6 January 2015. Further, it must have been apparent to Mr Young that the documents which were produced on 22 December 2014 improved Mr Lawler's prospects of success. The potential consequence of the production of those documents was discussed in the Court with Mr Young on 9 and 14 January 2015. It was apparent to the Court during those discussions that Mr Lawler's lawyers were of the opinion that they had improved prospects of success as a result of the

production of the further documents. Mr Lawler's case concept was clearly articulated in open court.

[168] The applications for further and better discovery made by Mr Lawler before the hearing, the letters Mr Maher wrote to Ms Spurr about waiver of legal professional privilege, Mr Maher's two affidavits of 8 January 2015 and the annexures to them, Mr Maurice's submission to the Court on 9 January 2015 (at [121]) and the discussions in court on 14 January 2015 clearly show that Mr Lawler's strategy was to rely on the further discovered documents to try and establish that, contrary to the affidavits made by Ms Lawrie, Mr Wyvill and Ms Spurr, Ms Lawrie's advisers had not relied on Mr Lawler's undertaking in his letter dated 17 February 2015. According to the defendant, the discovered documents established the following propositions. Ms Lawrie and her lawyers expected Mr Lawler to make adverse findings about Ms Lawrie's involvement in the grant of the Stella Maris site to Unions NT. In order to deal with the anticipated adverse outcome Ms Lawrie and her lawyers elected not to participate further in the Inquiry. They submitted everything they wished to submit to Mr Lawler. There was nothing more they wanted to submit to him. Ms Lawrie and her lawyers chose to do nothing, and instead engaged in a course of conduct aimed at "trapping" Mr Lawler and discrediting any report he produced.

[169] Mr Lawler's strategy did not simply amount to an attack on the credibility of Ms Lawrie, Mr Wyvill and Mr Spurr. However, a corollary of Mr Lawler's strategy was that Ms Lawrie, Mr Wyvill and Ms Spurr would need to be

cross-examined about what they had said in their affidavits. This meant that Mr McLure had to be engaged as Mr Maurice felt he could not cross-examine either Mr Wyvill or Ms Spurr because of his long association with them. All of these matters were known to Mr Young and Ms Lawrie and the Court by 14 January 2015.

[170] Mr Maher's email to Mrs Hart dated 14 January 2014 describes the developments in the litigation which have been referred to above and summarises Mr Lawler's strategy which was known to the Court and the parties. Mr Maher states that the argument that Mr Lawler now had, was that both the plaintiff and her legal advisers expected an adverse finding by Mr Lawler. That being the case, they had presented to Mr Lawler everything they wanted to present to him. "The fact they were not given a formal warning of the prospect of an adverse finding means nothing, because they had in fact anticipated that and had in fact made all the submissions they intended to make (paragraph 8 at [98])." He then goes on to set out the estimates of his future costs and disbursements in detail in the email.

[171] The only reason cross-examination of Mr Wyvill and Ms Spurr is mentioned in Mr Maher's email to Mrs Hart of 14 January 2015 is to explain why Mr Lawler's legal costs had increased so significantly. The necessity to cross-examine Mr Wyvill and Ms Spurr had meant that it was necessary for Mr Lawler to engage a junior counsel, Mr McLure. Both Mr Young and, through him, Ms Lawrie and the Court had been informed of these matters well before 20 January 2015. Mr Maher informed Ms Spurr of Mr Maurice's

difficulty in cross-examining her and Mr Wyvill on 16 December 2014. The question of Mr Lawler briefing a junior counsel was raised by the Court on 9 January 2015 and on 14 January 2015, Mr Maher informed the Court and Mr Young that he had briefed Mr McLure.

[172] It is also very important to understand how Mr Maher came to forward his email to Mrs Hart, to Mrs Southwood.

[173] As is stated at [100], the reason Mr Maher sent his email of 14 January 2015 to Mrs Hart is because his costs had exceeded his earlier estimate and his estimate of future costs was significantly greater than his original estimate. He felt compelled to give an explanation about his increased costs and disbursements to Mrs Hart, who was the relevant Executive Director in the Department of the Chief Minister. Mr Maher's email did not seek instructions about what tactics should be adopted by Mr Lawler. Nor was it sent to Mrs Hart to advise her about Mr Lawler's prospects of success. The email is in the nature of a report about the developments that had occurred in the course of the proceeding which resulted in the increase in costs.

[174] The reason Mr Maher forwarded to Mrs Southwood his email to Mrs Hart was that earlier in the day, on 20 January 2015, Mr Maher had received an email from Mrs Southwood asking him to provide her with an update in the estimate of his fees because the hearing dates of the proceeding were rapidly approaching. Hearing costs constitute a significant component of the costs of most litigious matters. Mr Maher forwarded the email to Mrs Southwood

in order to provide her with the latest estimate of his fees and disbursements. He did not provide the email to Mrs Southwood to inform her about the strategy of the lawyers for Mr Lawler or to obtain instructions from her about such matters. Nor did he forward the email to Mrs Southwood to advise her about Mr Lawler's prospects of success. Mrs Southwood was not part of Mr Lawler's team. Nor was she in the defendant's camp to any degree whatsoever. She was merely responsible for ensuring Mr Maher's ongoing engagement continued to comply with the established procurement process. Mrs Southwood's access to confidential information was confined to information which explained why there had been an increase in the estimates of legal fees and on this occasion the defendant's strategy which is described in the email to Mrs Hart was known to the Court and to the parties.

[175] It may be inferred that Mrs Southwood sent her email to Mr Maher for the following reasons. First, to ensure that, in accordance with the established procurement process for ad hoc litigious matters, the appropriate approvals had been obtained for all of the lawyers' estimates and to ensure funds were available to meet those costs. This is a requirement of r 3 of the *Procurement Regulations*. After Mrs Southwood received Mr Maher's email, she prepared each of the documents entitled, APPROVAL TO ENGAGE AD HOC LEGAL AND OTHER EXPERT SERVICES, for Mr Maher, Mr Maurice and Mr McLure which are in annexure CAS 9 to Mr Smyth's affidavit made on 4 June 2015. Those documents were signed by Mr Smyth

and Ms Hanson on 28 and 31 January 2015 respectively. Those documents contain the statement that the “client has been advised of the estimated expenditure and has authorised this engagement and the availability of funds”. Second, to ensure the estimates provided by Mr Maher were recorded in the database that had been established for the purpose of maintaining an audit trail and for providing reports to the Northern Territory Government about the outsourcing of legal services to lawyers in private practice.

[176] I find that the relevant facts known to the lay observer would include the following facts. Mr Maher sent his email to Mrs Hart to explain why his estimate of the costs of the trial had increased and to obtain approval for his further estimate of costs. The email contained an accurate description of the developments that had occurred during the course of the litigation and the impact those developments had on the conduct of the defendant’s case. It is a very matter of fact email. The developments that had occurred in the course of the litigation and the impact they had on Mr Lawler’s case were well known to the plaintiff and her legal advisers and to the Court. There was no closed circle of people who had access to the key information in Mr Maher’s email to Mrs Hart. Most of these matters had been dealt with in open court. Mrs Southwood was in no way concerned in the litigation. Her sole job was to administer the procurement of Mr Maher’s legal services in accordance with the established procurement process and no more. Her role in doing so was quite independent of Mr Lawler and his lawyers.

Mr Maher's email to Mrs Hart was sent to Mrs Southwood after Mrs Southwood sent an email to Mr Maher noting that the trial dates were approaching and requesting an updated estimate of Mr Maher's fees.

[177] In the circumstances, it would be most unreasonable for an independent lay observer to apprehend that Mrs Southwood might be in Mr Lawler's camp and that by association I might have an interest in the outcome of Mr Lawler's application for costs. No logical connection has been established or articulated between Mrs Southwood being provided with the information in Mr Maher's email to Mrs Hart and any apprehended deviation from the course of my deciding the costs application on its merits. It is difficult to see how there possibly could be when the Court was aware of Mr Lawler's strategy before Mrs Southwood received Mr Maher's email to Mrs Hart. Nor has a logical connection been established or articulated between Mrs Southwood being a person who was necessarily provided with some confidential information by Mr Lawler's lawyers about the proceeding and any apprehended deviation from the course of my deciding the costs application on its merits. I reiterate that the Court does not attribute to the lay observer a suspicion that a married couple might also talk about particular matters that would be a gross dereliction of their respective obligations.

Mr Wyvill's application for disqualification for apprehended bias

[178] Senior Counsel for Mr Wyvill adopted the submissions made by Mr Young in relation both limbs of Ms Lawrie's application that I should disqualify myself for apprehended bias.

[179] In support of the second limb of the application, which is based on Mrs Southwood receipt of Mr Maher's email to Mrs Hart dated 14 January 2015, Mr Sofronoff QC made the following additional submissions. The significance Mr Wyvill placed on Mrs Southwood's receipt of the email to Mrs Hart emerges from the fact that the information contained in the email was communicated to my wife. Mr Maher felt it incumbent upon him to keep Mrs Southwood informed of the content of the matters in his earlier email to Mrs Hart. Mrs Southwood had a need to know the contents of the email. The contents of the email included: (1) Mr Maurice's initial assessment of the Mr Lawler's prospects of success, including Mr Lawler's prospects of resisting a declaration that he had failed to accord Ms Lawrie procedural fairness; (2) the previous and current steps that Mr Lawler's lawyers had taken to progress Mr Lawler's case; (3) possible arguments that Mr Lawler's lawyers had considered presenting to the Court; (4) attempts that had been made by Mr Lawler's lawyers to obtain certain evidence; (5) the opinion of Mr Lawler's lawyers that there had been a waiver of legal privilege over certain documents; (6) the need for Mr Lawler to engage junior counsel and the reason why; and (7) Mr Lawler's lawyer's current assessment of the prospects of Mr Lawler's case. The information being confided to

Mrs Southwood was being confided to her by the solicitor for Mr Lawler who is the defendant in the proceeding before the Court. Mrs Southwood has been involved in her job in circumstances where she has been made privy to the attitudes of one side. Indeed she is on that side in a broad sense, in the sense that, however limited her role is, or however wide her role was, she is involved in the funding of the other side's lawyers.

[180] Powerful as these submissions seem at first, they suffer from similar difficulties to Mr Young's submissions. They ignore the context in which Mrs Southwood received Mr Maher's email to Mrs Hart. They ignore what Mrs Southwood's function was once she received the email and the reason why the email was sent to her. They overstate the content of Mr Maher's email to Mrs Hart. They ignore the fact that apart from Mr Maurice's initial assessment of Mr Lawler's prospects of success, the attempt to obtain evidence (letters) from Mr Barnes to the effect that the government and the public had made up their minds as to the role played by Ms Lawrie in the decision to grant a lease of Stella Maris to Unions NT, and the actual figures which constituted Mr Maher's estimate of future costs, most of what is in the email was known to the plaintiff and her lawyers and the Court or could be inferred as a matter of common sense given the developments that had occurred during the course of the proceeding as at 14 January 2015. They ignore the fact that the reason the email to Mrs Hart made reference to Mr Maurice's initial advice, and the attempt to obtain evidence from Mr Barnes, was to explain why there had been an increase in Mr Maher's

estimate of costs. By 14 January 2014 these matters were totally irrelevant to the proceeding. They are also totally irrelevant to Mr Lawler's application for costs.

[181] Further, there are an infinite variety of ways in which a person may be said to be involved in the funding of a party's lawyers. Involvement per se does not logically lead to an apprehension that a person might be on the side of the party who is being funded. Mrs Southwood had no involvement in the Northern Territory Government's decision to fund Mr Lawler's legal fees. This decision was made in the Department of the Chief Minister at the highest level. Mrs Southwood has no involvement or interest in Mr Lawler's application for costs. Any interest or involvement that the Northern Territory may have in recovering the costs it has paid on behalf of Mr Lawler is not something that involves the Unit Mrs Southwood is employed in. Mrs Southwood's principal job in the outsourcing of legal services such as this is to make sure that any procurement of legal services, including the procurement of legal services in this case, is done in accordance with the *Procurement Act* and Regulations and the procurement process that has been established for outsourced legal services. Even in a broad sense this does not put her on Mr Lawler's side. Mrs Southwood works in a Unit that is independent from Mr Lawler, his lawyers and the client Government Agency. Her job, once a lawyer has been engaged by a client agency, is to ensure Mr Lawler's lawyers and the client agency

comply with the provisions of the *Procurement Act* and Regulations, in particular r 3 of the *Procurement Regulations*.

[182] Again no logical connection is articulated between Mrs Southwood's receipt of the email and any apprehended deviation from the course of my deciding Mr Lawler's costs application on the merits.

[183] Further, this case does not fall foul of the principles enunciated in the Guide to Judicial Conduct. The guidelines state that in cases such as this, it is a matter of considering the particular circumstances in the case, including the nature and extent of the involvement in the matter of the person in question.

The interpretation of Mrs Southwood's email to Mr Maher dated 5 August 2014

[184] It was submitted by both applicants that the necessity for me to construe Mrs Southwood's email to Mr Maher dated 5 August 2014 puts me in the same position as if my wife was to be called as a witness. Consequently it was submitted that I should not sit because the Guide to Judicial Conduct states:

Where a person who is in a first degree relationship with a judge is known to be a witness, the judge *generally* should decline to take the case, unless the witness is to give only undisputed narrative testimony. In such a case, and if no objection is taken by the parties, the judge may decide to sit, but may well choose not to do so.

[185] I do not accept the submission. The two situations are quite different and the guideline is not applicable. It is not as if I am being asked to consider an affidavit that was made by Mrs Southwood. If a person is giving evidence or

has made an affidavit they naturally have an interest in the Court accepting what they have said. That is not the situation in this case. The submission incorrectly implies or relies on an unarticulated premise that Mrs Southwood has an interest in how her email dated 5 August is interpreted. She does not. If Mrs Southwood's email does fall to be interpreted, the situation is no different to the interpretation of any other document. The terms of the email are fixed and the context in which the email was sent is not disputed. Further, the construction of the email is arguably a question of law.

Conclusion

[186] In the circumstances, this is not a case where a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

[187] Ms Lawrie's application that I disqualify myself from hearing Mr Lawler's application for costs is dismissed. Mr Wyvill's application is also dismissed to the extent that it relies on the same grounds as Ms Lawrie's application. The other grounds raised by Mr Wyvill remain to be heard and determined at a later date.

[188] I will hear the parties further as to the costs of these applications.
